Washington and Lee Law Review

Volume 43 | Issue 2 Article 11

Spring 3-1-1986

V. Criminal Law And Procedure

V. CRIMINAL LAW AND PROCEDURE

A. Keeten v. Garrison: *Restricting an Accused's Right to Have His Guilt Tried by a Randomly Selected Jury*

In *Witherspoon v. Illinois,*[1] the United States Supreme Court ended as violative of an accused's right to trial by an impartial jury[2] the states' practice of striking for cause in capital cases all prospective jurors who were only generally against the death penalty.[3] The *Witherspoon* Court characterized

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1. 391 U.S. 510 (1968).

2. *See* U.S. CONST. amend. VI (guaranteeing to criminal defendant trial by impartial jury). The sixth amendment right to trial by an impartial jury requires that an accused be tried by a jury selected from a fair cross-section of the community. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (sixth amendment requires trial by representative jury); *see also* Peters v. Kiff, 407 U.S. 493, 500 (1972) (sixth amendment requires only fair chance that jury will be representative of cross-section of community). To establish a prima facie violation of the fair cross-section requirement of the sixth amendment, an accused first must show that the excluded group is a distinct group in the community. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979) (identifying elements of prima facie violation of accused's right to trial by jury drawn from fair cross-section of community). Second, the accused must show that the representation of this distinct group in the accused's jury is not fair and reasonable in relation to the number of persons belonging to that group in the community. *Id.* Third, the accused must show that the systematic exclusion of the group in the jury selection process causes under representation of the group in jury service. *Id.* In *Duncan v. Louisiana,* the United States Supreme Court found that the sixth amendment right of an accused to trial by jury was fundamental and binding on the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see* U.S. CONST. amend. XIV (prohibiting deprivation of liberty without due process of law). Although the *Duncan* Court did not mention the fair cross-section aspect of the right to trial by an impartial jury, the Supreme Court in *Taylor v. Louisiana* clarified that the fair cross-section requirement of the sixth amendment applied to the states through the fourteenth amendment. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (fair cross-section principle binding on states); *see also* U.S. CONST. amend XIV (prohibiting deprivation of liberty without due process of law). In contrast to the sixth amendment concept of impartiality, which requires trial by a jury that is representative in character, the due process clause independently prohibits trial by a jury that is biased-in-fact. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961) (due process standard of fairness requires trial by indifferent jurors); *see also* U.S. CONST. amend. XIV (prohibiting conviction without due proces of law).

3. *Witherspoon,* 391 U.S. at 521-22. The United States Supreme Court in *Witherspoon v. Illinois* did not make clear whether its invalidation of the state death-qualification procedure that excluded prospective jurors who only generally opposed capital punishment rested upon the fair cross-section principle of the sixth amendment, the right to fair trial by an unbiased jury under the due process clause of the fourteenth amendment, or both. *See id.* at 519-21 (implicating sixth amendment fair cross-section principle and fourteenth amendment notions of fundamental fairness); *see also* McCray v. Abrams, 750 F.2d 1113, 1129 (2d Cir. 1984) (discussing ambiguous constitutional basis of *Witherspoon); supra* note 2 (discussing substance of fair cross-section principle of sixth amendment and guarantee of trial by unbiased jury under fourteenth amendment). The Court in *Witherspoon* may have grounded its decision on both the fair cross-section requirement of the sixth amendment and due process fairness principles. *See Witherspoon,* 391 U.S. at 520 (stating that jury was unable to "speak for the community,"

juries from which states had excluded persons only generally against capital punishment as tribunals organized to impose the death penalty.[4] The Court determined that the philosophical composition of petit juries should include the views of the growing class of death penalty opponents.[5] Since *Witherspoon,* however, states have retained and exercised the power to "death-qualify" capital juries by striking for cause jurors, called *Witherspoon-excludables* (WEs), who so oppose capital punishment that they never would consider a state law that provided for the death penalty.[6]

Some authority, however, suggests that WEs, although unwilling to

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and that Illinois had defeated neutral character of jury by excluding persons only generally against death penalty); *see also* Grigsby v. Mabry, 758 F.2d 226, 242 (8th Cir. 1985) (observing that between due process clause and fair cross-section principle, fair cross-section principle dominated *Witherspoon* decision); *McCray,* 750 F.2d at 1124-29 (reasoning that *Witherspoon* dominated *Witherspoon* decision).

4. *See Witherspoon,* 391 U.S. at 521. In *Witherspoon,* the State of Illinois, pursuant to a state statute, successfully excluded for cause 47 prospective jurors, almost half the venire, because the prospective jurors were generally against capital punishment. *Id.* at 514-15; *see* ILL. REV. STAT. ch. 38, § 743 (1959) (authorizing state to challenge for cause in capital cases prospective jurors generally opposed to capital punishment). The Supreme Court of Illinois had construed the statute to empower the prosecution to challenge for cause all jurors who would hesitate to vote for the imposition of the death penalty. *Witherspoon,* 391 U.S. at 512-13; *see* People v. Carpenter, 13 Ill.2d. 470, 476, 150 N.E.2d 100, 103 (1958) (construing statute to empower state to strike for cause all jurors who might hesitate to return verdict of death), *cert. denied,* 358 U.S. 887 (1958). Therefore, the State of Illinois had power automatically to eliminate prospective jurors based on an attitude against capital punishment shared by nearly half the population of the Unites States. *See Witherspoon,* 391 U.S. at 519-20 (noting effect of state's power under Illinois' jury selection statute); *see also infra* note 5 (giving documentary basis for *Witherspoon* Court's assertion that nearly half of American population generally opposed capital punishment).

5. *See Witherspoon,* 391 U.S. at 519-20 (petit juries should include death penalty opponents). The *Witherspoon* Court accepted data indicating that 47% of the American population opposed capital punishment and that 11% were undecided. *See id.* (adopting survey indicating that 47% of population opposed death penalty); *see also* II POLLS, INTERNATIONAL REVIEW ON PUBLIC OPINION No. 3, at 84 (1967) (47% of American people oppose death penalty). The Court noted the importance of maintaining a connection between community values and the administration of criminal justice. *See Witherspoon,* 391 U.S. at 519 n.15 (noting importance of link between community and criminal justice).

6. *See Witherspoon,* 391 U.S. at 513-14 (clarifying that decision did not affect states' power in capital case to strike for cause at sentencing phase all jurors absolutely against death penalty). The Supreme Court has protected the states' right to impanel jurors who dutifully will apply state law when that law provides for a verdict of death. *See* Lockett v. Ohio, 438 U.S. 586, 596-97 (1978) (exclusion was proper when four veniremen refused to take oath to apply state law dutifully). The crucial question for courts applying *Witherspoon* has been whether the excluded juror expressed objection to capital punishment sufficient to show that he would never consider a state law that provided for a verdict of death. *See* Monroe v. Blackburn, 748 F.2d 958, 961 (5th Cir. 1984) (deciding propriety of challenging for cause during voir dire prospective juror stating, "[i]f we had to recommend the death penalty, I couldn't do it."); Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981) (deciding whether striking for cause prospective juror who stated at voir dire, "No, I don't *think* I could [vote for the death penalty]" violated accused's rights under *Witherspoon)* (emphasis in original), *cert. denied,* 455 U.S. 1003 (1982).

consider a state's death penalty law, can determine fairly a defendant's guilt or innocence.[7] Based on the premise that WEs can determine guilt or innocence fairly, capital defendants have claimed that states have no legitimate interest in death-qualifying juries at the guilt-innocence phase of capital

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7. *See* Grigsby v. Mabry, 758 F.2d 226, 228-29 (8th Cir. 1985) (accepting that WEs could determine guilt or innocence honestly); *see also* Keeten v. Garrison, 578 F.Supp. 1164, 1184 (W.D.N.C. 1984) (WEs can determine fairly whether person accused of capital crime is guilty), *rev'd,* 742 F.2d 129 (4th Cir. 1985); Grigsby v. Mabry, 569 F.Supp. 1273, 1290-91 (E.D. Ark. 1983) (distinguishing WEs who admit inability to determine impartially guilt from WEs who swear to serve dutifully at guilt phase, and concluding that no reason exists for excluding latter group of WEs from guilt phase of capital trial). *But see* Spinkellink v. Wainwright, 578 F.2d 582, 592-93 (5th Cir. 1978) (upholding exclusion of two jurors as WEs, even though those two jurors had stated unambiguously at voir dire that they could determine fairly defendant's guilt or innocence). In a variety of contexts, courts generally have recognized that jurors may be able and willing to set aside apparent personal influences and decide cases based on only the law and evidence. *See, e.g.,* Raulerson v. Wainwright, 753 F.2d 869, 875-76 (11th Cir. 1985) (holding that, although pretrial publicity of case might have influenced jurors, jurors were qualified to serve); United States v. Jimenez-Diaz, 659 F.2d 562, 568 (5th Cir. 1981) (no abuse of discretion when trial judge accepted jurors' expressions that, although exposed to pretrial publicity, they could set aside impressions and render verdict based on law and evidence), *cert. denied, sub nom.* Dalazar v. United States, 456 U.S. 907 (1982); United States v. Gullion, 575 F.2d 26, 29-30 (1st Cir. 1978) (unnecessary for trial judge to exclude for cause prospective juror who knew name of accused); Daut v. United States, 405 F.2d 312, 315 (9th Cir. 1968) (holding juror not disqualified to serve merely on ground that juror's affiliation with counsel in criminal prosecution could influence juror), *cert. denied,* 402 U.S. 945 (1971); Mares v. United States, 383 F.2d 811, 812 (10th Cir. 1967) (trial judge did not abuse discretion in denying prosecutor's challenge for cause of prospective juror who had read newspaper article concerning codefendant previously found guilty), *cert. denied,* 390 U.S. 961 (1968); United States *ex rel.* Cooper v. Reincke, 219 F.Supp. 733, 741 (D. Conn. 1963) (proper for trial judge to impanel juror who was wife of police commissioner in nearby city but stated that she would be a "good" juror). *See generally* Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and Prejudicial Publicity,* 43 LAW & CONTEMP. PROBS., No. 4, 155 (1980) (discussing bearing of juror's influences on juror's qualification to serve).

In *Grigsby v. Mabry,* the United States Court of Appeals for the Eighth Circuit distinguished the question whether states could exclude WEs from jury service before the guilt-innocence phase of a capital trial from the question whether states could exclude WEs before the sentencing phase. *See Grigsby,* 758 F.2d at 232 (stressing that decision concerned only whether state could exclude WEs before guilt phase, because *Witherspoon* clearly permitted exclusion of WEs from sentencing phase). Although the *Witherspoon* Court accepted the exclusion of WEs from the sentencing phase of capital trials, the *Witherspoon* Court did not authorize exclusion of WEs who could determine impartially the question of guilt or innocence. *See Witherspoon,* 391 U.S. at 513-14 (state only can exclude persons who cannot or will not consider death penalty and impartially determine question of guilt or innocence). Rather, the United States Supreme Court has left open the question whether a state can exclude for cause a WE before the guilt-innocence phase of a capital trial, if that WE swears to determine fairly the defendant's guilt or innocence. *See id.* at 520 n.18 (suggesting that defendant could challenge conviction on ground that preconviction death-qualification may be unconstitutional); *see also* Maggio v. Williams, 464 U.S. 46, 50, (1983) (suggesting possibility of showing that death-qualifying jury before guilt-innocence phase violates sixth and fourteenth amendments); Lockett v. Ohio, 438 U.S. 586, 596 (1978) (assuming that *Witherspoon* provided basis for attacking conviction as well as sentence in capital cases); *Grigsby,* 758 F.2d at 239-40 n.27 (tracing Supreme Court's several acknowledgments of possibility that preconviction death-qualification is unconstitutional).

trials.[8] The defendants have argued that the fair cross-section principle of the sixth amendment, therefore, requires reversal of convictions by death-qualified juries.[9] Defendants also have claimed that death-qualified juries at the guilt-innocence phase of capital trials are skewed in favor of the prosecution in violation of the due process clause of the fourteenth amendment.[10] In addressing the claims of defendants, courts have balanced the states' interest in impaneling dutiful jurors and the defendants' constitutional rights under the sixth and fourteenth amendments.[11] In *Keeten v. Garrison,*[12] the United States Court of Appeals for the Fourth Circuit considered whether the fair cross-section principle of the sixth amendment, the due process clause of the fourteenth amendment, or the doctrine of *Witherspoon v. Illinois* entitled three criminal defendants to habeas corpus relief.[13]

The *Keeten* case began with the separate trials of defendants Charles Keeten,[14] Bernard Avery,[15] and Larry Williams.[16] During the voir dire proceedings in each case, the respective trial judges excluded for cause some prospective jurors who would not consider returning the death penalty.[17] In

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8. *See, e.g.,* Grigsby v. Mabry, 758 F.2d 226, 239 n.27 (8th Cir. 1985) (position that exclusion of WEs from guilt-innocence phase of capital trial fulfills no legitimate state need); Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981) (same), *cert. denied,* 459 U.S. 882 (1982); Keeten v. Garrison, 578 F.Supp. 1164, 1183 (W.D.N.C. 1984) (same), *rev'd.* 742 F.2d 129 (4th Cir. 1985) rev'd, 742 F.2d 129 (4th Cir. 1985).

9. *See, e.g.,* Lockett v. Ohio, 438 U.S. 586, 595 (1978) (defendant claimed that exclusion of prospective juror at voir dire violated defendant's rights to trial by representative jury and served no legitimate state interest); Darden v. Wainwright, 725 F.2d 1526, 1528-30 (11th Cir.) (same), *cert. denied,* 104 S. Ct. 2688 (1984); O'Bryan v. Estelle, 714 F.2d 365, 368 (5th Cir. 1983) (same), *cert. denied,* 465 U.S. 1013 (1984); *see also supra* note 8 and accompanying text (supporting proposition that exclusion of WEs from guilt-innocence phase of capital trial serves no legitimate state interest).

10. *See, e.g.,* United States *ex rel.* Clark v. Fike, 538 F.2d 750, 762 (7th Cir. 1976) (defendant claimed death-qualified jury was conviction prone in violation of right to fair trial); United States v. Marshall, 471 F.2d 1051, 1053 (D.C. Cir. 1972) (same); Eli v. Nelson, 360 F.Supp. 225, 227 (W.D. Cal. 1973) (same).

11. *See infra* notes 63-76 and accompanying text (analysis of accused's constitutional protections and states' legitimate interests).

12. 742 F.2d 129 (4th Cir. 1984).

13. *Id.* at 130-31.

14. *See* Keeten v. Garrison, 578 F.Supp. 1164, 1168 (W.D.N.C. 1984) (summarizing events and disposal of Keeten's trial).

15. *See id.* (summarizing events and disposal of Avery's trial).

16. *See id.* at 1168-69 (summarizing events and disposal of Williams' trial).

17. *See Keeten,* 742 F.2d at 131 (reporting voir dire facts common to case of each defendant). In the separate cases of Keeten, Avery, and Williams, the respective trial courts sustained challenges for cause of several death penalty opponents. *Id.* The trial judge in Williams' case excluded prospective jurors based on *State v. Bowman,* which authorized the State of North Carolina to challenge death penalty opponents for cause. *See id.* at 131 (citing authority upon which trial court relied in Williams' case to sustain challenges for cause); *see also* State v. Bowman, 80 N.C. 394, 398 (1879) (permitting exclusion of death penalty opponents for cause). In the cases of Avery and Keeten, the respective trial judges excluded death penalty opponents from the guilt-innocence phase based on a newly enacted North Carolina jury selection statute. *See Keeten,* 742 F.2d at 131 (stating legal basis for excluding death penalty

addition, the judge at Williams' trial excluded for cause prospective juror, Nancy Melton, who at the voir dire had stated that she was "not sure" whether she could follow a state law that provided for the imposition of the death penalty.[18] In the trial of Keeten, the resulting death-qualified jury in a one-stage proceeding determined both Keeten's guilt and his sentence of life imprisonment.[19] At Avery's trial, a single jury participated in the entire trial, but found Avery's guilt and his sentence of life imprisonment in two separate stages.[20] In Williams' case, a jury tried Williams, convicted him for murder, and sentenced him to death.[21] Subsequently, the three defendants, having exhausted their state claims in the North Carolina courts, filed habeas corpus petitions consolidated in the United States District Court for the Western District of North Carolina.[22]

In the federal district court, the defendants claimed that the exclusions of WEs for cause before the guilt-innocence phase violated the sixth amendment right to trial by a jury drawn from a fair cross-section of the community.[23] The defendants further claimed that their respective death-

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opponents in trials of Avery and Keeten); *see also* N.C. GEN. STAT. § 15A-1212(8) (1977) (authorizing any party to challenge for cause a prospective juror who could not follow state law).

18. *See Keeten,* 742 F.2d at 131 (reporting voir dire facts unique to Williams' case). During the voir dire at Williams' trial in a North Carolina state court, the judge and prospective juror Melton engaged in the following exchange:

> Q.. . . do you have conscientious beliefs about the death penalty—religious beliefs about it?
>
> A.Yes.
>
> Q.And you do not feel that you could follow the instructions of the court if you were satisfied beyond a reasonable doubt of the things of which you must be satisfied. If those conclusions would call for the death penalty, you don't feel you could make such a recommendation?
>
> A.I'm not sure that I could.

See id. at 135 n.12 (giving portion of voir dire transcript in Williams' case). Based on the voir dire exchange, the trial judge determined that Melton could not apply dutifully a state law that provided for capital punishment. *Id.* The trial judge, therefore, sustained the State of North Carolina's challenge for cause of Melton. *Id.* at 131.

19. *See id.* at 131 (one jury and one proceeding in Keeten's trial).

20. *See id.* (single jury sat at Avery's trial, but determined guilt and sentence in two separate stages); *see also* N.C. GEN. STAT. § 15A-2000(a)(2)(8) (1977) (providing that single jury shall determine both guilt and sentence, but in two separate stages).

21. *See Keeten,* 578 F.Supp. at 1168 (disposal of Williams' case at trial).

22. *See Keeten,* 742 F.2d at 129; *see* 28 U.S.C. § 2254(a) (1982) (providing that federal court may issue habeas corpus relief from state court conviction that violated "Constitution, or laws, or treaties of the United States").

23. *See Keeten,* 578 F.Supp. at 1170; *see also supra* note 2 (substance of sixth amendment right to trial by jury drawn from fair cross-section of community). At the habeas corpus proceeding in *Keeten,* the defendants did not challenge the power of the state to exclude WEs before the sentencing phase of the trial. *Keeten,* 578 F.Supp. at 1170. Nor did the defendants challenge North Carolina's power to exclude, from either phase of the trial, death penalty opponents who would not or could not find the facts impartially and dutifully apply state law. *Id.* Instead, the defendants challenged only the exclusion of WEs from the guilt phase of the trials on the ground that the excluded WEs fairly could have determined guilt or innocence. *Id.*

qualified juries were prone to convict in violation of the due process clause of the fourteenth amendment.[24] Additionally, defendant Williams, sentenced to die, claimed that the trial judge excluded prospective juror Melton in violation of Williams' rights under *Witherspoon v. Illinois*.[25] The district court held that WEs comprised a distinctive group in the community and that their exclusion from the guilt-innocence determination violated the sixth amendment right to trial by a jury drawn from a fair cross-section of the community.[26] The district court also held that exclusion of WEs created conviction prone juries in violation of the due process clause of the fourteenth amendment.[27] The district court finally held that, in Williams' case, the trial judge excluded prospective juror Nancy Melton in violation of *Witherspoon*.[28] Based on its findings, the district court issued writs of habeas corpus on behalf of Keeten, Avery, and Williams and granted Williams relief from his death sentence.[29] The State of North Carolina subsequently appealed to the Fourth Circuit.[30]

In considering the State's contention that the district court had erred by accepting the defendants' fair cross-section theory, the Fourth Circuit acknowledged the defendants' sixth amendment right to trial by a jury selected from a fair cross-section of the community.[31] The Fourth Circuit found, however, that the sixth amendment did not require the impanelment of jurors who would not or could not consider a state law that provided for the death penalty.[32] Stating North Carolina's interest in impaneling dutiful jurors, the

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24. *See Keeten,* 578 F.Supp. at 1170. In *Keeten,* the defendants claimed to have evidence sufficient to show that death-qualified juries were partial to the prosecution in violation of the due process clause of the fourteenth amendment. *Id.* The defendants supported their claim that the excusals of death penalty opponents resulted in conviction prone juries by introducing attitudinal surveys and mock trial studies. *Id.* at 1170-71. The attitudinal surveys showed that WEs gave fewer conviction prone answers to questions than did persons in favor of, neutral on, or moderately opposed to the death penalty. *Id.* The mock trial studies indicated that WEs convicted less frequently than did death-qualified jurors. *Id.*

25. *Id.* at 1187-89; *see supra* note 18 (discussing voir dire examination of prospective juror Melton at Williams'trial); *see also Witherspoon,* 391 U.S. at 521-22 (prohibiting exclusions for cause of persons only generally against capital punishment); *supra* note 3 (discussing constitutional basis of *Witherspoon).*

26. *Keeten,* 578 F.Supp. at 1187.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Keeten,* 742 F.2d at 130; *see* 28 U.S.C. § 1291 (1982) (creating in federal court litigants the right to appeal from final decisions of federal district courts and granting jurisdiction to federal courts of appeals to hear appeals).

31. *Keeten,* 742 F.2d at 133; *see supra* note 2 (substance of accused's right to trial by jury selected from fair cross-section of community).

32. *See Keeten,* 742 F.2d at 133. The Fourth Circuit in *Keeten* cited two United States Supreme Court cases and two federal circuit cases to support its holding that the sixth amendment fair cross-section guarantee does not require states to permit WEs to serve at the guilt-innocence phase of capital trials. *See id.; see also* Adams v. Texas, 448 U.S. 38, 48 (1980) (stating that state's interest justifies exclusion for cause when prospective juror's views against capital punishment would prevent or substantially impair ability or willingness to follow state

Keeten court noted that permitting WEs to determine the guilt issue would cause jury nullification and would prevent impartial factfinding.[33] The *Keeten* court posited that even if the exclusions had infringed on the defendants' sixth amendment right to trial by a representative jury, North Carolina's interest in impaneling fair jurors justified the infraction.[34] Accordingly, the Fourth Circuit rejected the defendants' sixth amendment claim.[35]

Turning to North Carolina's contention that the district court incorrectly accepted the defendants' due process theory, the Fourth Circuit assumed, but did not decide, that the death-qualified juries at the trials were conviction prone.[36] The Fourth Circuit, nonetheless, rejected the defendants' fourteenth amendment due process claim.[37] The Fourth Circuit determined that the death-qualified jurors, even if conviction prone, could have set aside their personal attitudes and determined fairly guilt or innocence.[38] Concluding that the Constitution guarantees litigants impartiality but not favoritism, the Fourth Circuit reversed the district court's holding on the defendants' claim that trial by a conviction prone jury violated the due process clause of the fourteenth amendment.[39]

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law); Lockett v. Ohio, 438 U.S. 586, 596-97 (1978) (holding exclusion proper when prospective jurors refused to take oath to vote for death penalty if state law provided for imposition of death penalty in particular case); Spinkellink v. Wainwright, 578 F.2d 582, 596-97 (5th Cir. 1978) (reasoning that WEs, if permitted to sit at guilt stage of capital case, would cause jury nullification and would not be impartial fact finders); Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983) (affirming district court's adoption of *Spinkellink* holding on fair cross-section issue), *aff'g* 540 F.Supp. 451 (E.D.N.C. 1982).

33. *Keeten,* 742 F.2d at 133-34. The Fourth Circuit in Keeten discussed the concept of jury nullification, which is the acquittal of an accused caused by jurors voting against conviction to prevent imposition of a penalty. *See id.* at 133; *see also* K. REDDEN & VERNON, MODERN LEGAL GLOSSARY 289 (1980) (definition of jury nullification). The *Keeten* court accepted statistics that 56% of WEs impaneled to determine the guilt issue would vote to acquit notwithstanding evidence that proved guilt beyond a reasonable doubt. *See Keeten,* 742 F.2d at 133 n.9; *see also* L. HARRIS & ASSOCIATES, INC., NATIONAL OPINION SURVEY SECTION OF STUDY No. 2016 (1971) (56% of WEs at guilt-innocence phase would vote for acquittal regardless of evidence).

34. *Keeten,* 742 F.2d at 133-34; *see supra* note 6 and accompanying text (discussing state interest in impaneling dutiful jurors).

35. *Keeten,* 742 F.2d at 133-34.

36. *Id.* at 133. Although the Fourth Circuit in *Keeten* assumed that death-qualified jurors were conviction prone, the Fourth Circuit noted its reluctance to accept that view. *See id.* at 133 n.7 (noting hesitance to accept that death-qualified jurors are conviction prone).

37. *Id.* at 134.

38. *Id.* The *Keeten* court cited examples to support its finding that jurors could put aside personal biases and make impartial decisions based on the law and evidence. *Id.; see* Smith v. Phillips, 455 U.S. 209, 214-20 (1982) (permitting jurors to serve despite employment affiliation with prosecutor); Stroble v. California, 343 U.S. 181, 185 (1952) (permitting jurors to serve despite exposure to prejudicial pretrial publicity); *see also supra* note 7 and accompanying text (citing additional precedent regarding jurors' capacity to set aside impressions and personal attitudes and decide cases based on law and evidence). The Fourth Circuit also cited *Adams v. Texas* for the proposition that a juror may be impartial even if his general attitude "affects" his decision-making process. *Keeten,* 742 F.2d at 135 n.13; *see* Adams v. Texas, 448 U.S. 38, 49-50 (1980) (juror may be impartial even if his attitude "affects" his decision).

39. *Keeten,* 742 F.2d at 135.

In addressing the State's argument that the district court erred in finding that the trial court excluded prospective juror Melton in violation of Williams' right under *Witherspoon v. Illinois,* the Fourth Circuit again noted North Carolina's interest that jurors consider all penalties provided by state law.[40] The Fourth Circuit concluded that the trial judge was in the best position to determine the true meaning of Melton's "I'm not sure" statement, because her statement could have different meanings in different parts of the country and could mean either "yes" or "no" depending upon her voice inflections and her demeanor.[41] The Fourth Circuit, thus, accepted the state trial judge's determination that Melton was unfit to serve on the jury and reversed the federal district court's holding on the *Witherspoon* issue.[42]

The *Keeten* dissent, however, agreed with the district court that the state trial judge improperly had excluded prospective juror Nancy Melton in violation of *Witherspoon.*[43] In the dissent's view, Melton's "I'm not sure" statement did not show that she would vote automatically against the death penalty.[44] The dissent argued that the *Witherspoon* doctrine required the state to show that Melton had made "unmistakably clear" that she "automatically" would vote against the death penalty.[45] Therefore, the dissent would have affirmed the district court's order to grant Williams habeas corpus relief from his death sentence.[46]

Prior to *Keeten,* only the Fifth Circuit explicitly had considered whether the sixth amendment fair cross-section requirement prohibited the systematic exclusion of WEs before the guilt-innocence phase of a capital trial.[47] In *Spinkellink v. Wainwright,*[48] the Fifth Circuit held that, even if a defendant

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40. *Id.; see supra* note 6 and accompanying text (discussing state's need to have dutiful jurors).

41. *Keeten,* 742 F.2d at 135; *see supra* note 18 (discussing voir dire examination of Melton at trial of Williams).

42. *Keeten,* 742 F.2d at 135.

43. *Id.* (Butzner, J., dissenting)

44. *Id.* at 136.

45. *Id.* at 136-37. The dissent in *Keeten* explained that juror exclusion was proper under *Witherspoon* only if the prospective juror stated that she automatically would vote against the death penalty, or if she otherwise made unmistakably clear her predisposition against the imposition of the death penalty. *Id.* The dissent concluded that Melton's doubts were not unambiguous statements indicating that she automatically would vote against the death penalty regardless of what might develop at the trial. *Id.* Accordingly, in the dissent's opinion, the State did not satisfy *Witherspoon's* high standard of proof. *Id.*

46. *Id.*

47. *See* Spinkellink v. Wainwright, 578 F.2d 582, 597-98 (5th Cir. 1978) (holding that fair cross-section principle does not prohibit death-qualification prior to guilt-innocence phase of capital trial). The *Keeten* court noted that the Fourth Circuit earlier had adopted implicity the reasoning of *Spinkellink v. Wainwright* by affirming the decision of the District Court for the Eastern District of North Carolina in *Barfield v. Harris. Keeten,* 742 F.2d at 133 n.8; *see* Barfield v. Harris, 540 F.Supp. 451, 464-66 (E.D.N.C. 1982) (following *Spinkellink,* court held that sixth amendment does not prohibit preconviction death qualification), *aff'd,* 719 F.2d 58 (4th Cir. 1983).

48. 578 F.2d 582 (5th Cir. 1978).

could show a prima facie violation of the sixth amendment,[49] the threat to the state's need to impanel fair jurors justified breaching a defendant's sixth amendment right to trial by a representative jury.[50] At trial in *Spinkellink,* the state trial judge had sustained challenges for cause of two WEs before the guilt-innocence phase of the capital trial, although both WEs had professed at the voir dire that they could determine fairly the issue of guilt.[51] The resulting death-qualified jury convicted the defendant.[52] Claiming that conviction by a death-qualified jury violated the fair cross-section principle of the sixth amendment, the defendant unsuccessfully sought habeas corpus relief in a federal district court.[53] On the defendant's appeal from the federal district court's denial of habeas corpus relief, the Fifth Circuit posited that the two excluded WEs could not have determined fairly the defendant's guilt or innocence as required by the state's interest in impaneling dutiful jurors.[54] Accordingly, the Fifth Circuit in *Spinkellink* rejected the defendant's sixth amendment argument and affirmed the district court's denial of habeas corpus relief to the defendant.[55]

In contrast, in *Grigsby v. Mabry,*[56] a decision since *Keeten,* the Eighth Circuit found that the accused had established a prima facie violation of the fair cross-section requirement.[57] At the voir dire of the trial in *Grigsby,* the state trial judge sustained the prosecutor's challenges for cause of eight WEs.[58] The resulting jury found the accused guilty of capital murder.[59] In

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49. *See supra* note 2 (discussing prima facie elements for violation of accused's right to trial by jury drawn from fair cross-section of community).

50. *Spinkellink,* 578 F.2d at 597-98. The Fifth Circuit in *Spinkellink* stated that a defendant could not vindicate his sixth amendment fair cross-section right at the cost of defeating a state's interest in the just and evenhanded application of its death penalty statute. *Id.* The Fifth Circuit reasoned that even if a WE stated that he could judge impartially the defendant's guilt or innocence, the risk that the juror would be biased in favor of the defendant unduly threatened the state's need to impanel dutiful jurors. *Id.*

51. *See id.* at 592 (reporting that two WEs excluded from *Spinkellink* trial had stated that they could determine fairly issue of guilt).

52. *Id.* at 586.

53. *See id.* (defendant appealing to Fifth Circuit from federal district court's denial of habeas corpus relief).

54. *See id.* at 597 (stressing that permitting WEs to serve at any phase of trial creates unjustifiable risk that WE would be acquittal prone and, thus, would jeopardize important state interest in application of laws).

55. *Id.*

56. 758 F.2d 226 (8th Cir. 1985).

57. *Id.* at 231-32. The Eighth Circuit in *Grigsby v. Mabry* found that the practice of preconviction death-qualification constituted a prima facie violation of the fair cross-section requirement of the sixth amendment. *Id.; see supra* note 2 (listing prima facie elements for violation of fair cross-section requirement). The *Grigsby* court found that persons who absolutely opposed the death penalty comprised a distinct group in the community. *Grigsby,* 758 F.2d at 231. The *Grigsby* court further found that exclusion of WEs, a group comprised of between 11% and 17% of persons eligible for jury service, caused underrepresentation of a distinct group from petit juries. *Id.* The Eighth Circuit in *Grigsby* finally determined that the exclusion of WEs from petit juries was systematic in character. *Id.* at 232.

58. *Grigsby,* 758 F.2d at 229.

59. *Id.*

upholding the federal district court's decision to grant the accused habeas corpus relief, the Eighth Circuit found that the state had no legitimate interest in systematically excluding WEs from the guilt-innocence phase of a capital trial.[60] Accordingly, the Eighth Circuit concluded that the sixth amendment prohibited preconviction death-qualification and affirmed the federal district court's decision to grant habeas corpus relief.[61]

The United States Supreme Court never has decided whether the sixth amendment forbids preconviction death-qualification.[62] The Supreme Court's decision in *Taylor v. Louisiana,*[63] however, suggests the proper analysis for examining the *Keeten* court's first holding, that the sixth amendment does not bar states from automatically excluding for cause WEs from the guilt-innocence phase of capital trials.[64] The Supreme Court in *Taylor* condemned as violative of the sixth amendment state jury selection procedures that operated to exclude, systematically, identifiable groups from jury service.[65] In *Taylor,* the State of Louisiana had followed a jury selection procedure that excluded all women from jury service except women who filed a request

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60. *See id.* at 241 n.30 (delineating extent of state interest in exclusion of jurors who consciously would disregard law and evidence).

61. *Id.* at 243.

62. *See Witherspoon,* 391 U.S. at 520 n.18 (suggesting that defendant could challenge conviction on ground that preconviction death-qualification may be unconstitutional); *see also* Maggio v. Williams, 464 U.S. 46, 50 (1983) (suggesting possibility of showing that death-qualifying jury before guilt-innocence phase violates sixth and fourteenth amendments); Lockett v. Ohio, 438 U.S. 586, 596 (1978) (assuming that *Witherspoon* provided basis for attacking conviction as well as sentence in capital case); *Grigsby,* 758 F.2d 226, 239-40 n. 27 (8th Cir. 1985) (tracing Supreme Court's several acknowledgments of possibility that preconviction death-qualification is unconstitutional).

63. 419 U.S. 522 (1975).

64. *See infra* notes 65-76 and accompanying text (applying *Taylor* to *Keeten* court's holding that states may exclude WEs automatically from guilt phase of capital trials); *see also Taylor,* 419 U.S. at 530 (holding systematic exclusion of identifiable groups violates defendant's right to trial by jury drawn from fair cross-section of community); *Keeten,* 742 F.2d at 133-34 (states may exclude WEs systematically from guilt-innocence phase of capital trials).

65. *Taylor,* 419 U.S. at 530 (holding that systematic exclusion of identifiable groups violated defendant's right to trial by fair cross-section of community); *see also supra* note 2 (giving elements of fair cross-section violation). Although the Supreme Court decided *Taylor* in the context of systematic exclusion of women from a grand venire, *Taylor's* fair cross-section analysis applies also to the voir dire stage of jury selection. *See Witherspoon,* 391 U.S. at 519-20 (invalidating state voir dire procedure on fair cross-section grounds); *see also* McCray v. Abrams, 750 F.2d 1113, 1129 (2d Cir. 1984) (noting that *Witherspoon* progeny suggests that fair cross-section requirement applies to voir dire stage of jury selection). A state's compliance with the fair cross-section requirement does not depend upon whether the state excludes prospective jurors from grand venires or from petit juries, but whether the challenged jury selection procedure is random in character. *See McCray,* 750 F.2d at 1124-27 (observing that, although courts have applied fair cross-section principle in various contexts, focus of each court's analysis has been whether challenged jury selection practice precluded possibility of impaneling truly representative jury); *see also Taylor,* 419 U.S. at 530 (stating that random draw is essential to guard against exercise of arbitrary state power by interposing sense of the community between state and accuseds); *cf.* 28 U.S.C. § 1861 (1982) (creating federal right to trial by petit jury randomly selected from fair cross-section of community).

for eligibility to serve.[66] An all male jury drawn from an all male venire convicted the accused.[67] The Supreme Court in *Taylor* reversed the accused's conviction because Louisiana's selection procedure, effecting systematic exclusion of women, violated the accused's right to trial by a jury drawn from a fair cross-section of the community.[68] The *Taylor* Court found that the fair cross-section principle of the sixth amendment, in contrast to the fourteenth amendment due process claim that trial by a conviction prone jury was unfair, required no showing of actual bias.[69] Instead, the *Taylor* Court found that the fair cross-section principle simply protected an accused's sixth amendment right to trial by a randomly selected jury.[70]

To guard the right of criminal defendants to trial by a randomly selected jury, the Supreme Court has invalidated state jury selection procedures that manipulated the random draw to exclude systematically from jury service members of ascertainable groups in the community.[71] The *Keeten* decision, though, empowers states bound by Fourth Circuit decisions to exclude systematically a class of qualified jurors, WEs, from determining a defendant's guilt or innocence.[72] The Supreme Court, however, has left no doubt

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66. *See Taylor,* 419 U.S. at 523, 525-26 (describing Louisiana's jury selection procedure that excluded women from jury service).

67. *See id.* at 524-26 (all male jury convicted accused in *Taylor).*

68. *See id.* at 538 (*Taylor* Court reversing conviction on sixth amendment grounds).

69. *See id.* at 530. *Compare infra* notes 78-88 and accompanying text (discussing claim that conviction prone jury was biased in violation of due process clause of fourteenth amendment) *with infra* notes 70-71 and accompanying text (discussing sixth amendment goal of trial by representative jury, a goal pursued by enforcing random jury selection procedures); *see also supra* note 2 (distinguishing accused's right to trial by jury drawn from fair cross-section of community under sixth amendment from accused's right to trial by unbiased jury under due process clause of fourteenth amendment).

70. *See Taylor,* 419 U.S. at 538. The United States Supreme Court has determined that the guarantee of trial by a randomly selected jury is basic to a democratic society and should hedge the public's common sense judgment against overzealous prosecutors and mistaken judges. Glasser v. United States 315 U.S. 60, 85-86 (1942); *see* Smith v. Texas, 311 U.S. 128, 130 (1940) (stating exclusion of groups from jury service is inconsistent with democratic society and representative government). Recognizing the fundamental nature of the right, the Supreme Court in *Taylor* clarified that the fair cross-section principle of the sixth amendment applied to the states through the fourteenth amendment. *Taylor,* 419 U.S. at 530; *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (sixth amendment right to trial by impartial jury binding on states through fourteenth amendment).

71. *See, e.g.,* Duren v. Missouri, 439 U.S. 357, 363-64, 372 (1979) (striking down state statute that exempted women from jury duty); Peters v. Kiff, 407 U.S. 493, 502-04 (1972) (stating that discriminatory jury selection by states threatens integrity of judicial process); Carter v. Jury Comm'n. of Green Cty., 396 U.S. 320, 330 (1970) (noting that exclusion of blacks from jury service contravenes idea of jury as body truly representative of community); *cf.* Ballard v. United States, 329 U.S. 187, 191 (1946) (exercising its supervisory power, Court held that exclusion of women from jury service undermined federal design to make juries representative of community).

72. *See Keeten,* 742 F.2d at 133-34 (holding that states may death-qualify juries before guilt-innocence phase of capital trial); *see also supra* note 17 (North Carolina death-qualification statute authorizing exclusion of WEs for cause).

that a state may create reasonable exemptions from the fair cross-section principle, as long as the state tailors its laws authorizing systematic exclusion of jurors to fit legitimate state interests.[73] Because the state interest is in impaneling jurors who dutifully will find the facts and apply state law,[74] and because WEs may swear to serve dutifully at the guilt-innocence phase of a capital trial,[75] preconviction death-qualification arguably advances no legitimate state interest.[76] Therefore, under *Taylor's* scheme prohibiting systematic exclusion of jurors absent a legitimate state interest, the *Keeten* court incorrectly held that North Carolina's systematic exclusion of WEs from the guilt-innocence determination was consistent with the fair cross-section requirement of the sixth amendment.

Although the *Keeten* court incorrectly rejected the defendant's fair cross-section claim, the weight of authority indicates that the *Keeten* court correctly rejected the defendants' second claim, that the death-qualified juries were biased against the defendants in violation of due process principles of fairness.[77] In *Witherspoon v. Illinois,* the United States Supreme Court indicated that a defendant successfully might challenge his conviction by a death-qualified jury on due process grounds by producing evidence sufficient to show that death-qualified juries favored conviction.[78] Capital defendants answered the Supreme Court's invitation with claims that death-qualified juries were conviction prone and, therefore, the accused's trial was unfair under the due process clause of the fourteenth amendment.[79] At first, the federal courts rejected the due process argument on the ground that the accused failed to produce evidence sufficient to show that the jury was conviction prone.[80] In more recent decisions, however, the federal courts have bypassed the fac-

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73. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (noting that states may create reasonable exemptions in jury selection procedures); *see also* Duren v. Missouri, 439 U.S. 357, 370 (1979) (noting that state must confine exemptions in jury selection procedures to legitimate state interests); McCray v. Abrams, 750 F.2d 1113, 1129 (2d Cir. 1984) (state may not restrict unreasonably fair chance that petit jury will be representative of community).

74. *See* Lockett v. Ohio, 438 U.S. 586, 595-96 (1978) (noting state interest that jurors take oath to find facts impartially and apply state law faithfully).

75. *See supra* note 7 and accompanying text (discussing juror's ability to set aside personal attitudes and fairly find facts).

76. *See supra* notes 65-75 and accompanying text (analyzing defendants' sixth amendment right to trial by randomly selected jury relative to state interest in impaneling dutiful jurors).

77. *See infra* notes 81-89 and accompanying text (noting cases in which courts have found that trial by death-qualified jury did not violate due process fair trial requirement).

78. *See Witherspoon,* 391 U.S. at 516-18 (suggesting that future defendants may produce evidence sufficient to show that death-qualified jury was conviction prone in violation of due process right to trial by unbiased jury); *see also supra* note 2 (distinguishing protection of right to trial by unbiased jury under due process clause from protection of right to trial by jury drawn from fair cross-section of community under sixth amendment).

79. *See, e.g.,* United States *ex rel.* Clark v. Fike, 538 F.2d 750, 762 (7th Cir. 1976) (holding that death-qualified juries not unfair at guilt-innocence phase of capital trial), *cert. denied,* 429 U.S. 1064 (1977); Bailey v. United States, 405 F.2d 1352, 1355-56 (D.C. Cir. 1968) (same); Taylor v. Slayton, 341 F.Supp. 489, 491 (W.D. Va. 1972) (same).

80. *See, e.g.,* United States *ex rel.* Townsend v. Twomey, 452 F.2d 350, 362-63 (7th Cir.

tual question whether a jury was conviction prone and, instead, have held that trial by a conviction prone jury does not offend the due process clause of the fourteenth amendment.[81]

The Seventh Circuit's decision in *Rowan v. Owens*[82] is an example of the decisions holding that trial by a conviction prone jury does not offend the due process clause of the fourteenth amendment.[83] At trial in *Rowan,* the state trial judge excused WEs at the voir dire before the guilt-innocence phase of a capital trial.[84] The resulting jury found the defendant guilty of capital murder,[85] and the defendant sought reversal of the conviction by filing a petition for habeas corpus in a federal district court.[86] In upholding the district court's denial of habeas corpus relief, the Seventh Circuit in *Rowan* reasoned that the proper question was not whether the death-qualified jury was less sympathetic to the accused, but whether the jury was likely to convict an innocent man.[87] The Seventh Circuit held that a death-qualified jury, even if conviction prone, could mediate fairly between the accused and the prosecution on the issue of guilt.[88]

The Fourth Circuit in *Keeten* has followed the approach that *Rowan v. Owens* exemplifies.[89] By assuming that death-qualified juries were conviction prone, but, nonetheless, upholding the convictions, the *Keeten* court has foreclosed in the Fourth Circuit the fourteenth amendment due process argument that a defendant can invalidate his conviction by showing that the petit jury was prone to convict.[90] In contrast to the *Witherspoon* Court's suggestion that a defendant may present statistical data sufficient to prove

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1972) (holding that defendant failed to produce evidence sufficient to show jury was conviction prone), *cert. denied,* 409 U.S. 854 (1972) Bailey v. United States, 405 F.2d 1352, 1355-56 (D.C. Cir. 1968) (same); Craig v. Wyse, 373 F.Supp. 1008, 1011 (D. Colo. 1974) (same).

81. *See, e.g,* Smith v. Balkcom, 660 F.2d 573, 578-79 (5th Cir. 1981) (trial of guilt by death-qualified jury, even if jury was conviction prone, does not offend due process clause); Brinlee v. Crisp, 608 F.2d 839, 848 (10th Cir. 1979) (same), *cert. denied,* 444 U.S. 1047 (1980); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976) (same).

82. 752 F.2d 1186 (7th Cir. 1984)

83. *See id.* at 1190-91 (conviction prone jury can mediate impartially between prosecutor and accused); *see also supra* note 81 and accompanying text (trial by conviction prone jury does not offend due process clause).

84. *See Rowan,* 752 F.2d at 1190 (reporting state trial judge's exclusion of WEs at voir dire).

85. *See id.* at 1187 (conviction of defendant in *Rowan* by death qualified jury).

86. *See id.* (defendant in *Rowan* petitioning for habeas corpus relief in federal district court).

87. *Id.* at 1190-91.

88. *Id.*

89. *Compare id.* (conviction prone jury can mediate fairly between prosecutor and accused) *with supra* notes 37-39 and accompanying text (Fourth Circuit in *Keeten* holding that trial by conviction prone jury does not violate due process clause).

90. *See Keeten,* 742 F.2d at 132 (Fourth Circuit in *Keeten* holding that trial by conviction prone jury does not violate due process clause). *But cf. supra* note 78 and accompanying text (*Witherspoon* Court indicating that defendant could show jury was conviction prone in violation of due process clause).

unfair jury bias, virtually no quantum of empirical data can suffice to prove unfair bias under *Keeten*.[91] Therefore, the *Keeten* court's holding on the conviction proneness theory treats *Witherspoon's* invitation not as a new due process approach employing statistical tendencies to challenge a conviction, but as the old ground that an accused must prove specific bias of an individual juror to implicate the fair trial element of due process.[92]

The dissent in *Keeten* correctly disagreed with the Fourth Circuit's third holding, that the trial judge correctly sustained the challenge for cause of Nancy Melton, who had stated that she was "not sure" whether she could return a verdict of death.[93] When the Fourth Circuit decided *Keeten,* the *Witherspoon* doctrine prohibited exclusion for cause of death penalty opponents unless a prosecutor could show through voir dire questioning that a death penalty opponent had made "unmistakably clear" that he "automatically" would vote against a verdict of death.[94] The Supreme Court in *Adams v. Texas*,[95] for example, held exclusions of prospective jurors improper, even though the excluded jurors had admitted at the voir dire that the possibility of capital punishment would "affect" their honest judgment of the facts.[96] In short, the *Witherspoon* doctrine had come to require prosecutors to show that excluded jurors were absolutely biased against the state.[97] Only then would a defendant's *Witherspoon* rights yield to the state's interest in impaneling fair jurors.[98]

The Fourth Circuit in *Keeten,* however, stressing North Carolina's interest in disqualifying even equivocating jurors,[99] signaled a critical depar-

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91. *See supra* notes 36-38 and accompanying text (noting *Keeten* court holding that trial by conviction prone jury does not violate right to trial by unbiased jury under due process clause, because conviction prone jury can determine issue of guilt or innocence fairly).

92. *See supra* notes 78-88 and accompanying text (violation of right to trial by unbiased jury under due process requires showing of actual bias); *supra* note 2 (due process standard of fairness requires trial by indifferent jurors).

93. *See Keeten,* 742 F.2d at 135 (Butzner, J. dissenting); *see also Witherspoon,* 391 U.S. at 521 (state may exclude from sentencing phase only absolute opponents of death penalty); *Keeten,* 742 F.2d at 135 (upholding exclusion of Nancy Melton, who was "not sure" whether she could return death verdict); *see* also Maxwell v. Bishop, 398 U.S. 262, 265 (1970) (reading *Witherspoon* to require state to show juror's "unambiguous" purpose to vote "automatically" against death penalty); Boulden v. Holman, 394 U.S. 478, 482 (1969) (same); *see also infra* notes 94-98 and accompanying text (assessment of *Witherspoon* doctrine when Fourth Circuit decided *Keeten).*

94. *See Witherspoon,* 391 U.S. at 521-22 (on appeal, state must show the excluded juror made unmistakably clear that he absolutely opposed capital punishment).

95. 448 U.S. 38 (1980).

96. *Id.* at 49. The Supreme Court in *Adams v. Texas* found that a juror admitting that the possibility of the death penalty would affect his judgment of the facts meant only that he would deliberate more seriously. *Id.* The Court concluded that impanelment of jurors appreciating the seriousness of their task did not undermine the state's interest in having dutiful jurors. *Id.* at 50-51.

97. *See supra* notes 94-96 and accompanying text (describing *Witherspoon's* high standard of proof).

98. *Id.*

99. *See Keeten,* 742 F.2d at 133 (stressing state interest in excluding equivocating death

ture from *Witherspoon's* high standard of proof.[100] By holding that a state could exclude for cause even an equivocating death penalty opponent, the Fourth Circuit in *Keeten* implied that trial courts could sustain challenges for cause almost as readily as trial courts had done before *Witherspoon*.[101]

Since *Keeten*, the United States Supreme Court in *Wainwright v. Witt*[102] also has accepted a greatly weakened standard of proof and standard of review in *Witherspoon* cases.[103] At trial in *Witt*, a Florida state trial judge excluded as a WE a prospective juror who thought that her personal beliefs against the death penalty would interfere with her ability to serve dutifully on the jury.[104] The resulting jury convicted the accused for murder.[105] Affirming the conviction, the Supreme Court held that a trial judge, notwithstanding the sixth and fourteenth amendments, should exclude a person whose views of capital punishment would "prevent or substantially impair" his or her dutiful

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penalty opponents); *see also supra* note 6 and accompanying text (Keeten's court's reasoning concerning state interest).

100. *See infra* note 99-108 and accompanying text (analysis of effect of *Keeten* and *Witt* on *Witherspoon* doctrine).

101. *See Keeten,* 742 F.2d at 133; *see also* Turberville v. United States, 303 F.2d 411, 421 (D.C. Cir. 1962) (deferring to decision of trial judge to exclude for cause juror who at voir dire expressed reservations about imposing death penalty), *cert. denied,* 370 U.S. 946 (1962); United States v. Puff, 211 F.2d 171, 180-81 (2d Cir.) (no reversible error to exclude death penalty opponent even if grounds for exclusion insufficient), *cert. denied,* 347 U.S. 963 (1954); *supra* note 25 and accompanying text (conditions of Nancy Melton's exclusion); note 4 and accompanying text (Illinois practice invalidated in *Witherspoon); supra* notes 94-99 and accompanying text (*Witherspoon's* standard of proof).

102. 105 S.Ct. 844 (1985)

103. *See id.* at 852 (articulating "prevent or substantially impair" standard for excluding prospective jurors); *infra* notes 106-07 and accompanying text (standards of proof and review under *Wainwright v. Witt).*

104. *See Witt,* 105 S.Ct. at 848. In *Wainwright v. Witt,* the prosecutor and the excluded prospective juror engaged in the following exchange during the voir dire:

> Q. [prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> A. [Colby:] I am afraid personally but not—
>
> Q.Speak up, please.
>
> A.I am afraid of being a little personal, but definitely not religious.
>
> Q.Now, would that interfere with you sitting as a juror in this case?
>
> A.I am afraid it would.
>
> Q.You are afraid it would?
>
> A.Yes, Sir.
>
> Q.Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> A.I think so.
>
> Q.You think it would.
>
> A.I think it would.
>
> Q.Your honor, I would move for cause at this point.
>
> THE COURT: All right. Step down.

Id. Compare id. (portion of voir dire transcript in *Witt) with supra* note 18 (portion of voir dire transcript at Williams' trial in *Keeten).*

105. *See Witt,* 105 S.Ct. at 847-48 (conviction of defendant in *Witt).*

performance as a juror.[106] The *Witt* Court held that, in all cases, whether a person is fit to serve as a juror is a factual issue subject to the federal statute that requires federal appellate courts to presume the correctness of any district court finding of fact.[107] Therefore, under *Witt*, in contrast to *Witherspoon's* high standard of proof, a trial judge confidently may exclude a death penalty opponent of any degree from jury service if the judge reasonably believes that the prospective juror is unlikely to obey the instructions of the court.[108]

The new standards under *Witt* empower states to exclude from the sentencing phase of capital trials a larger class of death penalty opponents, including persons perhaps only mildly against capital punishment.[109] More subtly, states bound by the Fourth Circuit's decision in *Keeten* and the Fifth Circuit's decision in *Spinkellink* now may exclude the new, larger class of WEs from the guilt-innocence as well as the sentencing phase of capital trials, because *Keeten* and *Spinkellink* permit automatic exclusion of WEs from both phases.[110] On the other hand, although courts bound by *Grigsby* may not exclude WEs automatically from the guilt-innocence phase, those courts should recognize, nonetheless, that an accused's right to have his guilt tried by a randomly selected jury is not absolute.[111] The Supreme Court in *Witt v. Wainwright* noted that its "prevent or substantially impair" standard applies to both the guilt-innocence and the sentencing phases of capital

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106. *Id.* at 852.

107. *See id.* at 853-55 (holding that whether person is qualified to serve as juror is factual issue entitled to presumption of correctness under 28 U.S.C. § 2254(d)); *see also* 28 U.S.C. § 2254(d) (1982) (providing that factual issues determined by state courts of competent jurisdiction and reviewed in federal habeas proceedings are presumptively correct). Under *Witt*, federal courts in *Witherspoon* cases must afford broad discretion to a state trial judge's factual determination of whether a prospective juror was excludable as a WE. *Witt*, 105 S.Ct. at 854. The Supreme Court in *Witt* reasoned that, although trial judges have difficulty separating questions of fact from mixed questions of law and fact for § 2254(d) purposes, excluding WEs as unfit to determine sentence is no different than excluding jurors for innumerable other reasons. *See id.* at 855; *see also Patton v. Yount*, 104 S.Ct. 2885, 2891 (1984) (reasoning that determining prospective juror's fitness to serve based upon prospective juror's demeanor and credibility at voir dire is peculiarly within trial judge's province).

108. *See Witt*, 105 S.Ct. at 852 (articulating "prevent or substantially impair" standard); *see also supra* notes 94-107 and accompanying text (comparing *Witherspoon's* original standards to relaxed standards under *Witt*). The *Witt* Court outlined the procedure that a trial court should follow to determine whether exclusion for cause is proper. *See Witt*, 105 S.Ct. at 852. The state should show through voir dire questioning that the prospective juror lacks impartiality. *Id.* Then, the trial judge should determine whether the challenge is proper according to the "prevent or substantially impair" standard. *Id.*

109. *See supra* notes 94-107 and accompanying text (comparing relaxed standards under *Witt* to *Witherspoon's* originally strict standards of proof and review).

110. *See supra* notes 37-39 and accompanying text (Keeten court holding that preconviction death-qualification does not offend Constitution); *supra* notes 49-50 and accompaying text (*Spinkellink* court holding that preconviction death-qualification does not offend constitution).

111. *See infra* note 103-08 and accompanying text (WEs excludable from guilt-innocence phase if views would "prevent or substantially impair" ability to dutifully serve at guilt-innocence phase).

trials.[112] Therefore, under *Witt,* trial courts may exclude even from the guilt-innocence phase WEs who simply appear unable or unwilling to determine fairly guilt or innocence.[113] In capital cases in which WEs appear able and willing fairly to determine guilt or innocence, however, courts outside the Fourth and Fifth Circuits should find that impaneling WEs to sit at the guilt-innocence phase of trial does not undermine the states' legitimate interest in impaneling dutiful jurors.[114]

In *Keeten v. Garrison,* the Fourth Circuit, in a consolidated habeas corpus appeal, rejected the defendants' theories that death-qualification before conviction violated their right under the sixth amendment fair cross-section requirement,[115] and that trial by the resulting conviction prone juries violated fairness notions of the fourteenth amendment due process clause.[116] The Fourth Circuit also rejected a claim that the exclusion for cause of a prospective juror who was unsure whether she could consider a state death penalty law violated the *Witherspoon* doctrine.[117] In each of its three holdings, the Fourth Circuit warned that permitting death penalty opponents to participate as jurors in capital trials would threaten a state's legitimate interest in impaneling dutiful jurors.[118] Supreme Court precedent construing the sixth amendment coupled with a collection of cases suggesting that WEs can determine fairly guilt or innocence, however, indicates that the systematic exclusion of WEs from the guilt-innocence phase of a capital trial serves no legitimate state purpose and, therefore, violates the sixth amendment to the Constitution.[119] Because the decisions of *Witt* and *Keeten* will effect a larger class of WEs,[120] and because federal courts have rejected the theory that conviction prone juries are unconstitutionally biased,[121] the sixth amendment

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112. *Witt,* 105 S.Ct. at 851.

113. *See supra* notes 103-08 and accompanying text (discussing standards for proper exclusion under *Witt).*

114. *See supra* notes 62-76 and accompanying text (analysis suggesting that sixth amendment prohibits systematic exclusions of WEs from guilt-innocence phase).

115. *See supra* note 33 and accompanying text (Fourth Circuit in *Keeten* found that threat of jury nullification and juror bias against state preempted sixth amendment right).

116. *See supra* notes 36-39 and accompanying text (Fourth Circuit assumed death-qualified jurors were conviction prone, but found that conviction prone jurors could determine fairly guilt or innocence).

117. *See supra* note 41 and accompanying text (Fourth Circuit deferred to trial judge's determination because trial judge was in best position to determine true meaning of Melton's "I'm not sure" statements).

118. *See supra* notes 33 & 44 and accompanying text (Fourth Circuit stressed North Carolina's interest in having dutiful jurors).

119. *See supra* notes 63-76 and accompanying text (tracing Supreme Court fair cross-section holdings to suggest that systematic exclusion of WEs from determining defendant's guilt violates Constitution).

120. *See supra* notes 103-110 and accompany text (discussing that weakened standard of *Witherspoon* will result in increased exclusions of WEs).

121. *See supra* notes 6, 78-89 and accompanying text (conviction prone jurors may determine fairly defendant's guilt or innocence).

right of an accused to have his guilt determined by a randomly selected jury stands alone to prevent the exclusion of even only moderate opponents to the death penalty from the guilt-innocence phase of a capital trial. As fair cross-section litigation increases, courts should recognize that allowing WEs to determine a defendant's guilt or innocence in capital cases protects a constitutional guarantee without compromising a state's legitimate interest in impaneling dutiful jurors.[122]

MICHAEL A. KING

B. *The Consequences of Appealing Plea Bargain Agreements: Prisoners Face Increased Sentences on Retrial After Vacated Convictions*

The fifth amendment to the United States Constitution protects an individual against deprivation of life, liberty or property by the federal government without due process of law.[1] The protections provided by the fifth amendment due process clause are substantively similar to the protections afforded an individual against state deprivation of life, liberty or property under the due process clause of the fourteenth amendment.[2] In the

122. *See supra* notes 63-77 and accompanying text (analysis to support conclusion that defendant has sixth amendment right and that vindication of right threatens no legitimate state interest).

1. U.S. CONST. amend. V. The phrase no person shall "be deprived of life, liberty, or property, without due process of law," contained in the fifth amendment to the United States Constitution, refers to the law of the land as interpreted according to common law principles. Hallinger v. Davis, 146 U.S. 314, 323 (1892). The guarantee of due process of law dates back to the inception of English civilized government. *See* Munn v. Illinois, 94 U.S. 113, 123-124 (1876) (Magna Charta of 1215 contains due process of law provision). Due process of law provides the primary and indispensible foundation of individual freedoms in the United States Constitution. *See* In Re Gault, 387 U.S. 1, 20 (1966) (due process defines both rights of individual and limits on government power). Due process, however, is an elusive concept without definable boundaries and exact definitions. Hannah v. Larche, 363 U.S. 420, 442 (1959), *reh'g denied,* 364 U.S. 855 (1960). Therefore, due process depends on elements that vary with the specific facts and necessities of every situation. Moyer v. Peabody, 212 U.S. 78, 84 (1909).

2. *See* Hibben v. Smith, 191 U.S. 310, 325 (1903) (courts construe due process of law in fourteenth amendment in same sense and scope as due process in fifth amendment); Hallinger v. Davis, 146 U.S. 314, 323 (1892) (due process of law in fourteenth amendment carries same meaning and scope as due process in fifth amendment); U.S. CONST. amend. V (federal government shall not deprive any person of life, liberty or property without due process of law); U.S. CONST. amend. XIV, § 1 (no state shall deprive any person of life, liberty or property without due process of law); *see also supra* note 1 (discussing significance of constitutional right to due process).

context of criminal law, when an appellate court has overturned a conviction based on a guilty plea, the United States Supreme Court has interpreted the due process clauses of the fifth and fourteenth amendments to prohibit the imposition of a more severe sentence on retrial for the same offense because the possibility of receiving a harsher sentence might discourage defendants from exercising their statutory right to appeal.[3] The issue under consideration by the United States Court of Appeals for the Fourth Circuit in *United States v. Whitley*[4] concerned whether the imposition of an increased sentence on retrial violated defendant Tommy Lee Whitley's constitutional right to procedural due process.[5]

In *Whitley,* the defendant robbed a branch of the North Carolina National Bank.[6] During the robbery, the defendant seized a teller by the neck and held a gun to the teller's head and body while carrying out the crime.[7] Upon leaving the bank, Whitley released the teller and absconded.[8] A grand jury returned a four count indictment charging Whitley with violating the Federal Bank Robbery Act, 18 U.S.C. § 2113.[9] Specifically, the

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3. *See* Wasman v. United States, 104 S. Ct. 3217, 3223 (1984) (fifth amendment due process clause bars increased sentence on retrial for same offense if increased penalty is result of federal judicial vindictiveness against defendant exercising appellate right); North Carolina v. Pearce, 395 U.S. 711, 724-25 (1969) (fourteenth amendment due process clause bars increased sentence on retrial for same offense if increased penalty is result of state judicial vindictiveness against defendant exercising appellate right). *Compare infra* note 50 (discussing Supreme Court's decision in *Wasman) with infra* notes 40-45 and accompanying text (discussing Supreme Court's decision in *Pearce).*

4. 759 F.2d 327 (4th Cir.), *cert. denied,* 106 S. Ct. 196 (1985).

5. *Id.* at 329.

6. *Id.*

7. *Id.*

8. *Id.* In *United States v. Whitley,* North Carolina state police, suspecting the defendant Whitley of robbing a federal bank, arrested Whitley in Concord, North Carolina the week following the bank robbery. Brief for Appellant at 7, United States v. Whitley, 759 F.2d 327 (4th Cir. 1985) [hereinafter cited as *Brief for Appellant*]. Pursuant to the arrest, police conducted a search of Whitley's automobile which revealed evidence linking him to the robbery. *Id.* The District Court for the Western District of North Carolina upheld the police search of Whitley's automobile and denied Whitley's motion to suppress the evidence thereby obtained. *Id.* In a panel opinion, the Fourth Circuit affirmed the district court. *See Whitley,* 759 F.2d at 329.

9. *Whitley,* 759 F.2d at 329. The Federal Bank Robbery Act, 18 U.S.C. § 2113 (1982). provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

indictment charged that Whitley intended to rob a bank in violation of section 2113(a), carried away money valued at greater than $100 in violation of section 2113(b), committed armed robbery in violation of section 2113(d), and kidnapped a teller in violation of section 2113(e).[10] As part of a plea bargain agreement, Whitley pleaded guilty to armed robbery under subsection (d) of 18 U.S.C. § 2113, which carries a statutory maximum penalty of twenty-five years imprisonment.[11] The prosecution, in turn, dismissed the three remaining counts of the original indictment.[12] After hearing the evidence, the United States District Court for the Western District of North Carolina imposed the maximum twenty-five year sentence under subsection (d), which the court later reduced to twenty years.[13]

Subsequently, Whitley moved to vacate the sentence pursuant to 28

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both. . .

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

Id.; see H.R. REP. No. 1721, 75th Cong., 1st Sess. 637 (1937) (discussing legislative history of Federal Bank Robbery Act). Congress enacted the Federal Bank Robbery Act to prohibit the stealing of money from a federally insured bank; therefore, the act proscribes a different type of crime than common law robbery. H.R. REP. No. 1721. The Act has withstood constitutional challenges on several grounds. *See* United States v. Bolin, 423 F.2d 834, 837-38 (9th Cir.) (§ 2113(b) is not unconstitutional even though § 2113(b) permits different penalties for similar offenses), *cert. denied,* 398 U.S. 954 (1970); Clark v. United States, 184 F.2d 952, 954 (10th Cir. 1950) (Federal Bank Robbery Act does not violate tenth amendment proscription of federal interference with state police power), *cert. denied,* 340 U.S. 955 (1951); Audett v. United States, 132 F.2d 528, 529 (8th Cir. 1942) (Federal Bank Robbery Act is not unconstitutionally vague or indefinite).

10. *Whitley,* 759 F.2d at 329; *see supra* note 9 (text of 18 U.S.C. § 2113).

11. *Whitley,* 759 F.2d at 329; *see supra* note 9 (text of 18 U.S.C. § 2113(d)).

12. *Whitley,* 759 F.2d at 329. In *Whitley,* a grand jury indicted the defendant on subsections (a), (b), (d) and (e) of 18 U.S.C. § 2113. *Id.; see supra* note 9 (text of 18 U.S.C. § 2113(d)). Pursuant to a plea bargain agreement, the defendant pleaded guilty to subsection (d) and the prosecution dismissed subsections (a), (b) and (e). *Whitley,* 759 F.2d at 329.

13. *See Whitley,* 759 F.2d at 329 (district court in *Whitley* did not issue written opinion).

U.S.C. § 2255, alleging ineffective assistance of counsel.[14] Although the district court denied Whitley's motion to vacate, on appeal the Fourth Circuit reversed and remanded the case to the district court to set aside Whitley's conviction.[15] In setting aside Whitley's conviction, the Fourth Circuit found that Whitley's counsel was ineffective because defense counsel had advised Whitley to plead guilty under subsection (d) of section 2113 to avoid imposition of the death penalty provision of subsection (e).[16] The Fourth Circuit noted that the Supreme Court effectively had abolished the death penalty provision of section 2113 sixteen years before Whitley's plea bargain.[17] Upon retrial under the original indictment, a jury found Whitley guilty on each of the four counts of the indictment, sections 2113(a), (b),

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14. *Id.* Section 2255 of title 28 of the United States Code provides in relevant part that a prisoner in the custody of a court may attack collaterally his conviction by filing a motion with the court that imposed the sentence to vacate, to set aside or to correct the sentence. *Id.; see* 28 U.S.C. § 2255 (1982) (scope of defendants' postconviction remedies in district courts). Congress enacted § 2255 to shift the burden of post conviction judicial review away from courts in the district of incarceration, which are the appropriate courts for habeas corpus claims, to the court that originally meted out the sentence. Hill v. United States, 368 U.S. 424, 427-28 (1962). The Supreme Court in *Hill* noted that federal prisoners have available the same remedies under § 2255 as are available under a habeas corpus petition. *Id.* A federal prisoner also may make the same constitutional appeals under § 2255 that a state prisoner may raise on a habeas corpus petition. Stone v. Powell, 428 U.S. 465, 479-80 (1976) (expressing view that all constitutional guarantees demand similar treatment with extensive relief for violations of those guarantees); *see* Fay v. Noia, 372 U.S. 391, 399-415 (1963) (habeas corpus procedure is proper for all constitutional challenges). *See generally* Brown v. Allen, 344 U.S. 443, 447-50 (1953) (discussing procedural constraints on habeas corpus claim).

In *Whitley,* the defendant filed a motion to vacate under § 2255 based on ineffective assistance of counsel. *Whitley,* 759 F.2d at 329. Several courts have held that a motion to vacate a conviction under § 2255 is the proper procedure to attack the conviction on the grounds of ineffective assistance of counsel. *See, e.g.,* Harshaw v. United States, 542 F.2d 455, 457 (8th Cir. 1979) (stating standard for ineffective assistance of counsel claims under § 2255 requires trial record to support defendant's allegations of prejudicial harm); United States v. Valenciano, 495 F.2d 585, 587-88 (3d Cir. 1974) (finding § 2255 motion is proper means to assert that assistance of counsel was ineffective in guilty plea negotiations); United States v. Fisher, 477 F.2d 300, 302 (4th Cir. 1973) (holding § 2255 motion is proper procedure to attack conviction based on ineffective assistance of counsel). Circumstances sufficient to attack successfully a guilty plea based on ineffective assistance of counsel include counsel using erroneous interpretations of the law to advise a defendant, and counsel imploring a defendant to accept a guilty plea. *See* Cook v. United States, 461 F.2d 530, 532 (5th Cir. 1972) (ineffective assistance of counsel found when counsel erroneously advised defendant to plead guilty on forgery charge to avoid possible sentence six times greater than actually permitted by law); Edgerton v. State, 315 F.2d 676, 677 (4th Cir. 1963) (ineffective assistance of counsel found when counsel repeatedly urged defendant to plead guilty to burglary and rape).

15. *Whitley,* 759 F.2d at 329.

16. *Brief for Appellant, supra* note 8, at 3.

17. *United States v. Whitley,* 734 F.2d 994, 995 n.1 (4th Cir. 1984) (panel opinion); *see* Pope v. United States, 392 U.S. 651, 651 (1968) (per curiam) (finding death penalty provision in § 2113(e) suffered from same constitutional infirmity found in Federal Kidnapping Act, 18 U.S.C. § 1201(a)); United States v. Jackson, 390 U.S. 570, 572-91 (1968) (abolishing § 1201 dealth penalty provision of Federal Kidnapping Act as violative of fifth and sixth amendments to constitution).

(d) and (e).[18] The conviction carried a statutory maximum penalty of life imprisonment under subsection (e) of section 2113, the kidnapping offense.[19] The district court merged the four counts and sentenced Whitley to fifty years imprisonment under subsection (e) of section 2113.[20] The Fourth Circuit, in a panel opinion, vacated the fifty year sentence, reasoning that an increased sentence upon retrial for the same offense violated Whitley's due process rights.[21] Subsequently, however, the Fourth Circuit granted reconsideration en banc and affirmed the fifty year sentence.[22]

In affirming Whitley's fifty year sentence, the Fourth Circuit en banc, stated that the threshold issue concerned whether 18 U.S.C. § 2113 creates greater and lesser included offenses, or simply one offense with increased penalty provisions for aggravating circumstances.[23] The Fourth Circuit explained that if section 2113 creates only one offense, then due process considerations would bar any increased sentence on retrial for the same offense, unless the second trial court included in the record objective information concerning the defendant's conduct between trials that would justify an increased sentence.[24] Because the district court that retried Whitley had not included the necessary information, the court could not increase Whitley's sentence without violating Whitley's due process rights.[25] In contrast, however, the Fourth Circuit stated that if section 2113 creates greater and lesser included offenses, due process would not bar imposition of an increased sentence on retrial because a conviction under subsection (d) of section 2113 would be for a different crime than a conviction under subsection (e) of section 2113.[26] Subsection (d) of section 2113 proscribes the crime

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18. *Whitley,* 759 F.2d at 329; *see supra* note 9 (text of 18 U.S.C. § 2113).

19. *Whitley,* 759 F.2d at 329 n.1; *see* Pope v. United States, 392 U.S. 651, 651 (1968), (per curiam); *supra* note 17 (Pope effectively abolished death penalty provision of subsection (e)).

20. *Whitley,* 759 F.2d at 329. In sentencing the defendant to 50 years under subsection (e) of § 2113, the sentencing judge in *Whitley* commented that Whitley's crime represented one of the worst the judge had seen while on the district court bench. *Id.* at 331. The judge added that Whitley's actions displayed a willful disregard for human life and constituted completely inexcusable conduct. *See id.* at 331-32. The sentencing judge stated that the sentence should be commensurate with the crime and imposed a 50 year sentence. *Id.* at 322.

21. *Whitley,* 734 F.2d 994, 997-98 (4th Cir. 1984) (panel opinion).

22. *Whitley,* 759 F.2d at 329.

23. *Id.*

24. *Id.* at 330; *see infra* text accompanying note 45 (stating Supreme Court's prophylactic rule in *North Carolina v. Pearce* that bars increased sentence on retrial for same offense unless justified by objective facts in trial record); North Carolina v. Pearce, 395 U.S. 711, 726 (1968).

25. *Whitley,* 759 F.2d at 330.

26. *Id.* The Fourth Circuit in *Whitley* carefully explained that a retrial on a greater included offense, unlike a retrial on the same offense, does not trigger the proscriptions of the doctrine enunciated in *North Carolina v. Pearce. Id.* at 332; *see* North Carolina v. Pearce, 395 U.S. 711, 726 (1968); *infra* notes 40-45 and accompanying text (discussing Supreme Court's decision in *Pearce);* United States v. Barker, 581 F.2d 589, 590-93 (9th Cir. 1982); *infra* notes 60-66 (discussing Ninth Circuit's decision in *Barker* in which Ninth Circuit found that increased sentences on retrial for greater included offense does not offend defendant's due process rights);

of armed robbery, while subsection (e) proscribes the crime of kidnapping during the commission of an armed robbery.[27] After examining the legislative history and the United States Supreme Court's interpretation of 18 U.S.C. § 2113, the Fourth Circuit concluded that section 2113 creates greater and lesser included offenses.[28] Therefore, the benefit of Whitley's plea bargain agreement dissolved when the Fourth Circuit vacated the plea bargain in which Whitley pleaded guilty to violating subsection (d) of section 2113.[29] The *Whitley* court stated that, on retrial, the jury convicted Whitley of kidnapping, a more serious offense than the armed robbery offense to which Whitley originally had pleaded guilty and received a twenty year sentence.[30] Consequently, the Fourth Circuit held that the increased sentence Whitley received on retrial did not violate due process of law.[31]

Although both dissenting judges in *Whitley* agreed with the Fourth Circuit's holding that section 2113 creates greater and lesser included offenses, the dissenting judges argued that the Fourth Circuit should reverse the fifty year sentence imposed in the defendant's retrial on other grounds.[32] Judge Winter, in dissent, argued that Whitley's fifty year sentence should be vacated because the original sentencing court was aware of all the criminal acts Whitley committed when the court sentenced Whitley based on his plea of guilty.[33] The district court was aware of the armed robbery and the kidnapping because both acts occurred in the single criminal transaction of robbing the bank.[34] Since the district court, with full knowledge of all of

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United States ex rel v. McMann, 436 F.2d 103, 106-07 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971); *infra* notes 67-76 and accompanying text (discussing Second Circuit's decision in *McMann* in which Second Circuit found that increased sentences on retrial for greater included offense do not offend defendant's due process rights under *Pearce* rule).

27. *Whitley*, 759 F.2d at 329 n.1; *see supra* note 9 (text of 18 U.S.C. § 2113); *infra* text accompanying notes 100-02 (discussing lesser included offenses under § 2113).

28. *Whitley*, 759 F.2d at 331.

29. *Id.; see infra* text accompanying note 66 (vacated guilty plea dissolves plea bargain agreement).

30. *Whitley*, 759 F.2d at 329. In *Whitley*, after the Fourth Circuit vacated the defendant's plea of guilty to § 2113(d), the prosecution tried the defendant on the original indictment and the district court jury convicted the defendant on all counts of the indictment, subsections (a), (b), (d) and (e) of 18 U.S.C. § 2113. *Id.; see supra* note 9 (text of 18 U.S.C. § 2113); *infra* note 65 and accompanying text (vacated guilty plea constrains prosecutor to proceed under original indictment). The district court judge merged the convictions and sentenced the defendant to 50 years imprisonment. *Whitley*, 759 F.2d at 329; *see* Prince v. United States, 352 U.S. 322, 327-29 (1957) (holding only one sentence possible for multiple convictions under § 2113).

31. *Whitley*, 759 F.2d at 329.

32. *Id.* at 333 (Winter, J., dissenting); *Id.* at 336 (Murnaghan, J., dissenting).

33. *Id.* at 333 (Winter, J., dissenting).

34. *Id.* at 333-34 (Winter, J., dissenting); *see Whitley*, 734 F.2d at 997-98 (panel opinion) (single criminal transaction distinguished from multiple criminal transactions). In the Fourth Circuit panel opinion in *United States v. Whitley*, Judge Winter explained that a single criminal transaction involves only one physical act perpetrated by the defendant on a single occasion. *See Whitley*, 734 F.2d at 998. Furthermore, all charges under the indictment for a single criminal transaction relate to that single criminal act. *See id.* In contrast to a single criminal

Whitley's criminal acts, did not mete out the maximum sentence under the plea bargain conviction, Judge Winter contended that due process of law barred any increased sentence on retrial.[35] In a separate dissent in which three judges concurred, Judge Murnaghan argued that at the time Whitley filed his motion to vacate the original conviction and sentence, Whitley relied on Fourth Circuit authority which clearly held that section 2113 created merely one offense with increased penalties for aggravating circumstances.[36] Judge Murnaghan, therefore, contended that when the *Whitley* court held that section 2113 creates greater and lesser included offenses, the Fourth Circuit violated Whitley's due process rights by creating a new interpretation of an existing statute and trapping Whitley in a changing labyrinth of the law.[37]

The Fourth Circuit in *Whitley* correctly determined that the defendant's increased sentence on retrial did not violate due process of law.[38] In making the determination, the Fourth Circuit properly relied on the leading Supreme Court case on the issue, *North Carolina v. Pearce.*[39] In *Pearce,* the United States Supreme Court consolidated two cases with similar fact patterns.[40] In both cases, the defendants successfully appealed convictions and received

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transaction, Judge Winter suggested that a multiple criminal transaction involves many physical acts perpetrated by the defendant on different occasions. *See id.* Moreover, the charges contained in the indictment for multiple criminal transactions may require separate trials. *See id.*

35. *Whitley,* 759 F.2d at 333 (Winter, J., dissenting); *see infra* notes 104-06 and accompanying text (discussing Judge Winter's analysis in *Whitley* dissent).

36. *Whitley,* 759 F.2d at 335-36 (Murnaghan, J., dissenting).

37. *Id.; see infra* notes 111-14 and accompanying text (discussing Judge Murnaghan's analysis in *Whitley* dissent).

38. *See infra* notes 58-76 and accompanying text (due process of law does not prohibit increased sentence on retrial for greater included offense); *infra* notes 77-101 and accompanying text (supporting *Whitley* holding that court retried defendant on greater included offense).

39. 395 U.S. 711 (1968).

40. *North Carolina v. Pearce,* 395 U.S. 711, 713 (1968). The Supreme Court in *Pearce,* consolidated for decision two cases, *North Carolina v. Pearce* and *Simpson v. Rice. Id.* at 713-14. In *Pearce,* the defendant was charged and convicted of assaulting a woman with intent to commit rape. *Id.* at 713. The trial court sentenced the defendant to a prison term of 12-15 years. *Id.* Several years later, the North Carolina Supreme Court set aside the conviction in a state post conviction proceeding because the court found trial court error in admitting an involuntary confession against the defendant. *Id.* On retrial, a jury again convicted Pearce and the state court sentenced the defendant to eight years imprisonment, a longer sentence than imposed by the original trial court when considered in conjunction with the time the defendant already had spent in prison. *Id.* In *Simpson,* the defendant pleaded guilty to second-degree burglary and received a 10 year prison sentence. *Id.* at 714. Subsequently, pursuant to a state *coram nobis* proceeding in which the defendant alleged a violation of his sixth amendment right to counsel, a state court convicted the defendant on the same charge and sentenced the prisoner to 25 years imprisonment. *Id.* The writ of *coram nobis,* literally "our court," is a proceeding to obtain relief from errors of fact made at trial through duress, fraud or excusable mistake, without negligence on the defendant's part. People v. Adamson, 34 Cal.2d 320,____, 210 P.2d 13, 15-16 (1949); *see* People v. Crawford, 1 Cal. Rptr. 811, 812 (1959) (coram *nobis* is limited remedy available only when no other remedy exists); State v. Kubus, 243 Minn. 379 ____, 68 N.W.2d 217, 218 (1955) (coram *nobis* is common law writ that must be filed in same court that rendered erroneous judgment). Although rule 60(b) of the Federal Rules of Civil Procedure abolished the use of the writ of *coram nobis* in federal courts, the writ retains its vitality in criminal proceedings.

new trials.[41] Upon retrial, the respective courts found both defendants guilty and imposed sentences more severe than the sentences that the courts originally had imposed.[42] In reviewing the defendants' claims that the increased sentences imposed on retrial violated the defendants' due process rights, the Supreme Court in *Pearce* stated that punishing prisoners for exercising their constitutional rights on appeal by increasing the prisoners' sentences if found guilty on retrial would have a chilling effect upon the entire legal system.[43] Consequently, the *Pearce* opinion established a prohpylactic rule to safeguard individuals from both actual vindictiveness and the apprehension of vindictiveness for asserting their constitutional rights on appeal.[44] To guarantee that vindictiveness plays no role in the resentencing of a defendant found guilty on retrial, *Pearce* mandates that a trial judge enter into the record objective facts gleaned from the defendant's demeanor between the two trials that justify the increased sentence.[45]

See United States v. Morgan, 346 U.S. 502, 506-10 (1954) (courts may employ writ of *coram nobis* within scope of common law usage in criminal cases); FED. R. CIV. P. 60(b) (procedure for obtaining relief from civil judgment must be by 60(b) motion or independent action).

41. *Pearce,* 395 U.S. at 713-14.

42. *Id.; see supra* note 40 (discussing *Pearce* and *Simpson).*

43. *Pearce,* 395 U.S. at 724. In *Pearce,* the Supreme Court held that the immunity from harsher punishment accorded defendants exercising their constitutional rights applies equally to retrials granted for nonconstitutional error and retrials granted for constitutional error. *Id.* The Supreme Court in *Pearce* stated that the mere inherent threat of penalizing prisoners for exercising their constitutional right to challenge a conviction based on constitutional error would have a chilling effect on the guarantees provided by the Constitution. *Id.* The *Pearce* opinion further stated that the same chilling effect results when a court penalizes prisoners for appealing convictions based on nonconstitutional error because the detrimental effect on the right to appeal is no less flagrant. *Id.*

44. *Id.* at 725. In attempting to allay prisoners' fears of judicial vindictiveness that might deter a defendant from exercising the constitutional right to appeal, the Supreme Court in *Pearce* stated that a prophylactic rule would most effectively protect prisoners against vindictiveness. *Id.* The *Pearce* opinion cited the case of *Patton v. North Carolina* as indicative of prisoners' fears that exercising appellate rights would result in increased sentences on retrial. *Id.* at n.20; *see* Patton v. North Carolina, 256 F. Supp. 225, 231 n.7 (W.D.N.C. 1966), *aff'd,* 381 F.2d 636 (1967), *cert. denied,* 390 U.S. 905 (1968). In *Patton,* the defendant, who had already served 34 months of a 20 to 30 years sentence for committing an abominable and detestable crime against human nature (sodomy), wrote a letter to the trial judge explaining that he, the defendant, awaited a new trial. *Patton,* 256 F. Supp. at 231 n.7. In his letter, the defendant said "I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners [sic]." *Id. See generally* Note, *Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory,* DUKE L.J. 395, 398-403 (1965) (judicial retaliation against prisoners exercising constitutional right to appeal may be a significant problem in retrial sentencing).

45. *Pearce,* 395 U.S. at 726. To prevent judicial vindictiveness from deterring a defendant from exercising the right to appeal, the Supreme Court in *Pearce* concluded that a court may not impose an increased sentence on retrial unless the court articulates objective facts justifying the increased sentence that are fully reviewable for constitutional legitimacy on appeal. *Id.* In *Wasman v. United States,* however, the Supreme Court weakened the *Pearce* prophylactic rule by allowing resentencing judges to consider relevant events occurring subsequent to the original trial as well as the defendant's conduct. Wasman v. United States, 104 S. Ct. 3217, 3225 (1984); *see infra* note 50 (discussing Supreme Court's decision in *Wasman).*

The Supreme Court recently has elaborated on the *Pearce* holding by stating that appellate courts faced with a due process argument arising out of an increased sentence on retrial for the same offense must follow a two step analysis.[46] First, a court must determine whether actual vindictiveness motivated a trial judge to impose an increased sentence.[47] If an appellate court finds actual vindictiveness, then due process of law bars any increased punishment on retrial.[48] If a reviewing court, however, finds that actual vindictiveness did not motivate a trial judge to impose an increased sentence, an appellate court still must determine whether a trial judge has allayed a prisoner's apprehension that the harsher penalty is not a product of vindictiveness for exercising a successful appeal.[49] The Supreme Court has stated that the *Pearce* prophylactic rule thus creates a presumption of vindictiveness that the sentencing judge must rebut by objective information entered into the record.[50] The *Pearce* prophylactic rule, however, often is a harsh obstacle to a conscientious effort to deal with crime.[51] As a result, the Supreme Court

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46. *See* Wasman v. United States, 104 S. Ct. 3217, 3221 (1984) (explaining *Pearce* due process prohibitions against judicial vindictiveness); *infra* note 50 (discussing Supreme Court's decision in *Wasman).*

47. *See Wasman,* 104 S. Ct. at 3221; *Whitley,* 759 F.2d at 330 (appellate court first determines whether actual vindictiveness motivated trial court to impose increased sentence on retrial).

48. *Pearce,* 395 U.S. at 725.

49. *See Wasman,* 104 S. Ct. at 3221; *Whitley,* 759 F.2d at 330 (appellate court must ensure that record justifies increased sentence on retrial to satisfy due process prohibitions against judicial vindictiveness).

50. *See Wasman,* 104 S. Ct. at 3221 (explaining *Pearce* rebuttable presumption of judicial vindictiveness). In *Wasman v. United States,* the trial court had sentenced the defendant to two years imprisonment, partially suspended, under a conviction for knowingly and willfully making false statements in a passport application. *Id.* at 3219. The Fifth Circuit reversed the conviction, finding error in the trial court's decision to exclude crucial evidence needed by Wasman to provide a valid defense. *See* United States v. Wasman, 641 F.2d 326, 329 (1981) (finding reversible error in refusing to admit defendant's evidence alleging legally-changed name). Subsequently, but before retrial on the passport fraud charge, another trial court entered a judgment against Wasman for possessing counterfeit certificates of deposit. *Wasman,* 104 S. Ct. at 3219. Upon retrial in the original district court for passport fraud, a jury convicted Wasman as charged. *Id.* at 3220. The resentencing judge took into consideration the intervening counterfeit certificates conviction and sentenced Wasman to two years' imprisonment without any suspension. *Id.* In affirming the imposition of the increased sentence, the Supreme Court in *Wasman* stated that the district court effectively rebutted the *Pearce* presumption of vindictiveness by articulating that an intervening event, the counterfeit conviction, occurred between the two trials thereby justifying the increased sentence. *Id.* The Supreme Court in *Wasman* stated that the *Pearce* presumption of vindictiveness applies only when, on retrial for the same offense or a different offense not charged in the original indictment, harsher penalties result from judicial or prosecutorial vindictiveness against a defendant for appealing his convictions. *Id.* at 3223. The Supreme Court also stated that when the *Pearce* presumption of vindictiveness does not apply because the threat of judical retaliation is remote, such as a retrial on a greater included offense, the defendant must prove conclusively that any increased sentence on retrial is the product of actual judical vindictiveness. *Id.; see supra* note 45 and accompanying text (*Pearce* prophylactic rule prohibiting judicial vindictiveness).

51. *Wasman,* 104 S. Ct. at 3222.

has been adamant in refusing to expand the *Pearce* prophylactic rule beyond the situation in which a prisoner receives an increased sentence on retrial for the same offense.[52]

In applying the Supreme Court's two step analysis for detecting judicial vindictiveness, the Fourth Circuit in *Whitley* correctly determined that actual vindictiveness did not motivate the district court in sentencing Whitley to an increased sentence.[53] The Fourth Circuit noted that the district court entered into the trial record resentencing comments making clear that actual vindictiveness did not motivate the increased penalty meted out.[54] Then, in determining whether the *Pearce* prophylactic rule applied to invalidate Whitley's increased sentence, the Fourth Circuit correctly framed the issue in *Whitley* as being whether section 2113 creates merely one offense or whether section 2113 creates greater and lesser included offenses.[55] If section 2113 creates merely one offense, *Pearce* would bar imposition of Whitley's sentence on retrial because the district court failed to articulate objective facts concerning Whitley's conduct to merit an increased sentence in accordance with the *Pearce* prophylactic rule.[56] If section 2113 creates greater and lesser included offenses, however, *Pearce* would not bar imposition of an increased sentence on retrial because no presumption of vindictiveness exists when a court retries and convicts a defendant on a greater included offense.[57]

In support of the Fourth Circuit's assertion that the prophylactic rule of

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52. *Id.* In finding that the *Pearce* presumption of vindictiveness exacts a heavy toll upon effective law enforcement, the Supreme Court in *Wasman* stated that the Court has been hesitant to expand the presumption beyond the situation when a judge metes out an increased sentence on retrial for the same offense, or an offense not charged in the original indictment. *Id; see, e.g.*, United States v. Goodwin, 457 U.S. 368, 384 (1982) (refusing to apply presumption of vindictiveness when prosecution added felony charge to misdemeanor charge subsequent to defendant's demand for jury trial); Bordenkircher v. Hayes, 434 U.S. 357, 362-63 (1978) (finding prosecutor's threat of charging greater offense if defendant refuses plea bargain as constitutional negotiation permissible in plea bargaining); Chaffin v. Stynchcombe, 412 U.S. 17, 26-27 (1973) (refusing to apply presumption of vindictiveness to increased sentence imposed by second jury upon retrial because threat of vindictiveness is minimal); Colten v. Kentucky, 407 U.S. 104, 119 (1972) (finding state two-tier trial procedure not inherently vindictive). *But see* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (applying rebuttable presumption of vindictiveness when prosecutor substituted felony charge for vacated misdemeanor charge on trial de novo).

53. *Whitley,* 759 F.2d at 330 n.5; *see infra* note 54 (review of district court's resentencing comments indicated no actual vindictiveness).

54. *Whitley,* 759 F.2d at 330 n.5. In determining that actual vindictiveness did not motivate the district court judge who sentenced Whitley after the jury had found Whitley guilty on retrial, the Fourth Circuit in *Whitley* relied on the resentencing judge's comments. *Id.* In *Whitley*, before imposing the fifty year sentence, the resentencing judge stated that any sentence meted out would not be to penalize Whitley for exercising his constitutional right to appeal. *Id.* Moreover, the judge specifically entered into the record that vindictiveness did not motivate him in resentencing Whitley. *Id.*

55. *Id.* at 329.

56. *Id.; see supra* notes 24-25 and accompanying text (due process prohibits increased sentence if 18 U.S.C. § 2113 creates merely one offense with aggravating circumstances).

57. *Whitley,* 759 F.2d at 329; *see supra* notes 26-27 and accompanying text (due process does not bar increased sentence if 18 U.S.C. § 2113 creates greater and lesser included offenses).

Pearce does not operate to bar an increased sentence on retrial for a greater included offense are the Ninth Circuit's decision in *United States v. Barker,*[58] and the Second Circuit's decision in *United States ex rel. v. McMann.*[59] In *Barker,* the United States Court of Appeals for the Ninth Circuit held that due process did not preclude an increased sentence for conviction on a greater included offense after the court had vacated a conviction under a lesser included offense.[60] A grand jury in *Barker* returned an indictment charging the defendant with first degree murder.[61] Subsequently, the defendant pleaded guilty to the lesser included offense of second degree murder.[62] The defendant in *Barker* argued that accepting the guilty plea on the lesser included offense, second degree murder, implied acquittal on the greater included offense, first degree murder.[63] The Ninth Circuit in *Barker,* however, refused to accept the defendant's argument on the basis that reinstatement of the indictment would pose no threat to Barker's fifth amendment due process or double jeopardy rights.[64] The court reasoned that when a defendant's plea bargain

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58. 681 F.2d 589 (9th Cir. 1982).

59. 436 F.2d 103 (2d Cir. 1970), *cert. denied,* 402 U.S. 914 (1971).

60. United States v. Barker, 681 F.2d 589, 592-93 (9th Cir. 1982).

61. *Id.* at 590.

62. *Id.*

63. Brief for Appellee at 5, United States v. Barker, 681 F.2d 589 (9th Cir. 1982).

64. *Barker,* 681 F.2d at 592-93. In holding that the prosecutor's non-retaliatory reinstatement of the original indictment on retrial did not offend the defendant's fifth amendment due process rights, the Ninth Circuit in *United States v. Barker,* relied on the Supreme Court's decision in *United States v. Goodwin. Id.* at 593; *see* United States v. Goodwin, 457 U.S. 368, 373 (1982) (holding *North Carolina v. Pearce* proscribes only vindictively motivated prosecutorial and judicial conduct); *supra* notes 40-45 and accompanying text (discussing Supreme Court's decision in *Pearce).* Additionally, the *Barker* court held that the prosectuor's use of the original indictment on retrial did not violate the defendant's fifth amendment protection against double jeopardy. *See Ward v. Page,* 424 F.2d 491, 493 (10th Cir.) (reinstatement of original indictment does not offend fifth amendment double jeopardy clause), *cert. denied,* 400 U.S. 917 (1970), *reh'g denied,* 400 U.S. 1002 (1971); *see also* U.S. CONST. amend V (no person shall be subject to double jeopardy of life and limb). In *Ward v. Page,* a grand jury returned an indictment charging the defendant, Ward, with first degree murder. *Ward,* 424 F.2d at 492. Ward pleaded guilty to the lessesr included offense of manslaughter. *Id.* In a subsequent evidentiary hearing, the Tenth Circuit found that Ward initially pleaded guilty to the manslaughter charge involutarily. *Id.* The prosecution in Ward, faced with an order from the Tenth Circuit to act or appeal, retried the defendant under the original incidtment. *Id.* On retrial, a jury convicted Ward of first degree murder, and the trial court sentenced the defendant to life imprisonment. *Id.* Ward then appealed to the Oklahoma Court of Criminal Appeals which reduced the defendant's sentence to 40 years with credit for time already served. *Id.* Ward then petitioned the United States District Court for the Eastern District of Oklahoma for habeas corpus relief, alleging that the double jeopardy clause precluded Ward's retrial on the murder charge. *Id.* at 493. On appeal from the district court's denial of Ward's habeas corpus writ, the Tenth Circuit rejected the defendant's claim that a guilty plea on a lesser offense of manslaughter implies acquittal on the greater offense of murder. *Id.* The Tenth Circuit held that when voluntarily attacked by a defendant, a guilty plea on a lesser included offense does not serve to abrogate all greater offenses contained within the indictment because no trier of fact adjudicated the elements of the greater included offenses at the plea bargain hearing. *Id.* Therefore, the Tenth Circuit concluded that the prosecutor in Ward did not violate the defendant's rights under the fifth amend-

agreement terminates, a prosecutor may proceed only by charging the defendant under the original indictment.[65] When a judge vacates a plea bargain agreement, therefore, the benefit of the bargain dissolves and upon retrial for a greater or separate offense, the sentencing court may consider the elements of all the crimes charged in the original indictment.[66]

Based on reasoning similar to the reasoning of the Ninth Circuit in *Barker,* the United States Court of Appeals for the Second Circuit in *McMann* held that *Pearce* did not apply to limit a sentence imposed for conviction on a greater included offense after the court had vacated a conviction under a lesser included offense.[67] In *McMann,* a grand jury returned an indictment charging the defendant with feloniously selling a narcotic drug.[68] Subsequently, the defendant pleaded guilty to the lesser included offense of attempted felonious sale of a narcotic drug.[69] After successfully petitioning the Second Circuit to set aside the guilty plea conviction, the defendant faced retrial on the original indictment and received an increased sentence.[70] In affirming the increased penalty, the *McMann* court, like the *Barker* court, reasoned that due process does not prevent an increased sentence on retrial for a greater included offense.[71] The Second Circuit stated that because the defendant unilaterally revoked his part of the

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ment double jeopardy clause by retrying Ward on a greater included offense contained in the original indictment. *Id. See generally* Note, *"Upping the Ante" Against the Defendant Who Successfully Attacks his Guilty Plea: Double Jeopardy and Due Process Implications,* 50 NOTRE DAME LAW., 857, 878 (1975) (double jeopardy and due process are insufficient grounds to attack increased sentence on retrial after appellate court vacates original plea bargain conviction).

65. *Barker,* 681 F.2d at 593. In determining that a prosecutor must charge a defendant under the original indictment on retrial, the Ninth Circuit in *Barker* reasoned that imposing charges under the original indictment places the prosecution and the defense on neutral legal footing. *Id.* at 593. The *Barker* court further held that absent a retaliatory intent by a prosecutor to punish a prisoner for appealing a conviction, charging a prisoner under the original indictment does not offend due process of law. *Id.* The *Barker* court concluded that a prosecutor, without violating due process considerations, may enhance the charges against a defendant if the defendant refuses to plead guilty to a plea bargain agreement. *Id.; see supra* note 52 (limiting due process proscriptions of *Pearce* to situation of increased sentence on retrial for same offense or offense not charged in original indictment); *Pearce,* 395 U.S. at 726 (due process proscriptions against increased sentences on retrial for same offense).

66. *Barker,* 681 F.2d at 593.

67. United States ex rel. v. McMann, 436 F.2d 103, 106-07 (2d Cir. 1970), *cert. denied,* 402 U.S. 914 (1971).

68. *Id.* at 104.

69. *Id.*

70. *Id.* In *United States ex rel. v. McMann,* the defendant's plea bargain agreement on the attempted felonious sale charge permitted a maximum sentence of three to seven years imprisonment. *Id.* The defendant, pursuant to the erroneous belief that the court would sentence him as a second felony offender under the plea bargain charge, sought permission to withdraw his plea. *Id.* Subsequent to accepting the withdrawal of the defendant's plea, the trial court in *McMann* convicted the defendant of feloniously selling narcotics under the original indictment. *Id.* The trial court in *McMann* then sentenced the defendant to a term of five to ten years imprisonment. *Id.*

71. *See id.* at 107; *supra* note 65 (due process rights of defendant not violated by charging more severe offense on retrial under original indictment).

plea bargain agreement, the prosecutor properly could revoke his acceptance of the reduced charge and proceed on retrial under the charges contained in the original indictment.[72] In upholding the defendant's increased sentence on retrial, the *McMann* court noted that when a defendant obtains the benefits of a plea bargain agreement, yet remains at liberty to refute the plea bargain's binding authority, the defendant receives a windfall by inducing the prosecutor to accept a reduced charge without the defendant accepting the consequences.[73] The *McMann* court found that, for the defendant then to attack the plea bargain conviction, while claiming that the plea bargain sentence sets the upper limit on the defendant's jeopardy, the defendant would disrupt the balance of justice between prosecution and defense.[74] The *McMann* court concluded that an efficient plea bargain system is effective only if both adversaries adhere to the confines of the agreement.[75] Otherwise, prosecutors will abandon the plea bargain system, thus creating chaos in the administration of criminal justice by increasing an already overburdened iudicial system.[76]

In determining whether section 2113 creates greater and lesser included offenses, thus justifying Whitley's fifty year sentence on retrial under the analyses of *Barker* and *McMann,* the Fourth Circuit in *Whitley* noted that Congress has not used unambiguous language to indicate its intent in passing section 2113.[77] The Supreme Court also has not issued a firm directive in clarifying the proper interpretation of section 2113.[78] The Fourth Circuit,

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72. *McMann,* 436 F.2d at 107.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The Second Circuit in *McMann* cautioned that if courts allow defendants to attack plea bargain agreements at will, then judges will become predisposed to allow withdrawals of defendants' guilty pleas. *Id.* The *McMann* court concluded that disregarding judicial discretion in determining whether to allow withdrawal of defendants' guilty pleas will impede judicial efficiency and aggravate court congestion. *Id. See The Supreme Court, 1969 Term,* 84 HARV. L. REV. 30, 150 (1970) (suggesting breakdown of plea bargain system would severely impede criminal justice).

77. *See* O'Clair v. United States, 470 F.2d 1199, 1202 (1st Cir. 1971), *cert. denied,* 412 U.S. 921 (1973). The First Circuit in *O'Clair v. United States* noted that the ambiguous wording of 18 U.S.C. § 2113 obscures the purpose that Congress had in passing the statute. *Id.; see supra* note 9 (text of 18 U.S.C. § 2113). A House of Representatives Report concerning the congressional purpose in passing § 2113 illustrates the ambiguity of § 2113. *O'Clair,* 470 F.2d at 1202; *see* H.R. REP. No. 1461, 73d Cong., 2d Sess. 1 (1934). In relevant part, the House Report states that if during a bank robbery the perpetrator puts the life of any person in jeopardy by using a dangerous weapon, the statute increases the sentence to a fine not less than $1000 nor greater than $10,000, or imprisonment of not greater than 25 years or both. H.R. REP. No. 1461. The problem of interpreting the House report's sentencing passage lies in whether the increased sentence for armed robbery implies that § 2113 creates one offense with increasing penalty schemes, or rather, that § 2113 creates greater and lesser included offenses with corresponding penalty provisions. *See O'Clair,* 470 F.2d at 1202 (holding 18 U.S.C. § 2113 creates only one offense with aggravating circumstances despite ambiguous language in statute).

78. *See* United States v. Gaddis, 424 U.S. 544, 548 (1976) (distinguishing subsection (c) of § 2113 from subsections (a), (b) and (d) without articulating issue in terminology of greater

however, looked to the Supreme Court decisions in *Prince v. United States*[79] and *United States v. Gaddis*[80] to construe the statute.[81] Although neither *Prince* nor *Gaddis* directly addressed the issue of whether section 2113 creates greater and lesser included offenses or a single offense with aggravating penalty schemes,[82] the Fourth Circuit persuasively extrapolated from the ambiguous language of the Supreme Court and applied the language in *Whitley* to find that section 2113 creates greater and lesser included offenses.[83]

In *Prince,* a federal grand jury returned a two count indictment charging the defendant with unlawful entry into a bank with intent to perpetrate a robbery under subsection (a) of section 2113, and armed robbery under subsection (d).[84] In addressing the issue of whether the district court properly convicted and sentenced the defendant under both counts of the indictment, the Supreme Court in *Prince* stated that Congress intended section 2113 to create lesser offenses.[85] The *Prince* opinion, however, is unclear concerning what lesser offenses Congress intended to create.[86] Lesser offenses in *Prince* merely may refer to the individual greater and lesser acts proscribed within subsection (a) of section 2113, forcible robbery and entry with felonious intent, and those acts proscribed in subsection (b), felonious larceny and petit larceny.[87] In contrast, lesser offenses in *Prince* may refer to the entire set of acts proscribed by subsection (a), (b), and (d) of section 2113 as lesser included offenses of subsection (e).[88] The Supreme Court in *Prince,* however, stated that Congress enacted subsection (a) of section 2113 in an effort to ensure that one who entered a bank for the purpose of committing a crime, but who failed in his attempt, would not escape justice.[89] In addition, Congress

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and lesser included offenses); United States v. Prince, 352 U.S. 322, 327 (1957) (invalidating multiple sentences under subsections (a) and (b) of § 2113 without articulating issue in terminology of greater and lesser included offenses); *see also* Note, *The Federal Bank Robbery Act—The Problem of Separately Punishable Offenses,* 18 WM. & MARY L. REV. 101, 110-27 (1976) (discussing language interpretation problems of § 2113) [hereinafter cited as Note, *Federal Bank Robbery Act];* Note, *A General Sentence is to be Imposed for a Conviction Consisting of Several Counts Charging Violation of the Federal Bank Robbery Act but the Term Shall Not Exceed the Maximum Permissible Sentence on the Count that Carries the Maximum Sentence,* 9 HOUS. L. REV. 579, 579-86 (1972) (discussing sentencing interpretation problems of § 2113).

79. 352 U.S. 322 (1957).

80. 424 U.S. 544 (1976).

81. *Whitley,* 759 F.2d at 331.

82. *See supra* note 78 (discussing Supreme Court's failure to resolve ambiguity of § 2113 language in *Prince* and *Gaddis).*

83. *See Whitley,* 759 F.2d at 331 (finding guidance from *Prince* and *Gaddis* that 18 U.S.C. § 2113 creates greater and lesser included offenses).

84. *Prince,* 352 U.S. at 324.

85. *Id.* at 327.

86. *See id.* at 326-28; Note, *Federal Bank Robbery Act, supra* note 78, at 110 (discussing interpretation problems of *Prince* opinion).

87. *See Prince,* 352 U.S. at 326-28; *supra* note 9 (text of 18 U.S.C. § 2113).

88. *See Prince,* 352 U.S. at 326-28; *supra* note 9 (text of 18 U.S.C. § 2113).

89. *Prince,* 352 U.S. at 325-26. In *United States v. Prince,* the Supreme Court stated that

segregated the lesser crimes of petit larceny and felonious larceny into subsection (b).[90] Accordingly, a careful reading of the *Prince* opinion suggests that the Supreme Court, like the Fourth Circuit, construed each entire subsection of section 2113 as creating greater and lesser included offenses.[91]

Several years after the decision in *Prince,* the Supreme Court in *Gaddis* faced another challenge to the proper relationship between the specific subsections of 18 U.S.C. § 2113.[92] In *Gaddis,* a federal grand jury returned an eight count indictment charging two defendants with intent to rob a bank in violation of subsection (a) of section 2113, possessing stolen bank funds in violation of subsection (c), and armed robbery in violation of subsection (d).[93] The Supreme Court in *Gaddis* reasoned that Congress aimed the subsection (c) crime of possessing money stolen from a bank at a separate and distinct segment of criminals, uninvolved in the actual robbery of the bank itself.[94] Therefore, the Supreme Court's act of carving out subsection (c) as an offense distinct from the offenses in other subsections of section 2113 suggests that the *Gaddis* opinion did not find that Congress intended section 2113 to create merely one offense.[95] Rather, the Supreme Court's decision in *Gaddis,* like the decision in *Prince,* implies that Congress intended section 2113 to create greater and lesser included offenses.[96]

In considering whether 18 U.S.C. § 2113 creates greater and lesser included offenses, the United States Circuit Courts of Appeals that have found occasion to interpret section 2113 after Gaddis are split equally.[97] Approxi-

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Congress enacted the unlawful entry offense, subsection (a) of § 2113, in response to a request from the Attorney General. *Id.* The *Prince* opinion revealed that the Attorney General argued that without a provision in the Federal Bank Robbery Act proscribing the act of entering a bank with felonious intent to rob, incongruous results in the law had developed. *Id.* In support of his contention, the Attorney General cited a case in which a man secretly had stolen money from a federal bank without using force or violence, the essential elements of the crime of robbery. *Id.; see* Letter from Attorney General Homer S. Cummings to Hon. William B. Bankhead, Speaker of the House of Representatives (March 17, 1937) (requesting changes in Federal Bank Robbery Act). Although police apprehended the thief, The Act did not proscribe the crime perpetrated by the thief and, therefore, the federal authorities could not prosecute the perpetrator under The Act. *Prince,* 352 U.S. at 328.

90. *Prince,* 352 U.S. at 326 n.5.

91. *See id.* at 327-28.

92. *Gaddis,* 424 U.S. at 547-48.

93. *Id.* at 545-46.

94. *Id.* at 547-48. In *United States v. Gaddis,* the Supreme Court affirmed *Heflin v. United States,* in which the Supreme Court held that Congress, by enacting subsection (c) of § 2113, attempted to reach a class of criminals distinct from the perpetrators of the actual robbery. *Id.; see* Heflin v. United States, 358 U.S. 415, 420 (1958). The Supreme Court in *Gaddis* concluded that subsection (c) cannot merge with the other subsections of § 2113 because Congress aimed the crime at a different group of wrongdoers. *Gaddis,* 424 U.S. at 548.

95. *See Gaddis,* 424 U.S. at 547-48.

96. *See id.; supra* notes 89-91 and accompanying text (suggesting Supreme Court in *Prince* interpreted § 2113 as creating greater and lesser included offenses).

97. *See infra* note 98 (indicating circuit courts of appeals are split on proper interpretation of § 2113).

mately half of the circuits have held that section 2113 creates greater and lesser included offenses, while the remaining circuits have held that section 2113 creates merely one offense.[98] The very definition of a lesser included offense, however, bolsters the Fourth Circuit's finding that section 2113 creates greater and lesser included offenses.[99] A lesser included offense is an offense that contains common elements, but fewer in number than a greater offense such that a perpetrator cannot commit the greater offense without also committing the lesser offense.[100] Under section 2113, therefore, a jury cannot convict a defendant for armed robbery under subsection (d) unless the defendant also commits all elements of the offense of forcible robbery under subsection (a).[101] Similarly, a jury cannot convict a defendant for kidnapping under subsection (e) unless the defendant also has committed all elements of the offense of armed robbery under subsection (d).[102] Thus, the Supreme Court's interpretation of Congressional intent in *Prince* and *Gaddis*, the precedent of half of the United States Circuit Courts of Appeals, and the definition of lesser included offenses, all support the Fourth Circuit's holding that section 2113 creates greater and lesser included offenses.[103]

Although agreeing with the Fourth Circuit that section 2113 creates greater and lesser included offenses rather than a single offense with aggravating circumstances, Judge Winter argued in dissent that due process should bar Whitley's increased sentence.[104] Because *Whitley* involved a single criminal transaction in which the district court judge accepted the guilty plea and imposed sentence with full knowledge of all facts of the crime, Judge Winter asserted that *Pearce* prohibited increased punishment on retrial.[105] Judge

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98. *See, e.g.*, United States v. Evans, 665 F.2d 54, 55 (2d Cir. 1981) (per curiam) (subsection (a) of § 2113 is lesser included offense of subsection (d)); United States v. Fultz, 602 F.2d 830, 832 n.6 (8th Cir. 1979) (subsection (a) of § 2113 is lesser included offense of subsection (d)); United States v. Fleming, 594 F.2d 598, 609 (7th Cir.) (subsection (e) of § 2113 creates a separate offense within statutory scheme permitting separately imposed sentences), *cert. denied*, 442 U.S. 831 (1979); United States v. Davis, 573 F.2d 1177, 1179 (10th Cir.) (subsection (a) and (d) are lesser and greater included offenses under § 2113), *cert. denied*, 436 U.S. 930 (1978). *But see, e.g.*, United States v. Bosque, 691 F.2d 866, 868 n.2 (9th Cir. 1982) (subsection (d) is not separate offense under § 2113 but enhances possible penalties of subsections (a) and (b) when additional circumstances are present); United States v. Herrold, 635 F.2d 213, 215 (3d Cir. 1980) (subsection (d) of § 2113 merely makes offense of simple bank robbery an aggravated robbery with increased penalty); United States v. Rossi, 552 F.2d 381, 383 (1st Cir. 1977) (§ 2113 creates one offense with punishments varying by subsections).

99. *Whitley*, 759 F.2d at 331.

100. 2 WHARTON'S CRIMINAL PROCEDURE 339-40 (C. Torcia 12th ed. 1975) (defining lesser included offenses).

101. *See supra* note 9 (text of 18 U.S.C. § 2113).

102. *Id.*

103. *See supra* notes 84-96 and accompanying text (discussing Supreme Court's decisions in *Prince* and *Gaddis); supra* note 98 (circuit courts of appeals supporting position that § 2113 creates greater and lesser included offenses); *supra* text accompanying notes 100-02 (defining lesser included offenses).

104. *Whitley*, 759 F.2d at 333-34 (Winter, J., dissenting).

105. *Id.* In dissent in *Whitley*, Judge Winter stated that when a defendant enters a guilty

Winter contended that the *Whitley* single criminal transaction is in contrast to other cases involving a plea bargain to only one of several criminal transactions in which the district court judge may be unaware of all the facts prior to sentencing.[106] The Fourth Circuit, however, persuasively rebutted Judge Winter's dissent by explaining that subsections (d) and (e) of section 2113 describe separate offenses with correspondingly separate penalty provisions, as opposed to describing one offense with only one penalty provision.[107] When the district court accepted Whitley's guilty plea under subsection (d), the armed robbery subsection, the evidence presented at the sentencing

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plea pursuant to committing a single criminal transaction, a trial court in accepting the plea must hear all the evidence marshalled against the defendant. *Id.* Thus, if a court subsequently vacates a conviction, Judge Winter argued that on retrial under the original indictment, the prosecution cannot produce any new evidence before the trier of fact. *See id.* Judge Winter, in the *Whitley* dissent, contended that the *Pearce* doctrine applied to prohibit Whitley's 50 year sentence because the original district court, in accepting Whitley's guilty plea of armed robbery under subsection (d) of § 2113, heard all of the facts pertaining to the subsection (e) kidnapping offense before sentencing Whitley to 20 years imprisonment. *Id.* Because the resentencing court did not include any objective facts in the record justifying an increased sentence, Judge Winter concluded that the 50 year sentence violated Whitley's right to due process of law. *Id.; see North Carolina v. Pearce,* 395 U.S. at 726; note 45 and accompanying text (Pearce prophylactic rule prohibiting judicial vindictiveness).

106. *Whitley,* 759 F.2d at 333 (Winter, J., dissenting); *see supra* note 34 (distinguishing single from multiple criminal transactions). Judge Winter, in dissent in *Whitley,* relied on Fourth Circuit precedent in *United States v. Johnson* to distinguish the special facts of *Whitley* from the general rule that due process does not bar an increased sentence on retrial for a different offense under the original indictment. *Whitley,* 759 F.2d at 334 (Winter, J., dissenting) (en banc). (citing *Whitley,* 734 F.2d at 998) (panel opinion); *see* United States v. Johnson, 537 F.2d 1170, 1174-75 (4th Cir. 1976) (due process does not bar increased sentence on retrial under original indictment charging multiple criminal transactions). In *Johnson,* the defendant pleaded guilty to counts one and four of the original indictment which charged the defendant with conspiracy to distribute heroin and criminal enterprise, respectively. *Johnson,* 537 F.2d at 1171. After vactaing the guilty plea conviction on count four only, the Fourth Circuit held that the resentencing court would not violate Johnson's due process rights if the court meted out an increased sentence when retrying Johnson on the three remaining counts of the original indictment. *Id.* at 1172, 1174-75. Counts two and three of the indictment represented separate transactions from the original plea bargain on counts one and four, yet the Fourth Circuit made no mention of the single/multiple transactions significance. *See id.* at 1174-75. The *Johnson* court mentioned *North Carolina v. Pearce* in a footnote, commenting that *Pearce* would control the punishment that the resentencing court could mete out on retrial for conviction under count four, the criminal enterprise charge. *Id.* at 1174 n.5; *see* North Carolina v. Pearce, 395 U.S. 711, 726 (1968); *supra* notes 40-45 and accompanying text (discussing Supreme Court's decision in *Pearce).* The *Johnson* court also stated, however, that retrial on the original indictment places both prosecution and defense on the same footing. *Johnson,* 537 F.2d at 1175. A conviction on counts two and three of the indictment would expose Johnson to the real threat of being resentenced to a longer term since new evidence, inadmissible under the plea bargain, would be admissible on a retrial under the original indictment. *Id.* Consequently, *Johnson* actually supports the Fourth Circuit's decision in *Whitley* because the trial court that accepted Whitley's plea bargain could not consider the kidnapping element of Whitley's single criminal transaction. *Whitley,* 759 F.2d at 332; *see infra* notes 108-09 and accompanying text (trial court constrained from considering elements not included in plea bargain agreement).

107. *Whitley,* 759 F.2d at 332.

hearing related only to the crime described in subsection (d) with its respective penalty scheme.[108] In imposing the initial twenty year sentence, the district court did not consider elements of the subsection (e) crime, kidnapping.[109] Thus, when the district court, on Whitley's retrial, considered the evidence in light of the kidnapping offense and penalty provision of subsection (e), the court's imposition of a fifty year sentence did not deny Whitley due process of law under the *Pearce* doctrine.[110]

While also agreeing with the Fourth Circuit that section 2113 creates greater and lesser included offenses and not a single offense with aggravating circumstances, Judge Murnaghan argued in dissent that the *Whitley* court should not apply this interpretation of section 2113 retroactively[111] In his dissenting opinion, Judge Murnaghan asserted that when Whitley filed a 18 U.S.C. § 2255 motion to vacate his guilty plea, Whitley justifiably relied on existing Fourth Circuit decisions holding that section 2113 creates merely one offense with aggravating circumstances.[112] Consequently, when Whitley appealed his plea bargain conviction, Judge Murnaghan contended that Whitley had adequate reason to believe that the *Pearce* prophylactic rule would bar an increased sentence if a jury convicted him on retrial for the same offense.[113] Judge Murnaghan concluded that due process of law prevented the Fourth Circuit from creating, in effect, a judicial ex post facto law by interpreting section 2113 in a manner contradictory to the reading given the statute when Whitley exercised his right to appeal.[114]

In addressing Judge Murnaghan's dissenting argument that the Fourth Circuit violated Whitley's due process rights by creating a judicial ex post facto law, the Fourth Circuit justifiably refused to accept the argument because Whitley did not argue that he relied upon previous Fourth Circuit precedent in appealing the plea bargain agreement.[115] As Rule 28(a)(4) of the

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108. *Id.; see supra* note 9 (text of 18 U.S.C. § 2113).

109. *See Whitley,* 759 F.2d at 332; Klobuchir v. Pennsylvania, 639 F.2d 966, 969 (3d Cir.) (acceptance of plea bargain constrains judge from considering greater offenses of indictment), *cert. denied,* 454 U.S. 1031 (1981).

110. *Whitley,* 759 F.2d at 331-32; *see supra* note 54 (stating district court's resentencing comments in *Whitley); supra* notes 60-76 and accompanying text (Pearce due process considerations do not bar increased sentence on greater included offense).

111. *Whitley,* 759 F.2d at 334-35 (Murnaghan, J., dissenting).

112. *Id.; see infra* note 119 (discussing Fourth Circuit interpretations of § 2113 at time Whitley filed appeal).

113. *Whitley,* 759 F.2d at 334 (Murnaghan, J., dissenting); *see supra* text accompanying notes 24-25 (discussing Fourth Circuit's reasoning in *Whitley* that *Pearce* bars increased sentence if § 2113 creates merely one offense).

114. *Whitley,* 759 F.2d at 336 (Murnaghan, J., dissenting). In his dissent in *Whitley,* Judge Murnaghan argued that the Fourth Circuit violated Whitley's right to due process by creating a new interpretation of an existing statute. *Id.; see* Rabe v. Washington, 405 U.S. 313, 316 (1972) (unforeseeable judicial construction of criminal statute violates due process of law); Bowie v. City of Columbia, 378 U.S. 347, 353-54 (1964) (inconsistent judicial construction of criminal statute violated due process of law).

115. Sweetwine v. Maryland, 769 F.2d 991, 993 (4th Cir. 1985) (Murnaghan, J., concurring)

Federal Rules of Appellate Procedure mandates, an appellant must present the issues that the appellant wishes to litigate to the appellate court, supported by appropriate judicial authority.[116] In compliance with Rule 28(a)(4), the majority of circuit courts of appeals have refused to decide any issues, such as Judge Murnaghan's contention that the Fourth Circuit created a judicial ex post facto law, that may have important significance but which the defendant has not raised on appeal.[117] The vitality of the adversarial system of law in our country hinges on appellate courts sitting as neutral arbiters of issues argued before them by counsel, and not on the courts sitting as a board of self-initiated inquiry and research.[118] Even had Whitley's counsel raised the issue at the en banc appeal, however, a review of the history of the Fourth Circuit's treatment of section 2113 suggests that the Fourth Circuit, prior to *Whitley,* consistently had not interpreted section 2113 either as creating one offense or as creating greater and lesser included offenses.[119]

(failure of appellant to argue issue on appeal constrains court from addressing issue). In concurring with the Fourth Circuit in *Sweetwine v. Maryland,* Judge Murnaghan conceded that the *Whitley* court correctly refused to consider whether Whitley had relied on existing Fourth Circuit precedent in appealing his guilty plea conviction. *Id.*

116. FED. R. APP. P. 28(a)(4). Rule 28(a)(4) of the Federal Rules of Appellate Procedure provides, in pertinent part, that appellant's brief must contain an argument that represents all contentions of the appellant concerning the issue presented before the court. *Id.* In addition, appellant must support his arguments by citing authorities, statutes and relevant parts of the record. *Id.*

117. *See, e.g.,* Alabama Power Co. v. Gorsuch, 672 F.2d 1, 7 (D.C. Cir. 1982) (refusing to decide important issue not argued by party standing to benefit therefrom); Kemlon Prods. & Dev. Co. v. United States, 646 F.2d 223, 224 (5th Cir.) (refusing to decide issue merely mentioned by party when party did not discuss merits), *cert. denied,* 454 U.S. 863 (1981); Markowitz & Co. v. Toledo Metropolitan Hous. Auth., 608 F.2d 699, 707-08 (6th Cir. 1979) (refusing to decide apparent issue not argued by either party); United States v. John Bernard Indus., Inc., 589 F.2d 1353, 1362, n.5 (8th Cir. 1979) (refusing to decide issue merely mentioned by party when party did not cite supporting authority); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 692 (4th Cir. 1978) (refusing to decide issue not mentioned by either party); Harman v. Diversified Medical Inv. Corp., 524 F.2d 361, 365 (10th Cir. 1975) (refusing to decide issue merely mentioned by party as conclusory argument unsupported by authority or facts in record), *cert. denied,* 425 U.S. 951 (1976); United States v. White, 454 F.2d 435, 439 (7th Cir. 1971) (refusing to decide issue not sufficiently briefed by parties to permit intelligent argument before court), *cert. denied,* 406 U.S. 962 (1972).

118. Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

119. *See Whitley,* 759 F.2d at 329-31. In reviewing Fourth Circuit cases interpreting § 2113, a careful analysis reveals that contrary to Judge Murnaghan's dissent, the Fourth Circuit had not adopted a consistent interpretation of § 2113 prior to the time when Whitley filed a motion to vacate his guilty plea. *See id.; supra* notes 111-14 and accompanying text (discussing Judge Murnaghan's dissent in *Whitley).* The Fourth Circuit initially construed § 2113 in *United States v. Lawrenson.* United States v. Lawrenson, 298 F.2d 880, 888-89 (4th Cir. 1962), *cert. denied,* 370 U.S. 913, *cert. denied,* 370 U.S. 947, *cert. denied,* 370 U.S. 962 (1962). In *Lawrenson,* a jury convicted the defendant on count one of a four count indictment for taking property by intimidation from a bank in violation of subsection (a) of § 2113. *Id.* at 881. The Fourth Circuit opinion in *Lawrenson* provided conflicting language concerning the correct interpretation of § 2113. *See id.* at 889. The *Lawrenson* court stated that the various subsections of § 2113 were not separate ways of describing the same offense, but instead constituted related offenses.

Regardless of whether Whitley argued the ex post facto issue on appeal or not, therefore, Whitley could not have justifiably relied on Fourth Circuit precedent because the Fourth Circuit consistently had not interpreted section 2113 as creating merely one offense.[120]

In *United States v. Whitley,* the United States Court of Appeals for the Fourth Circuit held that the district court's conviction and imposition of an increased sentence on retrial under the Federal Bank Robbery Act did not violate the defendant's fifth amendment due process rights.[121] The Fourth Circuit noted that the United States Supreme Court has held that due process of law prevents courts motivated by judicial vindictiveness from meting out increased sentences on retrial to prisoners that successfully have exercised their right to appeal.[122] To prevent judicial vindictiveness against prisoners

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Id. The *Lawrenson* court, however, also stated that the sentences under § 2113 increased with the aggravation of the offense, thereby implying that the statute creates only one offense. *Id.* The language used by the Fourth Circuit in *Lawrenson,* therefore, is too ambiguous to provide a clear indication of whether § 2113 creates one offense, or greater and lesser included offenses. *See id.* Addressing the interpretation of § 2113 ten years after *Lawrenson,* the Fourth Circuit in *Walters v. Harris* read § 2113 as creating one offense with varying degrees of punishment depending on whether aggravating circumstances were present. Walters v. Harris, 460 F.2d 988, 994 (4th Cir. 1972), *cert. denied sub nom.,* Wren v. United States, 409 U.S. 1129 (1973). In *Walters,* the defendant pleaded guilty to two counts of an indictment charging the defendant with robbery under subsection (a) of § 2113 and armed robbery under subsection (d). *Id.* at 994. The trial court in *Walters* imposed two 20 year concurrent sentences which the Fourth Circuit found impermissible since § 2113 sanctioned sentencing on only the most aggravated count. *Id.*

Apparently questioning the dicta in *Walters,* the Fourth Circuit in *Crawford v. United States* concluded that subsections (d) and (e) of § 2113 may or may not establish independent offenses. Crawford v. United States, 519 F.2d 347, 351-52 (4th Cir. 1975). In *Crawford,* the defendant pleaded guilty to armed robbery in violation of subsection (d) of § 2113 and kidnapping to avoid apprehension in violation of subsection (e). *Id.* at 348-49. The *Crawford* court relied on precedent from the Seventh, Ninth and Tenth Circuits to hold that the distinction, or similarity, between subsections (d) and (e) depends on the nature of the criminal transaction. *Id.* at 351-32; *see, e.g.,* United States v. Faleafine, 492 F.2d 18, 24-25 (9th Cir. 1974) (relationship between 21 U.S.C. § 2113(d) and (e) turns on nature of criminal transaction); United States v. Parker, 283 F.2d 862, 864 (7th Cir. 1960) (same), *cert. denied,* 366 U.S. 937 (1961); Clark v. United States, 281 F.2d 230, 233 (10th Cir. 1960) (same). Thus, the Fourth Circuit in *Crawford* found that if a kidnapping arises out of the robbery, subsection (e) merges with the crime of robbery under subsection (d), but when the kidnapping arises out of avoiding apprehension or attempted escape, subsection (e) creates a separate offense. *Id.*

120. *See Whitley,* 759 F.2d at 330-31; *supra* note 119 (discussing Fourth Circuit's inconsistent interpretations of § 2113). Since the Fourth Circuit inconsistently had interpreted § 2113 prior to the time Whitley exercised his appellate right, the defendant in *Whitley* could not have predicted accurately the established precedent prevailing in the Fourth Circuit at the time defendant raised his appeal. *See Whitley,* 759 F.2d at 330-31. Therefore, the Fourth Circuit did not violate Whitley's due process rights by creating an inconsistent reading of an unambiguous statute. *See supra* note 114 (due process bars inconsistent interpretation of unambiguous statute).

121. *Whitley,* 759 F.2d at 329; *see supra* notes 83-103 and accompanying text (Federal Bank Robbery Act creates greater and lesser included offenses); *supra* notes 60-76 and accompanying text (increased sentence on retrial for greater included offenses does not violate due process).

122. *Whitley,* 759 F.2d at 330; *see Pearce,* 395 U.S. at 725 (increased sentence on retrial

appealing prior convictions, the Supreme Court has established that a rebuttable presumption of judicial vindictiveness exists whenever a defendant receives an increased sentence on retrial for the same offense.[123] In *Whitley,* however, the Fourth Circuit found that the presumption of vindictiveness did not apply because the jury, on retrial, did not convict the defendant of the same offense to which the defendant earlier had pleaded guilty.[124] The Fourth Circuit correctly found that the defendant pleaded guilty to armed robbery under subsection (d) of section 2113, a lesser included offense of the greater offense of kidnapping under subsection (e), which the jury convicted the defendant of on retrial.[125] *Whitley* conclusively makes evident that future due process claims arising out of increased sentences imposed on retrial for offenses in violation of section 2113 will succeed only if a defendant can prove actual judicial vindictiveness.[126] The burden of proving actual judicial vindictiveness, however, effectively precludes successful due process claims for future Fourth Circuit defendants contemplating appeal of convictions under section 2113.[127] Consequently, *Whitley* serves as an excellent warning to defendants who have successfully appealed convictions on lesser included offenses, that upon retrial, prosecutors may use the original indictment and imperil the defendant with increased sentences.[128]

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motivated by judicial vindictiveness violates prisoners' due process rights); *supra* notes 40-45 and accompanying text (discussing Supreme Court's decision in *Pearce).*

123. *North Carolina v. Pearce,* 395 U.S. 711, 725 (1968); *see supra* note 45 and accom-

123. *Pearce,* 395 U.S. at 725 (1968); *see supra* note 45 and accompanying text (Pearce prophylactic rule prohibiting judicial vindictiveness); *supra* notes 46-50 and accompanying text (explaining analysis to detect judicial vindictiveness under *Pearce* prophylactic rule).

124. *Whitley,* 759 F.2d at 332; *see supra* notes 23-31 and accompanying text (discussing Fourth Circuit's reasoning in *Whitley).*

125. *Whitley,* 759 F.2d at 331-32.

126. *See* Wasman v. United States, 104 S. Ct. 3217, 3222 (1984) (defendant must conclusively prove actual judicial vindictiveness when *Pearce* prophylactic rule does not apply); *supra* note 52 (Supreme Court reluctance to expand *Pearce* beyond situation when court increases sentence on retrial for same offense); *supra* notes 83-103 (retrial on various subsections of § 2113 is not for same offense).

127. *See* Wasman v. United States, 104 S. Ct. at 3221-23; *supra* note 44 at 399 n.25 (actual judicial vindictiveness in retrial sentencing is extremely difficult to prove conclusively).

128. *See* Santobello v. New York, 404 U.S. 257, 263 n.2 (1971) (defendant who attacks plea bargain conviction must plead anew to original indictment); *supra* note 65 and accompanying text (prosecutor must charge defendant with original indictment on retrial after vacated guilty plea conviction).

C. *Expanding the Automobile Exception: Fourth Circuit Upholds Warrantless Search of Parked Automobile Based Solely on Probable Cause to Believe Vehicle Contained Contraband*

The fourth amendment to the United States Constitution safeguards an individual's right to be free from all unreasonable searches and seizures.[1] The individual's fourth amendment safeguards are applicable to searches and seizures conducted by state officials through the due process clause of the fourteenth amendment.[2] As a means of protecting the right to be free from unreasonable searches and seizures, the fourth amendment generally requires that the federal government conduct all searches pursuant to a warrant issued by a neutral magistrate.[3] The United States Supreme Court, however, has found that the fourth amendment does not always require that police obtain a warrant prior to searching an automobile.[4] The Supreme Court has based the reduced fourth amendment warrant protection afforded automobiles both on the automobile's inherent mobility and on an individual's reduced privacy interests in his automobile due to pervasive state

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1. U.S. CONST. amend. IV. The fourth amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* The fourth amendment expresses the First Congress' intent that courts will defend the rights of the individual against unreasonable searches and seizures. I ANNALS OF CONG. 439 (1789). The Supreme Court has stated that courts should construe the provisions of the fourth amendment liberally. Boyd v. United States, 116 U.S. 616, 635 (1886). The fourth amendment's requirement that a magistrate issue a warrant based on probable cause mandates that the evidence presented to a magistrate must furnish a fair probability that police will discover the articles sought. Illinois v. Gates, 462 U.S. 213, 246 (1983). The same standards of probable cause and reasonableness apply to both federal and state officials. Ker v. California, 374 U.S. 23, 33 (1963).

2. Mapp v. Ohio, 367 U.S. 643, 655 (1961). In *Mapp v. Ohio,* the Supreme Court stated that the fourth amendment protections as applied through the fourteenth amendment due process clause mandate that state courts must exclude evidence seized in contravention of the fourth amendment. *Id.; see* U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty or property without due process of law); *supra* note 1 (text of fourth amendment).

3. U.S. CONST. amend. IV; *see, e.g,* Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (stating general proposition that fourth amendment requires warrant from neutral magistrate). Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (same); Giordenello v. United States, 357 U.S. 480, 486 (1958) (same); Johnson v. United States, 333 U.S. 10, 14 (1948) (same); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (same); *supra* note 1 (text of fourth amendment). *But see* Note, *Reasonable Suspicion and Probable Cause in Automobile Searches: A Validity Checklist for Police, Prosecutors, and Defense Attorneys,* 40 WASH. & LEE L. REV. 361, 362 n.10 (1983) (articulating 13 exceptions to general rule that police must conduct searches pursuant to procuring warrant).

4. *See, e.g.,* California v. Carney, 105 S. Ct. 2066, 2070 (1985) (warrantless automobile search does not violate fourth amendment because of automobile's inherent mobility and reduced privacy interests under pervasive state regulatory schemes); Colorado v. Bannister, 449 U.S. 1, 2-3 (1980) (warrantless automobile search is valid because automobiles frequently contain

regulation of motor vehicles.[5] The Court has labeled the reduced constitutional protection provided when police conduct an automobile search as the "automobile exception" to the fourth amendment warrant requirement.[6] Historically, under the automobile exception, a court could validate a warrantless search of an automobile when police had probable cause to believe that a vehicle contained contraband and exigent circumstances made the procurement of a warrant impractical.[7] In *United States v. $29,000-U.S. Currency,*[8] the United States Court of Appeals for the Fourth Circuit addressed the issue of whether probable cause to believe that an automobile contains contraband justifies a warrantless search under the automobile exception even though the automobile temporarily is parked on private property.[9]

In *$29,000,* Agent Cummings of the North Carolina Bureau of Investi-

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contraband); Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973) (warrantless automobile search is valid because of automobile's capability to escape jurisdiction of search warrant); Brinegar v. United States, 338 U.S. 160, 165 (1949) (warrantless automobile search is valid because of automobile's use as repository of contraband); Carroll v. United States, 267 U.S. 132, 153 (1925) (warrantless automobile search is valid because of automobile's use as repository of illegal goods and automobile's capability to escape jurisdiction of search warrant).

5. California v. Carney, 105 S. Ct. 2066, 2070 (1985); *see infra* notes 47-48 (cases applying dual justification to uphold warrantless vehicle searches under automobile exception).

6. *See* California v. Carney, 105 S. Ct. 2066, 2068-69 (1985) ("automobile exception" is anomaly to general rule that police must procure warrant prior to conducting search); Carroll v. United States, 267 U.S. 132, 153 (1925) (upholding warrantless search of automobile because of reduced constitutional protection afforded inherently mobile vehicles). *See generally* Note, *The Warrantless Search of Closed Containers Under the Automobile Exception:* United States v. Ross, 24 B.C.L. REV. 1311, 1314-25 (1983) (discussing development of automobile exception from *Carroll* to *Ross*); Note, *The Development of the Law of Warrantless Searches,* 68 CORNELL L. REV. 107, 107-15 (1982) (same); Comment, Search and Seizure: *From* Carroll *to* Ross, *the Odyssey of the Automobile Exception,* 32 CATH. U.L. REV. 221, 225-59 (1982) (same); Moylan, *The Automobile Exception: What it is and What it is Not—A Rationale in Search of a Clearer Label,* 27 MERCER L. REV. 987, 987-1031 (1976) (discussing automobile exception to fourth amendment warrant requirement).

7. Carroll v. United States, 267 U.S. 132, 155-56 (1925) (upholding warrantless search of automobile under automobile exception based on probable cause to believe vehicle contained illegal whiskey); *see infra* note 47 (discussing Supreme Court's decision in *Carroll).* Some courts have stated that all fourth amendment warrant exceptions, including the automobile exception, derive from the presence of exigent circumstances. *See* Hornblower v. State, 351 So.2d 716, 718 (Fla. 1977) (exigent circumstances abrogate warrant requirement because of police need to act expeditiously). In the context of warrantless automobile searches, exigent circumstances are emergency situations in which the threat that an individual may lose, move, or destroy the incriminating evidence sought, justifies police to act with celerity to secure the evidence without a warrant. BLACK'S LAW DICTIONARY 515 (5th ed. 1979); *see also* Arkansas v. Sanders, 442 U.S. 753, 763 (1979) (requiring lower courts to assess existence of exigent circumstances at point just prior to search); United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (finding exigent circumstances when mobility of luggage created danger of ready flight to conceal evidence); Cardwell v. Lewis, 417 U.S. 583, 595 (1974) (finding exigent circumstances when remote possibility existed that wife might remove defendant husband's parked automobile from public lot).

8. 745 F.2d 853 (4th Cir. 1984).

9. *Id.* at 854.

gation arranged to purchase marijuana at the residence of J.W. Lindsay.[10] Lindsay informed Agent Cummings that an automobile transporting marijuana would arrive in five minutes and back up to Lindsay's front porch.[11] Five minutes later Bruce Alan Schneider drove an automobile up to Lindsay's porch.[12] Agent Cummings ordered surveillance units to close in and arrest Lindsay and Schneider.[13] Agent Cummings proceeded to open the trunk of Schneider's automobile, which contained several bales of marijuana.[14] Cummings then closed the trunk and left Lindsay's residence to obtain a search warrant.[15] After obtaining a warrant, the officers conducted a thorough search of Schneider's automobile.[16] In the trunk of Schneider's automobile, the officers found 187 pounds of marijuana and 29,000 dollars in cash.[17]

In an effort to obtain undisputed title to the 29,000 dollars found in Schneider's automobile, the United States commenced an action pursuant to 21 U.S.C. § 881(a)(6).[18] Section 881(a)(6) of Title 21 of the United States

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10. *Id.* In *United States v. $29,000—U.S. Currency,* Agent Cummings of the North Carolina Bureau of Investigation negotiated with J.W. Lindsay to purchase 300 pounds of marijuana. *Id.*

11. *Id.* In *$29,000,* prior to informing Agent Cummings that marijuana would arrive shortly, J.W. Lindsay made a telephone call to B.A. Schneider in Agent Cummings' presence. *Id.* Because Agent Cummings had no probable cause to believe Schneider's automobile would be transporting the contraband prior to the telephone call, the police could not have procured a warrant prior to Schneider's arrival at Lindsay's residence. *See id.; see also* Colorado v. Bannister, 449 U.S. 1, 3 (1980) (constitutionality of warrantless search of automobile upheld when probable cause developed only after routine stop for traffic violation); United States v. Brennan, 538 F.2d 711, 721-22 (5th Cir.) (warrantless search of airplane upheld when police obtained probable cause supporting informants tip only after aircraft taxied without lights), *cert. denied,* 429 U.S. 1092 (1976); United States v. Vento, 533 F.2d 838, 867 (3d Cir. 1976) (warrantless search of automobile held constitutional when police were ignorant of vehicle transporting forthcoming narcotics); United States v. Upthegrove, 504 F.2d 682, 686 (6th Cir. 1974) (warrantless search of automobile found constitutional because police had no advance information of vehicle description transporting forthcoming drugs).

12. *$29,000,* 745 F.2d at 854.

13. *Id.*

14. *Id.*

15. *Id.* In *$29,000,* Agent Cummings left other surveillance agents at the Lindsay residence to guard B.A. Schneider's automobile while agent Cummings obtained a search warrant for the vehicle. *Id.* In leaving agents to stand watch over the automobile, Agent Cummings followed established Fourth Circuit precedent. *See* United States v. Bradshaw, 490 F.2d 1097, 1103 (4th Cir.) (posting guard while obtaining warrant is proper search procedure), *cert. denied,* 419 U.S. 895 (1974).

16. *$29,000,* 745 F.2d at 854.

17. *Id.* The State of North Carolina, in *$29,000,* prosecuted B.A. Schneider for possession of marijuana with intent to sell and deliver. *Id.* at n.1. The North Carolina Superior Court suppressed the marijuana and the $29,000 found in Schneider's trunk because, in the North Carolina Court's opinion, the police found the marijuana and the money during an illegal search. *Id.* The North Carolina Court of Appeals reversed the trial court's decision to suppress the evidence, relying on the Supreme Court's holding in *United States v. Ross. Id.*; *see* United States v. Ross, 456 U.S. 798, 824 (1982) (permitting warrantless search of automobile when probable cause exists to believe vehicle contains contraband); *infra* notes 50-57 and accompanying text (discussing Supreme Court's decision in *Ross*). *Schneider* appealed to the North Carolina Supreme Court. *Id.* The North Carolina Supreme Court denied certiorari. *Id.*

Code mandates forfeiture of currency obtained through the distribution of a controlled substance.[19] Schneider filed a motion for summary judgment on the grounds that Agent Cummings' initial warrantless search of the automobile trunk violated Schneider's fourth amendment rights.[20] The United States District Court for the Western District of North Carolina granted Schneider's motion for summary judgment and ordered the United States to return the 29,000 dollars to Schneider.[21] The district court held that the United States Supreme Court's decision in *United States v. Ross,*[22] in which the Court upheld a warrantless search of an automobile stopped in transit, requires police to obtain a search warrant whenever reasonably practical.[23] Because Agent Cummings arrested Schneider and Lindsay and police immobilized the automobile, the district court found that no exigent circumstances existed to justify Cummings' warrantless search of Schneider's trunk.[24]

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19. *Id.* Under section 881(a)(6) of title 21 of the United States Code, all moneys used or intended for use in the purchase of a controlled substance are subject to forfeiture to the United States. *Id; see* 21 U.S.C. § 881(a)(6) (1982) (text of federal narcotics forfeiture statute). Section 881(a)(6) additionally states that all moneys used or intended for use in the facilitation of purchasing a controlled substance are subject to forfeiture to the United States. *$29,000,* 745 F.2d at 854; *see* 21 U.S.C. § 881(a)(6) (1982) (text of federal narcotics forfeiture statute). Marijuana is a controlled substance. 21 U.S.C. § 812(c)(c)(10) (1982). Property forfeited under section 881 of title 21 of the United States Code is not repleviable or recoverable by the defendant, and is placed under the custody of the Attorney General. 21 U.S.C. § 881(c) (1982). The Attorney General may dispose of the forfeited property by retaining the property for official use, selling the property, placing the property under the custody of the General Services Administration, or turning the property over to the appropriate state or local authority responsible for apprehension of the forfeited goods. 21 U.S.C.A. § 881(e) (WEST Supp. 1985). Under section 881, the government has the initial burden of proving that probable cause justified the forfeiture. United States v. $13,000-U.S. Currency, 733 F.2d 581, 584 (8th Cir. 1984). Once the government establishes probable cause, the defendant must rebut the government's evidence by showing lawful use of the property. *Id.*

20. *$29,000,* 745 F.2d at 854. In *$29,000,* B.A. Schneider argued that Agent Cummings' initial warrantless search of Schneider's automobile violated Schneider's fourth amendment rights. *Id.; see supra* note 1 (discussing fourth amendment protections). Schneider further argued that since Agent Cummings obtained a search warrant based on observations made during the initial search of the trunk, the Fourth Circuit should suppress the $29,000 uncovered in the search carried out pursuant to the warrant as illegally tainted evidence under the fruit of the poisonous tree doctrine. *$29,000,* 745 F.2d at 854; *see* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (discussing fruit of the poisonous tree doctrine). In *Wong Sun v. United States,* the Supreme Court addressed the issue of the admissibility of evidence derived from unconstitutional arrests. *Wong Sun,* 371 U.S. at 488. In holding that the exclusionary rule barred the use of such evidence at trial, the Supreme Court in *Wong Sun* explained that any evidence uncovered subsequent to a violation of an individual's constitutional rights is tainted by the primary illegality of the initial police intrusion and is inadmissible. *Id.* at 487-88. The term "fruit of the poisonous tree" designates the initial illegal search as the "poisonous tree," and any evidence derived from the illegal search as the "fruit." *See id.*

21. *See $29,000,* 745 F.2d at 854 (district court in *$29,000* did not issue written opinion)

22. 456 U.S. 798 (1982). *See infra* notes 50-57 and accompanying text (discussing Supreme Court's decision in *Ross).*

23. *See $29,000,* 745 F.2d at 854 (Fourth Circuit citing district court's unpublished decision in *$29,000).*

24. *See id.* (Fourth Circuit citing district court's unpublished decision in *$29,000).*

On appeal, the Fourth Circuit reversed and ordered that Schneider forfeit the 29,000 dollars to the United States.[25] The Fourth Circuit in *$29,000* held that the probable cause to believe that Schneider's automobile contained contraband justified Agent Cummings' warrantless search of the automobile's trunk, and, therefore, the illegal search did not taint the subsequent discovery of the 29,000 dollars.[26] The Fourth Circuit based its decision on two similar but independent grounds—the automobile exception to the fourth amendment warrant requirement[27] and the federal narcotics forfeiture statute.[28]

In holding that the warrantless search of Schneider's automobile did not violate Schneider's constitutional right to be free from unreasonable searches and seizures, the Fourth Circuit in *$29,000* looked to *United States v. Ross* for guidance in the proper application of the automobile exception.[29] The Fourth Circuit reasoned that transporting contraband in an automobile reduces the vehicle owner's expectation of privacy to the extent that a warrantless search of the automobile is reasonable.[30] The *$29,000* court interpreted *Ross* as permitting a warrantless search of an automobile when police can articulate objective facts establishing the existence of probable cause that would be sufficient to justify a neutral magistrate's issuance of a warrant.[31] The *$29,000* court further stated that the scope of a permissible warrantless search of an automobile, conducted by police, is as exacting and broad as if police actually had procured a warrant.[32] Since the police in *$29,000* had sufficient objective evidence to obtain a warrant to search Schneider's automobile for contraband, and the scope of the search that Agent Cummings conducted was no broader than a magistrate could have authorized, the Fourth Circuit found no violation of Schneider's fourth amendment rights.[33] The defendant contended, however, that the automobile

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25. *Id.*

26. *Id.*

27. *Id. See infra* notes 30-33, 35-38 and accompanying text (discussing Fourth Circuit's reasoning in upholding warrantless search under automobile exception in *$29,000).*

28. *$29,000,* 745 F.2d at 855-56; *see infra* notes 39-43 and accompanying text (discussing Fourth Circuit's reasoning in upholding warrantless search under federal forfeiture statute in *$29,000).*

29. *$29,000,* 745 F.2d at 854-55; *see* United States v. Ross, 456 U.S. 798, 824 (1982) (applying automobile exception to warrant requirement when probable cause exists to believe vehicle contains contraband); *infra* notes 50-57 and accompanying text (discussing Supreme Court's decision in *Ross). But see* Wilson, *The Warrantless Automobile Search: Exception Without Justification,* 32 HASTINGS L.J. 127, 130-37 (1980) (probable cause that automobile contains contraband is insufficient to justify warrantless search without independent exigent circumstances); Note, *The Automobile Exception to the Warrant Requirement: Speeding Away from the Fourth Amendment,* 82 W. VA. L. REV. 637, 666-67 (1980) (police should obtain warrant before searching automobile whenever practical).

30. *$29,000,* 745 F.2d at 855.

31. *Id.*

32. *See id.* (scope of warrantless search under automobile exception is no narrower and no broader than warrant authorized search) (quoting United States v. Ross, 456 U.S. 798, 823 (1982)).

33. *$29,000,* 745 F.2d at 855.

exception did not apply in *$29,000* because the police had immobilized the automobile prior to the search.[34] Relying on Supreme Court precedent,[35] the *$29,000* court rejected the defendant's immobilization argument, finding that once police trigger the application of the automobile exception by obtaining sufficient probable cause, the immobilization of an automobile is irrelevant.[36] The Fourth Circuit also rejected the district court's finding that *Ross* mandates procurement of a warrant whenever reasonably practical.[37] The Fourth Circuit focused on language in *Ross* suggesting that the reasonably practical requirement does not apply when police have probable cause to believe that a vehicle conceals incriminating evidence.[38]

In addition to the conclusion that the automobile exception justified the warrantless search of Schneider's automobile, the *$29,000* court validated Agent Cummings' search on a similar but independent ground.[39] The Fourth Circuit interpreted 21 U.S.C. § 881(a)(4) to authorize forfeiture to the United States of the automobile Schneider used to transport the marijuana.[40] Section 881(a)(4) provides that all vehicles used to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance in violation of federal narcotics laws are subject to forfeiture to the United States.[41] Because the police had probable cause to believe that Schneider's automobile contained marijuana, the Fourth Circuit ruled that section 881 of title 21 of the United States Code permitted the warrantless seizure of Schneider's automobile.[42] The Fourth Circuit then held that since police made a valid seizure of Schneider's automobile under Section 881, the fourth amendment did not

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34. Brief for Appellant at 5, United States v. $29,000-U.S. Currency, 745 F.2d 853 (4th Cir. 1984).

35. Michigan v. Thomas, 458 U.S. 259, 261 (1982) (per curiam) (absence of exigent circumstances is irrelevant to validity of warrantless search of vehicle immobilized by police under automobile exception); *accord* Florida v. Meyers, 466 U.S. 380, 382 (1984) (per curiam) (police impoundment of vehicle is irrelevant to validity of subsequent warrantless search under automobile exception).

36. *$29,000*, 745 F.2d at 855; *see* Michigan v. Thomas, 458 U.S. 259, 261 (1982) (percuriam); *infra* note 44 (discussing Supreme Court's decision in *Thomas*).

37. *$29,000,* 745 F.2d at 855.

38. *Id.* The Fourth Circuit, in *$29,000,* cited the *Ross* opinion's holding that automobile searches are excepted from the general rule that police must procure search warrants when reasonably practical. *Id.*, (quoting Ross, 456 U.S. at 807-08). In *United States v. Ross*, the Supreme Court explained that police must have probable cause to believe that the automobile conceals contraband before proceeding with a warrantless search under the automobile exception. *Ross*, 456 U.S. at 807-09.

39. *See $29,000,* 745 F.2d at 855-56 (upholding constitutionality of warrantless automobile search under federal forfeiture statute).

40. *Id.*

41. 21 U.S.C. § 881(a)(4) (1982); *see supra* note 19 (discussing scope and application of 21 U.S.C. § 881).

42. *$29,000,* 745 F.2d at 855-56. The *$29,000* court reasoned that police lawfully entered J.W. Lindsay's property to arrest Lindsay and B.A. Schneider. *Id.* at 856. While on Lindsay's property, the discovery of Schneider's automobile fell within the purview of the plain view doctrine. *Id.; see* Texas v. Brown, 460 U.S. 730, 737-43 (1983) (holding police lawfully stopping an automobile may seize item in plain view if officer obtained probable cause to believe item

require Agent Cummings to obtain a warrant before searching the automobile.[43]

Under the automobile exception to the fourth amendment warrant requirement, upon which the Fourth Circuit based its holding in *$29,000*, the Supreme Court has validated warrantless searches of automobiles when police had probable cause to believe that automobiles stopped in transit contained contraband.[44] Additionally, the Supreme Court has validated warrantless searches of automobiles when police had probable cause to believe that

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contained contraband). Since the police had probable cause to believe that Schneider's automobile contained contraband and police complied with the tenets of the plain view doctrine, the Fourth Circuit authorized seizure of the vehicle under the federal narcotics forfeiture statute, 21 U.S.C. § 881. *$29,000*, 745 F.2d at 856; *see* United States v. Kemp, 690 F.2d 397, 400-01 (4th Cir. 1982) (21 U.S.C. § 881 authorizes immediate seizure of vehicles on less rigid probable cause than required for warrantless search under automobile exception whenever vehicle owner violates federal narcotics laws); *supra* note 19 (discussing scope and application of 21 U.S.C. § 881).

43. *$29,000* 745 F.2d at 856. In *$29,000*, the Fourth Circuit held that a vehicle lawfully seized under the federal narcotics forfeiture statute, 21 U.S.C. § 881, is subject to a subsequent warrantless search by police. *Id.; see* Cooper v. California, 386 U.S. 58, 60-62 (1967) (authorizing warrantless search of vehicle legally seized under state narcotics forfeiture statute resembling 21 U.S.C. § 881). The *$29,000* court relied on the holdings of other United States Circuit Courts of Appeals validating warrantless searches of vehicles lawfully seized. *$29,000*, 745 F.2d at 856 n.5; *see, e.g*, United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981) (explaining historical development of forfeiture statutes authorizing seizures and searches of vehicles without process); United States v. Kimak, 624 F.2d 903, 905-06 (9th Cir. 1980) (search of vehicle legally seized pursuant to arrest is authorized under automobile exception to warrant requirement); United States v. Pappas, 613 F.2d 324, 331 (1st Cir. 1979) (no judicial precedent precludes warrantless search of vehicle lawfully seized); United States v. Capra, 501 F.2d 267, 280 (2d Cir. 1974) (21 U.S.C. § 881(b)(4) authorizes seizure and search of automobile without process as long as police have probable cause to believe vehicle contains contraband), *cert. denied*, 420 U.S. 990 (1975); O'Reilly v. United States, 486 F.2d 208, 210-11 (8th Cir.) (*Cooper* authorizes search of vehicle without process when police validly seize vehicle pursuant to arrest), *cert. denied*, 414 U.S. 1043 (1973); United States v. Shye, 473 F.2d 1061, 1065-66 (6th Cir. 1973) (authorizing warrantless seizure and search of vehicle under automobile exception to fourth amendment warrant requirement); United States v. Edge, 444 F.2d 1372, 1375 (7th Cir.) (construing federal transportation forfeiture statute, 49 U.S.C. § 782, to authorize warrantless seizure and search of automobile), *cert. denied*, 404 U.S. 855 (1971); United States v. Stout, 434 F.2d 1264, 1267 (10th Cir. 1970) (holding federal transportation forfeiture statute, 49 U.S.C. § 782, authorized postal inspector to seize automobile transporting stolen money orders and to search vehicle without process); United States v. McKinnon, 426 F.2d 845, 849-50 (5th Cir. 1970) (authorizing warrantless seizure and search of automobiles under Florida state forfeiture statute).

44. *See* Michigan v. Thomas, 458 U.S. 259, 261 (1982) (per curiam). In *Michigan v. Thomas*, police stopped an automobile in transit because the defendant driver failed to signal before making a left turn. *Id.* at 259. Upon discovering an open bottle of beer in the passenger compartment, police arrested the two occupants of the automobile and impounded the vehicle. *Id.* An inventory search conducted before towing the automobile to police headquarters revealed a revolver and two bags of marijuana. *Id.* at 260. The Court in *Thomas* relied on previous Supreme Court applications of the automobile exception to uphold the legality of the warrantless search, even though the automobile was immobile at the time of the search. *Id.* at 261; *see* Chambers v. Maroney, 399 U.S. 42, 52 (1970) (holding location and immobilization of automobile is irrelevant in warrantless search once probable cause exists to believe that vehicle contains contraband); *accord* Texas v. White, 423 U.S. 67, 68 (1975) (plurality opinion)

automobiles parked on public property contained evidence of a crime,[45] and when police had probable cause to believe that automobiles unoccupied and impounded contained illegal evidence.[46] The Supreme Court based the justification for the automobile exception on the inherent mobility of the automobile,[47] and the fact that automobile owners have a reduced expectation of

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(upholding warrantless search of immobilized vehicle on authority of *Chambers*); *see infra* note 46 (discussing Supreme Court's decisions in *Chambers* and *White*; *see also* United States v. Ross, 456 U.S. 798, 825 (1982) (validating warrantless search of automobile stopped in transit by police who had probable cause to believe vehicle contained contraband); *infra* notes 50-57 and accompanying text (discussing Supreme Court's decision in *Ross*).

45. *See* Cardwell v. Lewis, 417 U.S. 583, 588-92 (1974) (plurality opinion). In *Cardwell v. Lewis*, after arresting the defendant Lewis for murder, police impounded Lewis' automobile, which Lewis parked in a public garage, to take tire and paint samples hoping to prove that Lewis used the vehicle as a murder weapon. *Id.* at 586-88. The Supreme Court in *Cardwell* upheld the warrantless search because automobiles function on municipal thoroughfares in the plain view of the public, thus reducing expectations of privacy. *Id.* at 590; *see* Katz v. United States, 389 U.S. 347, 351 (1967) (no legitimate expectation of privacy exists in what an individual willingly exposes to public view). In addition, the *Cardwell* opinion stated that individuals seldom use automobiles as a residence or a repository of personal effects. *Cardwell*, 417 U.S. at 590. The *Cardwell* opinion concluded that the diminished expectations of privacy in an automobile remove the rigorous warrant requirements of the fourth amendment. *See id.* at 590-92; *see also* California v. Carney, 105 S. Ct. 2066, 2070 (1985) (upholding warrantless search of motor home parked on public property under automobile exception to warrant requirement), *infra* notes 68-72 and accompanying text (discussing Supreme Court's decision in *Carney*).

46. *See* Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (upholding warrantless search of automobile even though search site was under police control). Acting on probable cause that an automobile contained evidence of a robbery, the police in *Chambers v. Maroney* arrested the occupants and impounded the vehicle. *Id.* at 44. A subsequent warrantless search of the automobile at police headquarters revealed incriminating evidence. *Id.* The Supreme Court in *Chambers* upheld the warrantless search of the automobile under the automobile exception, finding the probable cause that the automobile contained contraband at the time police seized the vehicle still obtained at the police station. *Id.* at 52; *see also* Texas v. White, 423 U.S. 67, 68 (1975) (plurality opinion) (upholding warrantless search of immobilized vehicle on authority of *Chambers).* In *Texas v. White,* police impounded an unoccupied automobile parked on a public street and conducted a warrantless search of the vehicle at the police stationhouse. *Id.* at 67-68. The Supreme Court refused to distinguish *White,* in which police seized the automobile in broad daylight, from *Chambers,* in which police impounded the automobile at night. *See* id. at 68-69. *See generally* Latzer, *Searching Cars and Their Contents:* United States v. Ross, 18 CRIM. L. BULL. 381, 384-86 (1982) (Chambers and *White* are evidence that Supreme Court stretched inherent mobility justification of automobile exception to breaking point); Note, *Misstating the Exigency Rule: The Supreme Court v. the Exigency Requirement in Warrantless Automobile Searches,* 28 SYRACUSE L. REV. 981, 992-93, 1002 (1977) (Chambers and *White* are evidence that inherent mobility of automobile alone is sufficient justification for Supreme Court to apply automobile exception).

47. *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (upholding warrantless automobile search by federal prohibition agents because automobile is inherently mobile). Acting on probable cause to believe that a certain automobile concealed illegal whiskey, the federal agents in *Carroll v. United States* conducted an extensive warrantless search and found 68 bottles of bootlegged liquor after tearing open the automobile's upholstery. *Id.* at 136. The *Carroll* opinion validated the warrantless search on the ground that the fourth amendment protection from unreasonable searches and seizures does not apply with equal force to immobile

privacy in their vehicles stemming from pervasive state regulation of motor vehicles.[48]

The dual justification for the application of the automobile exception played a significant role in the Supreme Court's opinion in *United States v. Ross*.[49] In *Ross*, police received a tip from a reliable informant that a man named Bandit was selling narcotics and that Bandit stored the narcotics in the trunk of his automobile.[50] Upon identifying Bandit's automobile, police checked the automobile's license plates and discovered that Albert Ross owned the vehicle.[51] After a brief observation, police determined that Ross, the driver of the automobile under suspicion, matched the informant's description of Bandit.[52] The police stopped the vehicle and conducted a warrantless search of the passenger compartment and trunk.[53] In the trunk, police found a paper sack that contained several glassine bags of powdered heroin, and a zippered pouch that contained 3200 dollars.[54] In finding that

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premises and inherently mobile vehicles. *Id.* at 153. The Supreme Court in *Carroll* reasoned that an automobile's inherent mobility creates exigent circumstances, which makes the police's securing of a warrant impractical. *Id.* at 156. In aiding effective law enforcement by abrogating the warrant requirement when impractical, the *Carroll* opinion relied on congressional guidance recognizing the importance of removing barriers to police searching vehicles transporting contraband. *Id.* at 149-56.

48. *See, e.g.*, California v. Carney, 105 S. Ct. 2066, 2070 (1985) (upholding warrantless search of automobile because automobiles are inherently mobile and motor vehicles are subject to pervasive state regulatory schemes); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976) (upholding warrantless search of automobile because automobiles are inherently mobile and motor vehicles are subject to periodic official inspections); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) (upholding warrantless search of automobile because automobiles are inherently mobile and motor vehicles function in plain view on public thoroughfares); Cady v. Dombrowski, 413 U.S. 433, 440-43 (1973) (upholding warrantless search of automobile because automobiles are inherently mobile and motor vehicles are subject to state registration and licensing requirements). *See generally* Gardner, *Search and Seizure of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-*Ross *World*, 62 NEB. L.R. 1, 9-13 (1983) (discussing diminished privacy interest justification for application of automobile exception). *But see generally* Latzer, *supra* note 46, at 387 (diminished privacy interest justification for application of automobile exception is without merit).

49. *See* United States v. Ross, 456 U.S. 798, 823 (1982) (individual has no expectation of privacy in inherently mobile automobile when police conduct warrantless search of automobile based on probable cause to believe vehicle contains contraband).

50. *Id.* at 800-01.

51. *Id.* at 800.

52. *Id.* In *United States v. Ross*, while investigating an informant's tip that a man named Bandit stored narcotics in the trunk of Bandit's maroon Malibu automobile, police found the Malibu parked on a public street. *Id.* After checking the Malibu's license plates though the Registry of Motor Vehicles and finding that no one near the parked Malibu matched the informant's description of Bandit, the police drove around the block. *Id.* Upon returning to the location of the Malibu, the officers observed that a caucasian male was driving the automobile. *Id.* at 801. The police proceeded to follow the automobile and eventually determined that the occupant, Albert Ross, matched the physical description of Bandit. *Id.*

53. *Id.*

54. *Id.* In *Ross*, after police initially discovered a bag containing heroin in the trunk of

the search did not violate the fourth amendment prohibition against unreasonable searches, the *Ross* opinion stated that the inherent mobility of the automobile[55] and the use of the automobile as a repository of contraband[56] justified the warrantless search of the defendant's vehicle. The Supreme Court further held that the scope of the permissible search extended to all areas and containers where police reasonably could find the contraband.[57]

In holding that the Supreme Court's opinion in *Ross* is the controlling case in deciding whether a warrantless automobile search is reasonable, the Fourth Circuit in *$29,000* joined the majority of the United States Circuit Courts of Appeals who have interpreted *Ross* as permitting warrantless searches of vehicles under the automobile exception whenever police obtain probable cause to believe that a vehicle contains contraband.[58] In so doing, the Fourth Circuit in *$29,000* correctly validated Agent Cummings' warrantless search of Schneider's automobile.[59] In both *$29,000* and *Ross,* police

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Albert Ross' automobile, the officers impounded the vehicle. *Id.* Pursuant to a second search conducted at police headquarters, the police found a pouch containing $3200. *Id.*

55. *Id.* at 805-06.

56. *Id.* at 806.

57. *Id.* at 820-22. In extending the permissible scope of a warrantless search under the automobile exception to include all containers in which the vehicle reasonably could contain contraband, the Supreme Court in *Ross* reasoned that the practical considerations justifying the application of the automobile exception—that is, preventing flight of the contraband and promoting effective law enforcement—operate to justify searching all containers within the vehicle. *Id.* at 802 n.28. To hold otherwise, concluded the *Ross* opinion, would only exacerbate police intrusions on privacy interests by forcing officials to search parts of an automobile beyond containers in which the officials have probable cause to believe contain the contraband. *Id.*

58. *See, e.g.,* United States v. Moscatiello, 771 F.2d 589, 596 (1985) (upholding warrantless search of truck under automobile exception based on probable cause to believe vehicle contained marijuana); United States v. Marin, 761 F.2d 426, 430-33 (7th Cir. 1985) (upholding warrantless search of automobile passenger compartment under automobile exception based on probable cause to believe vehicle contained contraband); United States v. Elkins, 732 F.2d 1280, 1286 (6th Cir. 1984) (upholding warrantless search of automobile under automobile exception based on probable cause to believe vehicle contained marijuana); United States v. Schecter, 717 F.2d 864, 869-71 (3d Cir. 1983) (upholding warrantless search of automobile trunk under automobile exception based on probable cause to believe vehicle contained cocaine); United States v. Williams, 714 F.2d 777, 780-82 (8th Cir. 1983) (upholding warrantless search of automobile passenger compartment under automobile exception based on probable cause to believe vehicle contained evidence of prior bank robbery); United States v. Rollins, 699 F.2d 530, 534 (11th Cir.) (upholding warrantless search of airplane under automobile exception based on probable cause to believe airplane contained illicit narcotics), *cert. denied,* 464 U.S. 933 (1983); United States v. Burns, 684 F.2d 1066, 1074 (2d Cir. 1982) (upholding warrantless search of automobile trunk under automobile exception based on probable cause to believe vehicle contained assorted drugs), *cert. denied,* 459 U.S. 1174 (1983). *But see* United States v. Barbin, 743 F.2d 256, 259-60 (5th Cir. 1984) (upholding warrantless search of sailboat under extended border search exception based on probable cause to believe vehicle contained marijuana but rejected alternate justification under automobile exception because of possibility of police to obtain telephone warrant).

59. *See $29,000,* 745 F.2d at 855 (holding *Ross* permits warrantless search of automobile based solely on police obtaining probable cause to believe automobile contains contraband).

had probable cause to believe that the trunk of a particular automobile contained a large quantity of marijuana.[60] Similarly, in each case, to prevent possible flight of the incriminating evidence, police acted reasonably in apprehending the drug dealers and searching the automobiles without a warrant.[61] As the Supreme Court in *Ross* correctly stated, to mandate that police obtain a warrant in searches of automobiles engaged in the transportation of illegal goods would be impractical.[62] Thus, the Supreme Court's holding, which permits warrantless police searches of automobiles concealing contraband, effectively reduces the possibility that an inherently mobile vehicle may escape the jurisdiction of a warrant before police can obtain the warrant from a neutral magistrate.[63]

In applying the holding of *Ross* to permit the warrantless search of a parked automobile in *$29,000,* the Fourth Circuit remained consistent with the court's previous decisions that have interpreted *Ross* to create no distinction between warrantless searches of vehicles parked and vehicles in transit.[64] The *Ross* opinion, however, is unclear concerning whether the

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60. *See id.* at 854-55; *Ross,* 456 U.S. at 801.

61. *Compare supra* notes 10-17 and accompanying text (relevant facts concerning warrantless search of defendant's automobile in *$29,000*) *with supra* notes 50-54 and accompanying text (relevant facts concerning warrantless search of defendant's automobile in *Ross*).

62. *Ross,* 456 U.S. at 806.

63. *See id.* In determining that police effectively may prevent the loss or destruction of illegal evidence by conducting warrantless automobile searches under the automobile exception, the Supreme Court in *Ross* stated that historically, individuals engaged in using vehicles to transport contraband are aware that their vehicles are subject to official warrantless searches whenever police obtain probable cause to believe that the individual's vehicle conceals contraband. *Id.* at 806 n.8. The *Ross* opinion concluded that the need to prevent the possibility of an individual moving the contraband outweighed any right the individual may have to continue on his journey without official interference. *Id.* at 807 n.9.

64. *See* United States v. Poole, 718 F.2d 671, 675 (4th Cir. 1983) (upholding warrantless search of automobile containing contraband under automobile exception to warrant requirement); United States v. Shephard, 714 F.2d 316 322-23 (4th Cir. 1983) (upholding warrantless search of automobile exception to warrant requirement), *cert. denied,* 466 U.S. 938. Acting on a reliable informant's tip that the defendant illegally bottled and transported whiskey, the police in *United States v. Shephard* observed the defendant place several plastic jugs into the trunk of his automobile. *Shephard,* 714 F.2d at 317. Police then moved in and searched the trunk of the automobile finding 38 one gallon jugs of moonshine. *Id.* In rejecting Shephard's argument that the automobile exception is not applicable to a parked vehicle on private property, the Fourth Circuit held that even though an individual may have a greater expectation of privacy in a parked vehicle than in a vehicle in transit, the inherent mobility of an automobile in which police have probable cause to believe that the automobile contains contraband outweighs any privacy interests. *Id.* at 322.

In *United States v. Poole,* the Fourth Circuit, in a later case similar to *Shephard,* again upheld a warrantless search of an automobile parked on private property. *Poole,* 718 F.2d at 674-75. In *Poole,* police observed a transfer of marijuana between the trunks of two automobiles parked in the defendant's driveway. *Id.* at 673. As one automobile drove away, police stopped the vehicle and searched the trunk pursuant to the driver's consent and found marijuana residue. *Id.* Obtaining a search warrant based on the marijuana residue evidence, police returned to the defendant's residence and searched the trunk of the defendant's automobile, finding a large quantity of marijuana. *Id.* Although the district court subsequently invalidated the search

Supreme Court intended *Ross* to authorize warrantless searches of a parked vehicle based solely on probable cause to believe that the vehicle contains contraband.[65] Nevertheless, the recent Supreme Court decision in *California v. Carney*[66] supports the Fourth Circuit's interpretation that *Ross* applies equally to stationary vehicles as well as vehicles in transit.[67]

In *Carney,* Drug Enforcement Agency (DEA) officers, acting on an informant's tip that the occupant of a motor home traded marijuana for sex, staked out the motor home which the owner had parked in a public lot.[68] DEA agents stopped and questioned a youth who had just visited the vehicle.[69] The youth admitted that Carney, the vehicle's occupant, had given the youth marijuana in exchange for sexual contacts.[70] The DEA agents then conducted a warrantless search of the motor home, uncovering marijuana and various drug paraphernalia.[71] The Supreme Court upheld the warrantless search of Carney's motor home.[72]

In validating the warrantless motor home search, the Supreme Court in *Carney* reasoned that the use of a state regulated vehicle on the public thoroughfares abrogates the vehicle owner's constitutional protection against warrantless searches.[73] Since vehicles readily are moveable and vehicle owners are aware of the diminished privacy associated with their vehicles,[74] the Supreme Court concluded that conducting warrantless searches of vehicles optimally serve society's interests.[75] The Supreme Court in *Carney*, however, stopped short of making probable cause a talisman to validate warrantless automobile

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warrant based on a technical defect, the Fourth Circuit upheld the search under the automobile exception. *Id.* at 674-75. The *Poole* court reasoned that once police obtained probable cause to believe that the defendant's automobile contained contraband, the exigency of the situation justified the warrantless search under the automobile exception. *See id.* at 675.

65. *See Ross,* 456 U.S. at 823; 2 W. LAFAVE, SEARCH AND SEIZURE § 7.2 (Supp. 1985) (concluding *Ross* holding should apply to permit warrantless searches of parked vehicles under automobile exception); W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 11.3 (1985) (suggesting *Ross* holding may be broad enough to permit warrantless searches of parked vehicles under automobile exception).

66. 105 S. Ct. 2066 (1985).

67. *See id.* at 2069-71.

68. *Id.* at 2067.

69. *Id.*

70. *Id.*

71. *Id.* In *California v. Carney,* during the initial warrantless search, DEA agents discovered marijuana, plastic bags, and a measurement scale on a table within the motor home. *Id.* A subsequent search yielded additional marijuana in the refrigerator and cupboards. *Id.*

72. *Id.* at 2070-71.

73. *Id.* at 2069-70.

74. *Id.* at 2070; *see supra* note 63 (automobile owners are aware that using vehicle for illegal purpose subjects automobile to warrantless search).

75. *Carney,* 105 S. Ct. at 2071. In holding that warrantless searches under the automobile exception promote societal interests in having effective law enforcement, the Supreme Court in *Carney* stated that the public is fully aware that the compelling need for governmental regulation of motor vehicles results in citizens having less privacy in their vehicles than in their homes. *Id.* at 2070-71. Consequently, the Court in *Carney* reasoned that because privacy interests in vehicles must yield to the authority of various official searches that do not require the prior approval of a magistrate, a warrantless vehicle search under the automobile exception is no more of an

searches in every situation.[76] The *Carney* opinion provided that the Supreme Court will acknowledge legitimate expectations of privacy in automobiles under certain circumstances.[77] Nevertheless, the Supreme Court in *Carney* gave no guidance concerning when a vehicle owner legitimately may claim an enhanced privacy interest in an automobile that would be sufficient to demand the rigorous application of the fourth amendment warrant requirement.[78] Circumstances affording a legitimate privacy interest in a vehicle requiring a search warrant may include those in which police search a suspect's immobile automobile that was sitting up on blocks in the suspect's driveway, or search an automobile parked in a suspect's garage when the suspect uses part of the garage as a bona fide business office. Additionally, a legitimate privacy interest in a vehicle may exist in an automobile parked in an enclosed car port if the automobile's owner did not register the vehicle for travel on the public roadways. The *Carney* opinion, however, addressed only the issue of whether police may conduct a warrantless search of a motor vehicle properly suspected of containing contraband when the vehicle is parked on public property.[79] The Supreme Court did not state that *Carney* applies to validate warrantless searches of automobiles momentarily parked on private property, as in *$29,000.*[80] Consequently, the issue in *$29,000* becomes whether, under previous Supreme Court interpretations of the automobile exception, Schneider possessed an enhanced privacy interest because Schneider parked his automobile in Lindsay's driveway.

In finding that Schneider had no enhanced privacy interests in parking his automobile in Lindsay's driveway, the Fourth Circuit correctly refused to apply the Supreme Court's decision in *Coolidge v. New Hampshire,*[81] in which the Supreme Court invalidated a warrantless search of an automobile parked on the owner's private property.[82] In *Coolidge,* police arrested the defendant for murder.[83] Thereafter, police impounded an automobile parked on the defendant's residential property and conducted a warrantless search

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invasion of privacy than if conducted pursuant to a warrant. *Id.* Additionally, to protect the community from the evils of illicit substances, the courts must ensure that privacy interests do not burden unduly law enforcement officials in their efforts to ferret out and prosecute criminal activities. *See id.* The Supreme Court in *Carney* concluded that upholding warrantless searches of vehicles believed to contain contraband under the automobile exception alleviates society's concerns while protecting genuine fourth amendment privacy interests. *Id.*

76. *See id.* at 2070 (parking vehicle on residential property may enhance owner's privacy interests in vehicle).

77. *Id.*

78. *See id.*

79. *Id. See* United States v. Bagley, 765 F.2d 836, 844 (9th Cir. 1985) (interpreting *Carney* to permit warrantless vehicle search based solely on probable cause to believe vehicle contains contraband only if vehicle is parked in public place).

80. *Compare Carney,* 105 S. Ct. at 2070 (valid warrantless search of vehicle parked on public property) *with $29,000,* 745 F.2d at 854-55 (valid warrantless search of vehicle temporarily parked on private property).

81. 403 U.S. 443 (1971) (plurality opinion).

82. *Id.* at 458-64.

83. *Id.* at 447.

of the automobile at police headquarters.[84] The police in *Coolidge*, however, did not have probable cause to believe that the vehicle contained contraband, the defendant could not take flight himself, and no confederates-at-large waited to remove the vehicle from the defendant's property.[85] In invalidating the warrantless search, the Supreme Court distinguished *Coolidge* from previous automobile exception cases because the particular automobile involved in *Coolidge* was immobile.[86] The Supreme Court stated that police should have procured a warrant because to do so would have been reasonably practical.[87]

The Fourth Circuit properly distinguished *Coolidge* from *$29,000* by noting that *Coolidge* was not a case involving the warrantless search of an automobile containing contraband.[88] In addition, the Fourth Circuit may have further factually distinguished *Coolidge* from *$29,000.*[89] In *Coolidge*, police seized the automobile on the defendant's own private property, the police did not search the automobile at the time of the defendant's arrest, and the destruction of evidence seized from the *Coolidge* automobile was a remote risk.[90] Conversely, in *$29,000,* police seized Schneider's automobile on another individual's private property rather than Schneider's own private land, the police searched Schneider's automobile immediately at the time of Schneider's arrest, and Agent Cummings had no information pertaining to confederates of Schneider or Lindsay who might have destroyed the marijuana while Agent Cummings procured a warrant.[91]

A recent opinion in the First Circuit, *United States v. Moscatiello,*[92] supports the Fourth Circuit's refusal to apply *Coolidge* to the facts of *$29,000.* The First Circuit in *Moscatiello* refused to find an enhanced expectation of privacy in an automobile parked on another individual's private property.[93] In *Moscatiello,* federal agents with probable cause to believe that several individuals conspired to distribute illegal narcotics made a warrantless search of the defendant's truck while the vehicle remained stationary on another individual's property.[94] In rejecting a per se private/

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84. *Id.* at 447-48.

85. *Id.* at 460-62.

86. *Id.* at 461-64.

87. *Id.*

88. *See $29,000,* 745 F.2d at 855 (distinguishing facts of *Coolidge* from facts of *Ross* because *Coolidge* automobile was not used for illegal purposes nor believed to contain contraband). *Compare Coolidge,* 403 U.S. at 460-62 (facts of *Coolidge) with Ross,* 456 U.S. at 800-01 (facts of *Ross).*

89. *Compare infra* text accompanying note 90 (summarizing facts of *Coolidge) with infra* text accompanying note 91 (summarizing facts of *$29,000).*

90. *See Coolidge,* 403 U.S. at 460-62; *supra* text accompanying notes 83-87 (discussing facts of *Coolidge).*

91. *See $29,000,* 745 F.2d at 854; *supra* text accompanying notes 10-17 (discussing facts of *$29,000).*

92. 771 F.2d 589 (1st Cir. 1985).

93. *Id.* at 599-600.

94. *Id.* at 595-96. In United States v. Moscatiello, federal agents conducted an investigation of suspected narcotic conspirators for approximately one year before making arrests. *Id.*

public property distinction in the application of the automobile exception, the *Moscatiello* court held that a temporary stopover on another's property is analogous to parking the vehicle on public property.[95] The First Circuit concluded that the decision in *Carney* validated the warrantless search because a defendant who parks his automobile on another individual's private property gains no greater expectation of privacy than if the defendant instead had parked his automobile in a public lot.[96]

In refusing to distinguish between automobiles parked and automobiles in transit when applying the automobile exception to the fourth amendment warrant requirement, the Fourth Circuit in *$29,000* correctly followed the Supreme Court opinions in *Ross* and *Carney*.[97] The dual justification for the application of the automobile exception—the inherent mobility of automobiles and reduced expectations of privacy—apply equally to automobiles in all situations when police have probable cause to believe that an automobile contains contraband.[98] Under the automobile exception as defined by the Supreme Court, police with the requisite probable cause may conduct warrantless searches of automobiles regardless of whether police stop an automobile in transit, search a parked automobile on public property, or impound an automobile prior to searching the vehicle.[99] In all three situations, the societal interest in keeping contraband out of the community supports the Supreme Court's decisions that validate the search.[100] Merely stopping an automobile on another individual's driveway, where the vehicle is readily

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at 591. While conducting a surveillance of a large warehouse suspected as the storage site for the narcotics, DEA agents observed a white pick up truck exit the building. *Id.* at 595. The DEA agents discretely followed the truck, which pulled into and parked in the driveway of a private residence. *Id.* As the driver of the truck, defendant John Rooney, got out of the vehicle, the agents moved in and arrested Rooney. *Id.* While arresting Rooney, the DEA agents smelled an odor resembling marijuana eminating from the truck and immediately conducted a warrantless search of the vehicle finding 60 bales of the illicit substance. *Id.*

95. *Id.* at 599-600. In *Moscatiello,* the First Circuit distinguished defendant Rooney's reliance on *Coolidge* primarily because in *Coolidge* police searched a vehicle parked on the owner's own property. *Id.* at 600; *see Coolidge,* 403 U.S. at 461; *supra* text accompanying notes 83-87 (discussing facts of *Coolidge).*

96. *Moscatiello,* at 599-600; *see Carney,* 105 S. Ct. at 2070-71 (authorizing warrantless search of motor home because vehicle parked in public lot is not afforded legitimate privacy interests).

97. *See supra* notes 62-63 and accompanying text (Supreme Court's reasoning in *Ross* for permitting warrantless vehicle searches under automobile exception to warrant requirement); *supra* notes 73-75 and accompanying text (Supreme Court's reasoning in *Carney* for permitting warrantless vehicle searches under automobile exception to warrant requirement).

98. *See supra* notes 47-48 (discussing dual justification for upholding warrantless vehicle searches under automobile exception).

99. *See supra* note 44 (validating warrantless searches of automobiles stopped in transit under automobile exception); *supra* note 45 (validating warrantless searches of automobiles parked on public property under automobile exception); *supra* note 46 (validating warrantless searches of impounded automobiles under automobile exception).

100. *See Carney,* 105 S. Ct. at 2070-71; *see supra* note 75 (discussing societal interests validated when courts uphold warrantless searches under automobile exception).

accessible from the public street, should not trigger any additional fourth amendment protection against warrantless searches because parking on another's land simply creates no enhanced expectation of privacy which society is willing to legitimize.[101] Even under the *Coolidge* opinion, the vitality of which is suspect after the Supreme Court's adoption of the dual justification for the automobile exception,[102] the Supreme Court plurality emphasized many supporting factors contributing to the unreasonableness of the police search in finding the warrantless automobile search invalid.[103] In *$29,000,* however, Schneider simply could not demonstrate any factors elevating his expectations of privacy by parking his automobile in Lindsay's driveway.[104]

The United States Court of Appeals for the Fourth Circuit in *$29,000* held that when police obtain probable cause to believe that an automobile parked on another individual's private property contains contraband, the officers may conduct a warrantless search of the vehicle under the automobile exception to the fourth amendment warrant requirement.[105] The Fourth Circuit emphasized the Supreme Court's finding that the use of an automobile to transport contraband abrogates the general rule that police must obtain a search warrant when reasonably practicable.[106] After *$29,000,* no distinction exists in the Fourth Circuit between an automobile in transit and an automobile immobilized for purposes of police conducting a warrantless vehicle search under the automobile exception.[107] The *$29,000* court's decision supports the public policy interest, enunciated by the Supreme Court, of keeping contraband narcotics off of the community streets.[108] The Fourth Circuit's

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101. *See Moscatiello,* 771 F.2d. at 599-600 (holding no privacy interest distinction between automobile parked on street and automobile parked in another individual's driveway).

102. *See* RINGEL, *supra* note 65 (questioning continued vitality of *Coolidge* holding that invalidated warrantless search of parked automobile on private property); Gardner, *supra* note 48, at 35 (automobile exception is now talisman making fourth amendment warrant requirement obsolete in warrantless searches of automobiles); Note, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From* Carroll *to* Cardwell: *Inconsistency Through the Seamless Web,* 53 N.C.L. REV. 722, 747 (1975) (suggesting fourth amendment warrant requirement may be inapplicable to automobiles).

103. *Coolidge,* 403 U.S. at 460-62; *see supra* notes 82-87 and accompanying text (discussing Supreme Court's decision in *Coolidge).*

104. *See $29,000,* 745 F.2d at 855 (distinguishing facts of *Coolidge* from facts of *$29,000* because defendant in *Coolidge* did not use automobile for illegal purposes and police in *Coolidge* did not believe vehicle contained contraband); *supra* text accompanying notes 90-91 (distinguishing facts of *Coolidge* from facts of *$29,000* because police in *Coolidge* did not seize automobile from another individual's private property nor seize vehicle pursuant to defendant's arrest).

105. *$29,000,* 745 F.2d at 855-56; *see supra* text accompanying note 31 (stating Fourth Circuit's holding in *$29,000).*

106. *$29,000,* 745 F.2d at 855-56; *see supra* notes 29-32 and accompanying text (discussing Fourth Circuit's reliance in *$29,000* on Supreme Court's decision in *Ross).*

107. *See supra* notes 97-104 and accompanying text (arguing no distinction exists between mobile and immobile vehicles for application of automobile exception).

108. *See Carney,* 105 S. Ct. at 2070-71; *supra* note 75 (discussing societal interests validated when courts uphold warrantless searches under automobile exception).