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The Investigation
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Corrupt Activities

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1977 Summer Seminar Program

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ADJUTANT'S

Techniques in the Investigation and
Prosecution of Organized Crime:
Manuals of Law and Procedure

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PREFACE

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Uses of the Phrase "Organized Crime"

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Summary

¶1 "Organized crime" is a phrase of many meanings. Nevertheless, it and related phrases are used as words of limitation in many aspects of the criminal process. In each instance, the concept can have a different definition, and it can be framed with a different purpose in mind. How its presence may be shown can also vary, usually depending on where and how in the criminal process the concept is used. Thus, a prosecutor ought to be aware of its many uses and of their different implications.

¶2 Even when it is legally defined, the concept may not be clearly defined. Some legal definitions can be read, for example, to refer, in whole or in part, to different types of criminal groups, ranging from teenage gangs to La Cosa Nostra. Generally, however, the concept, properly understood, may be broken down into three separate categories:

1. "enterprise"-a business organization;
2. "syndicate"-a quasi-governmental organization;
3. "venture"-an individual criminal episode with "syndicate" connections.

I. The Problem

¶3 An especially troubling problem with the phrase "organized crime" is that it is used in different contexts with different meanings. Sometimes, too, these different meanings are not always clearly separated. These different uses can, of course, lead to problems both in communication and in the law. For example, a statute creating a legal tool, e.g., a wiretap law, may define "organized crime" restrictively, and as a result, the use of the statute may be drastically limited, perhaps so much so that the tool created becomes unworkable. On the other hand, the use of the phrase without a clear definition or with a broad definition can be challenged as unconstitutionally vague. Such varying and ill-defined definitions can actually confuse issues they attempt to clarify. If definitions do not clearly differentiate those groups that are, properly understood, "organized crime" from those that are not, they are not only bad definitions; they are also less than useful definitions.

II. The Uses of the Phrase "Organized Crime"

A. Introduction

¶4 Like Humpty Dumpty language,¹ the phrase "organized

¹C. Dodgson ("Lewis Carroll"), Through the Looking Glass and What Alice Found There, Chapter 6, at 247 (Modern Library ed.): "When I use a word," Humpty Dumpty said, "it means just what I choose it to mean--neither more nor less."

crime" can mean whatever the speaker chooses to make it mean, and it has meant many things to many people. It can be used, for example, to refer to the crimes committed by organized criminal groups--gambling, narcotics, loan sharking, theft and fencing, and the like.² It can also be used to refer, not to the crimes committed, but to the criminal groups that commit them.³

¶5 Here, a difference of opinion sometimes exists. How sophisticated should a criminal group become before it is called "organized crime"? Should "white collar" criminal groups be called "organized crime"?⁴ Should "subversive groups" be called "organized crime"?⁵ Usually, "white collar" or "subversive groups" or ad hoc groups, such as youth groups, pickpocket rings, and professional criminal

²President's Commission on Crime and Administration of Justice, Task Force Report: Organized Crime 6 (1967) (hereinafter referred to as Task Force Report).

³Id.

⁴On the definition of "white collar " crime as generally not including "organized crime," compare E. Sutherland, White Collar Crime, 9 (Dryden Press Inc. 1949) with H. Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime, 3 (U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, 1970). The Report of the National Conference on Organized Crime, (Washington, D.C. October 1-4, 1975), broadly defines organized crime to be "any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities and, when appropriate, engaging in intricate financial manipulations." Id. at v.

⁵IIT Research Institute and Chicago Crime Commission, A Study of Organized Crime in Illinois 20 (Summary) (1971) ("independent social process, separate from" organized crime).

groups put together for one or more "scores," are excluded from definitions of "organized crime."⁶

¶6 Among those groups that have some plausible claim to the dubious title of "organized crime," additional distinctions can be helpfully drawn; it is useful, for example, to distinguish between "enterprises," "syndicates," and "ventures." Some, too, would probably not apply the label of "organized crime" to each of these groups; they would, for example, restrict it to "syndicates."

B. "Enterprise"

¶7 An organized crime "enterprise" is a criminal group that provides illicit goods or services on a regular basis.⁷ An example would be a narcotics wholesaler and his cutting crew.⁸ Thus, it is a criminal firm or business organiza-

⁶The President's Commission on Crime and Administration of Justice in 1967 suggested, for example, that "organized crime" should be limited to groups that have become sufficiently sophisticated that they must regularly employ techniques of both violence and corruption to achieve their criminal ends. Task Force Report at 8 ("unique form of criminal activity"); Schelling, "What is the Business of Organized Crime?," 20 J. Pub. Law 71 (1971) (concept keyed to "monopoly").

⁷See Schelling, "Economic Analysis and Organized Crime," Task Force Report at 115; Rubin, "The Economic Theory of the Criminal Firm," The Economics of Crime and Punishment 155 (1973).

⁸See 21 U.S.C.A. §848 (1972), "Continuing criminal enterprises." See, e.g., United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974). On the narcotics traffic generally see The Heroin Trail (Staff of Newsday New American Library 1974).

tion.⁹

C. "Syndicate"

¶8 An organized crime "syndicate" is a criminal group that regulates relations between various "enterprises." It may be metropolitan, regional, national, or international in scope. It may be concerned with only one field of endeavor or it may be concerned with a broad range of illicit activities. A "syndicate," therefore, is a criminal cartel or business organization. It fixes prices for illicit goods and services, allocates black markets and territories, acts as a criminal legislature and court, sets criminal policy, settles disputes, levies "taxes," and offers protection from both rival groups and legal prosecution.¹⁰

D. "Venture"

¶9 A "venture" is a criminal episode usually engaged in for profit by a group. It may be the hijacking of a

⁹ See Schelling, "Economic Analysis and Organized Crime," Task Force Report at 115; Rubin, "The Economic Theory of the Criminal Firm," The Economics of Crime and Punishment 155 (1973).

¹⁰ See Task Force Report at 6-10. Compare, Schelling, "What is the Business of Organized Crime," 20 J. Pub. L. 71 (1971).

truck¹¹ or the robbery of a bank.¹² It is "organized crime" when members of the "venture" have ties to a "syndicate." This tie gives the "venture" access to superior criminal resources, including capital, skilled labor, outlets for stolen property, etc.

E. Other Uses

¶10 Finally, "organized crime" may refer to the entire criminal underworld, or at least that part which has some semblance of organization.¹³ Thus, "organized crime" is distinguished from random acts of violence, passion, or greed.

¹¹ See, e.g., United States v. Persico, 339 F. Supp. 1077 (E.D. N.Y.), aff'd 467 F.2d 485 (2d Cir. 1972), cert. denied, 410 U.S. 946 (1973) (trial of Carmine J. Persico, Jr., a member of the Vito Genovese syndicate, S. Rep. No. 72, 89th Cong., 1st Sess. 20 (1965) for hijacking).

¹² See, e.g., United States v. Franzese, 392 F.2d 954 (2d Cir.), vacated in part as to Franzese only and remanded, otherwise cert. denied, 394 U.S. 310 (1968); related case, 525 F.2d 27 (2d Cir. 1975)

(trial of John Franzese, a caporegime of the Profaci syndicate, S. Rep. No. 72, 89th Cong., 1st Sess. 28 (1965) for bank robbery). On the background of the robberies and a related homicide trial, see generally J. Mills, The Prosecutor 96-245 (Farrar, Straus and Giroux, 1969).

¹³ See Task Force Report at 7; Schelling, supra note 10, at 115.

III. Different Meanings for Different Purposes in Different Contexts

¶11 Depending on what "organized crime" refers to, it will have different effects. Confusion of definitions creates problems for the investigation and prosecution of organized crime. As noted above, if a statute creating a legal tool uses a restrictive definition, the tool may be unworkable since its use may require proof that is impossible to obtain, or that involves the very object of the investigation itself.¹⁴ On the other hand, if no definition is provided, the provision may be unworkable or actually unconstitutionally vague.¹⁵ In general, given the nature of our criminal justice system and organized crime, it is probably best to avoid trying to use "organized crime" as a legal concept. The dilemma and its possible solution was aptly recognized by the Pennsylvania Crime Commission:

Crime syndicates cannot be outlawed or punished per se, since they cannot be defined with sufficient exactness, but the substantive prohibitions of our penal law can be better molded to encompass their schemes and activities.¹⁶

¹⁴ An excellent example is the Massachusetts wiretap statute. It limits permissible wiretaps to crimes connected to organized crime. See generally text infra at ¶¶36-37.

¹⁵ Classification of prisoners as organized crime members under N.Y. Correc. Law §§630 to 634 (McKinney Supp. 1975). Commissioner's General Orders, No. 31, 2[d][2f], Nov. 13, 1972, was held to be unconstitutionally vague in Dioguardi v. Warden, 80 Misc.2d 972, 365 N.Y.S.2d 446 (Sup. Ct. Bronx County 1975). See text infra at ¶¶46-48.

¹⁶ Pennsylvania Crime Commission, Report on Organized Crime 92 (1970).

¶12 Using the phrase "organized crime" as means of limitation is, moreover, often a mistaken attempt to protect supposed civil liberties.¹⁷ This approach, particularly, should be rejected. Such a limitation sets up a double standard of civil liberties. It suggests that organized crime members have less civil liberties under the Constitution than other citizens. If a statute violates the rights of a general member of the public, it also violates the rights of a member of organized crime.¹⁸

¶13 Finally, many criminal justice statutes may be more effective if they are not limited to organized crime. The study of organized crime has lead to the development of new investigation and prosecution techniques. Some of these techniques can be profitably used in a broad range of criminal prosecutions. Thus, using "organized crime" as a limiting concept might unnecessarily circumscribe a useful tool, while offering only specious protection to civil liberties.¹⁹

¹⁷ See, e.g., Letter from American Civil Liberties Union [on Organized Crime Control Act of 1970] to each member of the Senate, January 20, 1970, pp. 1-5, reprinted in, 116 Cong. Rec. 5422-26 (daily ed. January 22, 1970).

¹⁸ McClellan, "The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?," 46 Notre Dame Law. 55, 62 (1970). But see Catalano v. United States, 383 F. Supp. 346, 351-52 (D.Conn. 1974) (recognizing that organized crime members should be treated differently than ordinary prisoners); Dioguardi v. Warden, 80 Misc.2d 972, 974, 365 N.Y.S.2d 446, 448 (Sup. Ct. Bronx County 1975) ("the rational basis for different treatment [of organized crime members] is too obvious for comment.").

¹⁹ McClellan, supra note 18 at 60-62.

Appendix: Legal Uses of the Phrase "Organized Crime"²⁰

I. Federal

A. Grants to Law Enforcement Agencies

¶14 The Law Enforcement Assistance and Criminal Justice Act²¹ defines organized crime as:

the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.²²

The purpose of the L.E.A.C.J.A. is to:

1. encourage States and units of general local government to develop and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement and criminal justice;
2. authorize grants to States and units of local government in order to improve and strengthen law enforcement and criminal justice; and
3. encourage research and development directed toward the improvement of law enforcement and criminal justice and the development of new methods for the prevention and reduction of crime and the detection, apprehension, and rehabilitation of criminals.²³

²⁰This list does not claim to exhaust all the legal uses of the phrase "organized crime" in legal materials today. It merely collects a number of different examples in different contexts.

²¹42 U.S.C.A. §§3701 to 3795 (1973).

²²42 U.S.C.A. §3781(b) (1973).

²³42 U.S.C.A. §3701 (Supp. 1976).

Organized crime programs have priority for grants.²⁴

B. Organized Crime Strike Force Jurisdiction

¶15 There is no definition of organized crime in the orders setting up the Federal Strike Forces.²⁵ Instead, a case-by-case decision-making process is followed. Each case is under the jurisdiction of the United States Attorney or the Strike Force. If jurisdiction over the case is disputed, the United States Attorney assigns it, but the Chief of the Strike Force can refer it to the Criminal Division at the Department of Justice for a final decision.²⁶ The jurisdiction granted by this procedure allows a Strike Force attorney to appear before a grand jury in that case.²⁷ No showing of organized crime is necessary.²⁸

²⁴ 42 U.S.C.A. §3737 (1973).

²⁵ Office of the Attorney General, Order No. 431-70, April 20, 1970, reprinted in, In re Subpoena of Persico, 522 F.2d 41, 69 (2d Cir. 1975).

²⁶ Id. See also 28 C.F.R. §0.195 (1975).

²⁷ In re Subpoena of Persico, 522 F.2d 41, 67-68 (2d Cir. 1975).

²⁸ Id. For a collection of definitions of organized crime, see id. at 47.

C. Depositions

¶16 Under 18 U.S.C. §3503²⁹ to obtain an order to take a deposition from a witness, the motion must:

contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.³⁰

There is no definition of the term "organized criminal activity" in the statute.

¶17 The phrase is used to limit the cases in which out of court depositions of witnesses may be taken. Nevertheless, no proof of organized criminal activity is required, since:

the decision whether or not a proceeding is against a person believed to have participated in organized criminal activity is to be made by the Attorney General or his designee and not by the court.

. . . Unless the defendant shows bad faith on the part of the Government, the court is only to ascertain whether or not there has been a proper certification as required by statute.³¹

²⁹18 U.S.C.A. §3503 (Supp. 1976).

³⁰Under Rule 15 of the Fed. R. Crim. P. certification is not required:

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice the parties order that testimony of such witness be taken by deposition

This amendment became effective Dec. 1, 1975.

³¹United States v. Singleton, 460 F.2d 1148, 1154 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973).

D. Organized Crime Control Act of 1970

¶18 Under the Organized Crime Control Act of 1970, "organized crime" is described, but not actually defined.³² It is also not defined or used in the

³²Organized Crime Control Act of 1970, at 1073.

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

"Racketeer and Corrupt Organizations" title.³³

¶19 The courts are in conflict over whether a showing of "organized crime" is necessary in the application of this Title. In Barr v. Wui/Tas, Inc.,³⁴ the court held that the statute³⁵ did not apply to a telephone answering service system since the defendant could not be characterized as "organized crime."

¶20 In United States v. Campanale,³⁶ however, the court stated:

[Q]uite obviously Congress focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence. The statute³⁷ . . . makes unlawful such activities no matter who engages therein (emphasis added).³⁸

This same approach was recently taken in United States v. Mandel,³⁹ where the court held,

³³18 U.S.C.A. §§1961 et seq. (Supp. 1976).

³⁴66 F.R.D. 109 (S.D.N.Y. 1975).

³⁵18 U.S.C.A. §§1961 et seq. (Supp. 1976).

³⁶518 F.2d 352 (9th Cir. 1975), cert. denied, 18 Crim. L. Rptr. 4127 (Jan. 14, 1976).

³⁷18 U.S.C.A. §1962 (Supp. 1976).

³⁸United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 18 Crim. L. Rptr. 4127 (Jan. 14, 1976).

³⁹19 Crim. L. Rptr. 2032 (D.Md. March 23, 1976).

absence of any allegation that these defendants are in any way connected with "organized crime" does not require a dismissal of the charge brought under 18 U.S.C. Sec. 1961 et seq.⁴⁰

The court also stated,

To require proof beyond a reasonable doubt that a defendant was a member of "organized crime," with the highly subjective and prejudicial connotations of that term, would simply render the statute unenforceable. . . .

* * * *

Rather than attempt to define "organized crime" and make membership therein unlawful, a task which would undoubtedly have been impossible and probably unconstitutional, Congress defined an unlawful pattern of racketeering activity. . . .⁴¹

E. Classifying Prisoners

¶21 Under the United States Bureau of Prisons Policy Statement 7900.47 (April 30, 1974), a prisoner may be classified as a Special Offender if he is a member of organized crime.⁴² There is no definition of organized

⁴⁰Id. at 2033. See also United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) (organized scheme to cheat at cards).

It is true that [18 U.S.C.A. §1952 (1970)] was aimed at organized crime Congress did not choose to direct the prohibitions of Section 1952 against only those persons who could be shown to be members of an organized criminal group. . . . Id. at 884-885.

⁴¹Id.

⁴²Other categories meriting "Special Offender" designation are non-federal prisoners, protection cases, extreme custody risks, subversives, notorious individuals, persons who have threatened high government officials, and any other offender who requires "especially close supervision." See Rothman v. Director, United States Board of Parole, 403 F. Supp. 188, 189-90 (N.D.Ga. 1975).

crime; decisions as to Special Offender status are made by the prison staff on a case by case basis.

¶22 The purpose of the Special Offender designation is to identify prisoners who require close supervision.⁴³

Two reasons for the inclusion of organized crime members in the Special Offenders category are to lessen their contact with "young, less sophisticated and impressionable prisoners,"⁴⁴ and to place them in a facility where they are unable "to conduct any aspect of their illegal businesses. . . ."⁴⁵

¶23 The proof required of organized crime membership is that there is "a reasonable basis in fact to conclude that the inmate [is]. . . a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life."⁴⁶

Due process requires:

1. ten days notice that a Special Offender classification is contemplated;

2. that notice must state the reasons for the designation;

3. the prisoner must be allowed to appear before a disinterested decision-maker;

4. he must be permitted to call witnesses and present documentary evidence;

⁴³Cardaropoli v. Norton, 523 F.2d 990, 992 note 1 (2d Cir. 1975).

⁴⁴Catalano v. United States, 383 F. Supp. 346, 351-52 (D. Conn. 1974).

⁴⁵Id.

⁴⁶Id. at 350; Masiello v. Norton, 364 F. Supp. 1133, 1135 (D. Conn. 1973).

5. he must be informed of the evidence against him;
6. he must be given a reasonable time to present his case; and
7. the decision shall be reviewable by the Chief of Classifications and Parole, the Warden, and the Bureau of Prisons.

The full range of procedural safeguards are not required:

1. the hearing need not be recorded;
2. confrontation and cross-examination of witnesses is only in the discretion of the decision-maker; and
3. counsel need not be furnished, although in a complex case the prisoner may retain counsel.⁴⁷

The prisoner is allowed input into the fact-finding process to make it more accurate.⁴⁸ His rights are limited to minimize the risk of disrupting the prison.⁴⁹

¶24 Recently, in Marchesani v. McCune,⁵⁰ this hearing requirement was limited to cases where the reason for the classification is organized crime connections. If the Special Offender status is based on the nature of the crime for which a prisoner is convicted, then a hearing is not

⁴⁷Cardaropoli v. Norton, 523 F.2d 990, 996-97 (2d Cir. 1975); Stassi v. Hogan, 395 F. Supp. 141, 143 (N.D. Ga. 1975). Contra Catalano v. United States, 383 F. Supp. 346, 352 (D. Conn. 1974) (due process requires right to confront and cross-examine witnesses, assistance of counsel, and a recording of the hearing). See also, Masiello v. Norton, 364 F. Supp. 1133, 1135 (D. Conn. 1973) (prisoner must be told of organized crime designation before a parole hearing).

⁴⁸Cardaropoli, supra note 47 at 997.

⁴⁹Id. at 998.

⁵⁰531 F.2d 459 (10th Cir. 1976).

required.⁵¹

II. State

A. Naming Crimes

1. Ohio-Engaging in Organized Crime

¶25 Under the Ohio "Engaging in Organized Crime" statute,⁵² "organized crime" as such is not used or defined. Instead, a different phrase, "criminal syndicate," is used, and it is defined as:

five or more persons collaborating to promote or engage in [extortion, prostitution, theft, gambling, illegal traffic in drugs, liquor, or weapons, loan sharking, or any offense for profit]. . . on a continuing basis. . . ."⁵³

2. Pennsylvania-Corrupt Organizations

¶26 Under the Pennsylvania corrupt organizations statute,⁵⁴ organized crime is described as,

a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption. . . ."⁵⁵

The term "organized crime", as described in the preamble to the statute, is not, however, used as an operative legal concept. Instead, "racketeering activity" is used. This

⁵¹Id. at 460-61.

⁵²Ohio Rev. Code Ann. §2923.04 (Page 1975).

⁵³Id. at (C).

⁵⁴Pa. Stat. Ann. tit. 18, §911 (1973).

⁵⁵Pa. Stat. Ann. tit. 18, §911(a)(1) (1973).

concept is then carefully defined by reference to specified statutes.⁵⁶

⁵⁶Pa. Stat. Ann. tit. 18, §911(h)(1)(i), (iii), (iv) (1973), §911(h)(1)(ii) (Supp. 1976).

As used in this section "Racketeering activity" means:

(i) any act which is indictable under any of the following provisions of this title:

Chapter 25 (relating to criminal homicide)
Section 2706 (relating to terroristic threats)
Chapter 29 (relating to kidnapping)
Chapter 33 (relating to arson, etc.)
Chapter 37 (relating to robbery)
Chapter 39 (relating to theft and related offenses)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Chapter 47 (relating to bribery and corrupt influence)
Chapter 49 (relating to perjury and other falsification in official matters)
Section 5512 through 5514 (relating to gambling)
Chapter 59 (relating to public indecency)

(ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs);

(iii) any conspiracy to commit any of the offenses set forth in subclauses (i) and (ii) of this clause; or

(iv) the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.

Any act which otherwise would be considered racketeering activity by reason of the application of this clause, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

B. Jurisdiction

1. New Mexico-Governor's Organized Crime Prevention Commission

¶27 Under the New Mexico Organized Crime Act⁵⁷ organized crime is defined as:

the supplying for profit of illegal goods and services, including, but not limited to, gambling, loan sharking, narcotics, and other forms of vice and corruption, by members of a structured and disciplined organization. . . .⁵⁸

¶28 The statute creates the governor's organized crime prevention commission. The purpose of the commission is not set out in the statute. Its duties, however, include investigation of organized crime, education of the public, governor, and legislature, coordination of law enforcement agencies, and development of new methods to combat organized crime.⁵⁹

¶29 As a result, the jurisdiction of the commission is broad. It is not stated in the statute what proof of organized crime is necessary, but a legislative oversight committee does exist.⁶⁰ One of the committee's duties is to

maintain continuous review and appraisal of the activities of the governor's organized crime prevention commission and the investigations of its staff. . . .⁶¹

⁵⁷ N.M. Stat. Ann. §§39-9-1 to 39-9-15 (Supp. 1975).

⁵⁸ Id. §39-9-2-A.

⁵⁹ Id. §§39-9-5, 39-9-10.

⁶⁰ Id. §§39-9-11 to 39-9-15.

⁶¹ Id. §39-9-12-A(1).

2. New York-Organized Crime Task Force Before the Grand Jury

¶30 Section 70-a of the New York Executive Law (McKinney 1972) creates a statewide organized crime task force. The phrase "organized crime" is not defined in any portion of the statute. It is used only as a title and to define the general powers of the task force.⁶² It is, however, described in the legislative findings:

Organized crime, based upon an efficient and disciplined organizational structure, is a highly complex and diversified illegal activity which at times involves the corruption of public officials, which annually drains millions of dollars from the state's economy, which is expanding its corrosive influence by continuing to infiltrate and corrupt a variety of legitimate businesses and labor unions, which undermines free competition by coercive tactics, and which threatens the peace, security and general welfare of the people of the state.⁶³

Subdivision 7 of section 70-a of the New York Executive

⁶²N.Y. Exec. Law §70-a-1 (McKinney 1972):

There shall be established within the department of law a statewide organized crime task force which, pursuant to the provisions of this section, shall have the duty and power:

(a) To conduct investigations and prosecutions of organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction;

(b) To cooperate with and assist district attorneys and other local law enforcement officials in their efforts against organized crime.

⁶³Law of May 20, 1970, ch. 1003, §1, N.Y. Laws reprinted in N.Y. Exec. Law §70-a Historical Note (McKinney 1972).

Law (McKinney 1972) deals with the appearance of a task force attorney before a grand jury:

With the approval of the governor and with the approval or upon request of the appropriate district attorney, the deputy attorney general in charge of the organized crime task force, or one of his assistants, may attend in person any term of the county court or supreme court having appropriate jurisdiction, including an extraordinary special or trial term of the supreme court when one is appointed pursuant to section one hundred forty-nine of the judiciary law, or appear before the grand jury thereof, for the purpose of managing and conducting in such court or before such jury a criminal action or proceeding concerned with an offense where any conduct constituting or requisite to the completion of or in any other manner related to such offense occurred either in two or more counties of this state, or both within and outside this state. In such case, such deputy attorney general or his assistant so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform. In any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by such deputy attorney general.

¶31 This subdivision was recently construed by the New York Court of Appeals in People v. Rallo.⁶⁴ The court held that no showing of "organized crime" is necessary for a task force attorney to appear before the grand jury.⁶⁵ The court stated:

Because of what must be conceded to be the practical difficulty of describing or defining precisely what is intended by the phrase, "organized crime activities", it would appear naive at the least to make prosecutorial authority depend on the resolution of such a quicksilver issue, thereby in practice perhaps materially to handicap the

⁶⁴ 39 N.Y.2d 217, 347 N.E.2d 633 (1976).

⁶⁵ Id. at 224, 347 N.E.2d at 636.

prosecutorial efforts of the [Organized Crime Task Force] by spawning troublesome threshold issues whose resolution could be not only very difficult but also very time consuming and unpredictable.⁶⁶

3. Ohio-Attorney General Investigations

¶32 Under the Ohio organized criminal activity statute,⁶⁷ the concept of "organized criminal activity" is defined as:

any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of, criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loan sharking, drug abuse or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees.⁶⁸

At the direction of the governor or the general assembly, the attorney general may investigate this activity, refer evidence to a prosecutor, regular grand jury, or special grand jury, and appear before the grand jury.⁶⁹

4. Tennessee-Bureau of Criminal Investigation

¶33 Under the Tennessee Bureau of Criminal Investigation statute,⁷⁰ organized crime is defined as:

⁶⁶ Id. at 223, 347 N.E.2d at 635, citing McClellan, "The Organized Crime Act [S.30] or Its Critics: Which Threatens Civil Liberties?," 46 Notre Dame Law. 55 (1970). But see In re Sussman v. N.Y. State O.C.T.F., 39 N.Y.2d 227, 347 N.E.2d 638 (1976) discussed in text infra at ¶¶40-41.

⁶⁷ Ohio Rev. Code Ann. §109.83 (Page Supp. 1976).

⁶⁸ Ohio Rev. Code Ann. §109.83 (A) (Page Supp. 1976).

⁶⁹ Ohio Rev. Code Ann. §109.83 (Page Supp. 1976).

⁷⁰ Tenn. Code Ann. §§38-501 to 38-505 (1975).

the unlawful activities of the members of an organized, disciplined association engaged in supplying illegal goods and services, including, but not limited to, gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.⁷¹

¶34 The purpose of this statute is to authorize the use of scientific investigation techniques for the prosecution of organized crime.⁷² The powers granted to the investigators in organized crime cases are broad, including the power to issue subpoenas.⁷³

¶35 There does not appear to be any proof of organized crime required before the investigator for the Tennessee Bureau of Criminal Investigation⁷⁴ begins his investigation,⁷⁵ or when that evidence is presented for trial.⁷⁶

⁷¹Tenn. Code Ann. §38-502 (1975).

⁷²Hopton, "Scientific Crime Detection and Law Enforcement," 26 Tenn. L. Rev. 129, 129-30 (1959). Narcotic law offenses are emphasized in the statute. Tenn. Code Ann. §38-502 (1975), §§52-1439, 52-1442 (Supp. 1975).

⁷³Sheets v. Hathcock, 528 S.W.2d 47, 51-52 (Tenn. Crim. App.), cert. denied, 528 S.W.2d 47 (Tenn. Sup. Ct. 1975).

⁷⁴The T.B.C.I. is also called the Tennessee Bureau of Investigation or the T.B.I., apparently to emulate the F.B.I. Id. at 52; Hopton, "Scientific Crime Detection and Law Enforcement," 26 Tenn. L. Rev. 129, 131, 133 (1959).

⁷⁵Tenn. Code Ann. §38-502 (1975):

Investigators of the bureau of criminal identification are authorized, without a request from the district attorney general, to make investigations [of]
. . . organized crime.

⁷⁶Sheets v. Hathcock, 528 S.W.2d 47, 52 (Tenn. Crim. App.), cert. denied, 528 S.W.2d 47 (Tenn. Sup. Ct. 1975).

This precise issue, however, has not been litigated.

C. Investigative Tools

1. Massachusetts-Wiretapping

¶36 Under the Massachusetts wiretapping statute⁷⁷ organized crime is defined as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services."⁷⁸ The definition is used to limit the crimes against which wiretapping may be used.⁷⁹

It, like the other provisions of the statute, is "designed to ensure that unjustified and overly broad intrusions on rights of privacy are avoided."⁸⁰

¶37 The quantum of proof of organized crime connections required for the warrant is unclear. The Supreme Judicial Court of Massachusetts has merely stated:

[T]he application and any supporting affidavits should affirmatively demonstrate knowledge of the requirement that interception be limited to matter material to the designated crimes [specific crimes in connection with organized crime] [81] under investigation. . . .⁸²

⁷⁷Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1976).

⁷⁸Id. at §99-A.

⁷⁹Id. §§99-B-7, 99-F-2(a)(b).

⁸⁰Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 825 (1975).

⁸¹Mass. Gen. Laws Ann. ch. 272, §99-B-7 (Supp. 1976).

⁸²Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 826 (1975).

2. New Hampshire-Wiretapping

¶38 Under the New Hampshire wiretapping statute⁸³ organized crime is defined as

the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to homicide, gambling, prostitution, narcotics, marijuana or other dangerous drugs, bribery, extortion, blackmail and other unlawful activities of members of such organizations.⁸⁴

¶39 Unlike the Massachusetts statute, the term "organized crime" is used to broaden rather than narrow the scope of permissible wiretaps. If there are no connections with organized crime, then wiretaps may be used against only specified crimes, but if organized crime connections are shown, the crime being committed is immaterial under state law.⁸⁵ The amount of proof required to show organized crime connections is not set out in the statute and has not been developed in the cases.

⁸³ N.H. Rev. Stat. Ann. §570-A (1974).

⁸⁴ N.H. Rev. Stat. Ann. §570-A:1(XI) (1974).

⁸⁵ N.H. Rev. Stat. Ann. §570-A:7 (1974):

The attorney general, deputy attorney general, or a county attorney upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with RSA 570-A:9 an order authorizing, or approving the interception of wire or oral communications by law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of organized crime, as defined in RSA 570-A:1, XI, or evidence of commission of the

3. New York-Organized Crime Task Force Subpoenas

¶40 Subdivision 4 of New York Executive Law Section 70-a

(McKinney 1972) empowers the deputy attorney general in charge of the organized crime task force to subpoena witnesses:

The deputy attorney general in charge of the organized crime task force is empowered to conduct hearings at any place within the state, to administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence he may deem relevant or material to an investigation. He may designate an assistant to exercise any such powers. Every witness attending before such deputy attorney general or his assistant shall be examined privately and the particulars of such examination shall not be made public. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a class A misdemeanor.

¶41 This subdivision was recently construed by the New York

85 (continued)

offenses of homicide, kidnapping, gambling, bribery, extortion, blackmail, or dealing in narcotic drugs, marijuana or other dangerous drugs, or any conspiracy to commit any of the foregoing offenses (emphasis added).

See State v. Lee, 113 N.H. 313, 307 A.2d 827 (1973) (marijuana offender not shown to be connected to organized crime). See also State v. Rowman, ___ N.H. ___, 352 A.2d 737 (1976) (gambling ring not shown to be connected to organized crime). But see 18 U.S.C.A. §2516(2) (1970), which limits permissible state wiretaps to those that provide evidence:

of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year . . . or any conspiracy to commit any of the foregoing offenses.

Court of Appeals in In re Sussman v. N.Y. State OCTF.⁸⁶

Although a showing of "organized crime" is not necessary for a task force attorney to appear before a grand jury,⁸⁷ the court held that such a showing is necessary to issue office subpoenas.⁸⁸ As to the proof required, the court stated:

We do not now delineate the precise quantum of proof with respect to . . . organized crime activities which will be required. . . . The phrase "organized crime activities" is itself not susceptible of precise judicial definition. . . . The proof must establish that the Deputy Attorney-General is proceeding in good faith and that the testimony and documents he seeks bear a reasonable relation to matters properly under OCTF's investigatory jurisdiction, namely, "organized crime activities"⁸⁹

¶42 The court also discussed the problem of vagueness:

It is argued. . . that, because the phrase "organized crime activities" concededly is not susceptible of precise definition, the elusive character and vagueness of its content render subdivision 4 unconstitutional. . . .

It is unquestioned that constitutional due process requires that a statute which defines a substantive crime must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden (citations omitted). Section 70-a, however, does not fall within the category of statutes to which this constitutional principle is applicable.

* * * *

⁸⁶ 39 N.Y.2d 227, 347 N.E.2d 638 (1976).

⁸⁷ People v. Rallo, 39 N.Y.2d 217, 347 N.E.2d 633 (1976). See discussion in text, supra at ¶¶30-31.

⁸⁸ In re Sussman v. N.Y. State O.C.T.F., 39 N.Y.2d 227, 229, 347 N.E.2d 638, 639 (1976).

⁸⁹ Id. at 233, 347 N.E.2d at 641-42.

If after investigation by OCTF a presentment is made to a Grand Jury such presentment and any subsequent charges will be concerned with specific substantive crimes each of which may be tested under the constitutional void-for-vagueness test. The concept of "organized crime activities" will then be irrelevant.

By critical contrast to statutes in which there is asserted vagueness in the definition of substantive crimes, the aspect of subdivision 4 of section 70-a now under review relates only to the investigative authority and powers of a prosecutor.⁹⁰

2. Pennsylvania-Witness Immunity

¶43 Under the Pennsylvania immunity statute⁹¹ organized crime is defined in conjunction with racketeering to:

include, but not be limited to, conspiracy to commit murder, bribery or extortion, narcotics or dangerous drug violations, prostitution, usury, subornation of perjury and lottery, bookmaking or other forms of organized gambling.⁹²

It is not clear whether the term "conspiracy" applies to all the listed crimes or only to murder.⁹³ The Pennsylvania Supreme Court has assumed that a conspiracy is not necessary.⁹⁴

¶44 The purpose of this provision is to obtain evidence

⁹⁰Id. at 234-35, 347 N.E.2d at 642-43.

⁹¹Pa. Stat. Ann. tit. 19, §§640.1 to 640.6 (Supp. 1976).

⁹²Pa. Stat. Ann. tit. 19, §640.6 (Supp. 1976).

⁹³See Commonwealth v. Brady, 228 Pa. Super. 233, 240-41, 323 A.2d 866, 870 (1974) (Dissent Judge Cercone) (allocatur granted, pending before Pa. Sup. Ct.).

⁹⁴In re Falone, ___ Pa. ___, 346 A.2d 9 (1975). "Section 6 (of the immunity statute) defines 'organized crime or racketeering' to include 'bribery or extortion.'" Id. at 16. But a conspiracy was shown. Id.

otherwise unavailable.⁹⁵ It is limited to organized crime because a grant of immunity increases the possibility of perjury, and a broad immunity-granting power may be abused by prosecutors.⁹⁶ In organized crime cases, these factors are outweighed by the public's right to every man's evidence.⁹⁷

¶45 The organized crime requirement applies only to the proceeding, not to the individual witness.⁹⁸ In an investigation of organized crime, the Commonwealth must, "allege. . . that immunization is necessary for the grand jury to obtain information that is relevant to its inquiry from a witness who, it is reliably informed, possesses it."⁹⁹ This must be shown in a hearing "to the satisfaction of the court."¹⁰⁰

D. Classifying Prisoners-New York

¶46 Under the New York prisoner furloughs statute,¹⁰¹ organized crime is not defined. Under the Commissioner's

⁹⁵Id. at 17.

⁹⁶Commonwealth v. Brady, 228 Pa. Super. 233, 234, 323 A.2d 866, 867 (1974).

⁹⁷In re Falone, ___ Pa. ___, 346 A.2d 9 (1975).

⁹⁸Id. at 15-16.

⁹⁹Id. at 16-17.

¹⁰⁰Id. at 17.

¹⁰¹N.Y. Correc. Law §§630 to 634 (McKinney Supp. 1975).

General Orders, No. 31, 2[d][2f], Nov. 13, 1972, "[p]ersons identified with large scale or organized criminal activity," are ineligible. The General Orders do not define the phrase.

¶47 The reason for not allowing organized crime members to be eligible for furloughs is that they can exert their criminal power much more easily outside the prison, even without violating the limits of their furlough.¹⁰²

¶48 The lack of definition, however, was held in Dioguardi v. Warden¹⁰³ to make the classification unconstitutionally vague. Such vagueness creates "the potential for invidious discrimination. . . such as to negate equal protection."¹⁰⁴

¹⁰²Dioguardi v. Warden, 80 Misc.2d 972, 974, 365 N.Y.S.2d 446, 448-49 (Sup. Ct. Bronx County 1975).

¹⁰³Id. at 974-75, 365 N.Y.S.2d at 448-49.

¹⁰⁴Id. at 974, 365 N.Y.S.2d at 449.

Uses of the Phrase "Organized Crime" Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶5, Note 6: Following Task Force Report at 8 ("unique form of criminal activity"): Report of the Task Force on Organized Crime 7-8 (1976) (hereinafter referred to as Task Force Report 1976) states:

For the purposes of this report, no single definition is believed inclusive enough to meet the needs of the many different individuals and groups throughout the country that may use it as a means to develop an organized crime control effort.

Task Force Report 1976 does list characteristics of organized crime:

- 1) It is conspiratorial;
- 2) Economic gain is its goal;
- 3) It is not limited to patently illegal enterprises;
- 4) It employs predatory tactics;
- 5) It has controlled and disciplined members;
- 6) It is not synonymous with the "Mafia" or "La Cosa Nostra" and
- 7) It does not include terrorists dedicated to political change.

¶7, Note 8: Following United States v. Manfredi: United States v. Jeffers, 532 F.2d 1101 (7th Cir.), cert. granted, 97 S.Ct. 55 (1976) and United States v. Bergdall, 412 F.Supp. 1308 (D.Del. 1976). The constitutionality of 21 U.S.C.A. §848(b)(2) was upheld

in United States v. Cravero, 545 F.2d
406 (5th Cir. 1976), cert. denied, 97
S.Ct. 1123 (1977).

¶9, Note 12: Correction: related case United States
v. Franzese, 525 F.2d 27 (2d Cir. 1975),
cert. denied, 424 U.S. 965 (1976).

¶12, Note 17: Correction: 116 Cong. Rec. 852-856
(daily ed. Jan. 22, 1970).

¶14, Note 20: Following, "different contexts.": See
Task Force Report 1976 213-215.

¶15; Omit and replace:

B. Organized Crime Strike Force Jurisdiction

¶15 The general definition of organized crime followed
in the setting up the Federal Strike Force, is, in fact,
an illustration, not a definition; it reads as follows:

'organized crime'. . . includes all illegal
activities engaged in by members of criminal
syndicates operative through the United
States, and all illegal activities engaged
in by known associates and confederates
of such members.

In practice, each investigation or prosecution is under
the jurisdiction of the United States Attorney or the
Strike Force.²⁵ If jurisdiction over the case is disputed,
the United States Attorney assigns it, but the Chief of
the Strike Force can refer it to the Criminal Division
at the Department of Justice for a final decision.²⁶

The jurisdiction granted by this procedure allows a Strike
Force attorney to appear before a grand jury in that case.²⁷

No showing of organized crime is necessary.²⁸

¶15, Note 25: Omit and replace: See generally Office

of the Attorney General, Order No.431-70,
April 20, 1970, reprinted in, In re
Subpoena of Persico, 522 F.2d 41, 68-71
(2d Cir. 1975).

- ¶15, Note 27: Following In re Subpoena of Persico:
United States v. Prueitt, 540 F.2d 995-
1003 (9th Cir. 1976) and United States
v. Cravero, 545 F.2d 406, 410 (5th Cir.1976),
cert. denied, 97 S.Ct. 1123 (1977).
- ¶16, Note 29: Correction: 18 U.S.C.A. §3503(a) (Supp.
1977).
- ¶16, Note 30: Correction: Rule 15(a) of the Fed. R.
Crim. P.
- ¶18, Note 32: Correction: Organized Crime Control
Act of 1970, Pub. L. No. 91-452, 84 Stat.
922 (1970).
- ¶20, Note 36: Correction: 518 F.2d 352 (9th Cir. 1975),
cert. denied, 423 U.S.1050 (1976).
- ¶20, Note 38: Correction: 518 F.2d 352, 363 (9th Cir.
1975), cert. denied, 423 U.S. 1050 (1976).
- ¶20, Note 39: Correction: 415 F.Supp. 997 (D.Md. 1976).
- ¶20, Note 40: Correction: Id. at 1019.
- ¶20, Note 40: Following United States v. Roselli: United
States v. Walsh, 544 F.2d 156 (4th Cir.
1976) (conspiracy to commit sports bribery).
- ¶20, Note 41: Correction: United States v. Mandel,
415 F.Supp. 997, 1018-1019 (D.Md. 1976).

- ¶22, Note 44: Correction 383 F.Supp. 346, 352 (D.Conn. 1974).
- ¶23, Note 47: Correction: See also Catalano v. United States, 383 F.Supp. 346, 353 (D.Conn. 1974) ("Except in the unusual situation where the decision maker cannot rationally determine the facts, the opportunity for confrontation and cross examination of those furnishing evidence against the inmate is not requiredCounsel need not be furnished.").
- ¶23, Note 47: Following Catalano v. United States: Holmes v. United States Board of Parole, 541 F.2d 1243, 1249-1253 (7th Cir. 1976).
- ¶23, Note 47: Correction: Masiello v. Norton, 364 F.Supp. 1133, 1135-1137 (D.Conn. 1973).
- ¶28, Note 59: Correction: §§39-9-4.
- ¶30, Note 63: Correction: Law of May 20, 1970, ch. 1003, §1, 1970 N.Y. Laws.
- ¶31, Note 64: Correction: 39 N.Y.2d 217, 383 N.Y.S.2d 271, 347 N.E.2d at 633 (1976).
- ¶31, Note 65: Correction: Id. at 224, 383 N.Y.S.2d 274, 347 N.E.2d at 636.
- ¶31, Note 66: Correction: Id. at 223, 383 N.Y.S.2d at 273, 347 N.E.2d at 635.
- ¶31, Note 66: Correction: In re Sussman v. N.Y. State O.C.T.F., 39 N.Y.2d 227, 383 N.Y.S.2d 276, 347 N.E.2d 638 (1976).

- ¶34, Note 73: Following Sheets v. Hathcock: (The Court strongly criticized the broad grant of power).
- ¶41, Note 86: Correction: 39 N.Y.2d 227, 383 N.Y.S. 2d 276, 347 N.E.2d 638 (1976).
- ¶41, Note 87: Correction: 39 N.Y.2d 217, 383 N.Y.S.2d 271, 347 N.E.2d 633 (1976).
- ¶41, Note 88: Correction: 39 N.Y.2d 227, 229, 383 N.Y.S.2d 276, 277, 347 N.E.2d 638, 639 (1976).
- ¶41, Note 89: Correction: Id. at 233, 383 N.Y.S.2d at 279-280, 347 N.E.2d at 641-642.
- ¶42, Note 94: Correction: In re Falone, 464 Pa. 42, 346 A.2d 9 (1975).
- ¶44, Note 97: Correction: In re Falone, 464 Pa.42, 346 A.2d 9 (1975).

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REC: FED.

FEDERAL LAW OF BRIBERY, EXTORTION, AND GRAFT

OUTLINE

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SUMMARY

¶1 Federal law prohibits both bribery and graft in a single statute, 18 U.S.C. §201. Except for the standard of mental culpability, the crimes are almost identical. The prosecution must prove a gift or an offer or a solicitation or an acceptance of, anything of value, either directly or indirectly. The crucial difference between the crimes is the state of mind requirement. A bribe must be made with the intent to influence or be influenced corruptly. Intent is not required to convict for graft if the defendant knew that the payment was made otherwise than as provided by law. The graft sections specify a lesser included offense to the bribery provisions. Both crimes must involve federal officers. This element is considered a jurisdictional element, and no state of mind need be shown in reference to it.

¶2 Extortion is prohibited under federal law by the Hobbs Act. Jurisdiction is based on conduct that "affects" interstate commerce. This interstate element has been liberally construed; it states a jurisdictional element. The Hobbs Act includes two types of extortion. The first consists of the use of fear to obtain another's property. The second consists of the use of one's official office to obtain another's property. Under this second definition, the use of fear is not required. The Hobbs Act does not express a state of mind requirement. The courts seem to require proof of an intent to exploit the victim's reasonable fear or belief.

¶3 Both extortion and bribery are also federal crimes under the Travel Act if they involve the use of any interstate facility. The Travel Act prohibits use of any interstate facility to further any unlawful activity. Both bribery and extortion are included in this class of unlawful conduct. While there is some disagreement, the interstate nature of the facility probably constitutes a jurisdictional element as to which no state of mind is required. The prosecution must prove an intent to engage in activity that is in fact unlawful.

I. THE FEDERAL LAW OF BRIBERY

A. Basic Statutory Provisions

¶4 The basic provision of federal law relating to bribery can be found in 18 U.S.C. §201.¹ This section

¹The relevant portions of 18 U.S.C. §201 read as follows:

§201. Bribery of public official and witnesses
(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent-

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be an official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

1 (continued)

(c) Whoever, being a public official or person selected to be a public, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom-

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

was passed in 1962 as a standardization and consolidation of more than twenty separate provisions of the earlier code.² Although section 201 applies generally to all

1 (continued)

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom-

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

²Prior to 1962, there were at least 23 separate statutes which covered bribery offenses in Title 18 of the United States Code. The old code provisions were organized as follows:

- 18 U.S.C. §§201-202 (1958) (general)
- 18 U.S.C. §§204-205 (1958) (members of Congress)
- 18 U.S.C. §§206-208 (1958) (Judges and judicial officers)
- 18 U.S.C. §§203, 209-210, 1503-05 (other persons in legal administration)
- 18 U.S.C. §§211, 213 (1958) (revenue and customs officers)
- 18 U.S.C. §§214-215 (1958) (those procuring public office)
- 18 U.S.C. §§217-223 (1958) (government banking and lending operations). Congress specifically

public officials, there still exist a number duplicative statutes that prohibit bribery involving specified government officials.³ In general, section 201(b) prohibits the offering or making of a bribe to a public official, while section 201(c) prohibits its solicitation or acceptance.

B. Elements of the Offense

1. Conduct

a. Section 201(b)--the donor

¶5 Three forms of conduct are prohibited by this section: giving, offering or promising anything of value to a public official. If the culpable intent is present,⁴ the gravamen of the offense is the conduct itself, not the result.

2 (continued)

negatived any intent to restrict the broad scope that the courts gave to the earlier statutes. S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 3852-3. As a result, the rationale of decisions under the earlier statutes remains relevant.

³ 7 U.S.C. §60, 87(b), 473(c)(1), (2), 511(i)(d), and 511 (k) (all employees and inspectors under cotton standards, grain standards, cotton statistics and estimates, tobacco inspection, and Farmer's Home Acts).

19 U.S.C. §1620 (customs officers), 21 U.S.C. §622 (meat inspectors), 26 U.S.C. §7214 (revenue officers), 33 U.S.C. §447 (navigation inspectors), 33 U.S.C. §990 (St. Lawrence Seaway officials), 43 U.S.C. §254 (Homestead Act Officials).

The following Title 18 provisions also prohibit official bribery in certain cases: 18 U.S.C. §§152 (bankruptcy officials), 217 (officers of Dept. of Ag. adjusting farm indebtedness), 1912 (vessel inspectors).

4

State of mind requirements are discussed infra at paragraphs 19-21.

In United States v. Kemmel⁵ it was noted that,

The statute is violated when an offer to bribe is made regardless of the occasion therefore provided it is done with the requisite intent and the offeree is a person of the sort described in the statute.⁶

Hence, it makes no difference that the official to whom the bribe was given or promised was not actually influenced or corrupted⁷ or that the official does not actually have the authority to bring about the result which the offeror desires.⁸

¶6 It has been held that section 201(b) states three separate offenses. In United States v. Lubomski⁹ the court said,

Three separate and distinct activities may form the basis of a violation of section 201, since the giving, offering or promising something of value are stated disjunctively in the statute. Each constitutes a different means of violating the statute, and consequently it has been held that each of the three modes may give rise to a separate and distinct offense even when parts of a single transaction, since each involves an element which the others do not.¹⁰

⁵188 F.Supp. 736 (M.D. Pa. 1960), aff'd per curiam, 295 F.2d 712 (3d Cir. 1961), cert. denied, 368 U.S. 988 (1962).

⁶Id. at 739.

⁷United States v. Anderson, 509 F.2d at 312; (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); United States v. Jacobs, 431 F.2d 754 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

⁸United States v. Anderson, 509 F.2d at 332; United States v. Troop, 235 F.2d 123 (7th Cir. 1956).

⁹United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967).

¹⁰Id. at 716-7. See also United States v. Michelson, 165 F.2d 732 (2d Cir.), aff'd 335 U.S. 469 (1948).

This view was recently upheld in United States v. Bernstein,¹¹ where the court found that:

It was not . . . simply the payment of the money which constituted the offense under section 201; it was also the offering or promising to pay.¹²

Further, it appears that where a bribe is paid by installments, each separate payment, even if part of a single transaction, constitutes a separate violation.¹³

¶7 Finally, the statute does not discriminate between success and failure. As noted in United States v.

Jacobs:¹⁴

The statute makes attempted bribery a crime, and so long as a bribe is 'offered or promised' with the requisite intent to influence any official act the crime is committed.¹⁵

b. Section 201(c)--the recipient

¶8 Section 201(c) is the counterpart to section 201(b).

It prohibits the solicitation of bribes by public officials.

¹¹533 F.2d 775 (2d Cir. 1976).

¹²Id. at 800. But see United States v. Kemler, 44 F. Supp. 649 (D.C. Mass. 1942), for the opposite view that the forerunner to section 201 did not create separate offenses and that the statute should be read conjunctively.

¹³United States v. Anderson, 509 F.2d at 333. See also United States v. Cohen, 384 F.2d 699, 700 (2d Cir. 1967); United States v. Donovan, 339 F.2d 404, 410 (7th Cir. 1964), cert. denied, 380 U.S. 975 (1965); United States v. Alaimo, 297 F.2d 604, 606 (3d Cir. 1961), cert. denied, 369 U.S. 817 (1962).

¹⁴431 F.2d 754 (2d Cir. 1970), cert. denied, 402 U.S. 950, reh. denied, 403 U.S. 912 (1971).

¹⁵Id. at 760.

The conduct requirements are met by showing that a public official "asked," "demanded," "exacte^d," "solicited," "sought," "accepted," "received," or "agreed to receive" anything of value in return for exerting influence.

As with section 201(b), if the culpable intent is shown,¹⁶ the conduct itself, not the result, is the focus of the offense. The Supreme Court noted in United States v. Brewster:¹⁷

There is no need for the government to show that the defendant fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not the performance of the illegal promise.¹⁸

¶19 While courts construed earlier statutes to state separate and distinct offenses,¹⁹ no recent case can be found to that effect. The legislative history of section 201 suggests, however, that these earlier interpretations should still stand.²⁰ In Egan v. United

¹⁶State of mind is discussed infra at paragraphs 19-21.

¹⁷408 U.S. 501 (1972).

¹⁸Id. at 526.

¹⁹See Egan v. United States, 287 F. 958 (D.C. Cir. 1923).

²⁰The senate report that accompanied this bill noted that:

A secondary feature of the bill is the substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts.

States,²¹ the court dealt with the defendant's claim that the indictment that charged him with bribery was duplicative. The court held that the statute properly stated three separate offenses.²² It has not been decided whether each act of acceptance, though part of a single transaction, constitutes a separate violation.²³ Like section 201(b), section 201(c) places attempts on the same footing with success.²⁴

2. Attendant circumstances

a. Public official

¶10 Both sections are directed at bribes involving a "public official" who is defined in section 201(a).²⁵ Section 201(a) does not include former public officials. It is limited to present public officials and those who by appointment, election or nomination will soon become public officials.

²¹287 F. 958 (D.C. Cir. 1923).

²²Id. at 961-62. See also United States v. Raff, 161 F. Supp. 276, 282 (M.D. Pa. 1958) (the court found that the statute which read, "accepts or receives," stated two separate offenses).

²³Again, the legislative history and earlier decisions construing different sections of the same statute imply that it would. See notes 19, 20 supra.

²⁴In United States v. Russel, 255 U.S. 138, 143 (1921) the Supreme Court commented:

Guilt is incurred by the trial [attempt]-- success may aggravate, it is not a condition of it.

²⁵Set out at note 1 supra.

¶11 Four groups of officials are included in section 201(a):

- (1) Members of Congress
- (2) Officers or employees of the United States
- (3) Persons acting for or on behalf of the United States in any official function
- (4) Jurors

In Hurley v. United States,²⁶ it was decided that the phrases "officer or employee" and "person acting for or on behalf of the United States in any official function" should be read disjunctively. The phrase "in any official function," therefore, modifies only the word "person" and not the phrase "officer or employee."²⁷ Hence, it is no defense that a bribe was offered to an officer or employee not acting in an official function. This reasoning under the earlier statute was accepted and applied by the Fifth Circuit in Parks v. United States.²⁸

¶12 The courts have construed the phrase "officer or employee" literally.²⁹ The phrase has been taken to

²⁶192 F.2d 297 (4th Cir. 1951).

²⁷Id. at 299.

²⁸355 F.2d 167 (5th Cir. 1965).

²⁹The rationale for this position was suggested in Sears v. United States, 264 F. 257 (1st Cir. 1920):

Final decisions frequently, perhaps generally, rest in large part upon honesty and efficiency of preliminary advice. . . . Honesty at the top is not enough; it must begin at the bottom and run through the whole service.

Id. at 261.

include a warehouseman at an Air Force base,³⁰ a narcotics agent,³¹ an internal revenue collector,³² a camp administrator at a federal prison,³³ and a representative of the Small Business Administration.³⁴

¶13 The courts have liberally construed the phrase "person acting for or on behalf of the United States in any official function." It has been interpreted to include civilians temporarily charged with federal responsibility, whether part-time or full-time, paid or unpaid.³⁵ Nevertheless, full federal funding of a city employee's salary is insufficient to create a "public official" within the meaning of the statute.³⁶

³⁰Fulks v. United States, 283 F.2d 259 (9th Cir.), cert. denied, 365 U.S. 812, reh. denied, 365 U.S. 864 (1960).

³¹Hone Wu v. United States, 60 F.2d 189 (7th Cir. 1932).

³²United States v. Piazza, 148 F.2d 334 (2d Cir. 1945).

³³United States v. Alessio, 528 F.2d 1079 (9th Cir.), cert. denied (1976).

³⁴United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974), reh. denied, 420 U.S. 939 (1975).

³⁵Kemler v. United States, 133 F.2d 235 (1st Cir. 1943) (examining physician at Selective Service Board); Harlow v. United States, 301 F.2d 361 (5th Cir.), cert. denied, 371 U.S. 814 (1962) (civilian employees of European Exchange System).

³⁶United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976); United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

¶14 It is immaterial under this section whether the officer to whom the bribe was offered or given could bring about the desired result.³⁷

¶15 In United States v. Jennings,³⁸ the defendant contended that his ignorance that the offeree was a federal official barred prosecution under section 201. The court refused to recognize such a defense, writing:

Though the official must be a federal official to establish the federal offense, nothing in the statute requires knowledge of this fact which we perceive as a jurisdictional rather than an a scienter [emphasis in original] requirement.³⁹

b. Anything of value

¶16 Section 201(b) prohibits anyone from offering, promising, or giving "anything of value" to a public official. Identical language appears in section 201(c). Almost invariably, the payments involve cash. The phrase, however, is not limited to payments of cash.

³⁷ United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975) (no defense that officer lacked power to bring about desired result); United States v. Hall, 245 F.2d 338 (2d Cir. 1957) (no defense that immigration inspector had no authority to grant or deny particular application); Wilson v. United States, 230 F.2d 521 (4th Cir.), cert. denied, 351 U.S. 931 (1956) (no defense that defendant was no longer directly in chain of supervision); United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967) (immaterial that person bribed is without authority to bring about desired result).

³⁸ 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973).

³⁹ Id. at 1312.

Thus, in United States v. Pommerening,⁴⁰ the gift of a five thousand dollar car constituted a violation.

c. Directly and indirectly

¶17 In United States v. Rosner,⁴¹ the fact that the money was filtered through an intermediary was held to be immaterial on the question of liability since section 201(b) expressly prohibits indirect payment as well. Regarding direct payments,⁴² identical language exists in section 201(c).

d. Any other person or entity

¶18 Section 201(b) and (c) expressly forbid bribes both to the public official himself and to any other person or entity. At some point, a payment made to "any other person or entity" is no different than an indirect payment. Thus, in United States v. Brewster,⁴³ the court considered payments that were made to a campaign committee both as payments to a separate entity and as payments made indirectly to the defendant.⁴⁴

3. State of mind

a. Standard of mental culpability

¶19 The prosecution must show that the conduct specified

⁴⁰500 F.2d 92, 97.

⁴¹352 F. Supp. 915 (S.D.N.Y. 1972), aff'd 516 F.2d 269 (2d Cir. 1973).

⁴²Id. at 923.

⁴³506 F.2d 62 (D.C. Cir. 1974).

⁴⁴Id. at 75-76.

in sections 201(b) and (c) was undertaken with a specific intent to corrupt.⁴⁵ Hence, under section 201(b), the bribe must be offered or given with the specific intent:

- (1) To influence any official act, or
- (2) To influence such public official or person to aid in committing any fraud on the United States, or
- (3) To induce such public official to do or omit to do any act in violation of his official duty.

Under section 201(c), the bribe must be solicited or accepted with the specific intent "in return for"⁴⁶

- (1) Being influenced in the performance of any official act, or
- (2) Being influenced to commit or aid in committing any fraud on the United States, or
- (3) Being induced to do or omit to do any act in violation of his official duty.

Under both sections, the bribe must be intended to influence future conduct.⁴⁷

b. Proof of intent--direct evidence

¶20 Unlike other crimes, there is always a witness to a bribe. Hence, there is always some direct evidence bearing on the defendant's intent. The scrupulous citizen or public official can be placed on the stand to testify or the conversation itself may be played to the court,

⁴⁵H.R. Rep. No. 748, 87th Cong., 1st Sess. states:

The word 'corruptly' . . . means with wrongful or dishonest intent.

⁴⁶In United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974), this requirement was viewed as a quid pro quo.

⁴⁷It is simply not possible to influence past conduct.

when available.⁴⁸ This kind of direct evidence nearly always establishes the state of mind of the donor, but it is not always sufficient to establish the intent of the recipient who may try to characterize the illicit receipt as graft, the lesser offense.

c. Proof of intent--circumstantial evidence

¶21 Payment of the bribe itself, of course, is strong circumstantial evidence of an individual's intent.⁴⁹ Evidence that relates to the opportunity and motive is also important. For example, a taxpayer who offers a sum of money to an agent of the Internal Revenue Service during the course of an audit is in a poor if not impossible position to contest the matter of his intent.⁵⁰ Evidence that describes the defendant's official capacity and the matter that was pending before him was properly admitted in Stephens v. United States⁵¹ in a prosecution

⁴⁸ See Lopez v. United States, 373 U.S. 427 (1962), reh. denied, 375 U.S. 870 (1963); United States v. Greenberg, 445 F.2d 1158 (2d Cir. 1971); United States v. Koska, 443 F.2d 1167 (2d Cir.), cert. denied, 404 U.S. 852 (1971); United States v. Madda, 345 F.2d 400 (7th Cir. 1965).

⁴⁹ United States v. Barash, 365 F.2d 395 (2d Cir. 1966), cert. denied, 396 U.S. 832 (1967). The fact of payment, however, is not sufficient in itself to establish the requisite intent under section 201(b).

⁵⁰ See United States v. Harary, 457 F.2d 471 (2d Cir. 1972); United States v. Barash, 365 F.2d 395 (2d Cir. 1966). But see United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977), discussed infra at note 90.

⁵¹ 347 F.2d 722 (5th Cir. 1965).

for bribery. Testimony that shows convictions for similar prior crimes may also be admitted.⁵²

4. Defenses

a. Entrapment

¶22 Entrapment is frequently raised as a defense to a charge of bribery.⁵³ If proven, it is a complete defense to the charge. Speaking for the Court in Lopez v. United States,⁵⁴ Mr. Justice Harlan described the defense:

The conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents. [emphasis in original]⁵⁵

To establish the defense, the defendant must show that the alleged offense was instigated by the law enforcement officials.⁵⁶ Yet if the plan of bribery originates with the defendant and officers merely provide an opportunity for its fulfillment, there is no entrapment.⁵⁷

b. Extortion

¶23 Extortion is also a frequently raised defense to a charge of bribery. The defendant will try to prove

⁵²United States v. Roberts, 408 F.2d 360 (2d Cir. 1969).

⁵³For a case where entrapment was established, see United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957).

⁵⁴373 U.S. 427 (1963).

⁵⁵Id. at 434.

⁵⁶United States v. Russell, 411 U.S. 423 (1973).

⁵⁷United States v. Tartar, 439 F.2d 1300 (9th Cir.), cert. denied, 404 U.S. 866 (1971).

that the bribe was coerced. In United States v. Barash⁵⁸ the court found that extortion was not a complete defense like duress, but that it bore on the state of mind necessary for the commission of bribery.⁵⁹ Hence, the jury is allowed to weigh this evidence in determining whether the defendant had the state of mind necessary to commit bribery.

II. THE FEDERAL LAW OF GRAFT

A. Basic Statutory Provisions

¶24 Section 201 may be severed into a bribery prohibition composed of subsections (b) and (c), and a graft prohibition consisting of subsections (f) and (g).⁶⁰ The graft provisions were first added to section 201 in 1962.⁶¹ Section (f) prohibits graft by the donor while section (g) prohibits graft by the recipient. The purpose of these sections was described in United States v. Brewster:⁶²

The gratuity sections (f) and (g) . . . were primarily designed to take care of the case where the illegal payer offers a public official a gift for doing what the public official is paid to do anyway.⁶³

⁵⁸United States v. Barash, 365 F.2d 395 (2d Cir. 1966).

⁵⁹Id. at 401.

⁶⁰These sections are set out at note 1, supra.

⁶¹The constitutionality of these sections has been upheld. United States v. Irwin, 354 F.2d 192, 196 (2d Cir.), cert. denied, 383 U.S. 967 (1965).

⁶²506 F.2d 62 (D.C. Cir. 1974).

⁶³Id. at 72 n.26.

Graft is distinguished from bribery in that the element of intent to influence or be influenced need not be alleged or proved.⁶⁴ This is the crucial distinction between the two. The elimination of the element of specific intent was explained in United States v. Irwin:⁶⁵

The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not.⁶⁶

¶25 The two crimes can be distinguished on three further grounds. First, (f) and (g) reach offers of anything of value to former as well as present public officials whereas (b) and (c) do not include former public officials.⁶⁷ Second, under (f) and (g) an offense is committed only if the payment is made directly or indirectly to the public official. By contrast, a bribe under (b) and (c) can be paid to the public official, or to any other person

⁶⁴This is the crucial distinction between the bribery and graft provisions. See United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974); United States v. Barash, 412 F.2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969); United States v. Irwin, 354 F. 192 (2d Cir.), cert. denied, 383 U.S. 967 (1965). It has also been suggested that the graft provisions were added because it was often difficult to prove intent. Hearings on H. Rep. No. 2156 before the Antitrust Subcom. of the House Com. on the Judiciary, 86th Cong., 2d Sess., ser. 17, pt. 2 at 613 (1960).

⁶⁵354 F.2d 192.

⁶⁶Id. at 196.

⁶⁷Discussed infra ¶28.

agreed upon by the parties.⁶⁸ Third, (f) and (g) reach payments "for or because of" official action. Thus, these sections apply to money given for past acts while (b) and (c) extend to bribery with intent to influence future action.⁶⁹

B. Elements of the Offense

1. Conduct

a. Section 201(f)

¶26 There is no difference between the conduct proscribed by this section and that which is prohibited by section 201(b).⁷⁰ Presumably, like subsection (b), the offenses in subsection (f) are to be read disjunctively.⁷¹ There is no reason to expect that identical language within the same provision would be given inconsistent meanings.⁷² As a result, each offense, even if part of the same transaction, would give rise to separate and distinct liability. The language of section 201(f) specifically prohibits offers as well as gifts. An attempted gift

⁶⁸ Discussed infra ¶30.

⁶⁹ Discussed infra ¶28.

⁷⁰ This conduct requirement is discussed supra ¶¶5-7.

⁷¹ Apparently, this point has not yet been decided. Even so, the cases so construing section 201(b) would lend support to this view. See United States v. Bernstein, 533 F.2d 775, 800 (2d Cir. 1976); United States v. Lubomski, 277 F. Supp. 713, 716-7, (N.D. Ill. 1967).

⁷² Unless, of course, the court chose to read the section conjunctively, Cf. United States v. Kemler, 44 F. Supp. 649 (D.C. Mass. 1942).

under this section would also be treated no differently than a completed gift.

b. Section 201(g)

¶27 Again, the conduct that is prohibited under this subsection is the same as that which is proscribed under subsection 201(c).⁷³ As the discussion above indicates, there is no reason to expect that the courts would view the language in this subsection differently than the identical language in subsection (c).

2. Attendant circumstances

a. Public official

¶28 Like the bribery provisions of subsections (b) and (c), the graft provisions are directed at gratuities involving a "public official" as defined in subsection (a). Unlike the bribery provisions, the prohibitions of subsections (f) and (g) extend to former as well as present public officials. In addition, the graft section would prohibit payments "for or because of any official act," thus encompassing past, present and future acts.⁷⁴

b. Anything of value

¶29 This language is identical to that in subsections

⁷³The conduct requirement of section 201(c) is discussed above at I(B)(1)(b).

⁷⁴See United States v. Bishton, 463 F.2d 887, 892 (D.C. Cir. 1972), where the court said,

[W]e have no doubt that Congress intended to reach demands and acceptances of money for acts already performed....

(b) and (c). As mentioned above,⁷⁵ it must be taken to mean what it says.

c. Directly or indirectly

¶30 Subsections (b) and (c) bar payments made either to the public official or any other agreed upon person or entity. The graft prohibitions extend only to payments made directly or indirectly to the public official. In United States v. Brewster,⁷⁶ the court looked through payments made to the defendant's campaign committee and found payments made indirectly to the defendant in violation of section 201(g).

d. Otherwise than as provided for by law

¶31 This is the crucial clause. It constitutes an attendant circumstance; it is also necessary to show state of mind in reference to it. The prosecution must prove (1) that the conduct was in fact otherwise than as provided by law and (2) that the defendant knew that the conduct was otherwise than as provided by law. An offer or solicitation prompted through inadvertance or mistake or by some other innocent reason would thus be excluded from the section.⁷⁷

3. State of mind

a. Standard of mental capacity--ability

¶32 Intent is not required under either section 201(f)

⁷⁵ See paragraph 17, supra.

⁷⁶ 506 F.2d 62, 75-76 (D.C. Cir. 1974).

⁷⁷ United States v. Irwin, 354 F.2d at 197.

or (g).⁷⁸ Instead, the prosecution must prove that the defendant acted with knowledge of the attendant circumstances. It must show that the defendant knew that the payment was offered or solicited otherwise than as provided by law for the proper discharge of official duty.⁷⁹

b. Proof of knowledge--direct evidence

¶33 Proof of knowledge is available through testimony by either the donor or the recipient or both. Direct evidence is also obtainable by the use of wiretapping and bugging devices. In United States v. Harary,⁸⁰ conversations obtained by the use of a concealed tape recorder were used in a prosecution under section 201(b) and (f).

⁷⁸See comment and authorities cited at note 64, supra.

⁷⁹In United States v. Irwin, 354 F.2d at 197, the court noted,

Obviously Congress made a distinction between the two groups of subsections and purposely omitted from the latter group the description of the specific intent which was an essential element of the former.

This does not mean, however, that intent is not an essential element of the offense set forth in §200(f). Although the specific intent of subsections (b) through (e) are not required, nevertheless, to convict an accused under subsections (f) through (i), it is necessary that the Government prove that he committed the act prohibited knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons.

⁸⁰457 F.2d 471, 473-74 (2d Cir. 1972).

c. Proof of knowledge--circumstantial evidence

¶34 Actual payment or receipt of a gratuity bears on the defendant's knowledge, though it may not be sufficient to establish knowledge.⁸¹ In United States v. Polansky,⁸² the prosecution was permitted, over objection, to cross-examine the defendant about his financial condition during the years in question.⁸³ The court found this line of questions reasonably probative of the defendant's motive for seeking and accepting gratuities.

4. Defenses

a. Entrapment

¶35 The principles relating to the use of entrapment as a defense are discussed above at paragraph 22. There is no reason to expect that these same principles would not apply to a prosecution for graft.

b. Extortion

¶36 Few cases have raised the issue of whether showing extortion would constitute a defense to a charge of graft. In United States v. Barash,⁸⁴ the court expressed the view that extortion was not properly available as a defense

⁸¹Proof of payment alone was insufficient to prove specific intent under the bribery provisions of §201. United States v. Barash, 365 F.2d 395, 402-3 (2d Cir. 1966).

⁸²418 F.2d 444 (2d Cir. 1969).

⁸³Id. at 448.

⁸⁴365 F.2d 395 (2d Cir. 1966).

to crimes that have no requirement of specific intent.⁸⁵
Its rationale was that extortion only tended to negate
the specific intent requirement of bribery.

C. Relationship Between the Bribery and Graft Provisions
of Section 201.

¶37 The relationship between 201(b) and (c) and 201
(f) and (g) was set out in United States v. Umans,⁸⁶
where the court stated,

[T]he correct relationship between §201(b) and
§201(f) is that §201(f) is a lesser included
offense of §201(b).⁸⁷

The court held that the lesser conviction should be va-
cated where a single transaction resulted in convictions
and sentences under both sections.⁸⁸ The jury may con-
sider both charges only where an element of required

⁸⁵Id. at 402. This proposition has been cited with
approval in United States v. Ramzy, 446 F.2d 1184, 1186
(5th Cir.), cert. denied, 404 U.S. 992 (1971).

⁸⁶368 F.2d 725 (2d Cir. 1966), cert. denied, 389 U.S.
80 (1967).

⁸⁷Id. at 730. See also United States v. Brewster, 506
F.2d at 72; United States v. Harary, 457 F.2d at 475.

⁸⁸In so holding, the court said,

There is no reason to believe that Congress
intended that there should be concurrent con-
victions and sentences under both sections,
and we should not allow multiple convictions
based on the same transactions even where
the sentences are concurrent.

United States v. Umans, 368 F.2d at 730.

proof is in dispute. The Supreme Court has held:

A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.⁸⁹

Since there are no contradictory elements of proof between the different sections of 201, the only additional element, the requirement of intent, must be in dispute if the jury is to be charged on both offenses.⁹⁰

⁸⁹Sansone v. United States, 380 U.S. 343, 350 (1965).

⁹⁰See United States v. Harary, 457 F.2d 471; United States v. Brewster, 506 F.2d 62. See also United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977). This case provides a good fact pattern to illustrate the difference between bribery and graft. The court found that defendant's offer of \$1500 to an IRS agent during an audit could be merely graft and defendant was entitled to a jury charge on that lesser included offense in addition to the charge on bribery. The facts were that the defendant repeatedly told the agent that he had done nothing wrong and wanted to assist in getting material together to complete the audit; the IRS agent criticized the work done by defendant's accountant and offered to work with the defendant in reconstructing the records.

III. THE FEDERAL LAW OF EXTORTION--THE HOBBS ACT

A. Basic Statutory Provisions

¶38 The federal law of extortion is contained in a number of sections scattered throughout the code.⁹¹ The single

⁹¹18 U.S.C. §872 (1970) punishes by up to three years in prison any officer or employee of the United States who commits or attempts to commit an act of extortion. The statute reads as follows:

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than \$5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed \$100, he shall be fined not more than \$500 or imprisoned not more than one year, or both.

The statute nowhere defines "extortion." In United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947), the court distinguished extortion at common law from the extortion described by this statute:

At common law, if a public employee under color of his office demanded and received money or a thing of value to which he was not entitled, he was guilty of extortion.... The instant statute requires more. It does more than substitute color of office for fear, threats, or pressure. The use of official position must be coupled with extortion. Under this statute, a Federal employee is guilty only if he uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily. It is the oppressive use of official position that is the essence of this offense. Official acts must be committed which cause another to act by reason of the pressure therefrom and not of his own volition.

most important of these is the Hobbs Act, 18 U.S.C. §1951.⁹² Unlike the statutes regulating conduct that

92 (continued)

Thus, this statute expanded the common law meaning of extortion. Unlike the provisions of the bribery and graft sections, this statute has been construed narrowly. United States v. Kelly, 86 F.2d 613 (2d Cir. 1936). This statute fails to express a state of mind requirement. Of the handful of cases that have been brought under this statute, indictments that charged the defendant with willful, knowing, unlawful, and corrupt use of federal office was held sufficient. United States v. Sutter, 160 F.2d at 755.

I.R.C. §7214(a) is a more specific statute. It punishes by up to five years in prison any revenue officer who is found guilty of extortion.

18 U.S.C. §874 (1970) makes it a crime to coerce kickbacks from employees engaged in public works financed in whole or in part by grants from the United States. A conviction can lead up to five years in prison.

18 U.S.C. §875 (1970) makes it a crime to transmit by interstate facilities any communication containing either a demand for ransom or a threat to kidnap or injure someone.

18 U.S.C. §§876, 877 punish the use of the foreign or domestic mails to engage in any scheme to extort.

18 U.S.C. §894 punishes by up to twenty years persons who engage in extortionate credit transactions.

⁹²The Hobbs Act provides in part:

§1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section-

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened

is distinctively of federal concern,⁹³ the Hobbs Act assumes federal jurisdiction to punish conduct of a wider scope, that is, conduct that would otherwise fall within the police power of the States. This jurisdiction is based on the power to regulate conduct that "affects" interstate commerce. Hence, it is not so much the conduct as the result that is technically forbidden under the Hobbs Act since acts of extortion that do not affect commerce are beyond the scope of the statute.⁹⁴

B. Elements of the Offense

1. Conduct

¶39 The conduct proscribed by the Hobbs Act is an

92 (continued)

force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points outside such State; and all other commerce over which the United States has jurisdiction.

⁹³18 U.S.C. §§201 and 872 are examples of these.

⁹⁴In light of the decisions discussed infra, it seems fair to ask whether it is possible to commit extortion without in some way or degree affecting commerce.

act or attempted act of extortion by a public official.⁹⁵

The act defines extortion as

the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.⁹⁶

Until recently,⁹⁷ almost all prosecutions of local officials for extortion under this act proceeded on the theory that wrongful use of force or fear constituted the act of extortion.⁹⁸ In United States v. Kenny,⁹⁹ however, it was recognized for the first time that this definition of extortion should be read disjunctively:

⁹⁵Actually, the Act proscribes much more than extortion, but these proscriptions are beyond the scope of this paper. See generally Annot., 4 A.L.R. FED. 881 (1970); 67 AM. Jur. (second) Robbery §§100-103 (1973).

⁹⁶18 U.S.C. §1951(b)(2) (1970).

⁹⁷This development is discussed in 62 Va. L. Rev. 439, 443 (1976).

⁹⁸United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974); United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974); United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied sub. nom. 409 U.S. 914 (1972); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968); United States v. Sopher, 362 F.2d 523 (7th Cir.), cert. denied, 385 U.S. 928 (1966); Ladner v. United States, 168 F.2d 771 (5th Cir.), cert. denied, 335 U.S. 827 (1948); United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965).

⁹⁹462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972).

The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress.¹⁰⁰

In 1974, the first¹⁰¹ prosecution under the Hobbs Act to rely solely on the "color of official right" definition of extortion was affirmed by the Seventh Circuit in United States v. Staszuk.¹⁰² Since then, this reading of the act has been upheld in every case in which the point has been raised.¹⁰³ Thus, the act defines extortion in two distinct ways. One involves the wrongful use of fear; the other involves the wrongful use of office.

¶40 This new reading of the act created another issue: the meaning of extortion by "color of official right." As a practical matter, the issue is whether the disjunctive

¹⁰⁰Id. at 1229.

¹⁰¹In Kenny, the defendants were charged with extortion through the wrongful use of fear and under the "color of official right" provision.

¹⁰²502 F.2d 875 (7th Cir. 1974), rev'd on other grounds, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975).

¹⁰³United States v. Hall, 536 F.2d 313 (10th Cir. 1976), cert. denied (1977); United States v. Hathaway, 534 F.2d 386 (1st Cir. 1976), cert. denied, (1977); United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); United States v. Mazzei, 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); United States v. Price, 507 F.2d 1349 (4th Cir. 1974); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

reading of the statute obviates the need to prove duress in a prosecution for extortion under the Hobbs Act.

¶41 In United States v. Kenny,¹⁰⁴ the court stated that the "under color of official right" language repeated the common law definition of extortion.¹⁰⁵ As noted above,¹⁰⁶ duress was not an element of the offense at common law. Extortion was simply the taking by color of office¹⁰⁷ something of value that was not due, or before it was due or more than was due.¹⁰⁸ In United States v. Mazzei,¹⁰⁹ the court noted that:

Under the common law definition of extortion color of public office took the place of the coercion implied in the ordinary meaning of the word extortion.¹¹⁰

¹⁰⁴462 F.2d 1205.

¹⁰⁵Id. at 1229.

¹⁰⁶See note 91 supra for discussion.

¹⁰⁷At common law, "extortion" could only be committed by public officials. The same act if committed by a private individual was called "blackmail." See 5 Loy. Chi. L.J. 513, 518-9 (1974).

¹⁰⁸United States v. Laudani, 134 F.2d 847 (3d Cir. 1943), rev'd on other grounds, 320 U.S. 543 (1944).

¹⁰⁹521 F.2d 639 (3d Cir.), cert.denied, 423 U.S. 1014 (1975).

¹¹⁰Id. at 645. See also Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), cert. denied, 349 U.S. 915 (1955), where the court said:

Defendants are referring to the common law offense of extortion where, in the case of public officials, color of office takes the place of force, threats, and pressure.

The Mazzei court concluded that a showing of the inducement of payments under "color of official right" could replace proof of "force, violence or fear" in a Hobbs Acts prosecution.¹¹¹ Absent this coercive element, however, there is little to distinguish extortion from bribery, and earlier decisions had found that distinction crucial. In United States v. Kubacki,¹¹² the prosecution failed to secure a conviction for extortion under the Hobbs Act because the court held that bribery and extortion were mutually exclusive crimes;¹¹³ the defendant was able to argue successfully that his acts constituted bribery, not extortion.¹¹⁴

¶42 In the 1970's, federal courts began to reject the Kubacki holding that bribery and extortion are mutually exclusive and to prosecute official corruption solely on the basis that property was obtained "under color of official right."¹¹⁵ In United States v. Braasch,¹¹⁶

¹¹¹United States v. Mazzei, 521 F.2d at 645.

¹¹²237 F. Supp. 638 (E.D. Pa. 1965).

¹¹³Id. at 641.

¹¹⁴The Kubacki holding has been scrutinized recently. Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion." 3 Seton Hall L. Rev. 1 (1971); 5 Loy. Chi. L.J. 513 (1974).

¹¹⁵United States v. Kahn, 472 F.2d 272, 278 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

¹¹⁶505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

the court pointed out that

the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive.¹¹⁷

The court held that when the motivation for payment focused on the recipient's office, the conduct fell within the Hobbs Act. It was immaterial that the conduct might also constitute classic bribery.¹¹⁸

¶43 Hence, the current trend is to view the Hobbs Act as stating two definitions of extortion. Under the "color of official right" definition, there is no requirement that the taking involve fear. In United States v. Staszczuk,¹¹⁹ it was sufficient that the evidence show that the public official obtained something of value to which the official is not entitled in return for something that should have been provided without payment.¹²⁰ The second definition of extortion

¹¹⁷Id. at 151.

¹¹⁸Id., where the court stated:

It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951. That such conduct may also constitute 'classic bribery' is not a relevant consideration.

¹¹⁹502 F.2d 875 (7th Cir. 1974), cert. denied, 423 U.S. 837 (1975).

¹²⁰Id. at 882-3.

involves the wrongful use of force or fear to obtain another's property. As the earlier cases indicate,¹²¹ public officials may also be prosecuted for violations under this section of the act. Case law is generally more settled under this wing of the Act's definition of extortion. "Fear" is given a subjective meaning. The prosecution must show that the fear that induced the victim to part with his property was reasonable under the circumstances.¹²² It is not necessary that the prosecution prove that the fear was a consequence of direct threat, if under the circumstances, the victim's fear was reasonable.¹²³ Further, it is not required that the defendant induce the fear himself. It is sufficient that he exploits it.¹²⁴

¶44 In addition, the fear contemplated by the act is not restricted to fear of personal injury. Fear of economic loss comes within the first clause of 18 U.

¹²¹Cases cited at note 98 supra.

¹²²United States v. Quinn, 514 F.2d 1250 (5th Cir.), cert. denied, 424 U.S. 955 (1975); United States v. Tolub, 309 F.2d 286 (2d Cir. 1962).

¹²³The defendant's reputation for violence can be a crucial factor in determining the reasonableness of the victim's fear. See United States v. Stubbs, 476 F.2d 626, 628 (2d Cir. 1973); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

¹²⁴United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. Gorden, 449 F.2d 100 (3d Cir. 1971), cert. denied, 404 U.S. 1058 (1972); Callahan v. United States, 223 F.2d 171 (8th Cir.), cert. denied, 350 U.S. 862, reh. denied, 350 U.S. 926 (1955).

S.C. §1951(b)(2).¹²⁵ It is not required to show that the extortioner derived any personal benefit from his victim's loss, under either definition of extortion. The Act is focused on the victim's loss, not the extortioner's gain.¹²⁶ Similarly, it is no defense to an extortion prosecution under the Hobbs Act that the public official did not actually have the power to achieve the desired result. In United States v. Mazzei,¹²⁷ it was held sufficient that

[the victim] held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine the recipient's of the state leases here involved.¹²⁸

¹²⁵United States v. Brecht, 540 F.2d 45 (2d Cir. 1976); United States v. Emalfurb, 484 F.2d 787 (7th Cir.), cert. denied, 414 U.S. 1064 (1973); United States v. Addonizio, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936, reh. denied, 405 U.S. 1048 (1972); United States v. Jacobs, 451 F.2d 530 (5th Cir. 1971); cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972); United States v. Iozzi, 420 F.2d 512 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971).

¹²⁶United States v. Green, 350 U.S. 415 (1955); United States v. Jacobs, 451 F.2d 530 (5th Cir. 1971); United States v. Provenzano, 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 947 (1964).

¹²⁷521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975).

¹²⁸Id. at 643. See also United States v. Price, 507 F.2d 1349 (4th Cir. 1974).

¶45 In United States v. Addonizio,¹²⁹ the court said that

the essence of the crime of bribery is voluntariness, while the essence of the crime of extortion is duress.¹³⁰

This seems to be an accurate statement only in so far as it construes the first definition of extortion in the Hobbs Act. In cases involving the use of fear, the distinction between extortion and bribery or graft is fairly clear. As noted above,¹³¹ this clarity disappears when extortion under the second wing of the definition is at issue.¹³²

2. Attendant circumstances

a. Public official

¶46 The Hobbs Act is broad enough to reach the extortionate conduct of virtually anyone under the first definition of extortion. Only public officials may be prosecuted under the "color of official right" provision. The cases do not yet define the reach of

¹²⁹451 F.2d 49 (3d Cir. 1971), cert. denied, 405 U.S. 936, reh. denied, 405 U.S. 1048 (1972).

¹³⁰Id. at 77.

¹³¹Supra, ¶41.

¹³²The consequences of this failure to distinguish are significant. Under the graft sections of 18 U.S.C. §201, the maximum term is two years. The maximum is fifteen years for bribery under the same statute. But under the Hobbs Act, a public official is subject to up to twenty years in prison if convicted.

this phrase.¹³³

b. Wrongful

¶47 Under the first clause of section 1951(2), the government must show not only that the victim has parted with property out of fear, but also that the payment was "wrongful." In United States v. Enmons,¹³⁴ the Supreme Court held that the word "wrongful" did not modify the phrase "actual or threatened force, violence, or fear." "Wrongful" limits application of the Act to those instances in which the extortionist has no lawful claim to the property sought, since, the Court reasoned, it would be redundant to speak of "wrongful violence" or "wrongful force."¹³⁵

3. Result

¶48 The statute is limited in its application to extortionate behavior that "in any way or degree . . . affects commerce."¹³⁶ The Supreme Court has sanctioned a broad reading of this phrase. In Stirone v. United States,¹³⁷ the Court stated:

¹³³One court has held that a mere candidate for public office is not subject to prosecution under the Hobbs Act. United States v. Meyers, 395 F. Supp. 1067 (E. D. Ill.), rev'd on other grounds, 529 F.2d 1033 (7th Cir. 1975), cert. denied, 20 Crim. L. Rptr. 4037 (Oct. 20, 1976).

¹³⁴410 U.S. 396 (1973).

¹³⁵Id. at 399-400.

¹³⁶19 U.S.C. §1951(a) (1970).

¹³⁷361 U.S. 212 (1960).

The Hobbs Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws such interference 'in any way or degree.'¹³⁸

Taking their cue from the Stirone decision, the circuit courts have fashioned at least four tests which express this commerce requirement. (1) "Arguably de minimis" test. Unlike the Sherman Act, the Hobbs Act does not require that the effect on interstate commerce be substantial. If the conduct has an actual effect, even if only de minimis, it is forbidden.¹³⁹ (2) "If the threat were carried out" test. In Hulahan v. United States,¹⁴⁰ United States v. Pranno,¹⁴¹ and United States v. Augello,¹⁴² the courts reasoned that a sufficient nexus with commerce had been shown if commerce would have been affected if the threats had been carried out. (3) "Depletion of assets" test. In United States v. Provenzano,¹⁴³

¹³⁸ Id. at 215.

¹³⁹ United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); Battaglia v. United States, 383 F.2d 303 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972).

¹⁴⁰ 214 F.2d 441 (8th Cir.), cert. denied, 348 U.S. 856 (1954).

¹⁴¹ 385 F.2d 387 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968).

¹⁴² 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972).

¹⁴³ 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 947 (1964).

the nexus with commerce was met if the payment of extortion diminished the capacity of the victim to participate in interstate commerce. (4) "Realistic probability" test. Even if the payment of extortion had no actual effect on interstate commerce, the Hobbs Act has been construed to apply where a realistic probability exists, at the time the demand is made, that an extortionate transaction will have some effect on interstate commerce.¹⁴⁴ It is not surprising that commerce jurisdiction has been found in virtually all cases brought under the Hobbs Act.

¶49 Two recent cases, United States v. Yokley¹⁴⁵ and United States v. Culbert,¹⁴⁶ however, have taken a view that would severely limit application of the Hobbs Act. The view can be stated simply; Even though particular conduct may fit the literal language of the Act, that conduct must constitute "racketeering" to be within the scope of the Act.¹⁴⁷ The reasoning of the courts is:

¹⁴⁴United States v. Staszuck 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975). In Staszuck, the defendant was paid \$3,000 for not opposing a zoning change. The zoning change lost anyway. Since it was reasonably possible that the change would be made and that the change might require goods to be shipped interstate, jurisdiction under the Hobbs Act was upheld.

¹⁴⁵542 F.2d 300 (6th Cir. 1976).

¹⁴⁶548 F.2d 1355 (9th Cir. 1977).

¹⁴⁷548 F.2d at 1357; 542 F.2d at 304.

Given the applicable de minimis burden on interstate commerce rule (citations omitted) a contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history also emphasized in Yokley, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty.¹⁴⁸

Neither court indicates what it means by the term "racketeering." Given the holdings in these cases, single instances of armed robbery¹⁴⁹ or extortion¹⁵⁰ performed by one or more persons and not part of a pattern or series of such acts would seem not to be violations of the Hobbs Act no matter what their effect on interstate commerce. If sound, this view would result in a significant loss of federal criminal jurisdiction. The view is not sound.

¶50 First, matters of legislative history and intent are usually relevant where the language of a statute is ambiguous or unclear. Such is not the case here. Robbery or extortion that affect interstate commerce constitute prohibited conduct under the Hobbs Act.¹⁵¹

The statute says nothing whatsoever about "racketeering." It is reasonable to assume that where the language

¹⁴⁸ 548 F.2d at 1357.

¹⁴⁹ United States v. Yokley, 542 F.2d 300 (6th Cir. 1976).

¹⁵⁰ United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977).

¹⁵¹ The relevant portions of the Act are set out supra note 92. Notice the conspicuous absence of any language there which even suggests a "racketeering" restriction.

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of a statute is perfectly clear, that language embodies Congressional intent.¹⁵² It is not reasonable to think that a major restriction on the scope of a statute would find absolutely no expression in the statute.

¶51 Second, to talk in terms of an "unprecedented encroachment on state sovereignty" is inaccurate and begs crucial questions. If liberal application of the Hobbs Act according to its plain language was within the power of Congress, then in one sense there is no "encroachment." A long line of Supreme Court cases hold that Congress has plenary power to regulate activities that

¹⁵²Caminetti v. United States, 242 U.S. 470 (1917). The Supreme Court squarely held: (1) Where the language of a statute is clear and does not lead to absurd results, there is no occasion or excuse for judicial construction; (2) Courts must accept clear statutory language as the sole evidence of ultimate legislative intent; (3) Reports of congressional committees may be resorted to by courts when the meaning of the statute is doubtful and requires interpretation. Caminetti was followed in United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967). Cf. United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1975); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971), where efforts to limit the general language of Title IX of the Organized Crime Control Act of 1970 failed. That organized crime was the principle target of the Act was irrelevant. Similar efforts to limit Title IX to organized crime infiltration only of legitimate business activity have also failed. United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. denied, 97 S. Ct. 736 (Jan. 10, 1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

affect interstate commerce.¹⁵³ As noted above,¹⁵⁴ the Supreme Court has clearly held that through the Hobbs Act, Congress meant to exercise its full power to protect interstate commerce from acts of robbery and extortion.

¶52 Third, there is another reason why the "encroachment" argument is ill-conceived. As Judge Carter's penetrating dissent in Culbert makes clear,¹⁵⁵ the Hobbs Act does not supercede or destroy state criminal jurisdiction over robbery or extortion. Under the Act, federal jurisdiction over such conduct is parallel to that of the states. There is good reason for this. Parallel state and federal jurisdiction over the same criminal activities allows the full investigative and prosecutorial power of both the state and federal governments to be leveled at such activities. Parallel jurisdiction also permits differences of approach and method in controlling what is basically the same kind of criminal activity.

¹⁵³Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). In Barrett v. United States, 423 U.S. 212 (1976), the Supreme Court interpreted a provision of the Gun Control Act of 1968, 18 U.S.C. §922. Under the Court's interpretation, the statute validly made it a federal crime for any convicted felon to receive a gun or use a gun in any crime if the gun had at any time been transported in interstate commerce. Given the breadth of §922, it is perhaps late in the day to worry about federal jurisdiction over extortion.

¹⁵⁴At ¶48. Stirone v. United States, 361 U.S. 212 (1960).

¹⁵⁵United States v. Culbert, 548 F.2d at 1358 (Carter, J., dissenting).

Differences in state and federal interests can be better met. In fact, federal criminal statutes that parallel state criminal statutes are numerous.¹⁵⁶

¶53 Fourth, the legislative history of the Hobbs Act does not show that the statute was meant to be limited to "racketeering." Representative Hobbs described the purpose of his own bill this way:

This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; . . . It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion.¹⁵⁷

¶54 Again as Judge Carter points out, the Yokley-Culbert view would leave gaping holes in federal criminal jurisdiction. For example, attempted extortion of federally insured or chartered banks by means of threats of violence would not be punishable under any federal statute.¹⁵⁸

Federal jurisdiction over official corruption at the

¹⁵⁶ Id.

¹⁵⁷ 89 Cong. Rec. 3217.

¹⁵⁸ United States v. Culbert, 548 F.2d at 1359 (Carter, J., dissenting). It is not at all clear what the law is in the Ninth Circuit regarding attempted extortion of federally insured banks. In United States v. Snell, 550 F.2d 515 (9th Cir. 1977), the court reversed defendants' convictions under the Hobbs Act for an attempted kidnap-extortion scheme. Although the defendants were not charged under the federal bank robbery statute, 18 U.S.C. §2113, the court found that their conduct fell under that statute. The court then held that where conduct falls under §2113, that statute provides the exclusive remedy so that a charge cannot be brought under another federal statute covering the same conduct.

state and municipal level involving single acts of extortion would be nullified.

¶55 In another recent case, United States v. Brecht,¹⁵⁹ the Second Circuit reached a conclusion flatly opposed to the Yokley-Culbert view. The court held that a single instance of the use of economic fear by a private corporation's purchasing agent violated the Hobbs Act. In trying to obtain a kickback from a prospective subcontractor, the purchasing agent demanded a thousand dollars and told the subcontractor that he would not get the pending contract unless he paid. The court stated:

There is no limitation in the Hobbs Act definition of extortion which would exclude the activities of the appellant from its sweep. . . .

Since Congress has not limited the scope of extortion save for the statutory definition itself, we can formulate no judicial rule that would draw a practical line between one type of extortion that is covered by the Hobbs Act and another type which is not.¹⁶⁰

4. State of Mind

a. Standard of mental culpability

¶56 The statute does not express a state of mind requirement nor have the courts carefully addressed the issue. Even so, a standard does emerge from the cases. The prosecution must show the intent to exploit a victim's fear or belief. It is immaterial whether the defendant instilled that fear, so long as he intended to

¹⁵⁹540 F.2d 45 (2d Cir. 1976).

¹⁶⁰Id. at 52.

exploit it.¹⁶¹ In United States v. Braasch,¹⁶² the fact that police shakedowns occurred tended to prove the exploitive intent not only of those who actually participated in the shakedowns, but also of those who knew about them. Consequently, knowledge of the victim's fear, coupled with intent to exploit it, fulfilled the state of mind requirement.

¶57 The commerce requirement is apparently jurisdictional as to which no state of mind need be shown. In United States v. Pranno,¹⁶³ the court said:

All that must be proved . . . is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce.¹⁶⁴

This reading of the act is also fortified by a recent Supreme Court decision, United States v. Feola.¹⁶⁵

b. Proof of intent--direct evidence

¶58 This kind of evidence is often not available in prosecutions of public officials for extortion under

¹⁶¹Cases cited at note 124 supra.

¹⁶²505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

¹⁶³385 F.2d 387 (7th Cir.), cert. denied, 390 U.S. 944 (1967).

¹⁶⁴Id. at 389-90.

¹⁶⁵420 U.S. 671 (1975). In Feola, a factual element that was a jurisdictional requirement of the substantive offense was held to be a jurisdictional element of the conspiracy charge. Prior to Feola, the factual element became an element as to which a state of mind had to be shown in the context of a conspiracy charge.

the Hobbs Act. Under the first clause of section 1951(a)(2), the evidence must point directly to the use of fear to obtain property. Unless the extortionist has actually threatened the victim, this kind of evidence is not available. Payments are often made without much of anything being said. Veiled references to the possible adverse effect of not paying are rarely direct enough to support a conclusion without inference. Similar problems plague the second clause of section 1951(a)(2). Here the direct evidence must link the use of office to the payment. Again, the reference to official capacity is more likely to be veiled than direct. As a result, prosecutions must usually depend on circumstantial evidence.

c. Proof of intent--circumstantial knowledge

¶59 Under either definition of extortion, the actual payment or receipt of payment almost always establishes intent. If the prosecution can prove that the victim's fear or belief was reasonable, the defendant is placed in an untenable position. Formerly, the defendant could raise the defense of bribery.¹⁶⁶ Currently, the courts are leaving the bribery-extortion distinction up to the jury.¹⁶⁷ Almost always, the payment will be otherwise than as provided for by law. If accepted, and if

¹⁶⁶ See United States v. Kubacki, 237 F. Supp. 638 (E.D.Pa. 1965).

¹⁶⁷ See United States v. Addonizio, 451 F.2d 49 (3d Cir.), cert. denied, 465 U.S. 936, reh. denied, 405 U.S. 1048 (1972).

a scheme of extortion can be shown, receipt with knowledge of that scheme by a public official can be considered tantamount to proof of intent. Knowledge of the scheme to extort can be inferred. In United States v. Braasch,¹⁶⁸ evidence of the extortion included the following facts: that defendants knew about the operation since it was openly discussed; that in three and one-half years only three arrests were made at the 53 participating (paying) clubs; and that none of these were made by any of the defendants.¹⁶⁹ Where conspiracy to extort is charged only "slight" evidence is needed to show knowledge of the object of the conspiracy.¹⁷⁰

IV. THE FEDERAL LAW OF EXTORTION AND BRIBERY-- THE TRAVEL ACT

A. Basic Statutory Provisions

¶60 Title 18 Section 1952¹⁷¹ of the United States Code, better known as the "Travel Act," prohibits interstate

¹⁶⁸505 F.2d at 151.

¹⁶⁹Id. at 148.

¹⁷⁰United States v. Braasch, 505 F.2d 139; United States v. Marrapese, 486 F.2d 918 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974); United States v. Nunez, 483 F.2d 453 (9th Cir.), cert. denied, 414 U.S. 1076 (1973); United States v. Robinson, 470 F.2d 121 (7th Cir. 1972).

¹⁷¹The Travel Act reads, in part, as follows,

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

travel or the use of interstate facilities, including the mails,¹⁷² with intent to promote, carry on, or fac-

171 (continued)

(a) Whoever travels in interstate or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the United States, or

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. §1952 (1970).

¹⁷²18 U.S.C. §1341 (1970), the "Mail Fraud Act," is a separate provision of the Code that prohibits the use of the post to further any scheme to defraud. It is more limited than the Travel Act in two respects. First, it regulates only one interstate facility, the mails, while the Travel Act prohibits the use of any interstate facility to further an unlawful act. Second, the Mail Fraud Act prevents the use of the mails to further any "scheme to defraud." This phrase has been interpreted to include bribery but not extortion. Fasulo v. United States, 272 U.S. 620 (1926). The Mail Fraud Act can, however, be an important prosecution tool, especially where there has been insufficient use of interstate facilities to justify a conviction under the Travel Act. United States v. Isaccs, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976, reh. denied, 418 U.S. 955 (1974). To secure a conviction under this

ilitate any "unlawful activity."¹⁷³ Subsection (b)(2) defines unlawful activity to include extortion and bribery in violation of state or federal law. The basis for federal jurisdiction under the Travel Act is similar to that of the Hobbs Act. Here, the violation is in the use of interstate facilities to promote an unlawful activity.¹⁷⁴ Although the Act was intended to combat organized crime,¹⁷⁵ neither its language nor subsequent judicial interpretations so limit it.¹⁷⁶ Even so, the Supreme Court has cautioned that the Act should not be given a broad-ranging interpretation.¹⁷⁷

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Act, the prosecution must show the formation of a scheme to defraud and the use of the mails to further the scheme. United States v. Shavin, 287 F.2d 647, 648-50 (7th Cir. 1961). The gist of the offense is the use of the mails. Hence, proof of a violation of state law is immaterial. United States v. States, 488 F.2d 761 (8th Cir.), cert. denied, 417 U.S. 909 (1973).

¹⁷³A general discussion of the Travel Act can be found in Annot., 1 A.L.R. Fed. 638 (1969).

¹⁷⁴Under the Hobbs Act, jurisdiction is based on activity that "affects" interstate commerce.

¹⁷⁵H. Rep. No. 966, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S. Code Cong. & Ad. News 2664, 2665. See also United States v. Nardello, 393 U.S. 286, 290-92 (1969).

¹⁷⁶United States v. Peskin, 527 F.2d 71, 76-77 (7th Cir. 1975), cert. denied, 45 U.S.L.W. 3249 (Oct. 5, 1976); United States v. Archer, 486 F.2d 670, 678-80 (2d Cir. 1973); United States v. Philips, 433 F.2d 1364, 1367 (8th Cir.), cert. denied, 401 U.S. 917 (1970); United States v. Roselli, 432 F.2d 879, 855 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

¹⁷⁷Rewis v. United States, 401 U.S. 808, 812 (1971);

B. Elements of the Offense

1. Conduct

¶61 The statute specifies two conduct requirements. The prosecution must first show that the defendant utilized some facility of interstate commerce with the intent to commit or promote any "unlawful activity." Second, it must prove that the defendant performed or attempted to perform an act in furtherance of the unlawful activity subsequent to the use of interstate facilities.¹⁷⁸ In United States v. Azar,¹⁷⁹ it was held that:

It is not required that the travel be in itself a criminal act, nor that the subsequent act be itself, unlawful, if it does in truth facilitate the carrying on.¹⁸⁰

177 (continued)

Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

¹⁷⁸ Thus, the Act apparently exempts suppliers from liability as long as they refrain from further participation in the unlawful enterprises.

¹⁷⁹ 243 F. Supp. 345 (E.D. Mich. 1964).

¹⁸⁰ Id. at 350.

This statement of the law remains unchallenged.¹⁸¹

¶62 The circuit courts are split on the issue concerning how much nexus must be shown between the first conduct requirement (i.e. travel or use) and the alleged unlawful activity. In a series of cases, the Fourth Circuit has espoused the view that any use of an interstate facility in furtherance of any of the unlawful acts defined in the act is sufficient to ground federal jurisdiction.¹⁸²

It is immaterial in the Fourth Circuit that the use of interstate facilities is tangential to the unlawful activity. The view of the Seventh Circuit is flatly opposed. It has held that there must be something more than a minimal and incidental use of interstate facilities to justify

¹⁸¹See United States v. Nichols, 421 F.2d 570 (8th Cir. 1970); McIntosh v. United States, 385 F.2d 274, 277 (8th Cir. 1967); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 419-20 (E.D. La. 1972).

¹⁸²In United States v. Weschler, 392 F.2d 344 (4th Cir.), cert. denied, 392 U.S. 932 (1968), the court affirmed a Travel Act conviction based on the deposit of a single out-of-state check into a local bank. In United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970), the court upheld a Travel Act conviction based upon the defendant's cashing groups of out-of-state checks received from a gambling operation. In United States v. LeFaivre, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975), jurisdiction was upheld where the defendants deposited local checks that had to be cleared through interstate facilities.

federal jurisdiction under the Travel Act.¹⁸³ The reasoning of the Seventh Circuit suggests that it is reluctant to disturb sensitive federal-state relationships by broadly construing the Act.¹⁸⁴ The Fourth Circuit, on the other hand, points to the lack of any restrictions in the language of the statute to justify its broader approach.

¶63 An excellent summary of this conflict can be found in a recent Sixth Circuit decision, United States v. Eisner,¹⁸⁵ in which that circuit chose to side with the Fourth Circuit's reading of the statute. The Third Circuit also follows the Fourth. In United States v.

¹⁸³In United States v. Altobella, 442 F.2d 310 (7th Cir. 1971), the victim's use of interstate facilities to cash a check was held not sufficient to hold the defendants liable under the Travel Act. In United States v. McCormick, 442 F.2d 316 (7th Cir. 1971), the defendant placed an ad in a local paper seeking all lottery tickets. Some of these papers were sold out-of-state. Again, the court would not uphold jurisdiction under the Travel Act. Finally, in United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974), jurisdiction was denied where only three out-of-state checks were involved. But see United States v. Rauhoff, 525 F.2d 1170, 1174 (7th Cir. 1975), where the court found that a bribery scheme that involved the cashing of nine checks was covered by the Act. Unlike the single check in Altobella and the three checks in Isaacs, the nine checks in Rauhoff constituted "extensive interstate activity."

¹⁸⁴This view is taken largely from Rewis v. United States, 401 U.S. 808 (1971), in which the Court cautioned against an expansive reading of the Act. Even so, the Seventh Circuit announced similar views in Altobella, prior to the Supreme Court's decision in Rewis.

¹⁸⁵533 F.2d 987 (6th Cir.), cert. denied (1976).

Barrow,¹⁸⁶ it held that interstate travel need not be an integral or essential part of the unlawful activity in order to find jurisdiction under the Travel Act. Like the Fourth Circuit, it found nothing in the enactment that limited its application. While the Seventh Circuit apparently maintains a minority view, its position constitutes a significant burden for the prosecutor in any circuit in which this nexus problem has not been resolved.¹⁸⁷

¶64 In Rewis v. United States,¹⁸⁸ the Supreme Court expressly approved decisions by the circuit courts that upheld section 1952 liability of "individuals whose agents or employees cross state lines in furtherance of illegal activity."¹⁸⁹ The Ninth Circuit applied agency principles to hold an individual liable for causing another to use interstate facilities to promote an un-

¹⁸⁶ 363 F.2d 62, 63 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

¹⁸⁷ A court may choose to avoid the issue. Noting the conflict between the Fourth and Seventh Circuits, the First Circuit in United States v. Hathaway, 534 F.2d 386 (1st Cir. 1976), cert. denied, (1977), found that the higher standard of the Seventh Circuit had been met without deciding whether meeting the lower standard of the Fourth Circuit would have been sufficient.

¹⁸⁸ 401 U.S. 808 (1970).

¹⁸⁹ Id. at 813, citing with approval: United States v. Chambers, 382 F.2d 910, 913-4 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62, 64-5 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965).

lawful activity.¹⁹⁰ While the Court in Rewis, held that the interstate travel by patrons could not be attributed to the operators, it left open the question whether

the conduct encouraging interstate patronage so closely approximates the conduct of a principal in a criminal agency relationship that the Travel Act is violated.¹⁹¹

2. Attendant circumstances

a. Interstate facility

¶65 The statute prohibits the use of any interstate facility, including the mails, to promote or facilitate any unlawful activity. Hence, telephones,¹⁹² newspapers,¹⁹³ interstate banking facilities,¹⁹⁴ and interstate roads¹⁹⁵ have all been found to constitute "facilities" or "use of facilities" within the meaning of the Act.

¹⁹⁰United States v. Antonick, 481 F.2d 935, 938 (9th Cir.), cert. denied, 414 U.S. 1010 (1973).

¹⁹¹Rewis v. United States, 401 U.S. at 814.

¹⁹²Menendez v. United States, 393 F.2d 312 (5th Cir. 1968), cert. denied, 393 U.S. 1029 (1969).

¹⁹³United States v. Erlenbaugh, 452 F.2d 967 (7th Cir. 1971), aff'd, 409 U.S. 239 (1972).

¹⁹⁴United States v. LeFaivre, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).

¹⁹⁵United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

b. Unlawful activity

¶66 The Travel Act denies the facilities of interstate commerce to those who would use them to further any "unlawful activity." Section 1952(b)(2) defines unlawful activity to include "extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States." In Nardello v. United States,¹⁹⁶ the Supreme Court refused to construe the term "extortion" narrowly. The defendants claimed that under the applicable state law their activities constituted blackmail, not extortion and were thus excluded from the scope of the Act. The Court rejected this claim, noting:

The fallacy of this contention lies in its assumption that, by defining extortion with reference to state law, Congress also incorporated state labels for particular offenses.¹⁹⁷

Instead, the Court concluded:

[T]he inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged.¹⁹⁸

Hence, if the act is one which the state prohibits and that act would be generically classified as extortionate, then it would be extortion under the Travel Act irrespective of its state label.¹⁹⁹ Citing Nardello, the

¹⁹⁶393 U.S. 286 (1969).

¹⁹⁷Id. at 293.

¹⁹⁸Id. at 295. See also United States v. Dansker, 537 F.2d 40 (3d Cir. 1976).

¹⁹⁹I.e., an extortionate act would include the obtaining of some thing of value from someone by the wrongful use of fear and the obtaining of property by a public official under color of office.

Fourth Circuit found the same principles applied to the definition of the term bribery as it appears in the Act.²⁰⁰

As a result, it held that bribes to a bank officer constituted a violation of the Travel Act.

¶67 Further, since the gravamen of the offense is the use of interstate facilities, courts have found it unnecessary to require proof of further conduct constituting a violation of the underlying state law.²⁰¹ The reference to state law is necessary only to identify the type of unlawful activity.²⁰² Hence, the prosecution must show only the use of interstate facilities with the intent to violate the law.²⁰³

²⁰⁰ United States v. Pomponio, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874, reh. denied, 423 U.S. 991 (1975). This can work the other way. In United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), the court held that the Travel Act does not cover commercial bribery under New York Penal Law, §180.05. Defendant sought a kickback from a subcontractor regarding award of a pending contract by defendant's employer. Mere use of the word "bribery" in the New York statute did not bring defendant's conduct within scope of the Travel Act.

²⁰¹ United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), cert. denied, (1976); United States v. Pomponio, 511 F.2d 953 (4th Cir. 1975); United States v. Conway, 507 F.2d 1047 (5th Cir. 1975); McIntosh v. United States, 385 F.2d 274 (8th Cir. 1967).

²⁰² McIntosh v. United States, 385 F.2d at 276.

²⁰³ In Pomponio, 511 F.2d at 957, the court stated:

Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952,

The use must of course, be followed by certain acts specified in paragraphs (1)-(3); the point is that they need not as such constitute violations of state law.

¶68 The violation of the Travel Act is a felony which carries with it a fine of up to \$10,000 and imprisonment for up to five years. The fact that the underlying state offense is a misdemeanor has been held immaterial.²⁰⁴

As a result, a state law misdemeanor may be treated as a federal law felony if so much as an out of state phone call is made in furtherance of the unlawful act.

¶69 Since the federal violation is the use of interstate commerce, there is no reason to believe that a section 1952 prosecution would bar a subsequent state charge based on the substantive offense.²⁰⁵ Nor does it appear that a prosecution for the state offense would bar a prosecution under the Travel Act.²⁰⁶

3. State of mind

a. Standard of mental culpability

(i) interstate facility

¶70 The courts are in disagreement as to whether the use of interstate facilities is an element of the offense as to which a state of mind must be shown. The Third Circuit, in United States v. Barrow,²⁰⁷ and the Seventh

²⁰⁴See United States v. Pomponio, 511 F.2d at 957; United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); United States v. Karigiannis, 430 F.2d 148 (7th Cir.), cert. denied, 400 U.S. 904 (1970); United States v. Brennan, 394 F.2d 151 (2d Cir.), cert. denied, 393 U.S. 839 (1968).

²⁰⁵Cf. McIntosh v. United States, 385 F.2d 274 (8th Cir. 1967).

²⁰⁶Id.

²⁰⁷363 F.2d 62, 65 (3d Cir. 1966), cert. denied, 365 U.S. 1001 (1967).

Circuit, in United States v. Ruthstein,²⁰⁸ state the minority view that knowledge of the interstate nature of the crime must be proven in a Travel Act prosecution. Five other circuits have rejected the necessity for such a showing.²⁰⁹ The Supreme Court in a recent decision, United States v. Feola,²¹⁰ undermined the views of the Third and Seventh Circuits in its reversal of acquittals based on a "sliding scale."²¹¹ After Feola, the use of interstate facilities should probably be viewed solely as a jurisdictional element. Hence, the defendant's knowledge or lack of knowledge of the interstate nature of the facility would be immaterial in a Travel Act prosecution. This jurisdictional element may not, however, be supplied by the law enforcement officials. Hence,

²⁰⁸414 F.2d 1079, 1082 (7th Cir. 1969).

²⁰⁹United States v. Doolittle, 507 F.2d 1368, aff'd en banc, 518 F.2d 500 (5th Cir.), cert. dismissed, 423 U.S. 1008 (1975); United States v. LeFaivre, 507 F.2d 1288, 1298 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); United States v. Roselli, 432 F.2d 879, 890-1 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

The Sixth Circuit has adopted a "sliding scale" approach which represents a compromise. In United States v. Barnes, 383 F.2d 287, 289-93 (6th Cir. 1967), cert. denied, 389 U.S. 1040 (1968), the court held that knowledge was required for a conviction under the conspiracy charge but not under the substantive offense.

²¹⁰420 U.S. 671 (1975).

²¹¹In Feola, the issue was whether the prosecution had to prove knowledge on the part of the conspirators that the intended victim was a federal officer where such proof was not needed to sustain a conviction for the substantive offense.

the Second Circuit in United States v. Archer,²¹² reversed the convictions where the sole basis for federal jurisdiction was interstate phone calls which the law enforcement officers induced the defendants to make.

(ii) unlawful activity

¶71 The Act states an intent requirement with reference to the unlawful activity. The prosecution must prove that the travel in or the use of interstate facilities was undertaken with intent to:

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion management, establishment, or²¹³ carrying on, of any unlawful activity.

b. Proof of intent--direct evidence

¶72 These principles are discussed above at II (B)

(3) (b) and at III (B) (4) (b).

c. Proof of intent

¶73 These principles are discussed above at II (B)

(3) (c) and at III (B) (4) (c).

²¹²486 F.2d 670 (2d Cir. 1973).

²¹³18 U.S.C. §1952(a) (1970).

BEG: FIA.

FLORIDA LAW OF BRIBERY, EXTORTION, AND GRAFT

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SUMMARY

¶1 The Florida law of bribery, graft, and extortion involves five statutes: section 838.015 (bribery), section 838.016 (graft), section 838.021 and section 836.05 (extortion), and 839.25 (official misconduct).¹

¶2 Bribery is the offer, conferral, solicitation, or acceptance by a public servant of a benefit for the performance or non-performance of an official act. The offer, conferral, solicitation, or acceptance must be made with the intent of influencing an official act. The conduct must be performed "corruptly." In addition, the offerer must know, or at least believe, that the official act sought to be influenced is within the public servant's power or discretion.

¶3 Graft involves the same conduct as bribery. The conduct must be performed "corruptly," but no intent to influence an official act is necessary. The graft statute reaches rewards for past, present and future official conduct, unlike bribery, which is concerned with future official conduct.

¶4 Extortion requires the threatened or actual use of force to gain some benefit, pecuniary or otherwise. Florida proscribes harm or threats of harm to a public servant to force him to perform his official duty in a certain way. Florida has no statute explicitly prohibiting "color of office" extortion--the taking under color of office by a public servant of a fee greater than authorized by law.

I. BRIBERY

¶5 Fla. Stat. Ann. §838.015 proscribes bribery of and solicitation of a bribe by a public servant. This section replaces repealed sections 838.01, 838.011, 838.012 and 838.013.

A. Conduct

¶6 The conduct requirement for bribery is giving, offering, promising, or requesting, soliciting, accepting, or agreeing to accept.² There may be the additional conduct requirement that the public servant represented the official act to be influenced as being within his power.³ By the terms of this section, actual receipt or transmission of a benefit is not necessary. Additionally, the interposition of a third party acting as an agent or go-between, does not affect the guilt of the offerer or offeree; he can still be convicted as a principal.⁴

¹The statutes abrogate the common law in relation to bribery and corruption of public servants. Nell v. State, 277 So.2d 1, 5 (Fla. 1973); Ewing v. State, 81 So.2d 185, 186 (Fla. 1955).

Specific forms of bribery are prohibited by: 914.14, "Witnesses accepting bribes," §918.12, "Tampering with jurors," and §918.14, "Tampering with witnesses." These sections do not require that the act be done "corruptly." Section 918.12 does require intent to influence. Section 914.14 and 918.14 do not.

²Fla. Stat. Ann. §838.015(1) (West 1976).

³This conduct probably occurs when the deal is initiated by the public servant.

⁴Buchanan v. Husk, 167 So.2d 38, 40 (Fla. 1964), cert. denied, 382 U.S. 54 (1965):

A person who deals for and obtains a bribe through an agent or go-between, may be in violation of a statute against receiving bribes equally as if he dealt directly.

B. Attendant Circumstances

1. Public servant

¶7 The individual whose conduct is to be influenced must be a "public servant." A public servant is defined by statute as any public officer, agent or employee of government, whether elected or appointed.⁵ Candidates for any such office are also included in the definition. The statute may even reach a federal officer.⁶

¶8 Under former section 838.011 (repealed), the Supreme Court of Florida had held that bribery "occurs upon the corrupt officer to a public officer only when the object sought to be accomplished comes within the scope of the official's public capacity or duty."⁷ Section 838.015(2), however, provides:

Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that he had assumed office, that the matter was properly pending before him or might by law properly be brought before him, that he possessed jurisdiction over the matter, or that his official action was necessary to achieve the person's purpose.

⁵Fla. Stat. Ann. §838.014(4) (West 1976).

⁶State v. Turner, 175 So.2d 809 (Fla. 1965) (decided under former bribery statute).

⁷Nell v. State, 277 So.2d 1 (Fla. 1973).

2. Benefit

¶9 The benefit running to the public servant may be "any pecuniary or other benefit."⁸ The standard used to determine whether a given item is a benefit may be subjective: anything regarded by the person to be benefitted as a gain or advantage.⁹ It may also be objective: any gain, advantage or thing of economic value.¹⁰ The purchase of a lottery ticket and "guarantee that the said number would come out and be the winning numbers,"¹¹ for example, was deemed sufficient benefit to support an attempted bribery conviction. The court found "an expression of an ability to produce a bribe is sufficient to complete the offense."¹² Thus, no tender of the benefit, nor even proof of an ability to deliver the benefit, is needed. Finally, a direct benefit to the public servant is not necessary. The offer, gift, solicitation or

⁸ Fla. Stat. Ann. §838.014(2) (West 1976):

'Pecuniary benefit' is benefit in the form of any commission, gift, gratuity, property, commercial interest, or any other thing of economic value.

Fla. Stat. Ann. §838.014(1) (West 1976):

'Benefit' means gain or advantage or anything regarded by the person to be benefitted as a gain or advantage, including the doing of an act beneficial to any person in whose welfare he is interested.

⁹ Id.

¹⁰ Id.

¹¹ Zalla v. State, 61 So.2d 649, 651 (Fla. 1952).

¹² Id.

acceptance of "the doing of an act beneficial to any person in whose welfare [the public servant] is interested" is sufficient for a violation of the statute.¹³

C. State of Mind

¶10 Section 838.015 requires the briber act with an intent or purpose to influence the performance of a public servant.

The bribe receiver must have an intent to be influenced.¹⁴

In addition, the offerer or offeree must act "corruptly."

Section 838.014(6) supplies the definition of this term:

"Corruptly" means done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.

Thus, to win a conviction for bribery or bribe receiving both the intent to influence or be influenced and the purpose of compensating or receiving compensation must be shown.

¶11 To convict for bribery, the defendant must have knowledge of the official capacity of the person to whom the bribe is offered.¹⁵ It is not necessary that the public servant be able to act in the desired way;¹⁶ it is only necessary to show that the defendant believed that the official act he

¹³Fla. Stat. Ann. §838.014(1) (West 1976). For text of statute, see supra note 8.

¹⁴See Zalla v. State, 61 So.2d 649, 651 (Fla. 1952).

¹⁵Nell v. State, 277 So.2d 1, 5 (Fla. 1973). This was decided under old section 838.011. The change to Section 838.015, however, does not seem to affect this particular point.

¹⁶See Fla. Stat. Ann. §838.015(2) (West 1976). The text of this subsection is set out in ¶8 supra.

intended to influence was within the discretion of the public servant.¹⁷

II. GRAFT

¶12 Defined as unlawful compensation or reward for official behavior, graft is proscribed under Florida law by section 838.016. This section does have a component of intent required, as is the case with bribery; the influenced act, however, may be past, present, or future.

A. Conduct

¶13 Section 838.016 sets forth the conduct requirement: "give, offer, or promise;" "request, solicit, accept, or agree to accept." Thus, section 838.016, like section 838.015, focuses on the acts of the individual offering to compensate an official, or the official seeking compensation.

¶14 There is a specific exception to the conduct requirement of section 838.016(1): "Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal."

B. Surrounding Circumstances

1. Public servant

¶15 Like bribery, the individual whose conduct is to be influenced must be a "public servant." "Public servant" is

¹⁷or that the public servant represented it as being within his official capacity. See ¶6 supra.

defined by statute and includes any public officer, agent or employee of government whether appointed or elected.¹⁸ Section 838.016(3) also contains a qualification similar to that of section 838.015(2):

Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

2. Benefit

¶16 The official whose conduct was or is to be the object of compensation must be offered, or request "any pecuniary or other benefit not authorized by law."

¶17 Under former section 838.071, compensations "other than those provided by law" were proscribed. Where a municipal ordinance provided for receipt of gifts (and their donation to charity), "if it is impossible or inappropriate to refuse" such gifts, the court found that receipt of a gift and its subsequent delivery to a charity did not violate section 838.071.¹⁹

¶18 The same situation under section 838.016 would presumably lead to a similar result, thus creating an exception to this statute when other state or local laws permit receipt of a gift. An additional exception -- reward for apprehension of criminals -- is included in section 838.016(1).

¹⁸ See ¶7 note 5, supra.

¹⁹ Jucoff v. State, 273 So.2d 387, 389 (Fla. 1973).

3. Act or omission

¶19 Section 838.016 subsections (1) and (2) differ in the nature of the act or commission required as an attendant circumstance. Section 838.016(1) proscribes compensation

for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty.

The conduct to be (or having been) influenced can be an affirmative act (e.g. changing a vote), an omission (e.g. failure to prosecute an individual), a "violation of any act" (i.e. a criminal act itself). It can be "past, present, or future." Section 838.016(2) proscribes compensation

for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission which the person believes to have been, or which is represented to him as having been, either within the official discretion of the other public servant, violation of a public duty, or in performance of a public duty.

Here the conduct for which compensation is given or offered includes influence upon or with another public servant. Thus, these subsections prohibit compensation for acts done (or to be done) by the public servant as well as acts done through the public servant's influence upon or with another public servant.

C. State of Mind

¶20 Unlike bribery, graft does not require an intent to influence an official act. Graft, however, does require that the conduct be performed "corruptly." "Corruptly" is defined by statute to mean a wrongful intent and with the purpose of compensating or receiving compensation.²⁰ Thus, an intent must be shown to win a conviction for graft but it is the intent to compensate or receive compensation not the intent to influence an official act.²¹

¶21 Section 838.016 parts (1) and (2) require knowledge, on the part of the individual offering compensation that the act or omission is either within the official's discretion, a violation of a public duty or a performance of a public duty.²² Section (3) dictates that such circumstances (accomplishing the compensated act, it being within the official's discretion, etc.) need not in fact have existed.²³

²⁰ Fla. Stat. Ann. §838.014(b) (West 1976). The text of this subsection is set out in ¶10, supra. See Williams v. Christian, 335 So.2d 358 (Fla. 1976) (former graft provision construed as "broader in scope than bribery").

²¹ Contrast this with Massachusetts law where knowledge is the only state of mind requirement that must be shown. Mass. Gen. Laws Ann. ch. 268A §3 (Michie/Law. Co-op 1968).

²² Fla. Stat. Ann. §838.016(1)(2) (West 1976) uses the following language:

any act or omission which the person believes to have been or the public servant represents as having been

²³ Fla. Stat. Ann. §838.016(3) (West 1976). The text is set out in ¶15, supra.

III. OFFICIAL MISCONDUCT

¶22 Section 839.25 proscribes "official misconduct." While this offense bears some resemblance to bribery (§838.015) and what is generally called graft (§838.016), it is available as a separate offense, and it may be applicable to certain special circumstances:

(1) "Official misconduct" means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:

(a) Knowingly refraining, or causing another to refrain, from performing a duty imposed upon him by law; or

(b) Knowingly falsifying, or causing another to falsify, any official record or official document; or

(c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.

(2) "Corrupt" means done with knowledge that act is wrongful and with improper motives.

(3) Official misconduct under this section is a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

¶23 This section applies only to public servants. It requires "corrupt intent" rather than an act done "corruptly" (as in §838.015-016). "Corrupt," defined in section 839.25 (2), requires knowledge of the wrongful nature of the act, and improper motives. Thus, "with corrupt intent to obtain a benefit" should be read to require proof of (1) intent to obtain a benefit, (2) knowledge that the act for which benefit is received is wrongful, and (3) improper motives.

¶24 The acts proscribed by section 839.25, moreover, are less inclusive than those indicated in section 838.015 and section 838.016. "Official misconduct" deals with failure to fulfill a duty, falsification, or violation of the law. Bribery and graft cover compensation for performance of a duty, any act, or omission concerned with the official's position.

IV. EXTORTION

¶25 Extortion is proscribed by sections §838.021 and 836.05. Section 838.021 deals with "corruption by threat against public servant." Section 836.05 covers all threats and extortion. It prohibits use of any force or threats for the purpose of obtaining any benefit.

A. Conduct

¶26 Section 838.021 sets forth the conduct requirements: "unlawfully harms or threatens unlawful form of any public servant, to his immediate family, or to any other person with whose welfare he is interested"

¶27 Section 836.05 requires the following conduct:

Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another to impute any deformity or lack of chastity to another

This conduct requirement omits the specific mention of "immediate family" and "other person" found in section 838.021, but it does include several specified acts (e.g. impute

unchastity), not involving harm or threat of harm, which are not covered by section 838.021.

B. Attendant Circumstances

1. Public servant

¶28 Section 838.021 states that the individuals being threatened must be a public servant or his family or another with whom he is concerned. As was the case in sections 838.015 and 838.016, section 838.021(2) contains a provision stating that the actual qualifications of the public servant need not be proved:

Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that he had assumed office, that the matter was properly pending before him or might by law properly be brought before him, that he possessed jurisdiction over the matter, or that his official action was necessary to achieve the person's purpose.

¶29 Section 836.05 does not require that any party to the crime be a public servant.

2. Conduct influenced

¶30 Section 838.021(1)(a) and (b) follows the pattern of section 838.016(1) and (2). Section 838.021(1)(a) makes it unlawful to threaten harm to a public servant "to influence the performance of any act or omission" Section 838.021(1)(b) prohibits threats of harm to a public servant in order "to cause or induce him to use or exert, or procure the use or exertion of, any influence upon or with any other public servant regarding any act or omission"

¶31 An attendant circumstance in violations of section 838.021, therefore, must be some potential act or omission, or another public servant who may be influenced to do an act or omission.

¶32 Section 838.021 requires an act involving some official capacity; section 836.05 proscribes the use of force or threats of force to obtain purely private acts.

¶33 Section 836.05 also specifically mentions communication of a written, printed or verbal threat. Section 838.021 requires unlawful harm, or a threat of unlawful harm, but makes no mention of the actual communication of that threat. It is an open question whether actual communication of the threat to the threatened party is required under section 838.021.

C. State of Mind

¶34 Section 838.021 specifically requires "intent or purpose" to influence a public servant in the manner described above. In this respect, it is similar to sections 838.015 and 838.016. The intent required for violation of section 838.021 need not be "corrupt," as that term is defined in the bribery and graft statutes. The harm threatened, however, must be "unlawful." The combination of "unlawful" harm and simple intent would appear to be roughly equivalent to the single term "corruptly" as defined in section 838.014(6). Section 836.05 requires a "malicious" threat and intent to exact payment or compel an act or omission.

¶35 Parts (a) and (b) of section 838.021 also require either knowledge by the individual using force or threat of force, or a representation by the public servant, that the act desired is "within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty."²⁴

D. Result

¶36 Section 838.021 provides for two possible penalties. Section 838.021(3)(a) states:

Whoever unlawfully harms any public servant or any other person with whose welfare he is interested shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

Section 838.021(3)(b) states:

Whoever threatens unlawful harm to any public servant or to any other person with whose welfare he is interested shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

The penalty for violation of this section is thus dependent on whether there is a result-- that is, actual harm to a public servant or only threatened harm.

¶37 Section 836.05 does not condition the severity of punishment on a particular result. It deals only with threats of force, exposure, etc. Any violation is a felony in the second degree.

²⁴It is difficult to imagine a solution in which an official, when confronted with force or threats of force, would mislead the extortionist into thinking he had the power to do acts which he actually could not

BEG: MASS.

MASSACHUSETTS LAW OF BRIBERY, EXTORTION AND GRAFT

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SUMMARY

¶1 The Massachusetts law of bribery, graft and extortion involving public officials is contained in three sections of the Massachusetts General Laws: section 2 of chapter 268A (bribery and extortion), section 3 of chapter 268A (graft and extortion) and section 25 of chapter 265 (extortion).

¶2 In general, anyone who solicits or demands anything of value not due him in his governmental capacity in exchange for some official consideration, or any person who gives such thing of value in return for an official favor, or any person who attempts either action, is guilty of an offense. No successful result is necessary for conviction.

¶3 Bribery is offering, giving, accepting, or agreeing to accept anything of value to influence official action by a public officer. Conviction of a private citizen for bribery requires that he have a corrupt intent to influence official action. To convict a public officer it is necessary to show that the officer had the corrupt intent to be influenced in some official action.

¶4 Graft is offering, giving, accepting, or agreeing to accept anything of value for or because of any official act performed or to be performed. Conviction of a private citizen, therefore, does not require any specific intent to influence official action. Rather, for both parties to the deal, proof of knowledge of the circumstances of the exchange would result in conviction.

¶5 Extortion is the unlawful taking by any officer, by

color of his office, of anything of value that is not due him, or more than is due, or before it is due. Conviction of an officer for extortion requires that he have the intent to be influenced in his official duty and that he have knowledge of the circumstances surrounding his action, that is, that he has no legal right to the money or thing of value which he has demanded of his victim.

I. INTRODUCTION

¶6 The Massachusetts law of bribery and graft is contained in a statute passed by the legislature in 1962 to form a general code of conduct for public officials and employees of the Commonwealth: chapter 268A.¹

¶7 Section 2 of chapter 268A is the general bribery statute² while section 3 forbids gifts to public servants, a practice commonly called graft.³ Other sections of chapter 268A deal with conflicts of interest, such as an employee acting as attorney in matters related to his official position⁴ or having an interest in contracts in which his

¹Conduct of Public Officials and Employees, Mass. Ann. Laws ch. 268A §§1-25 (Michie/Law. Co-op 1968 & Supp. 1977), inserted by 1962 Mass. Acts ch. 779, effective May 1, 1963. This statute was modeled on the bill then pending in the United States Congress which emerged as 18 U.S.C. §§201 et seq. Commonwealth v. Dutney, ___ Mass. ___, 348 N.E.2d 812, 822, n. 16 (1976). See generally "Federal Law of Bribery, Graft and Extortion," these materials.

²Mass. Ann. Laws ch. 268A, §2 (Michie/Law. Co-op 1968). There are, however, additional statutes that deal with specialized forms of bribery. See, e.g., Mass. Ann. Laws ch. 56, §32 (Michie/Law. Co-op 1971) (bribery related to elections); Mass. Ann. Laws ch. 127, §166 (Michie/Law. Co-op 1972) (parole and commutation of prison sentences); Mass. Ann. Laws ch. 268, §§313, 314 (Michie/Law. Co-op 1968) (arbitrators, referees, umpires); Mass. Ann. Laws ch. 271, §39A (Michie/Law. Co-op 1968) (bribery related to athletic contests).

³Mass. Ann. Laws ch. 268A, §3 (Michie/Law. Co-op 1968). Other sections of chapter 268A also deal with compensation to employees of the commonwealth.

⁴Mass. Ann. Laws ch. 268A, §§4, 11, 17 (Michie/Law. Co-op 1968) (state, county, municipal employees, respectively). For discussion of the conflicts of interest aspect of chapter 268A see Braucher, "Conflicts of Interest in Massachusetts" in Perspectives of Law: Essays for Austin Wakeman Scott (Pound, Griswold, and Sutherland 1964); Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis," 45 B.U.L. Rev. 297 (1965).

employer has an interest.⁵ Former state employees and partners of state employees are subject to the same sorts of restrictions.⁶ Thus, this statute attempts to provide a comprehensive plan for dealing with corruption and impropriety in government.⁷

¶8 Sections 2(b) and 3(b) of chapter 268A also demonstrate the comprehensive nature of this statute. Both of these sections prohibit demanding or exacting bribes or gifts, conduct traditionally associated with extortion.⁸ Police

⁵ Mass. Ann. Laws ch. 268A, §§7, 14, 19 (Michie/Law. Co-op 1968) (state, county, municipal, respectively).

⁶ Mass. Ann. Laws ch. 268A §5 (Michie/Law. Co-op 1968). See also Mass. Ann. Laws ch. 268A §§12, 18 (Michie/Law. Co-op 1968) (former county and municipal employees, respectively).

⁷ Mass. Ann. Laws ch. 268A §§9, 15, 21 (Michie/Law. Co-op 1968) provide a comprehensive plan for civil remedies in addition to criminal penalties for violations of this statute. Under these sections, the official action taken because of a violation may be rescinded or avoided. This remedy is available to both the government and private parties. Everett Town Taxi, Inc. v. Board of Aldermen, ___ Mass. ___, 320 N.E.2d 896 (1974). The government may also bring a civil action to recover the amount of the bribe or gift or \$500 whichever is greater. These sections also provide for a civil action to recover double the amount of the bribe or gift or \$500 whichever is greater. This, however, is only available if no conviction or acquittal has been had in a criminal prosecution and utilization of this remedy prohibits a subsequent criminal prosecution. Mass. Ann. Laws ch. 268A §25 (Michie/Law. Co-op Supp. 1977) provides for suspension without pay while an employee is under indictment for violation of chapter 268A.

⁸ Cf., e.g., Mich. Stat. Ann. §28.411 (1962) (public officers demanding money); R.I. Gen. Laws §11-42-1 (1970) (excessive fees demanded by public officer).

officers and employees of licensing authorities, however, are included in the general extortion statute which carries a more severe penalty.⁹ Thus, the law of Massachusetts on bribery, extortion and graft can be seen in an analysis of these three sections: section 2 of chapter 268A, section 3 of chapter 268A and section 25 of chapter 265.

II. BRIBERY

A. Conduct

¶19 The principle bribery statute of the Commonwealth proscribes giving, offering, or promising;¹⁰ asking, demanding, exacting,¹¹ soliciting, seeking, accepting, receiving, or agreeing to receive¹² anything of value, with intent to influence any official action. Of these various forms of conduct, violation occurs if any or all of the acts are committed;¹³ no result is required. Thus, a citizen may be

⁹Mass. Ann. Laws ch. 265 §25 (Michie/Law. Co-op 1968). The maximum penalty is 15 years and/or \$5,000 fine as compared with section 2 of chapter 268A (note 2 supra) which carries a maximum penalty of 3 years in state prison or 2 1/2 years in jail and/or \$5,000 fine and section 3 (note 3 supra): 2 years and/or \$3,000 fine.

¹⁰Mass. Ann. Laws ch. 268A, §2(a) (Michie/Law. Co-op 1968).

¹¹See ¶¶24-26 infra.

¹²Mass. Ann. Laws ch. 268A, §2(b) (Michie/Law. Co-op 1968).

¹³Commonwealth v. Beal, 314 Mass. 210, 50 N.E.2d 14 (1943); Commonwealth v. Hogan, 249 Mass. 555, 564, 144 N.E. 390 (1924).

convicted for unlawfully offering money to an official, even though the official never accepts it,¹⁴ and an officer may be found guilty of soliciting a bribe even though his victim never delivers.¹⁵

¶10 If there are several solicitations, the prosecution may either treat each instance as a separate offense¹⁶ or simply charge one continuing offense.¹⁷ Likewise, if a number of payments have been received, each payment may be charged as a separate offense if the prosecution wishes to do so.¹⁸

¶11 The interposition of an intermediary or authorized agent to request, receive, or offer the gift or gratuity on behalf of the defendant has no effect whatsoever on the guilt of the defendant.¹⁹ Even if he has employed someone

¹⁴Commonwealth v. Hurley, 311 Mass. 78, 40 N.E.2d 255 (1942); Commonwealth v. Tsaffaras, 250 Mass. 445, 145 N.E. 922 (1925); Commonwealth v. Donovan, 170 Mass. 228 (1898).

¹⁵Commonwealth v. Albert, 307 Mass. 239, 243, 29 N.E.2d 817 (1940).

¹⁶Commonwealth v. Mannos, 311 Mass. 94, 40 N.E.2d 291 (1942).

¹⁷Commonwealth v. Stasiun, 349 Mass. 38, 44, 206 N.E.2d 672 (1965) (successive takings actuated by a single continuing impulse or intent or pursuant to the execution of a common scheme equals a single offense).

¹⁸Commonwealth v. Beal, 314 Mass. 210, 226 N.E.2d 14 (1943).

¹⁹Mass. Ann. Laws ch. 268A §2 (Michie/Law. Co-op 1968) ("Whoever, directly or indirectly . . ."). See also Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 323, 275 N.E.2d 33 (1971), cert. denied sub nom. Farrell v. Massachusetts, 407 U.S. 910 (1972) and sub nom. Beneficial Fin. Co. v. Massachusetts, 407 U.S. 914 (1972); Commonwealth v. Albert, 310 Mass. 811, 40 N.E.2d 21 (1942); Commonwealth v. Connolly, 308 Mass. 481, 33 N.E.2d 303 (1941), citing Dolan v. Commonwealth, 304 Mass. 325, 23 N.E.2d 904 (1939).

else to "do the dirty work," the defendant is guilty--and guilty as a principal and not simply as an accessory.

B. Attendant Circumstances

1. Public servant

¶12 Section 2 of chapter 268A requires that the person seeking or being offered the bribe be a member of the judiciary, a state, county, or municipal employee or a person selected to be such an employee.²⁰ The statute defines the term employee broadly so that it also includes, for example, legislators, executive officers, part-time consultants and those serving without pay.²¹

2. Benefit

¶13 Bribery or bribe receiving requires the offer, giving, solicitation or acceptance of anything of value.²² The "thing" may be as little as the price of two fifths of Canadian Club.²³ The bribe might also take the form of any kind of favor or forbearance; it need not be money.²⁴ There is

²⁰Mass. Ann. Laws ch. 268A §1(1) (Michie/Law. Co-op 1968) defines "person who has been selected" to be any person nominated or appointed or who has been officially notified that he will be so nominated or appointed.

²¹Mass. Ann. Laws ch. 268A §1(d), (g), (q) (Michie/Law. Co-op 1968).

²²See discussion at ¶21, infra.

²³At the time, this was \$9.00. Commonwealth v. Heffernan, 350 Mass. 48, 213 N.E.2d 399, cert. denied, 384 U.S. 960 (1966).

²⁴Commonwealth v. Gallo, ___ Mass. ___, 318 N.E.2d 187 (1974) (installation of sliding doors at his home).

no requirement that the bribe directly benefit the officer.²⁵ For example, a violation may be proved if, in return for some official action or inaction, the officer wins a favor for some member of his family.

3. Conduct influenced

¶14 The crime of bribery requires intent to influence an official act or any act within the official responsibility of the public servant involved.²⁶ It is not necessary that the official be empowered by statute, regulation or established usage to make the particular decision in question.²⁷ An official who is de facto, though not de jure, responsible for a specific governmental action may still be convicted of bribery.²⁸ Section 2 also reaches the intent to influence the public servant to commit, aid in committing or to allow any fraud on the commonwealth and inducement to do or omit to do any acts in violation of official duty.²⁹

²⁵Mass. Ann. Laws ch. 268A §2 (Michie/Law. Co-op 1968) ("Whoever . . . promises anything of value to another person or entity. . . ; Whoever . . . seeks . . . for himself or another . . .").

²⁶Commonwealth v. Kaste, ___ Mass. ___, 355 N.E.2d 488, 490 (1976).

²⁷Mass. Ann. Laws ch. 268A §1(h) (Michie/Law. Co-op 1968) defines official act to include "action in a particular matter."

²⁸Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 302, 275 N.E.2d 33 (1971), cert. denied sub nom. Farrell v. Massachusetts, 407 U.S. 910 (1972) and sub nom. Beneficial Fin. Co. v. Massachusetts, 407 U.S. 914 (1972).

²⁹Mass. Ann. Laws ch. 268A §2(a)(2), (3), and §2(b)(2), (3). (Michie/Law. Co-op 1968).

These additional categories of conduct would reach even actions outside the de facto responsibility of a public servant.

C. State of Mind

¶15 To win a conviction for bribery, the prosecution must prove that the defendant not only gave, offered, or promised the bribe, but did so with the intent to influence official conduct.³⁰ To convict a public servant of bribe receiving, the commonwealth must show a corrupt intent to be influenced in his future performance of an official act.³¹ Although it is not clear whether the defendant's actual offer, giving, solicitation, or acceptance be made intentionally or merely knowingly, it is certain that the rationale behind the conduct must be the intent to influence governmental affairs or to be influenced in performance of official acts.

¶16 In addition, a conviction for bribery requires that the accused have knowledge of the attendant circumstances--that is, the defendant must know that an object of value is being offered or given to an employee of the state, county, or municipality or a member of the judiciary with certain governmental powers and responsibilities.³²

³⁰Mass. Ann. Laws ch. 268A §2(a) (Michie/Law. Co-op 1968); Commonwealth v. Kaste, ___ Mass. ___, 355 N.E.2d 488 (1976).

³¹Mass. Ann. Laws ch. 268A §2(b) (Michie/Law. Co-op 1968); Commonwealth v. Dutney, ___ Mass. ___, 348 N.E.2d 812 (1976).

³²See Commonwealth v. Beneficial Fin. Co., supra note 28, 360 Mass. at 302 (belief that a given official was the key figure in their scheme is sufficient). See also Commonwealth v. Albert, 307 Mass. 239, 29 N.E.2d 917 (1940).

¶17 The state of mind of the defendant is the only one involved in a prosecution for bribery. A would-be briber may be convicted even if the public official whom he is trying to corrupt has no knowledge of the defendant's intentions,³³ and a public officer may violate the statute by soliciting a bribe even if the victim lacks understanding of the officer's intent.³⁴

III. GRAFT

A. Conduct

¶18 Graft involves the same conduct as bribery.³⁵ Thus, section 3 of chapter 268A forbids giving, offering, promising, asking, demanding,³⁶ soliciting or receiving anything of value, for or because of any official action.

¶19 Just as with bribery, commission of any or all of the mentioned acts constitutes unlawful conduct. A defendant, therefore, may be convicted for simply attempting to perform the corrupt activity; he is not excused simply because

³³ Commonwealth v. Murray, 135 Mass. 530 (1883).

³⁴ Commonwealth v. Famigletti, ___ Mass. ___, 354 N.E.2d 890 (1976).

³⁵ Offenses under Mass. Ann. Laws ch. 268A §3 (Michie/Law. Co-op 1968) are lesser included offenses of Mass. Ann. Laws ch. 268A §2 (Michie/Law. Co-op 1968). The element of corrupt intent, necessary under section 2, but not under section 3, is the principal distinguishing feature, Commonwealth v. Dutney, ___ Mass. ___, 348 N.E.2d 812, 822 (1976).

³⁶ See discussion ¶¶24-26, infra.

the bargain is not carried out. If a number of solicitations or payments have been made, they may be prosecuted either as separate counts or as one continuing offense. The use of an intermediary or agent to offer or solicit the gift or gratuity will not relieve the defendant of his guilt.

B. Attendant Circumstances

1. Public servant

¶20 State, county and municipal employees, members of the judiciary and persons selected to be such employees are prohibited from receiving gifts or gratuities.³⁷

2. Benefit

¶21 To win a conviction for graft, the commonwealth must show that a public servant sought, accepted, was offered or given something of substantial value.³⁸ Whether or not the "thing" is of substantial value is to be determined by the court in relation to the particular facts of the case.³⁹ The Supreme Judicial Court of Massachusetts has deemed fifty dollars of substantial value.⁴⁰ The court also indicated that in cases of solicitation the fact that the defendant

³⁷ See notes 20, 21, supra.

³⁸ Mass. Ann. Laws ch. 268A §§3(a), (b) (Michie/Law. Co-op 1968). Contrast Mass. Ann. Laws ch. 268A §2 (Michie/Law. Co-op 1968) ("anything of value").

³⁹ Commonwealth v. Famigletti, ___ Mass. ___, 354 N.E.2d 890, 893 (1976) quoting Report of the Special Commission on Code of Ethics, 1962 Mass. House Doc. No. 3650, p. 11.

⁴⁰ Commonwealth v. Famigletti, supra note 39, 354 N.E.2d at 893.

asked for a given object or amount is sufficient to qualify as "of substantial value."⁴¹

3. Conduct involved

¶22 To constitute a criminal act, the offer, giving, solicitation or acceptance of something of substantial value must be "for or because of an official act performed or to be performed by him."⁴² Thus, section 3 reaches both future and past conduct.⁴³

C. State of Mind

¶23 The required state of mind for graft is much easier for the prosecution to prove. While the defendant may or may not intend to do the actual giving, offering, soliciting or accepting, he need not have an intent to influence official action in order to be convicted of graft.⁴⁴ The defendant must know that an object of value is being offered to or solicited by a public official for or because of future or past conduct.⁴⁵ As with bribery, the state of mind of the other person involved is irrelevant.

⁴¹Id.

⁴²Mass. Ann. Laws ch. 268A §3 (Michie/Law. Co-op 1968).

⁴³Commonwealth v. Dutney, ___ Mass. ___, 348 N.E.2d 812, 821, n. 14 (1976).

⁴⁴Commonwealth v. Dutney, ___ Mass. ___, 348 N.E.2d 812, 821 (1976). This is the most significant difference between bribery and graft.

⁴⁵Cf., e.g., Mass. Ann. Laws ch. 268A §17 (Michie/Law. Co-op 1968) (Knowledge of direct and substantial interest of employing town or city is sufficient). See also Commonwealth v. Dutney, supra note 44.

IV. EXTORTION

A. Conduct

¶24 The principle extortion statute of the Commonwealth prohibits using or threatening to use one's official power or authority against another person with intent to extort some advantage, pecuniary or otherwise, or to compel him to do something against his will.⁴⁶ Section 2 and section 3 of chapter 268A prohibit demanding or exacting anything of value by public officials.⁴⁷

¶25 Although at common law the actual receipt of illicit money was necessary for an extortion conviction,⁴⁸ a violation of chapter 265, section 25 occurs when the defendant attempts to extort.⁴⁹ As is the case with bribery and graft, no "successful" result is necessary.

¶26 Finally, as with the other two crimes if there have been numerous threats, demands, or payments, the prosecution may either charge each instance separately⁵⁰ or lump all

⁴⁶Mass. Ann. Laws ch. 265 §25 (Michie/Law. Co-op 1968).

⁴⁷Mass. Ann. Laws ch. 268A §§2(b), 3(b) (Michie/Law. Co-op 1968). See notes 8, 9, supra; Commonwealth v. Heffernan, 350 Mass. 48, 213 N.E.2d 399, cert. denied, 384 U.S. 960 (1966).

⁴⁸Commonwealth v. Cony, 2 Mass. 522 (1807); Commonwealth v. Pease, 16 Mass. 91 (1819).

⁴⁹Commonwealth v. Corcoran, 252 Mass. 465, 483, 148 N.E. 123 (1925), citing Commonwealth v. Goodwin, 122 Mass. 19, 33 (1877).

⁵⁰Commonwealth v. De Vincent, 358 Mass. 592 (1971).

of the threats, etc. together and charge the defendant with one continuous offense.⁵¹

B. Attendant Circumstances

1. Public servant

¶27 Although anyone can commit extortion by threatening another with injury to extort money, only police officers, persons with the power of police officers, and officers and employees of licensing authorities are specifically covered by the extortion statute.⁵² State county, and municipal employees and members of the judiciary are covered in the bribery and graft statutes.⁵³

2. Malice

¶28 Section 25 of chapter 265 requires that the use or threatened use of official capacity to extort money or other advantage be done maliciously and unlawfully. Although unlawfully does not appear to have a particular meaning in this statute, maliciously does. The courts have defined malice, as used in this section, as the willful doing of an unlawful act without excuse.⁵⁴ There is no need to show a

⁵¹Commonwealth v. Moreau, 364 Mass. 829, 304 N.E.2d 198 (1973) (Rescript Opinion).

⁵²Mass. Ann. Laws ch. 265 §25 (Michie/Law. Co-op 1968).

⁵³Mass. Ann. Laws ch. 268A §§2(b), 3(b) (Michie/Law. Co-op 1968).

⁵⁴Commonwealth v. Goodwin, 122 Mass. 19, 35 (1877).

feeling of ill-will, spite, revenge or malice towards the person threatened.⁵⁵

3. Power or authority

¶29 For a public servant to violate the general extortion statute,⁵⁶ he must use or threaten to use the power or authority vested in him. Thus, the official must have the responsibility for making an official decision. He may also be convicted if he represents himself as having such power or authority.⁵⁷

¶30 Under sections 2 and 3 of chapter 268A, the public servant must intend to be influenced in an official act or any act within his official responsibility, or to do or omit to do any act in violation of his official duty.⁵⁸

C. State of Mind

¶31 Like bribery, extortion requires that the accused in demanding or exacting money or using or threatening to use his official power to benefit himself, specifically intend

⁵⁵ Id.

⁵⁶ Mass. Ann. Laws ch. 265 §25 (Michie/Law. Co-op 1968).

⁵⁷ Runnells v. Fletcher, 15 Mass. 525 (1819).

⁵⁸ Mass. Ann. Laws ch. 268A §§2(b), 3(b) (Michie/Law. Co-op 1968). See discussion ¶¶14, 22, supra.

to influence official action by his conduct.⁵⁹ With regard to the attendant circumstances, the defendant must know that he occupies a position of public trust and that he has exacted money which is not due him in his official position.

¶32 Just as with bribery and graft, the state of mind of the defendant is the only consideration. An officer may violate the statutes by exacting a payment, even if the victim completely lacks understanding of the officer's plans.⁶⁰

⁵⁹Mass. Ann. Laws ch. 265 §25 (Michie/Law. Co-op 1968); Mass. Ann. Laws ch. 268A §2(b) (Michie/Law. Co-op 1968); Commonwealth v. Snow, 269 Mass. 598, 169 N.E. 542 (1930). In the case of extortion, the influence on official conduct by the officer may be a negative one: the officer will refrain from prosecuting, or arresting the victim in return for money or something of value. In the case of employees of licensing authorities, the influence is more likely to be positive: 'pay or no license granted.' Section 3(b) of chapter 268A, of course, requires no intent--only knowledge.

⁶⁰See discussion ¶17, supra.

BEG: N.J.

NEW JERSEY LAW OF BRIBERY, EXTORTION, AND GRAFT

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SUMMARY

¶1 The major statutory provisions in New Jersey dealing with bribery, extortion, and graft are contained in three chapters of the New Jersey Statutes Annotated: Chapter 85--General Provisions Relating to Crimes, Chapter 93--Bribery and Corruption, and Chapter 105--Extortion, Threats, and Unlawful Takings.

¶2 The major bribery statutes require giving, offering, and promising plus receiving or accepting as elements of conduct. The two major extortion statutes apply to the conduct of public officers and the general public. A public officer may not receive or take, while the general public may not threaten to kill, injure, kidnap, steal, or forcibly take away. Since no threat or demand need occur for a public officer to commit extortion, the statute incorporates what many jurisdictions call graft. Misconduct in office involves the performance of an unlawful act or the omittance of a lawful act.

¶3 The required attendant circumstances vary for each offense. They generally involve (1) some thing of value being conveyed to (2) some person, usually a public officer, for the performance or non-performance of his duties or under a threat of injury.

¶4 All of the offenses require intent as the state of mind for conduct. It appears that knowledge of attendant circumstances must also be present.

I. BRIBERY

A. Basic Statutory Provisions

¶15 The statutory provisions relating to bribery are contained in seven chapters of the New Jersey Statutes Annotated.¹

Chapter 2A: 93 (Bribery and Corruption) defines the general statutes (section 2A: 93-1, 2, 4, and 6)² as well as more

¹N.J. Stat. Ann. §2A: 72-8 (West 1969) (bribery of jurors; penalty: \$150.00);

N.J. Stat. Ann. §2A: 91-1 (West 1969) (bribery of bank officials; penalty: misdemeanor);

N.J. Stat. Ann. §2A: 93-1 through 2A: 93-14 (West 1969) (Bribery and Corruption Generally);

N.J. Stat. Ann. §§2A: 170-88, 89 (West 1969) (corruption of employees);

N.J. Stat. Ann. §§18A: 14-88, 90, -96 (West 1969) (bribery in school elections);

N.J. Stat. Ann. §§19: 34-25, -32, 38, 39, 40, 45 (West 1969) (bribery in elections);

N.J. Stat. Ann. §§32: 23-21 (West 1969) (bribery of stevedoring services).

²N.J. Stat. Ann. §2A: 93-1 (West 1969) (bribery of judge or magistrate) states:

Any person who directly or indirectly gives, offers or promises any money, real estate, service or thing of value as a bribe, present or reward, to obtain, procure or influence the opinion, judgment or behavior of any judge or magistrate in any action, matter or cause, and the judge or magistrate who receives or accepts the same, are guilty of a high misdemeanor;

N.J. Stat. Ann. §2A: 93-2 (West 1969) (bribery of legislators) states:

specific statutes such as the bribery of labor representatives,³ foremen,⁴ and professional sport participants.⁵ The other six chapters pertain to bribery in areas such as public

2 (continued)

Any person who directly or indirectly gives, offers or promises any money, real estate, service or thing of value as a bribe, present or reward, to obtain, procure or influence the opinion, behavior, vote or abstention from voting of any member of the senate or general assembly, upon any bill, resolution, election, appointment or other proceeding pending before the legislature, or before either house, or before both houses in joint meeting, and the member of the senate or general assembly, or other person who directly or indirectly receives or accepts the same, are guilty of a high misdemeanor;

N.J. Stat. Ann. §2A: 93-4 (West 1969) (soliciting or receiving reward for official vote). This states:

Any member or officer of any state, county or municipal government, or member of any public authority, board, association, commission or committee, who solicits or receives, directly or indirectly, any money or valuable thing, reward or commission for his vote as a member thereof, is guilty of a misdemeanor;

N.J. Stat. Ann. §2A: 93-6 (West 1969) (giving or accepting bribes in connection with government work). This states:

Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

³N.J. Stat. Ann. §2A: 93-7 (West 1969) (penalty: misdemeanor).

⁴N.J. Stat. Ann. §2A: 93-8 (West 1969) (penalty: misdemeanor).

⁵N.J. Stat. Ann. §§2A: 93-10, 11, 12, 13 (West 1969) (penalties: misdemeanors).

elections⁶ and school elections.⁷

B. Conduct

¶6 Sections 2A: 93-1 (Bribery of judge or magistrate)⁸ and 2A: 93-2 (Bribery of legislator)⁹ both forbid the giving, offering or promising of any money, real estate, service, or thing of value and its receiving or accepting. The penalty for violating either statute is a high misdemeanor.¹⁰ Actual payment must occur for the bribee to be convicted for receiving or accepting.¹¹ The giving, offering, or promising of a bribe is itself unlawful, however, without anyone receiving or accepting. Attempted bribery is not considered a separate crime, but the offering of a bribe.

¶7 Section 2A: 93-4 (Soliciting or receiving reward for

⁶See note 1 supra.

⁷See note 1 supra.

⁸See note 2 supra.

⁹See note 2 supra.

¹⁰See N.J. Stat. Ann. §2A: 85-6 (West 1969) (any person guilty of a crime specified as a high misdemeanor where no punishment is specifically provided will be punished by a fine of not more than \$2,000, or by imprisonment for not more than 7 years, or both). See also N.J. Stat. Ann. §2A: 85-7 (West 1969) (any person guilty of a crime specified as a misdemeanor where no punishment is specifically provided, will be punished by a fine of not more than \$1,000, or by imprisonment for not more than 3 years, or both).

¹¹This substantially reiterates the common law position. See State v. Begyn, 34 N.J. 35, 47, 48, 167 A.2d 161, 167 (1961). Solicitation of a bribe can, however, constitute attempted extortion. Id., 34 N.J. at 48, 167 A.2d at 167.

official note),¹² a misdemeanor, proscribes the soliciting or receiving of a bribe in return for a vote. Thus, merely attempting to receive a bribe in violation of this statute is punishable.

¶8 Section 2A: 93-6 (Bribes in connection with government work)¹³ prohibits the giving, offering to give, or promising to give and the receiving, offering to receive, or promising to receive.¹⁴ Since the offering or promising to receive requires no result, the bribee does not have to receive anything to be convicted. For this reason, the scope of the statute is broader than sections 2A: 93-1 and 2. The penalty, however, decreases from a high misdemeanor to a misdemeanor.

¶9 Since these statutes include two conduct requirements, the payor and payee might be convicted as principals and accomplices for the same illegal payment. The New Jersey court, however, have not yet confronted this issue; the payor and payee in a bribery charge have only been convicted as principals in giving or receiving.

¹²See note 2 supra.

¹³See note 2 supra.

¹⁴The courts have interpreted the recipient's conduct to mean that the bribee must agree to use whatever apparent influence he might possess to corrupt a public official on a public act. See United States v. Densker, 537 F.2d 40, 48 (3d Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (1977).

C. Result

¶10 Sections 2A:93-1 and 2A: 93-2 both require actual conveyance of a bribe or thing of value before the bribee can be convicted for receiving or accepting.

D. Attendant Circumstances

1. Money, real estate, service, or thing of value

¶11 All the bribery statutes involve the conveyance of money, real estate, service or thing of value as a bribe, present, or reward. The bribe does not have to benefit the bribee personally; the destination of the money or valuable thing does not matter.¹⁵

2. Position of bribee

¶12 Section 2A: 93-1 prohibits the bribery of any judge or magistrate.

¶13 Section 2A: 93-2 forbids the bribery of any member of the senate or general assembly. Further, the statute specifically provides that any person who receives or accepts a bribe designed to influence a legislator is also guilty.

¶14 Section 2A: 93-4 pertains to any member or officer of any state, county, or municipal government, or member of any public authority, board, association, commission, or committee. In addition, the officer must presently be a member of government. For instance, the statute does not pertain to a councilman-elect.¹⁶

¹⁵State v. Smagula, 39 N.J. Super. 187, 191, 120 A.2d 621, 623 (1956).

¹⁶State v. Penta, 127 N.J. Super. 201, 316 A.2d 733 (1974).

This, however, does not prevent conviction on other grounds.

¶15 Section 2A: 93-6 precludes the bribery of any person whether or not a public official.¹⁷ The bribee, however, must possess at least the apparent ability to influence the public action involved.¹⁸

¶16 Other statutes prohibit the bribery of foremen,¹⁹ professional sport figures,²⁰ and labor representatives.²¹ In section 2A: 93-7 (Bribery of labor representatives), the courts have interpreted "representative" to embrace all who represent a labor union, whether officers or lesser agents.²² Further, "appointed" only means that the labor union designate a person as a representative.²³

¶17 In State v. Begyn the New Jersey Supreme Court stated in dictum that it is not necessary that the official have the authority to perform the act bargained for.²⁴ Official power, ability, or apparent ability suffices.

¹⁷State v. Ferro, 128 N.J. Super. 353, 320 A.2d 177 (1974).

¹⁸United States v. Dansker, supra note 14, 537 F.2d at 49.

¹⁹See note 4 supra.

²⁰See note 5 supra.

²¹See note 3 supra.

²²State v. Provenzano, 34 N.J. 318, 169 A.2d 135 (1961).

²³Id.

²⁴34 N.J. at 47, 48, 167 A.2d at 167. The court in dictum described the elements of common law bribery, which the present statutes have incorporated. See also State v. Ellis, 33 N.J.L. 102, 97 Am. Dec. 707 (1868).

3. Purpose of the bribe

¶18 The bribe must be aimed at influencing some action, matter, or cause,²⁵ legislative proceeding,²⁶ or some act connected with or appertaining to any government office or authority.²⁹

E. State of Mind

¶19 The requisite state of mind must be ascertained from the specific statute and the case law. No general culpability statute exists.

1. Conduct

¶20 All of the bribery statutes provide that the bribe must be given, received, offered, or solicited to obtain, procure, or influence some type of official activity or conduct. For instance, in State v. Smajula, the court stated that the gist of the offense charged under section 2A: 93-4 "was the solicitation of money by the defendant bargaining for their votes with a corrupt mind."²⁸ The briber must therefore engage in conduct with intent to influence some future act.²⁹ Likewise, the bribee must intend to exert whatever apparent ability exists to acquire the future unlawful advantage.³⁰ The

²⁵See N.J. Stat. Ann. §2A: 93-1, note 2 supra.

²⁶See N.J. Stat. Ann. §2A: 93-2, note 2 supra.

²⁷See N.J. Stat. Ann. §2A: 93-6, note 2 supra.

²⁸39 N.J. Super. at 191, 120 A.2d at 623.

²⁹State v. Begyn, supra note 11, 34 N.J. at 48, 167 A.2d at 167.

necessary intent can be proven "by showing that the opportunity was used to perform a public duty as a means of acquiring an unlawful benefit."³¹ In addition, the official action bargained for does not have to occur for the commission of an offense.³²

2. Attendant circumstances

¶21 Knowledge appears to be the requisite state of mind for attendant circumstance. To intend the necessary conduct a person must be aware of the bribe and of the bribee's apparent ability to influence some future act.

F. Other Statutory Provisions

¶22 Two statutes grant persons involved in a bribery scheme immunity for their testimony. Section 2A: 93-3³³ provides

³⁰ Id.

³¹ State v. Sherwin, 127 N.J. Super. 370, 385, 317 A.2d 414, 422 (1974).

³² State v. Landecker, 100 N.J.L. 195, 197, 126 A. 408, 409 (1924), aff'd, 103 N.J.L. 716, 137 A. 919 (1927). The court states:

The test is whether the person who gives, offers, or promises the gift or gratuity does so with the intent denounced by the statute. Where that intent appears, it is quite immaterial whether its successful carrying out will be injurious to the business of the employer or not. The legislative purpose, as declared in the caption, is to punish attempts to corruptly influence agents, employees, or servants with relation to the matters indicated in the body of the act; and proof that such attempt has been made is proof that the statutory provision has been violated.

³³ N.J. Stat. Ann. §2A: 93-3 (West 1969).

transactional immunity for anyone testifying to the bribery of a legislator and section 2A: 93-9³⁴ provides use immunity for anyone testifying to the bribery of a labor representative or a foreman.

II. EXTORTION

A. Basic Provision

¶23 The New Jersey statute and common law define extortion two ways:

- (1) any person demanding money from others through threats violates N.J. Stat. Ann. §2A: 105-4 (Threatening to kidnap, kill, or injure for purposes of extortion);³⁵ and

³⁴N.J. Stat. Ann. §2A: 93-9 (West 1969).

³⁵N.J. Stat. Ann. §2A: 105-4 (West 1969) provides:

Any person who, with intent to extort money or other thing of value, directly or indirectly threatens to kidnap or steal or forcibly take away any person, or who directly or indirectly demands any sum of money or other thing of value, on a threat to kidnap, steal or forcibly take away any person, or who directly or indirectly threatens to kill or to do bodily injury to a person unless a sum of money be paid or other thing of value be delivered, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 30 years, or by a fine of not more than \$5,000, or both.

Under common law extortion, it was also a criminal offense to take money from a person by threat of criminal prosecution. See State v. Morrissey, 11 N.J. Super. 298, 301, 78 A.2d 329, 330 (1951). This has been incorporated into statute in N.J. Stat. Ann. §2A: 105-3 (West 1969). Further, anyone who commits extortion when armed is subject to additional sentences under N.J. Stat. Ann. §2A: 151-5 (West 1969).

- (2) any public officer who unlawfully takes or receives any fee or reward violates N.J. Stat. Ann. §2A: 105-1 (Unlawful takings).³⁶

A violation of the first statute constitutes a high misdemeanor punishable by imprisonment for not more than thirty years, or by a fine of not more than \$5,000, or both. The second statute, a misdemeanor, does not require a public officer to make threats or instill fear to violate what the courts have defined as the New Jersey extortion statute. It suffices that an officer unlawfully receives money, whether it be for past, future, or present services or for any other reason. Consequently, New Jersey's extortion statute largely incorporates what many jurisdictions define as graft or simple corruption.³⁷ Further, this concept of extortion overlaps the bribery statutes since an officer still commits extortion where the object is to influence the officer and such influence is not demonstrated.³⁸

³⁶N.J. Stat. Ann. §2A: 105-1 (West 1969) provides:

Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdemeanor.

In State v. Weleck, 10 N.J. 355, 371-72, 91 A.2d 751, 759 (1952), the court stated that the elements of extortion are:

- (1) an officer; by
- (2) color of office;
- (3) taking money; that
- (4) is not due him.

³⁷Graft is usually defined as receiving a gratuity for a past official act.

³⁸State v. Begyn, supra note 11, 34 N.J. at 47, 167 A.2d at 167.

¶24 Other statutory provisions define more specific violations, such as the intimidation of employees in elections,³⁹ delivery of threatening letters,⁴⁰ and the forcible collection of loans.⁴¹ These materials, however, are limited to an analysis of the major extortion statutes, sections 2A: 105-1 and 2A: 105-4.

B. Conduct

¶25 Section 2A: 105-1 forbids the unlawful receiving or taking or any fee or reward. No threats or demands are required; conviction can occur for the mere taking.⁴²

¶26 Section 2A: 105-4 prohibits anyone from threatening or demanding on a threat to kill, injure, kidnap, steal or forcibly take away any person in exchange for money or any other thing of value. A threat or demand is essential.

C. Result

¶27 Section 2A: 105-1 requires a taking or receiving before any violation occurs. This, however, does not prevent conviction for attempted extortion.⁴³ The demand, solicitation,

³⁹N.J. Stat. Ann. §19: 34-27 (West 1969).

⁴⁰N.J. Stat. Ann. §2A: 105-3 (West 1969).

⁴¹N.J. Stat. Ann. §2A: 105-5 (West 1969).

⁴²See State v. Matule, 54 N.J. Super. 326, 331, 148 A.2d 848, 850 (1959); State v. Weleck, supra note 36, 10 N.J. at 371, 91 A.2d at 759.

⁴³N.J. Stat. Ann. §2A: 85-5 (West 1969) (an attempt to commit an indictable offense is a misdemeanor).

or attempted taking constitutes the prohibited conduct.⁴⁴

D. Attendant Circumstances

1. Item Being Extorted

¶28 Section 2A: 105-1 forbids the receiving or taking of any fee or reward not allowed by law. The fee or reward being extorted must be included in an indictment. Specifically, if an indictment charges that a fee was extorted in excess of a lawful fee, and the lawful fee is certain, then only the amount actually demanded and received must be charged. If the lawful fee can fluctuate, however, then both the lawful and extorted fee must be included.⁴⁵

¶29 Section 2A: 105-4 prohibits anyone from extortionately demanding any sum of money or other thing of value.

2. Persons involved

¶30 Section 2A: 105-1 refers only to a judge, magistrate, or public officer. The courts have broadly construed "public officer," interpreting it to include a Borough Health Department official,⁴⁶ a Deputy Director of the Department of Public Affairs,⁴⁷ and a Housing Project foreman.⁴⁸ The New Jersey

⁴⁴State v. Weleck, supra note 36, 10 N.J. at 373, 91 A.2d at 760.

⁴⁵Loftus v. State, 19 A. 183, 184 (1890).

⁴⁶State v. Begyn, supra note 11, 34 N.J. at 43, 167 A.2d at 165.

⁴⁷State v. Goodman, 9 N.J. 569, 89 A.2d 243 (1952).

⁴⁸State v. Attanasio, 92 N.J. Super. 267, 223 A.2d 42 (1966).

Supreme Court described the scope of this term in State v.

Begyn:

The scope of the term should be governed by the nature of the particular problem. The underlying basis of the various crimes of official misconduct is the breach of a duty of public concern by one who by virtue of his position--whatever it might be called--is in some way entrusted with the public welfare. So the definition of "officers" with respect to any such crime must be so broad that no public employee can claim to be outside its circumscription so long as the alleged misconduct is at all related to his official duties and obligations, express or inherent.⁴⁹

The state can convict both de facto and de jure officers.⁵⁰

Further, the statute does not limit its scope solely to officers of New Jersey; it permits the conviction of officers from other states.⁵¹

¶31 Section 2A: 105-4 contains no restrictions since it refers to "any person."

3. Color of office

¶32 A judge, magistrate, or public officer must take or receive a fee or reward by color of his office. In State v. Weleck, the New Jersey Supreme Court quoted a definition of this phrase:

That is, the service rendered, or to be rendered, or pretended to have been rendered, must be apparently, or pretended to be, under official power or authority, and the money must be taken in such an apparent or claimed capacity.⁵²

⁴⁹34 N.J. at 43, 167 A.2d at 165.

⁵⁰Kirby v. State, 57 N.J.L. 320, 31 A. 213 (1894) (dictum).

⁵¹State v. Barts, 132 N.J.L. 74, 38 A.2d 383 (1944), aff'd, 132 N.J.L. 420, 40 A.2d 639 (1945).

⁵²10 N.J. at 372, 91 A.2d at 459-60, quoted from 1 Burdick, Law of Crime (1949), §275, p. 395. In the Weleck opinion, Chief Justice Vanderbilt composed a paraphrase of this definition stating:

If a public officer accepts a fee or reward solely in his private capacity, however, this does not constitute extortion since the fee or reward is not accepted under color of office.⁵³

4. Performance of duties

¶33 A public officer must take the fee or reward "for performing his duties." Various courts have disagreed over the interpretation of "for performing." The court in State v. Bart⁵⁴ held that a police officer was guilty of extortion for receiving money in exchange for foregoing an arrest. The court rejected the defendant's argument that the statute did not apply because he had received money for not doing his duty. Instead, the court felt he bargained for a reward which he received, an act not permitted by law for doing his duty. In State v. Savoie, however, the New Jersey Supreme Court questioned the holding in Bart, stating in dictum that the fee or reward must literally be for the performance of the duties involved.⁵⁵

52 (continued)

'By color of his office' means simply that the officer must have taken money not due him for the performance of his official duties. 10 N.J. at 372, 91 A.2d at 759.

State v. Matule subsequently acknowledged this shorter definition. 54 N.J. Super. 326, 332, 148 A.2d 848, 851 (1959). The New Jersey Supreme Court in State v. Savoie, 67 N.J. 439, 341 A.2d 598 (1975), however, questioned the paraphrase as too narrow and emphasized the original quote. 67 N.J. at ___, 341 A.2d at 604.

⁵³State v. Savoie, supra note 52, 67 N.J. at ___, 341 A.2d at 603.

⁵⁴132 N.J.L. 74, 38 A.2d 383 (1944), aff'd, 132 N.J.L. 420, 40 A.2d 639 (1945).

⁵⁵67 N.J. at ___, 341 A.2d at 604.

The Savoie court proceeded to hold that no culpability exists where the fee or reward is given as a pure gift.⁵⁶

¶34 A recent case further defined the scope of Savoie. In State v. Dolton,⁵⁷ a municipal police chief was convicted under section 2A: 105-1 for receiving \$500 as a Christmas gift so that he might look into a pending drunk driving charge against the giver's son. The defendant tried to rely on Savoie in arguing that since the alleged influence concerning the dismissal of the charge was not within the authority of a police chief he could not be convicted "for performing" his duties. The court rejected this argument stating:

We do not conceive [Savoie] to imply that misfeasance in the manner in which the duties are performed removes the conduct from having occurred in (and for) the performance of the official duties. We deem Savoie to mean at most only that the statutory offense does not occur if the official receives something for his restraint from official duties.⁵⁸

E. State of Mind

1. Conduct

¶35 In State v. Savoie, the supreme court stated that the

⁵⁶ 67 N.J. at ___, 341 A.2d at 603. Justice Sullivan wrote a strong dissent, stating:

[T]his construction does violence to the plain meaning of the statute and seems to give sanction to the odious practice of a public officer accepting "gifts" from persons who stand to benefit or lose from the way in which the public officer performs his duties. 67 N.J. at ___, 341 A.2d at 613.

⁵⁷ 146 N.J. Super. 111, 369 A.2d 17 (1977).

⁵⁸ 146 N.J. Super. at ___, 369 A.2d at 20.

principles of the Model Penal Code⁵⁹ and the proposed New Jersey Code were "substantially anticipated and declared by this court as the law of the State in Morss v. Forbes, 24 N.J. 341, 132 A.2d 1 (1957)." ⁶⁰ In accordance with these principles, the court proceeded to state in dictum that section 2A: 105-1 required intent as a state of mind.⁶¹ The accused must intend to engage in the conduct proscribed by the statute.

¶36 Section 2A: 105-4 specifically requires that a person act with intent to extort money or other things of value.

¶37 Even though a person intends to act in the proscribed manner, ignorance of the law may afford an exemption to conviction where a prevalence of opinion concerning the propriety of the illegal conduct might show that the defendant was not consciously doing anything wrong.⁶²

⁵⁹The court summarized the Model Penal Code as follows:

[C]ulpability, absent specific legislation otherwise, requires purposeful and knowing action as to each element. If the element involves the attendant circumstances, there must be awareness of the circumstances. 67 N.J. at ___, 341 A.2d at 608-9.

⁶⁰67 N.J. at ___, 341 A.2d at 610.

⁶¹Id.

⁶²State v. Cutter, 36 N.J.L. 125 (1873). The court held that ignorance of the law may afford a defense to a conviction. In this case, a Justice of the Peace alleged that he exacted fees under a belief that he had a right to them by force of statute. The court stated that although any prevalence of opinion that the magistrate had a right to exact the fees would not legalize the act of taking them, it might show that the defendant was not consciously doing anything wrong. In State v. Savoie, the New Jersey Supreme Court acknowledged Cutter stating:

2. Attendant circumstances

¶38 To be convicted under any extortion statute, knowledge of the attendant circumstances appears to be required. The Model Penal Code supports this contention stating that if any element of a crime involves attendant circumstances "there must be awareness of the circumstances."⁶³

F. Other Related Material

¶39 The New Jersey courts have not decided whether a person can be simultaneously convicted for both bribery and extortion.

III. GRAFT

¶40 Graft generally refers to the receipt of a reward or gratuity for past conduct. No agreement or influence is involved. As already discussed, section 2A: 105-1, defined by the courts and legislature as an "extortion" statute, comprises the major provision that covers what other jurisdictions refer to as graft.⁶⁴ A few other statutes more narrow in scope, which can be defined as graft provisions,

62 (continued)

The Cutter decision illustrates the principle that while knowledge of the criminal law is not a requisite element of an offense, yet reasonable ignorance or mistake as to a legal relationship made an element of the offense by the statute involved, as in Cutter and here, will ordinarily negate the required mental culpability. 67 N.J. at ___, 341 A.2d at 611.

⁶³ See note 59 supra.

⁶⁴ See ¶23, supra.

proscribe illegal conduct by bank officials,⁶⁵ election officers,⁶⁶ and officers of public utilities.⁶⁷ Since section 2A: 105-1 covers the majority of what can be called graft violation, these statutes will not be analyzed.

IV. MISCONDUCT IN OFFICE

A. Basic Provision

¶41 Misconduct in office characterizes a specific common law offense punishable as a misdemeanor under N.J. Stat. Ann. 2A: 85-1 (Offenses indictable at common law and not otherwise covered, punishable as misdemeanors).⁶⁸ The State can covict a person for both misconduct in office and bribery or extortion since the statutes prohibiting bribery and official misconduct do not abrogate the common law but supplement it.⁶⁹ The New Jersey Supreme Court defined the offense in State v. Begyn:

⁶⁵ N.J. Stat. Ann. §2A: 91-1 (West 1969).

⁶⁶ N.J. Stat. Ann. §18A: 14-89 (West 1969).

⁶⁷ N.J. Stat. Ann. §48: 3-6 (West 1969).

⁶⁸ N.J. Stat. Ann. §2A: 85-1 (West 1969).

⁶⁹ State v. Ellis, 33 N.J.L. 102, 103, 97 Am. Dec. 707 (1868). See also State v. Cutter, 36 N.J.L. at 126:

[T]he old and new law are to be construed together; and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear.

[N]o public officer shall, in the exercise of the duties of his office or while acting under color of his office, (1) do any act which is wrongful in itself--malfeasance, (2) do any otherwise lawful act in a wrongful manner--misfeasance, or (3) omit to do any act which is required of him by the duties of his office--nonfeasance. And any corrupt violation by an officer in any of these three ways is a common-law misdemeanor.⁷⁰

¶42 Bribery, unlawful taking (extortion), and misconduct in office constitute separate crimes. They can overlap, however, when the same conduct comprises the unlawful taking and the misconduct in office.⁷¹ The New Jersey prosecutors seemingly indict for misconduct in office instead of bribery or extortion where money is conveyed, even though additional elements relating to conduct must be proved.⁷² Consequently, although broader in scope than any bribery or extortion statutes, the relevancy of misconduct in office to this material warrants close analysis.

B. Conduct

¶43 This offense includes:

- (1) doing any wrongful act--malfeasance;
- (2) doing any otherwise lawful act wrongfully--misfeasance;
- (3) omitting to do any required lawful act--nonfeasance.

⁷⁰ 34 N.J. at 49, 167 A.2d at 168, quoted from Perkins, Criminal Law (1957), p. 409. See also State v. Seaman 114 N.J. Super. 19, 31, 274 A.2d 810, 816 (1971), cert. denied, 404 U.S. 1015 (1972); State v. Silverstein, 76 N.J. Super. 536, 540, 185 A.2d 45, 47 (1962), aff'd, 41 N.J. 203, 195 A.2d 617 (1963); and State v. Weleck, 10 N.J. at 365, 91 A.2d at 756.

⁷¹ United States ex rel. Triano v. Superior Ct. of N.J., 393 F. Supp. 1061 (1975), cert. denied, 423 U.S. 1056 (1976). See also State v. Seaman, 114 N.J. Super. at 31-2, 274 A.2d at 816.

⁷² 34 N.J. at 48, 167 A.2d at 168.

C. Attendant Circumstances

1. Public officer

¶44 This offense only involves public officers as defined in section 2A: 105-1.⁷³

2. Under color of office or in the exercise of the duties of the office

¶45 The public officer must act under the color of an office or in pursuance of its duties. The duties cast by law on an office may:

- (1) be prescribed by some private or special law;
- (2) be imposed by a general act of legislature; or
- (3) arise out of the nature of the office.⁷⁴

Where the duties arise from private law, the indictment must allege the duty and the facts of the offense. The court takes judicial notice of duties arising from the other two sources.⁷⁵

D. State of Mind

1. Conduct

¶46 Intent comprises the culpable mental state for conduct.⁷⁶ Only the intent to commit the proscribed act must be shown;

⁷³ See ¶30, supra.

⁷⁴ 10 N.J. at 366, 91 A.2d at 756.

⁷⁵ Id.

⁷⁶ State v. Boncelet, 107 N.J. Super. 444, 451, 258 A.2d 894, 898 (1969); State v. Lally, 80 N.J. Super. 502, 507, 194 A.2d 252, 255 (1963).

no profit or benefit is required.⁷⁷

2. Attendant circumstance

¶47 It appears that a person must possess knowledge of any attendant circumstances to intend to violate this offense.

⁷⁷State v. Boncelet, 107 N.J. at 451, 258 A.2d at 898.

NEW YORK LAW OF BRIBERY, EXTORTION, AND GRAFT



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SUMMARY

¶1 These materials will discuss New York law relating to the crimes of bribery, extortion and graft involving public servants acting in their official capacity. The basic New York statutory provisions on these offenses are contained in two sections of the Penal Law: Article 155-- Larceny and Article 200-- Bribery Involving Public Servants and Related Offenses. These provisions operate to limit the scope of activities for which a public servant may lawfully be remunerated.

¶2 The common element of conduct for bribery, extortion and graft is the offer, solicitation, acquisition, or acceptance of a benefit by a public servant, or another for him. Extortion requires the additional conduct necessary to instill fear in the victim. The only common attendant circumstance of these crimes is that a public servant must be involved and his illegal activities must relate to his official position, powers, or duties.

¶3 Bribery or bribe receiving requires a benefit conferred as the result of an understanding that the public servant's future conduct will thereby be influenced. Graft involves a benefit conferred as a reward or gratuity for past acts related to the public servant's official position. No result is required for either crime. The circumstances surrounding an extortion scheme must be a threat of abuse of official position and ownership of the extorted property by the victim or a third person. Fear must be

instilled in the victim, and as a second result, the property must be delivered to the extortionist, or another for him.

¶4 To secure a bribery conviction, intent to confer or solicit and knowledge of the attendant circumstances must be proved. An agreement between the parties should be sufficient to fulfill this requirement. For graft offenses, knowledge of conduct and surrounding circumstances is required. Intent to deprive, instill fear, and appropriate another's property plus knowledge of the attendant circumstances are required to secure an extortion conviction.

¶5 Various related sections of the New York Penal Law deny a defendant certain defenses and codify other permissible defenses.

I. NEW YORK BRIBERY

A. Conduct

¶6 The required conduct for bribery or bribe receiving is conferring, offering, or agreeing to confer, or soliciting, accepting, or agreeing to accept any benefit.¹ The essential element of the crime of bribery, according to the sections pertaining to the bribe giver's activity,² is the effort or attempt to attain an unfair advantage in the various governmental processes. The sections that sanction the bribe receiver's conduct³ focus on the solicitation or acceptance of some reward pursuant to an agreement that the public servant's future conduct will thereby be influenced. In either case, actual delivery or receipt of a benefit is not an essential element of conduct; fulfillment of the corrupt agreement is also not essential.

¶7 Section 20.10 of the Penal Law specifically precludes prosecution of an individual for both bribe giving and

¹N.Y. Penal Law §200.00 (McKinney 1975) (bribery in the 2d degree, class D felony); §200.04 (bribery in the 1st degree, class B felony); §200.10 (bribe receiving in the 2d degree, class D felony); §200.12 (bribe receiving in the 1st degree, class B felony).

Other provisions of the revised Penal Law relates to bribery not involving a public servant: commercial bribery (§§180.00-180.05); bribing a labor official (§§180.10-180.30); sports bribery (§§180.35-180.45); bribing a witness (§§215.00-215.05); and bribing a juror (§§215.15-215.20).

²Id. at §§200.00-200.05.

³Id. at §§200.10-200.15.

bribe receiving with regard to one instance of conduct. Under former law, it was possible to obtain a conviction for both offenses by arguing that the bribe giver aided the bribe receiver in committing the offense. Under the new law, this is no longer possible. A third party may be liable, however, for aiding and abetting either bribery or bribe receiving if his conduct with respect to the crime is more than "necessarily incidental thereto."⁴

¶8 Conviction for both criminal solicitation and bribery or bribe receiving is precluded by section 100.20 of the Penal Law.⁵ This section provides that where an individual's conduct is "necessarily incidental to the commission of the crime solicited," he shall not be guilty of solicitation. Instead, he may only be convicted of the crime solicited, that is, bribery or bribe receiving.

¶9 Offering a bribe is not a criminal attempt, but rather, the crime itself. Thus, an attempt to offer a bribe will not be an invalid attempt to attempt.⁶

¶10 Similarly, agreeing to confer or accept a bribe is conduct sufficient to constitute the crime.

⁴People v. Morhouse, 21 N.Y.2d 56, 233 N.E.2d 456, 286 N.Y.S.2d 657 (1967) ("go-between" held liable as aider and abettor); N.Y. Penal Law §20.10 (McKinney 1975).

⁵See also People v. Yore, 36 App. Div.2d 818, 320 N.Y.S.2d 601 (1st Dep't 1971) (defendant should not have been convicted of two counts of bribery involving one common scheme).

⁶People v. Legrand, 50 App. Div.2d 906, 377 N.Y.S.2d 562 (2d Dep't 1975) (offer communicated to third person who never communicated to complainant sufficient to establish attempt).

B. Attendant Circumstances

1. Benefit

¶11 Bribery and bribe receiving both require a benefit offered to or agreed to be accepted by a public servant. Since no tangible result is required to secure a conviction for either offense, the benefit need not actually be given or received. "Benefit" is broadly defined in section 10.00 [17] of the Penal Law to include "any gain or advantage to the beneficiary" or to any third person designated by the beneficiary. Although political or personal advantage may qualify as well as the traditional benefits of money or property, the benefit must not be so nebulous or contingent as to create speculation as to its real value.⁷

2. Public servant

¶12 The person bribed must be a public servant. The statutory definition of "public servant"⁸ is broad enough to include every category of government or public officer as well as every employee of such officer, any person functioning as a public officer or employee,

⁷People v. Cavan, 84 Misc.2d 510, 376 N.Y.S.2d 65 (Sup. Ct. 1975) (vague offer to turn State's evidence held not to constitute benefit); People v. Adams, 382 N.Y.S.2d 879 (Suffolk County Ct. 1976) (political benefit found too uncertain). See also People v. Ioppolo, 45 App. Div.2d 745, 356 N.Y.S.2d 662 (1974) (conviction or indictment for bribery require proof of benefit to the defendant of the thing offered).

⁸N.Y. Penal Law §10.00(15) (McKinney 1975).

and every person elected or designated to become a public servant.⁹

3. Agreement or understanding

¶13 The existence of an agreement or understanding that the public servant's future conduct in his official capacity will be influenced by the benefit he is to receive must be proved to secure a conviction under the New York bribery laws. This element distinguishes bribery from crimes involving reward for past independent conduct. Failure of the public servant to fulfill his part of the agreement is immaterial. Similarly, it is irrelevant that the result agreed upon was legal or proper, or that it might have been obtained in the absence of the bribe.

4. Future conduct ("as a public servant") influenced

¶14 The agreement or understanding must concern the future official conduct of the public servant. As noted earlier, this conduct may or may not be lawful and proper; it need only relate to the powers and duties of the public servant. As one court stated, "Absent a relationship between his public office and the allegedly purchased conduct, the evidence is not legally sufficient."¹⁰ The statute refers to duties

⁹ See People v. Woodford, 85 Misc.2d 213, 379 N.Y.S.2d 241 (Nassau County Ct. 1975) (state university security officer held to be public servant); People v. Lewis, 386 N.Y.S.2d 560 (Crim. Ct. N.Y. 1976) (special patrolman held to be public servant). But see People v. Tuttle, 45 App. Div.2d 750, 356 N.Y.S.2d 652 (2d Dep't 1974) (attorney not a public servant merely because State Attorney General could have brought the same legal action).

¹⁰ People v. Ginsberg, 80 Misc.2d 921, 928, 364 N.Y.S.2d 260, 264 (Nassau County Ct. 1974).

"as public servant" that are sought to be influenced. This term has been construed to mean "the powers, duties or functions of the public officer in his official of public servant capacity, as opposed to his individual capacity."¹¹

¹¹ People v. Herskowitz, 80 Misc.2d 693, 695, 364 N.Y.S.2d 350, 354 (Orange County Ct. 1975), aff'd, slip op. No. 253 (Court of Appeals May 10, 1977). In Herskowitz the lower court dismissed bribery indictments against defendants who had attempted to bribe a state assemblyman to exert his influence regarding local water and sewer connections. Only members of the local Town Board had any authority in this matter. Since the assemblyman had no related authority, the acts sought to be influenced were not, the court found, his acts "as a public servant" as required by the statute.

In unanimously affirming Herskowitz, the Court of Appeals held that §200.00 does require that the acts of the public servant sought to be influenced must in fact be within or related to the official's power. Where the result sought by the bribe giver is in no manner related to the public servant's official position, offering the bribe is not a violation of §200.00 even though the bribe giver thought the result was so related.

On this interpretation, New York bribery law differs markedly from Federal bribery law under 18 U.S.C. §201. See United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975) (no defense that officer lacked power to bring about desired result); United States v. Hall, 245 F.2d 338 (2d Cir. 1957) (no defense that immigration inspector had no authority to grant or deny particular application); Wilson v. United States, 230 F.2d 531 (4th Cir.), cert. denied, 351 U.S. 931 (1956) (no defense that defendant was no longer directly in chain of supervision).

It is at least arguable, however, that the language of §200.00 does encompass the defendants' conduct in Herskowitz. §200.00 states:

A person is guilty of bribery in the second degree when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgement, action, decision or exercise of discretion as a public servant will thereby be influenced. (emphasis added)

CONTINUED

2 OF 20

5. Aggravated bribery

¶15 When the corrupt agreement relates to any aspect of the various class A drug felonies under Article 220, the punishment is graded two degrees higher than that for the class D felony of 2d degree bribery or bribe receiving.¹²

6. Bribery for public office

¶16 Sections 200.45 and 200.50 deal with conduct similar to that proscribed in the sections dealing with bribery generally. The attendant circumstances differ in that either a public servant or party officer¹³ may be involved in the scheme, and money or property must be the subject of the agreement rather than a general "benefit." The future conduct must relate to the appointment, designation or nomination of some person as a candidate for public office. The remaining elements of the crime are the same as those in the general bribery provisions.

11(continued)

The argument against the Herskowitz decision is that the phrase "as a public servant" occurs within the "that" clause which serves to characterize or spell out the requisite content of the defendants' understanding or agreement. The phrase does not specify an independent surrounding circumstance. In so far as the defendants think or believe that the conduct sought to be influenced is part of or related to the public servant's official capacity, their agreement or understanding has the requisite content.

Cf. People v. Ginsberg, note 10 supra, at 926-7, 364 N.Y.S.2d at 263, where the court held that the prosecution must show how and in what official capacity the defendant acted under color of office.

¹²See note 1 supra. When the bribe is given to influence the public servant's conduct with respect to the investigation, arrest, detention, prosecution or incarceration of any person for the commission or attempted commission of a class A felony involving a dangerous drug, bribery becomes a class B felony.

¹³N.Y. Penal Law §200.40 (McKinney 1975) defines the term "party officer."

C. State of Mind

¶17 Because specific mental states are not mentioned in the provisions dealing with bribery and bribe receiving, Article 15--Culpability must be examined to determine the requisite state of mind. Penal Law section 15.5[2] commands that where no culpable mental state is specified in a criminal statute, the offense will still require such if it is necessary to carry out the prohibited conduct.

¶18 The required conduct of conferring, offering, or agreeing to confer and the necessary elements of an agreement or understanding and future conduct influenced would all seem to imply conscious deliberation on the part of the individuals involved in a bribery scheme. Since the bribe givers objective is to secure an improper advantage in a governmental process, the required state of mental culpability as to his conduct is intent to influence. Similarly, since the bribe receiver's goal is to receive an impermissible advantage in exchange for an agreement concerning his future conduct, intent should be the requisite mental state as to his conduct. Logically, the existence of an agreement or understanding between the parties should be sufficient to prove intent.

¶19 Knowledge of the surrounding circumstances should be the required correlative state of mind. The persons involved in a bribery scheme must be aware that the attendant circumstances exist in order to engage in the criminal conduct. Otherwise, it would be difficult to find that one had made an effort to gain an impermissible advantage or confer an improper benefit.

D. Other Statutory Provisions

¶20 When a public servant commits extortion to secure an agreement on the part of another person to confer a benefit on the public servant, this fact may be used as an affirmative defense by the person charged with bribe giving in a bribery prosecution.¹⁴ Thus, the distinction between voluntarily giving and giving under duress is codified in current New York law. The victim of an extortion scheme is now given a statutory defense to a prosecution for bribe giving. Section 200.15 specifically provides, however, that bribe receiving and extortion are not mutually exclusive crimes. Thus, when in one instance an individual commits both crimes, it is no defense to a prosecution for bribe receiving that he also committed the crime of extortion. An individual may be prosecuted for both offenses arising out of the same conduct.

II. GRAFT

¶21 For purposes of this discussion, the sections of the New York Penal Law sanctioning reward or receipt of reward for official misconduct and giving or receipt

¹⁴N.Y. Penal Law §200.05. See People v. Court, 52 App. Div.2d 891, 383 N.Y.S.2d 66 (1st Dep't 1976); People v. Bollino, 31 App. Div.2d 74, 296 N.Y.S.2d 919 (1st Dep't 1969).

of unlawful gratuities¹⁵ will be referred to as the graft provisions, although the term is not used within the statutes. Graft differs from bribery in that the essence of graft is reward for past official conduct. For this reason, no element of agreement or understanding as to influenced conduct is required.

¶22 Graft is sanctioned because it may bring about preferential behavior or treatment in the future. Rewarding official conduct encourages future misconduct. Unlawful gratuities place pressure on all individuals to "tip" or risk disfavor. Both of these offenses undermine the integrity of government.

A. Conduct

¶23 The conduct required for rewarding or receiving reward for official misconduct or giving or receiving unlawful gratuities is the same as that required for bribery or bribe receiving: conferring, offering, or agreeing to confer or soliciting, accepting, or agreeing to accept a benefit. As with bribery, section 100.20 of the Penal Law precludes conviction for both criminal solicitation and any graft offense. Also, attempted graft is not an invalid attempt

¹⁵N.Y. Penal Law §200.20 (McKinney 1975) (rewarding official misconduct in the 2d degree, class E felony); §200.22 (rewarding official misconduct in the 1st degree, class C felony); §200.25 (receiving reward for official misconduct in the 2d degree, class E felony); §200.27 (receiving reward for official misconduct in the 1st degree, class C felony); §200.30 (giving unlawful gratuities, class A misdemeanor); §200.35 (receiving unlawful gratuities, class A misdemeanor).

to attempt. Various instances of conduct relating to one graft scheme will lead to prosecution for only one offense, as with bribery. No result is required.

B. Attendant Circumstances

¶24 The circumstances surrounding graft offenses are basically the same as those for bribery offenses. A benefit must be conferred or agreed upon, and a public servant's actions related to his official capacity must be involved. The difference between the two types of offenses is the point at which the wrongful agreement concerning compensation of the public servant occurs.

1. Past conduct

a. Violated duty as a public servant

¶25 Sections 200.20 to 200.27 prohibit reward or receipt of reward for a public servant's past conduct in violation of his official duties. Section 200.22 represents an aggravated form of the offense that is graded two degrees higher if the official misconduct relates to Article 220 drug offenses. Duties "as a public servant" are given the same broad interpretation as in the provisions relating to bribery.

b. No entitlement to additional compensation

¶26 Sections 200.30 and 200.35 prohibit the giving or receiving of unlawful gratuities. In these provisions, the past conduct of the public servant must be that which he was required or authorized to perform. The public

servant must have no entitlement to any extra compensation for such conduct. This provision differs from that discussed immediately above in that the conduct of the public servant must have been lawful in the first instance. No possibility or probability of preferential treatment of the donor is required. All that need be proved is that additional compensation was offered for an official act performed by the donee.¹⁶ There is no aggravated form of this offense.

C. State of Mind

¶27 The culpable mental state specified for the individual who rewards official misconduct or gives unlawful gratuities is knowledge. No mental state is specified for the public servant who receives such benefits. Since the law is aimed at discouraging various types of reinforced behavior, knowledge as to the public servant's conduct seems appropriate. Such conduct is reinforced only if the public servant realizes (1) that he is being rewarded and (2) that the reward is for a specific instance of conduct. Thus, knowledge would also be required as to the attendant circumstances of the transaction, both for the donor and the recipient of the unlawful compensation.

¹⁶People v. LaPietra, 64 Misc.2d 807, 316 N.Y.S.2d 289 (Suffolk County Ct. 1970) (Under sections 200.30 and 200.35, a violation does not require that there be a possibility or probability of future preferential treatment).

III. EXTORTION

A. Conduct

¶28 Section 155.05 of the New York Penal Law defines larceny by extortion as the wrongful taking, obtaining, or withholding of an owner's property by compelling or inducing the delivery of such property by instilling fear. The essential elements of conduct are taking property by instilling fear: theft by threat, or wrongful acquisition by intimidation. Nine different methods of intimidation are listed in the statute, one of which specifically refers to extortion by a public servant. Such a public servant must threaten to use or abuse his official position by performing or failing or refusing to perform some act relating to his official duties. The statute does not specify how the fear must be instilled in the victim.

B. Result

¶29 Two results are required elements of the crime of extortion. First, a fear of some sort of harm must be instilled in the victim. Second, that fear must induce the victim to engage in conduct from which he has a legal right to abstain: the delivery of property owned by the victim to the criminal or a third party. If the element of fear is missing, the criminal may still be prosecuted either for attempt or ordinary larceny. If the delivery is not completed, the criminal may be prosecuted either for attempt or bribe receiving.

C. Attendant Circumstances

1. Public servant

¶30 One need not be a public servant to commit extortion. Section 155.40 of the Penal Law provides, however, that extortion committed by a public servant through use or abuse of his official position is first degree grand larceny, a class C felony. As discussed earlier, the statutory definition of "public servant" is broadly phrased. Similarly, "use or abuse his position as a public servant" covers a wide range of activities.

2. Another's property

¶31 Section 155.05 defines larceny as the wrongful taking of "another's property" and refers to the "owner thereof." Larceny by extortion must involve the wrongful acquisition of an owner's property. An owner is defined as someone with a superior right of possession of the property. It is an affirmative defense that the property was taken under a mistaken, but good faith claim of right.¹⁷ Property has been defined and construed to include "every species of valuable right and interest and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."¹⁸ Thus, both

¹⁷N.Y. Penal Law §155.15(1) (McKinney 1975); People v. Fenster, 63 Misc.2d 486, 312 N.Y.S.2d 682 (Suffolk County Ct. 1970).

¹⁸People v. Spatarella, 34 N.Y.2d 157, 162, 313 N.E.2d 38, 40, 356 N.Y.S.2d 566, 569 (1974) (customer's patronage and business found to be property); People v. Wisch, 58 Misc.2d 766, 296 N.Y.S.2d 882 (Sup. Ct. 1969) (milk route held to be property).

tangible and intangible items are included in the definition of property.

D. State of Mind

¶32 The required state of mind as to conduct is specified as "intent to deprive." Section 15.15[1] states that when only one term of mental culpability appears in a statute, it will be presumed to apply to all elements of the offense. Thus, the required culpability as to instilling fear is intent to do so. Intent is also required as to the result. Intent is not, however, applicable to surrounding circumstances; instead, knowledge of one's position as public servant and ownership of the involved property is required.

E. Other Statutory Provisions

¶33 Section 155.10 provides that extortion and bribe receiving are not mutually exclusive. It is no defense in a prosecution for extortion that by the same conduct the defendant also committed the crime of bribe receiving. This provision corresponds to section 200.15, which is discussed above.

¶34 Section 155.15 provides a statutory defense to an extortion prosecution. If the defendant threatened the victim with being charged with a crime, and did so hoping to induce the victim to "make good the wrong which was the subject of such threatened charge," and if the defendant reasonably believed the charge to be true, this will be an affirmative defense.

¶35 As a procedural matter, section 155.45 requires that a charge of extortion must be supported by an indictment for extortion. The indictment so charging must be supported by proof establishing extortion. Because of these requirements, proof that the defendant embezzled \$300 (3d degree grand larceny) will not support an indictment for extortion (also 3d degree grand larceny). This may be because extortion is grand larceny regardless of the value of the stolen property. The specificity required by this provision may prove to be a trap for the unwary prosecutor.

BEG. STATES

BRIBERY, EXTORTION, AND GRAFT STATUTES OF THE STATES



BRIBERY, EXTORTION AND GRAFT STATUTES OF
THE STATES--NOTE

The following charts exhibit state laws on bribery, extortion and graft, analyzed into elements to facilitate structural comparison. The analyses incorporate no case law. In New Jersey, for example, which retains as misdemeanors offenses at common law, under N.J. Stat. Ann. §2A:85-1, corrupt officials are often prosecuted for misconduct in office, among other offenses--but this common law offense does not appear in these materials.

Concepts used in the charts are standardized, while statutory concepts vary widely among the states. Extortion appears in two forms: threatening with intent to obtain another's property, and demanding an unauthorized fee under color of office. Not all states have statutes covering both forms. Some states call the first form blackmail or coercion. Some states include in the second form the receiving of unauthorized fees under color of office, an offense here analyzed as graft. Extortion in these materials requires the presence of threat, or at least some measure of coercion, and so it includes as conduct demanding, but not merely asking or receiving. Some statutes appear in both extortion and graft charts, and some in both bribery and graft charts.

Similarly, concepts referring to mental states have been standardized. Where intent is defined for attendant

circumstances, in some statutes, it has the meaning normally conveyed by the word knowledge, which has been used here. Where a bribery statute, however, requires an agreement that the bribe is to influence an official act, either knowledge or intent with respect to the agreement may be implied. This has been shown on the charts by agreement or understanding among the attendant circumstances and (agreement) or (understanding) as the corresponding mental state.

Various states define public servant differently. Here it includes public officers and employees, but not jurors or witnesses. Where a state defines public servant to include jurors the appendices show the inclusion. Many states define public servant to include persons who have been appointed or elected to office but have not yet taken office. This variation has not been shown. Nor have the phrases to another (indicating the involvement of two persons in the crime) or directly or indirectly (indicating that the bribe may be given to a person for another). Corruptly has been included as an attendant circumstance; it has been read to mean not lawfully. Maliciously, the meaning of which is seldom clear from the face of the statute, has been treated similarly.

Most states provide for fines and imprisonment as punishment for felonies and misdemeanors. A felony usually is distinguished by a sentence of more than a year in a state facility. Fines have not been indicated separately here. Constitutional provisions barring

from office persons convicted of bribery, or in some states of any felony, have been exhibited only in the bribery chart.

The appearance of "(N)" following the name of a state indicates the presence of a new penal code.

BRIBERY STATUTES OF THE STATES

Statutes	Conduct	Attendant Circumstances	Result	State of Mind		Penalties
				Conduct	Att'd Circ's	
ALABAMA						
\$63 (\$65)(\$76)	offers, gives or promises	public officer (juror)(witness) gift or thing of value corruptly	---	intent to influence official act pending or possible	---	felony, bar to office
\$64 (\$67)(\$77)	accepts or agrees to accept	public officer (juror)(witness) gift, thing of value or promise <u>agreement</u> corruptly	accepts or agrees	---	---	felony, bar to office
					(agreement)	

Note: See also, e.g., §70 (compounding), §72 (legislator demanding bribe). Constitution Art. 4 §§79-81 prohibits bribery of public officers.

ALASKA						
\$11.30.040	offers, gives or promises	public officer gift or valuable consideration or thing corruptly	---	intent to influence official act pending or possible	---	felony
\$11.30.050	accepts or receives	public officer gift, valuable consideration or thing, or promise <u>agreement</u> corruptly	receives	---	---	felony
					(agreement)	

Note: See also §11.30.190 (compounding).

ARIZONA						
\$13-281 (\$13-287) (\$13-289)	offers or gives	public officer (judicial officer, juror, referee, arbitrator or umpire)(witness) bribe	---	intent to influence official act	---	felony, bar to office

ARIZONA continued
§13-282 (§13-288)
(§13-290)

asks, receives or
agrees to receive

public officer (judicial officer,
juror, referee, arbitrator or
umpire)(witness)

felony, bar to
office

bribe

agreement

(agreement)

Note: See also, e.g., §13-283 (bribery of councilman, commissioner or board member), §13-285 (bribery of legislator), §13-286 (legislator seeking bribe).

ARKANSAS (N)
§41-2703 (§41-
2613)(§41-2608)

offers, confers or
agrees to confer

public servant (juror)(witness)
benefit as consideration for
official act

not explicit¹

not explicit¹

felony, bar to
office

§41-2703 (§41-
2613)(§41-2608)

solicits, accepts or
agrees to accept

public servant (juror)(witness)
benefit as consideration for
official act

not explicit¹

not explicit¹

felony, bar to
office

Note: See also §41-2807 (compounding). Constitution Art. 5 §§9, 35 bars from office and provides for punishment as felons those convicted of bribery.

¹Per §41-204(2): purposely, knowingly or recklessly.

CALIFORNIA
§67 (§92)(§137)

offers or gives

executive officer (judge or
juror)(witness)

intent to influence
official act

felony, bar to
office

bribe

§68 (§93)

asks, receives or
agrees to receive

executive or ministerial officer,
employee or appointee (judge or
juror)

felony

bribe

agreement

(agreement)

Note: See also, e.g., §85, 86 (legislators), §153 (compounding), §95 (jury tampering), §165 (bribery of councilman).

COLORADO (N)
§18-8-302 (§18-
8-606)(§18-8-602)

offers, confers or
agrees to confer

public servant (juror)(witness)
pecuniary benefit

intent to influence
official act

felony, bar to
office

§18-8-302 (§18-
8-607)(§18-8-603)

solicits, accepts or
agrees to accept

public servant (juror)(witness)
pecuniary benefit

felony, bar to
office

agreement

(agreement)

Note: Constitution Art. 12 §4 bars from office those convicted of bribery. Per §18-8-302(2) it is no defense that the person sought to be influenced was not qualified. §§18-1-502 and 18-1-503 refer to culpability.

CONNECTICUT (N) §53a-147 (§53a-152)(§53a-149)	offers, confers or agrees to confer	public servant (juror)(witness) benefit as consideration for official act	---	---	---	felony
§53a-148 (§53a-153)(§53a-150)	solicits, accepts or agrees to accept	public servant (juror)(witness) benefit as consideration for official act	---	---	---	felony

Note: See also, e.g., §22-399 (meat and poultry inspectors). §53a-5 refers to culpability.

DELAWARE (N) §1201 (§1264) (§1261)	offers, confers or agrees to confer	public servant (juror)(witness) personal benefit <u>agreement</u>	---	not explicit ¹	not explicit ¹ (<u>agreement</u>)	felony, bar to office
§1203 (§1265) (§1262)	solicits, accepts or agrees to accept	public servant (juror)(witness) personal benefit <u>agreement</u>	---	not explicit ¹	not explicit ¹ (<u>agreement</u>)	felony, bar to office

Note: Constitution Art. II §21 and Art. VI §2 provides for removal and disqualification from office of those convicted of bribery. Per §1202 coercion is a defense to a prosecution for offering or conferring a bribe; under §1204 coercion is not a defense to a prosecution for receiving a bribe. Per §1208 it is no defense that the person sought to be influenced was not qualified.

¹Per §251: intentionally, knowingly or recklessly.

FLORIDA §838.015	offers, gives or promises	public servant benefit corruptly	---	intent to influence official act pending or possible	---	felony, bar to office
	solicits, accepts or agrees to accept	public servant benefit for himself or another corruptly	---	intent to be influenced in official act pending or possible	---	felony, bar to office

Note: See also, e.g., §§914.14, 918.14 (bribery and tampering with witnesses), §918.12 (tampering with jurors). Constitution Art. 6 §4 bars from office those convicted of bribery; but see §112.011 (removal of disqualification). Per §838.015(2) it is no defense that the public servant had not assumed office or was not qualified.

GEORGIA (N) §26-2301	offers or gives	public servant unauthorized benefit	---	intent to influence official act	---	felony, bar to office
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GEORGIA (N) continued

\$26-2301	solicits or receives	public servant unauthorized benefit given with purpose to influence official act	---	not explicit ¹	---	felony, bar to office
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Note: Constitution §2-801 bars from office those convicted of bribery.

¹Per §§26-601 to 26-605 a criminal act must have an intention or criminal negligence.

HAWAII (N)

\$710-1040(1)(a) (\$710-1073)(\$710-1070)	offers, confers or agrees to confer	public servant (juror)(witness) pecuniary benefit	---	intent to influence official act	not explicit ¹	felony
\$710-1040(1)(b) (\$710-1073)(\$710-1070)	solicits, accepts or agrees to accept	public servant (juror)(witness) pecuniary benefit	---	intent to be influenced in official act	not explicit ¹	felony

Note: See also §710-1013 (compounding) and, e.g., §159-28 (meat inspectors). Per §710-1040(2) coercion or extortion is a defense to a prosecution for bribery. Per §710-1001 property offered or conferred in violation of bribery laws can be forfeited to the state.

¹Per §§702-204, 702-207: knowledge or recklessness.

IDAHO

\$18-2701 (\$18-4703)(\$18-1301)	offers or gives	executive officer (legislator, or another for him)(juror or judicial officer) bribe	---	intent to influence official act pending or possible	---	felony
\$18-2702 (\$18-4704)(\$18-1302)	asks, receives or agrees to receive	executive officer (legislator, or another for him) (juror or judicial officer) bribe <u>agreement</u>	---	---	---	felony (agreement)

Note: See also §18-1601 (compounding) and, e.g., §18-1309 (bribery of municipal or county officer).

ILLINOIS (N)

\$33-1	promises or tenders	public servant, or person believed to be a public servant (or person) unauthorized benefit, or benefit which a public servant would be unauthorized to accept	promises or tenders	intent to influence official act (or intent to cause person to influence official act)	not explicit ¹	felony, bar to office
	receives or agrees	unauthorized benefit given with intent to cause recipient to influence official act	receives or agrees	not explicit ¹	knowledge of other's intent to cause recipient to in- fluence official act	felony, bar to office

ILLINOIS (N) continued

\$33-1	solicits	unauthorized benefit <u>agreement</u>	---	not explicit ¹	not explicit ¹ (<u>agreement</u>)	felony, bar to office
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Note: See also §32-1 (compounding). Constitution Art. 13 §1 bars from office convicted felons.

¹Per §4-3: intent, knowledge or recklessness.

INDIANA (N)

\$35-44-1-1(a)(1)	offers, confers or agrees to confer	public servant unauthorized property	---	intent to control official act	knowledge	felony
\$35-44-1-1(a)(2)	solicits, accepts or agrees to accept	public servant unauthorized property	---	intent to be controlled in official act	knowledge	felony

Note: See also, e.g., §35-44-1-1(a)(7) (bribery of witness), §33-2.1-8-9 (bribery of judicial officer). Per §35-44-1-1(b) it is no defense that the person sought to be influenced was not qualified.

IOWA (N)*

\$2201	offers, gives or promises	public servant, juror or witness benefit	---	intent to influence official act	---	felony, bar to office
\$2202	solicits or receives	public servant, juror or witness benefit or promise given with intent to influence official act	---	---	---	felony, bar to office

*Code effective January 1, 1978.

Note: See also §2001 (compounding) and, e.g., §§2003, 2004 (tampering with witness, juror).

KANSAS (N)

\$21-3901(a)	offers, gives or promises	public servant benefit to which he is not entitled	---	intent to influence official act	---	felony, bar to office
\$21-3901(b)	requests, receives or agrees to receive	public servant benefit given with intent to influence official act	---	not explicit ¹	---	felony, bar to office

Note: See also, e.g., §21-3815 (attempting to influence a judicial officer).

¹Per §21-3201: intentionally or recklessly.

KENTUCKY (N)

\$521.020(1)(a) (\$524.060)	offers, confers or agrees to confer	public servant (juror) pecuniary benefit	---	intent to influence official act	---	felony
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KENTUCKY (N) continued

\$521.020(1)(b) (\$524.070)	solicits, accepts or agrees to accept	public servant (juror) pecuniary benefit <u>agreement</u>	---	---	---	felony <u>(agreement)</u>
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Note: See also, e.g., §§524.020, 524.030 (bribery of witness). Per §432.350 executive, legislative and judicial officers are barred from office on conviction of bribery. Per §521.020(2) and (3) extortion or coercion is a defense, but failure of the person sought to be influenced to be qualified is not a defense, to a prosecution for bribery.

LOUISIANA (N)
§118

offers or gives	public servant, juror or witness thing of apparent value	---	intent to influence official act	---	felony
offers to accept or accepts	public servant, juror or witness thing of apparent value given with intent to influence official act	---	---	---	felony

Note: See also, e.g., §§129, 130 (jury tampering), §131 (compounding). Constitution Art. 19 §12 and Art. 3 §30 bars from office those convicted of bribery.

MAINE (N)
§602(1)(A)

offers, gives or promises	public servant or party official pecuniary benefit	---	intent to influence official act	knowledge	felony
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§602(1)(B)

solicits, accepts or agrees to accept	public servant, party official or candidate pecuniary benefit given with intent to influence official act	---	knowingly	knowledge	felony
fails to report	offer or promise of pecuniary benefit which violates (1)(A)	---	knowingly	knowledge	felony

MARYLAND
§23

bribes or attempts to bribe	public servant	---	intent to influence official act	---	felony, bar to office
demands or receives	public servant bribe, fee, reward or testimonial given with purpose to influence official act	---	---	---	felony, bar to office

Note: See also, e.g., §26 (emercery). Constitution Art. III §50 bars from office those convicted of bribery.

MASSACHUSETTS

C. 268A §2

offers, promises or offers to give to another	public servant or witness thing of value corruptly	---	intent to influence official act or violation or to commit or aid fraud	---	felony, bar to office
asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive	public servant or witness thing of value given in return for being influenced in official act or violation or to commit or aid fraud corruptly	---	---	---	felony, bar to office

Note: See also, e.g., C. 268A §3. Constitution §93 bars from office or legislature those convicted of bribery.

MICHIGAN

\$28.312 (\$28.314)	offers, gives or promises	public servant (juror, appraiser, trustee, etc.) gift, money, property or other thing of value corruptly	---	intent to influence official act pending or possible	---	felony
\$28.313 (\$28.315)	accepts	public officer (juror, etc.) gift or promise (for official act) <u>agreement</u> corruptly	accepts	---	---	felony <u>(agreement)</u>

Note: See also, e.g., §28.316 (bribery by contractors), §27A.1347 (bribery of juror).

MINNESOTA (N)

\$609.42(1)	offers, gives or promises	public servant unauthorized benefit or reward	---	intent to influence official act	knowledge	felony, bar to office
\$609.42(2)	requests, receives or agrees to receive	public servant unauthorized benefit or reward <u>understanding</u>	---	---	---	felony, bar to office <u>(understanding)</u>

See also, e.g., §609.42(3), (4) (bribery of witness), §609.42(5) (compounding).

MISSISSIPPI

\$97-11-11	offers, gives or promises	public or private officer, agent or trustee, or wife of same, or candidate money, goods, right in action or other property	---	intent to influence official act pending or possible	---	felony, bar to office
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MISSISSIPPI continued

\$97-11-13	accepts (or consents to wife's acceptance)	public or private officer, agent or trustee, or candidate money, good, right in action or other property	accepts (or consents)	--- (knowingly consents) ---	felony, bar to office
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Note: See also, e.g., §97-7-53 (bribery of legislator), §97-9-5 (bribery of juror, arbitrator, referee). Constitution Art. 4 §§44, 50 bars from office legislators convicted of bribery, and provides for impeachment of governor or civil officers for bribery.

MISSOURI \$558.010	gives	public servant money, goods, right in action or other valuable consideration	gives	intent to influence official act pending or possible	--- felony or misdemeanor
\$558.020 (\$558.090)	accepts or receives (asks, solicits or offers to take)	public servant money, goods, right in action or other valuable consideration <u>agreement</u>	receives	--- (agreement)	felony or misdemeanor

Note: See also, e.g., §§558.030 to 558.070 (bribery to obtain office), §§557.100 to 557.130 (bribery of juror).

MONTANA (N) \$94-7-102	offers, confers or agrees to confer	public servant or party official pecuniary benefit as consideration for official act or violation of duty	---	purposely or knowingly	knowledge felony, bar to office
	solicits, accepts or agrees to accept	public servant or party official pecuniary benefit as consideration for official act or violation of duty	---	knowingly	knowledge felony, bar to office

Note: See also, e.g., §23-4723 (bribery of candidate), §23-4756 (inducement to accept or decline nomination). Per §94-7-102 it is no defense that the person sought to be influenced was not qualified.

NEBRASKA \$28-706 (\$28-708)	gives (offers or attempts to bribe)	public officer money or other bribe or promise unlawfully	gives	intent to influence official act	--- felony
	receives (solicits or agrees to receive)	public officer money or other bribe or promise given with intent to influence official act unlawfully	receives	---	felony

Note: See also, e.g., §28-703 (bribery of juror), §28-705 (compounding).

NEVADA

\$197.010 (\$199.010) (\$218.590)(\$197.020)	offers, gives or promises	executive or administrative officer (judicial officer, juror, arbitrator, referee, etc.)(legislator)(other public officer) compensation, gratuity or reward	---	intent to influence official act	---	felony
\$197.030 (\$199.020, asks or receives \$199.030)(\$218.600) (\$197.040)		executive or administrative officer (judicial officer, juror, arbitrator, referee, etc.)(legislator)(other public officer) compensation, gratuity, reward or promise <u>agreement</u>	---	---	---	felony (agreement)

Note: See also \$199.290 (compounding) and, e.g., §§199.240, 199.250 (bribery of witness), \$293.584 (election bribery).

NEW HAMPSHIRE (N)

\$640:2(I)(a)	offers, gives or promises	public servant, juror or party official pecuniary benefit	---	intent to influence official act	knowledge	felony
\$640:2(1)(b)	solicits, accepts or agrees to accept	public servant, juror or party official pecuniary benefit given with intent to influence official act	---	knowingly	knowledge	felony
	fails to report	offer of pecuniary benefit which violates (I)(a)	---	knowingly	knowledge	felony

NEW JERSEY

\$2A:93-1 (\$2A:93-2)(\$2A:93-6)	offers, gives or promises	judge or magistrate (legislator) (person) money, real estate, service or other value as bribe or reward	---	intent to influence official act	---	felony
	receives or accepts	judge or magistrate (legislator) (person) money, real estate, service or other value given with intent to influence official act	receives ---	---	---	felony

Note: See also, e.g., \$2A:93-4 (soliciting reward for official vote), \$2A:105-2 (officer taking fee).

NEW MEXICO (N)

\$40A-24-1	offers or gives	public servant thing of value	---	intent to influence official act pending or possible	---	felony
\$40A-24-2	solicits or accepts	public servant thing of value	---	intent to be influenced in official act pending or possible	---	felony

Note: See also, e.g., §40A-24-3 (bribery of witness), §11-2-53 (bribery of public treasurer). Constitution Art. IV §§39, 40 concerns bribery of and by legislators.

NEW YORK (N)

\$200.00 (\$215.15)	offers, confers or agrees to confer	public servant (juror) benefit <u>agreement</u>	---	---	---	felony (<u>agreement</u>)
\$200.10 (\$215.20)	solicits, accepts or agrees to accept	public servant (juror) benefit <u>agreement</u>	---	---	---	felony (<u>agreement</u>)

Note: See also, e.g., §§200.45, 200.50 (bribery for office). Per §200.05 extortion or coercion is a defense to a prosecution for conferring a bribe, but per §200.15 it is no defense to a prosecution for receiving a bribe that by reason of the same conduct the defendant also committed extortion or coercion or attempted these.

NORTH CAROLINA

\$14-218	offers	bribe	---	---	---	felony
\$14-217	receives or consents to receive	official thing of value, personal advantage or promise not in payment of legal salary or fees <u>understanding or given for perfor-</u> <u>mance or omission of official act</u>		receives or consents	---	felony (<u>understanding</u>)

Note: See also, e.g., §14-219 (bribery of legislator), §14-220 (bribery of juror).

NORTH DAKOTA (N)

\$12.1-12-01	offers, gives or agrees to give	public servant thing of value as consideration for official act or violation of duty	---	knowingly	knowledge	felony
	solicits, accepts or agrees to accept	public servant thing of value as consideration for official act or violation of duty	---	knowingly	knowledge	felony

NORTH DAKOTA (N) continued

Note: See also, e.g., §12.1-12-03 (unlawful compensation for assistance), §12.1-09-01 (tampering with witness). Constitution §§40, 81 concerns bribery of governor and legislators. Per §12.1-12-01(2) it is no defense that the recipient was not qualified.

OHIO (N) §2921.02	offers, gives or promises	public servant or party official (witness) valuable thing or benefit	---	intent to corrupt or influence official act (testimony)	---	felony, bar to office
	solicits or accepts	public servant or part official (witness) valuable thing or benefit to corrupt or influence official act (testimony)	---	knowingly	---	felony, bar to office

Note: See also, e.g., §3599.01 (election bribery).

OKLAHOMA §381 (§383)	offers, gives or promises	public servant (judicial officer, juror, arbitrator, etc.) gift or gratuity corruptly	---	intent to influence official act pending or possible	---	felony or misdemeanor
	requests or accepts	public servant gift, gratuity or promise for official act corruptly	---	---	---	felony or misdemeanor, bar to office
§382						
§384	asks, receives or agrees to receive	judicial officer, juror, arbitrator, etc. bribe <u>agreement</u>	---	---	---	felony (agreement)

Note: See also, e.g., §§265, 266 (bribery of executive officer), §308 (bribery of legislator). Per §402 monies, etc. used in violation of bribery laws can be forfeited to the state.

OREGON (N) §162.015	offers, confers or agrees to confer	public servant or juror pecuniary benefit	---	intent to influence official act	knowledge	felony
	solicits (accepts or agrees to accept)	public servant or juror pecuniary benefit (agreement)	(accepts or agrees)	intent that official act shall be influenced	knowledge (agreement)	felony

Note: See also, e.g., §162.265 (witness), §162.335 (compounding). Per §162.035 it is no defense that the person sought to be influenced was not qualified.

PENNSYLVANIA (N)
§4701

offers, confers or agrees to confer	public servant, juror or party official pecuniary benefit as consideration for official act	---	recklessly	recklessness	felony, bar to office
solicits, accepts or agrees to accept	public servant, juror or party official pecuniary benefit as consideration for official act	---	recklessly	recklessness	felony, bar to office

Note: See also, e.g., §§4907, 4909 (bribery of witness). Constitution Art. 2 §7 bars from office those convicted of bribery. Per §4701(b) it is no defense that the person sought to be influenced was not qualified.

RHODE ISLAND
§11-7-4

offers or gives	public servant gift or valuable consideration as inducement or reward for official act, omission or favor corruptly	---	---	---	misdemeanor
obtains or attempts to obtain, accepts or agrees to accept	public servant, for himself or another gift or valuable consideration as inducement or reward for official act, omission or favor corruptly	---	---	---	misdemeanor

Note: See also §11-7-5 (compounding) and, e.g., §11-7-1 (bribery of judicial officer or juror). Per §11-7-6 injured person may recover double damages.

SOUTH CAROLINA
§16-211

offers, gives or promises	public officer gift or gratuity corruptly	---	intent to influence official act pending or possible	---	felony
accepts	public officer gift or gratuity or promise <u>agreement</u> corruptly	accepts	---	---	felony, bar to office (<u>agreement</u>)

Note: See also §1-360.52 (compensation to influence--state ethics commission) and, e.g., §16-217 (corruption of juror), §16-558.1 (bribery to obtain office).

SOUTH DAKOTA (N)
§22-12A-6 (§22-
12A-11)

offers or gives	public servant (juror or judicial officer) bribe	---	intent to influence official act	---	felony
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SOUTH DAKOTA (N) continued

\$22-12A-7 (\$22-12A-11)	asks, receives or agrees to receive	public servant (juror or judicial officer) bribe <u>agreement</u>	---	---	---	felony, bar to office
					(<u>agreement</u>)	

Note: See also, e.g., \$22-12A-4, 22-12A-5 (bribery of legislator).

TENNESSEE

\$39-801 (\$39-805)	offers, gives or promises	public officer (juror) thing of value corruptly	---	intent to influence official act pending or possible	---	felony, bar to office
\$39-802 (\$39-806)	accepts or agrees to accept (takes)	public officer (juror) thing of value or promise (gift, gratuity or anything to influence verdict) <u>Agreement</u> corruptly	---	accepts or agrees (takes)	---	felony, bar to office
					(<u>agreement</u>)	

See also \$39-3103 (compounding) and, e.g., \$39-803, 39-804 (bribery of peace officer).

TEXAS (N)

\$36.02	offers, confers or agrees to confer	public servant or party official pecuniary benefit as consideration for official act	---	intentionally or knowingly	---	felony
	solicits, accepts or agrees to accept	public servant or party official pecuniary benefit as consideration for official act	---	intentionally or knowingly	---	felony

Note: See also, e.g., \$36.05 (tampering with witness), \$4476-7 (bribery of meat or poultry inspector). Per \$36.02(b) it is no defense that the person sought to be influenced was not qualified.

UTAH (N)

\$76-8-103	offers, gives or promises	public servant or party official pecuniary benefit	---	intent to influence official act	---	felony
	solicits, accepts or agrees to accept	public servant, party official or candidate pecuniary benefit given with purpose to influence official act	---	---	---	felony
					knowledge of other's purpose to influence official act	

Note: See also, e.g., \$76-8-308 (bribery to prevent prosecution), \$76-8-508 (bribery of witness).

VERMONT §1101	offers, gives or promises	public officer gift or gratuity corruptly	---	intent to influence official act	---	felony
§1102	accepts	public officer gift or gratuity or promise <u>understanding</u> corruptly	accepts	---	---	felony, bar to office (<u>understanding</u>)

Note: See also, e.g., §1103 (bribery of trier of cause),

VIRGINIA (N) §18.2-447	offers, confers or agrees to confer	public servant or juror pecuniary or other benefit as consideration for official act	---	---	---	felony
	solicits, accepts or agrees to accept	public servant or juror pecuniary or other benefit as consideration for official act	---	---	---	felony, bar to office

Note: See also §18.2-462 (compounding) and, e.g., §18.2-438 (bribery of officers and candidates), §18.2-441 (bribery of commissioners, etc.) Per §18.2-448 it is no defense that the person sought to be influenced was not qualified.

WASHINGTON (N) §9A.68.010	offers, confers or agrees to confer	public servant or juror pecuniary benefit	---	intent to secure particular result in official act	---	felony, bar to office
	requests, accepts or agrees to accept	public servant or juror pecuniary benefit <u>agreement</u>	---	---	---	felony, bar to office (<u>agreement</u>)

Note: See also §9A.76.100 (compounding), §§9A.68.040, 9A.68.050 (trading in office or influence). Per §9A.68.010(2) it is no defense that the person sought to be influenced was not qualified. §9A.20.030 provides for restitution to victim of amount not exceeding double damages.

WEST VIRGINIA §61-5A-3	offers, confers or agrees to confer	public servant or juror pecuniary benefit as consideration for official act or violation of duty	---	---	---	felony, bar to office
	solicits, accepts or agrees to accept	public servant or juror pecuniary benefit as consideration for official act or violation of duty	---	---	---	felony, bar to office

Note: See also, e.g., §61-5A-7 (trading in public office). Per §61-5A-8 it is no defense that the person sought to be influenced was not qualified.

WISCONSIN (N)
§946.10

transfers or promises	unauthorized property or personal advantage	---	intent to influence public servant in official act pending or possible or to induce violation of duty	---	felony
accepts or offers to accept	public servant unauthorized property or personal advantage <u>understanding</u>	---	---	---	felony (<u>understanding</u>)

Note: See also §946.67 (compounding) and, e.g., §946.61 (bribery of witness).

WYOMING
§6-156

offers, gives or promises	public servant money, beneficial act or valuable thing corruptly	---	intent to influence official act pending or possible	---	felony
solicits or accepts	public servant money or valuable thing given to influence official act pending or possible	---	---	---	felony

Note: See also §6-158 (compounding) and, e.g., §6-157 (bribery of juror, witness, etc.).

DISTRICT OF COLUMBIA
§22-701

offers, gives or promises, or causes to be offered, given or promised	public servant, juror, witness or any person acting in official function thing of value	---	intent to influence official act	---	felony
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Note: See also, e.g., §22-704 (corrupt influence).

EXTORTION STATUTES OF THE STATES

Statutes	Conduct	Attendant Circumstances	Result	S t a t e o f M i n d		Penalties
				Conduct	Att'd Circ's	
ALABAMA §§49, 50 (Blackmail)	threatens to injure, accuse, expose or pub- lish libel	orally or in writing	threatens	intent to extort money or property, or to influence action of public officer, or to abet illegal or wrongful act	---	misdemeanor

ALASKA §11.20.345	obtains by threat to injure, cause official action, etc.	property of another	obtains	---	---	felony
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Note: See also, e.g., §11.15.300 (blackmail). Per §11.20.345(d) honest claim for restitution is a defense to a prosecution for extortion.

ARIZONA §13-401	obtains by use of force or fear induced by threat to injure, accuse, expose or by color of office	property of another wrongfully	obtains	---	---	felony
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Note: See also, e.g., §13-403 (attempted extortion by verbal threat).

ARKANSAS (N) §§41-2202, 41- 2203 (Theft by)	obtains by threat	property of another	obtains	knowingly and with intent to deprive another of property	knowledge ¹	felony
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Note: See also, e.g., §41-2705 (influencing public servant), §41-2614 (intimidating juror).

¹ per §41-204.

CALIFORNIA §§518, 519	obtains by use of force or fear induced by threat to injure, accuse, expose or by color of office	property of another with his induced consent, or official act of public officer wrongfully	obtains	---	---	felony
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Note: See also §524 (attempt to extort) and, e.g., §85 (menacing legislator), §95 (intimidation of juror, arbitrator, umpire or referee).

COLORADO (N)
§18-8-306

attempts to influence by public servant
deceit or threat of
violence or economic
reprisal

intent to influence official
act pending or possible

felony, bar to
office

Note: See also, e.g., §§18-8-604, 18-8-608 (intimidation of witness, juror). §§18-1-502, 18-1-503 refer to culpability.

CONNECTICUT (N)
§53a-119(5)

compels or induces de-
livery by fear of injury,
damage to property,
accusation, exposure,
official act, testimony,
strike, etc.

property of another
wrongfully

delivery
fear

intent to deprive another of
property

knowledge¹

felony

¹per §53a-5.

DELAWARE (N)
§846

compels or induces de-
livery by fear of injury,
damage to property,
accusation, exposure,
false testimony or
official act

property of another
wrongfully

delivery
fear

intent to deprive another of
property

not explicit¹

felony

Note: Per §847(a) claim of right is a defense to a prosecution for extortion.

¹Per §251: knowledge or recklessness.

FLORIDA
§836.05

threatens to injure,
accuse or expose

verbally or in writing
maliciously

threatens

intent to extort money or
pecuniary advantage, or to
compel person to act against
his will

felony, bar to
office

GEORGIA (N)
§26-1804
(Theft by)

obtains by threat to
injure, expose, act
officially, etc.

property of another
unlawfully

obtains
over \$50

not explicit¹

felony

§§89-9909, 89-
9910

demands and receives,
or takes

public officer
fee not allowed by law
under color of office

receives
or takes

misdemeanor

Note: Per §26-1804(c) honest claim of right is a defense to a prosecution for extortion.

¹Per §§26-601 to 26-605 a criminal act must have an intention or criminal negligence.

HAWAII (N) §708-830(3) (Theft by)	obtains by threat to injure, damage property, accuse, expose, confine, act officially, testify, cause a strike, etc.	property or service of another	obtains	intent to deprive another of property	knowledge	felony
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Note: See also, e.g., §710-1074 (intimidation of juror). Per §708-834(4) belief in claim as restitution is a defense to a prosecution for extortion.

IDAHO §18-2801	obtains by use of force or fear induced by threat to injure, accuse, etc. <u>or</u> by color of office	property of another wrongfully	obtains	---	---	felony
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Note: See also §18-2808 (attempt to extort), §18-2806 (extortion not otherwise provided for) and, e.g., §18-1353 (political threats).

ILLINOIS (N) §16-1	obtains control by threat	property of another	obtains control over \$150	knowingly and with intent to deprive owner of property	not explicit ¹	felony
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Note: See also, e.g., §24-3-14-5 (oppression in office).

¹Per §4-3: intent, knowledge or recklessness.

INDIANA (N) §35-43-4-2(1)(6) (Theft by)	exerts control by threat to injure, damage property or impair rights	property of another	controls	intent to appropriate	knowledge	felony
§17-2-44-7	charges, demands or takes	officer fee other than provided by law for official act	---	---	---	misdemeanor

Note: Officer convicted under §17-2-44-7 shall be liable on his official bond to injured party for five times illegal fees charged, demanded or taken.

IOWA (N)* §1104	threatens to injure, accuse, expose, inform, damage property, etc.	---	threatens	intent to obtain thing of value	---	felony
	threatens to take or withhold official action	public servant	threatens	intent to obtain thing of value	---	felony

*Code effective January 1, 1978.

Note: See also, e.g., §714.37 (use of telephone to extort). Per §1104 belief in right to threaten in order to recover is a defense to a prosecution for extortion.

KANSAS (N) \$21-3701(c) (Theft by)	obtains control by threat	property of another unauthorized	obtains \$50 or more	intent to deprive	---	felony
\$21-3902(b)	demands	public servant illegal fee or reward for official act under color of office	---	intentionally	--- knowledge of illegality	misdemeanor

Note: See also, e.g., \$21-3428 (blackmail), \$21-4401 (racketeering).

KENTUCKY (N) \$514.080	obtains by threat to injure, accuse, expose, etc.	property of another	obtains over \$100	intentionally	knowledge	felony
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Note: See also, e.g., \$524.040 (intimidation of witness), \$524.080 (intimidation of juror), \$524.120 (intimidation of judicial officer). Per \$514.020(1) claim of right is a defense to a prosecution for extortion.

LOUISIANA (N) \$66	communicates threats to injure, accuse, expose, etc.	---	communi- cates	intent to obtain thing of value	---	felony
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MAINE (N) \$355	extorts by threat to injure or harm	property of another	obtains over \$100	intent to deprive another of property	knowledge	felony
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MARYLAND \$561 (\$562, 563)	sends or delivers letter threatening to injure or accuse (threatens to injure, accuse or accuse falsely)	letter (verbally)	--- (threatens)	knowingly and with intent to extort money or valuable thing (intent to extort)	---	felony
\$23 (part of Bribery)	demands or receives	public servant bribe, fee, reward or testimonial given for influence on official act	---	---	---	felony, bar to office

Note: See also, e.g., \$562A (coercion to contribute).

MASSACHUSETTS
C. 265 §25

threatens to injure person or property or to accuse

verbally or in writing maliciously

threatens

intent to extort money or pecuniary advantage, or to compel person to act against his will

felony

uses or threatens to use authority against person

police officer or officer of licensing authority verbally or in writing maliciously and unlawfully

uses or threatens

intent to extort money or pecuniary advantage, or to compel person to act against his will

felony

C. 268A §2
(part of Bribery)

demands

public servant or witness thing of value given in return for being influenced in official act or in commission or aid of fraud or in violation of duty

felony, bar to office

Note: See also, e.g., C. 268 §13B (intimidation of witness or juror), C. 268A §3 (includes demand for anything of value for official aid), C. 265 §26 (kidnapping to extort), C. 55 §17 (coercion of public servant to contribute).

MICHIGAN
§28.410

threatens to injure, accuse, etc.

orally or in writing maliciously

threatens

intent to extort money or pecuniary advantage, or to compel person to act against his will

felony

§28.411

demands and receives

fee or compensation greater than provided by law, for performance of official duties corruptly

receives

willfully

misdemeanor

Note: See also, e.g., §28.315(1) (intimidation of juror).

MINNESOTA (N)
§609.27
(Coercion)

threatens to harm, confine, injure, damage property, accuse, expose, etc. and causes another to act against his will

orally or in writing

threatens

felony

causes act

MISSISSIPPI
§97-3-77
(Robbery)

takes by threat to injure person, family or property

property of another, delivered from fear in presence feloniously

obtains fear

felony

MISSISSIPPI continued

\$97-11-33	demands, takes or collects	judge, justice of the peace, sherrif or other officer money fee or reward not authorized by law under color of office	---	knowingly	---	misdemeanor
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Note: See also, e.g., §97-7-53, 97-9-55 (intimidation of legislator, juror, witness, attorney, judge), §97-23-83 (threat against business), §97-29-51 (procuring prostitutes by threat).

MISSOURI \$560.130 (Robbery)	accuses or threatens to injure or accuse, <u>and</u> extorts	verbally or in writing money or property	extorts	intent to extort	---	felony
\$558.140	exacts, demands or receives	officer fee or reward greater than or before due, for official act done or to be done under color of office unlawfully	---	willfully	---	misdemeanor

Note: See also, e.g., §558.110 (oppression in office), §30.420 (extortion by state treasurer).

MONTANA (N) \$94-6-302 (Theft by)	obtains control by threat to injure, accuse, take or withhold official action, etc.	property of another	obtains over \$150	purpose to deprive another of property	knowledge	felony
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NEBRASKA \$28-441 (\$28-444) (\$28-445) (Blackmail)	threatens to injure or accuse (or expose) (obtains or seeks to obtain by threat property or to compel acts or to induce surrender of valuable thing or right)	orally or in writing maliciously	threatens	intent to extort money or pecuniary advantage, or to compel person to act against his will	---	felony
\$28-714	demands or receives	public officer fee or reward, not authorized by law, to perform duties	---	knowingly	---	misdemeanor

NEVADA \$205.320	threatens to injure, accuse, expose or publish libel	---	threatens	intent to extort money or property, or to compel act, or to influence public officer, or to abet illegal or wrongful act	---	felony
\$197.170	asks, receives or agrees to receive	public officer fee or compensation greater than provided by law	---	---	---	felony

Note: See also, e.g., \$207.190 (coercion), \$197.200 (oppression under color of office).

NEW HAMPSHIRE (N) \$637:5 (Theft by)	obtains or controls by extortion through threat to injure, confine or take or withhold official action	property of another	obtains or controls over \$100	intent to deprive another of property	knowledge	felony
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NEW JERSEY \$2A:105-4	threatens, or demands on a threat, to injure or kill, kidnap, etc.	money or other valuable thing	---	intent to extort money or other valuable thing	---	felony
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NEW MEXICO (N) \$40A-16-8	communicates threats to injure, accuse, expose, kidnap, etc.	---	communi- cates	intent wrongfully to obtain thing of value or to compel person to act against his will	---	felony
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NEW YORK (N) \$155.05(2)(e) (Larceny by)	compels or induces de- livery by fear through threat to injure, accuse, expose, take or withhold official action, etc.	property of another	delivery fear	intent to deprive another of property	knowledge	felony
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NORTH CAROLINA \$14-118.4	threatens or communicates a threat	---	threatens or com- municates	intent wrongfully to obtain thing of value	---	felony
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Note: See also, e.g., \$14-226 (intimidation of juror), \$14-118 (blackmail).

NORTH DAKOTA (N) \$12.1-23-02 (\$12.1 -23-03)	obtains by threat	property of another (ser- vice available only for compensation)	obtains over \$150 or by pub- lic servant	knowingly and with intent to deprive owner of property (intentionally)	knowledge	felony
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OHIO (N)
\$2905.11

menaces, exposes, utters
calumny or threatens to
commit felony or violent
offense or to expose or
utter calumny

menaces,
etc., or
threatens

intent to obtain valuable
thing or benefit, or to
induce unlawful act

felony

Note: See also, e.g., \$2905.12 (coercion), \$2903.21 (menacing), \$2921.03 (intimidation).

OKLAHOMA
\$1481

obtains by use of force
or fear induced by threat
to injure, accuse, expose
or by color of office

property of another with
his induced consent

obtains

felony

OREGON (N)
\$164.075
(Theft by)

compels or induces de-
livery by fear from threat
to injure, accuse, damage
property, etc.

property of another

delivery
fear

intent to deprive another of
property

knowledge

felony

Note: Per \$164.035(1) honest claim of right is a defense to a prosecution for extortion; per \$164.035(2) so are belief in truth of threat and purpose to compel making good and ignorance that property taken was that of another.

PENNSYLVANIA (N)
\$3523

obtains or withholds by
threat to harm, expose,
take or withhold official
action, etc.

property of another

obtains or
withholds
over \$200

intentionally

knowledge

felony

65 \$133
(not penal code)

charges, demands or takes

public officer
fee greater than provided
by law or for service
not performed

misdemeanor

Note: Per \$3923(b) honest claim for restitution is a defense to a prosecution for extortion.

RHODE ISLAND
\$11-42-2

threatens to injure
person or property or
to accuse

verbally or in writing
maliciously

threatens

intent to extort money or
pecuniary advantage, or to
compel person to act against
his will

felony

\$11-42-1

exact or extorts
(levies, demands or
takes)

state officer
fee for service (bond)
greater than provided
by law
under color of office
corruptly

exact or
extorts

felony

SOUTH CAROLINA

\$16-566.1 (Blackmail)	accuses, exposes or com- pels person to act against his will, or attempts or threatens any of these	verbally or in writing	---	intent to extort money or other valuable thing	--	felony
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SOUTH DAKOTA (N)

\$22-30A-4 (Theft by)	obtains by threat to injure, accuse, take or withhold official action, etc.	property of another	obtains over \$200	intent to deprive another of property	---	felony
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Note: Per §22-30A-16 honest claim of right or ignorance that the property taken was that of another is a defense to a prosecution for extortion.

TENNESSEE
\$39-4301

threatens to injure person, property or reputation, or to accuse	---	threatens	intent to extort money, property or pecuniary advan- tage, or to compel person to act against his will	---	felony
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TEXAS (N)

§§31.01, 31.03 (Theft by)	appropriates by threat to injure, accuse, expose, harm or take or withhold official action	property of another unlawfully	appro- priates over \$200	intent to deprive owner of property	---	felony
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UTAH (N)

\$76-6-406 (Theft by)	obtains or controls by extortion through threat to injure, accuse, reveal or take or withhold official action, etc.	property of another	obtains or controls over \$250	purpose to deprive another of property	---	felony
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Note: Per §76-6-402(3) honest claim of right is a defense to a prosecution for extortion.

VERMONT

\$1701	threatens to injure person or property or to accuse	---	threatens	intent to extort money or pecuniary advantage, or to compel person to act against his will	---	felony
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VIRGINIA (N)

\$18.2-59	threatens to injure or accuse <u>and</u> extorts	money, property or pecuniary benefit	threatens and extorts	---	---	felony
\$18.2-470	demands and receives	public officer fee greater than provided by law for performance of official duties	receives	knowingly	---	misdemeanor

WASHINGTON (N)

\$9A.56.110	obtains or attempts to obtain by threat to injure, accuse, take or withhold official action, etc.	property or services of owner	---	knowingly	---	felony
\$42.18.210	uses power of office	state employee not in course of duties	---	intent to induce or coerce person to provide thing of economic value	---	misdemeanor

Note: \$9A.20.030 provides for restitution to victim of violation of \$9A.56.110 of amount not exceeding double damages. \$42.18.290 provides for civil recovery of damages by victim of violation of \$42.18.210.

WEST VIRGINIA

\$61-2-13	threatens to injure or accuse <u>and</u> extorts	money, pecuniary benefit, etc.	threatens and extorts	---	---	felony
\$61-5-20	demands and receives	public officer fee greater than provided by law for performance of official duties	receives	knowingly	---	misdemeanor

WISCONSIN (N)

\$943.30(1)	threatens to injure person, property, etc. or to accuse	verbally or in writing maliciously	threatens	intent to extort money or pecuniary advantage, or to compel person to act against his will	---	felony
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Note: See also, e.g., \$943.30(3) (attempt to influence witness), \$943.31 (threats to expose).

WYOMING

\$6-147 (Blackmail)	demands with menaces of injury, or accuses or threatens to injure or accuse, or sends or delivers letter which accuses or threatens to injure or accuse	verbally or in writing chattel, money or other valuable thing	---	intent to extort or gain chattel, money or other valuable thing or pecuniary advantage, or to compel person to act against his will letter sent or delivered knowingly	---	felony
\$6-180	asks, demands or receives	public officer fee unauthorized or greater than authorized under color of office	---	---	---	misdemeanor

DISTRICT OF COLUMBIA

\$22-2305 (Blackmail)	accuses or threatens to accuse or expose	verbally or in writing	accuses or threatens	intent to extort thing of value, or to compel person to act against his will	---	felony
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GRAFT STATUTES OF THE STATES

Statutes	Conduct	Attendant Circumstances	Result	S t a t e o f M i n d		Penalties
				Conduct	Att'd Circ's	
ALABAMA §221	asks or receives	public officer compensation, gratuity, reward or promise, not allowed by law, for official act or omission or service not actually rendered	---	---	---	misdemeanor
Note: See also, e.g., §160 (public officer receiving illegal fee).						
ALASKA §11.30.230	charges, takes or receives	public officer (excluding governor and supreme court judges) fee not authorized by law, for official act	receives	willfully and knowingly	---	misdemeanor, dismissal
ARIZONA §38-444	asks or receives	compensation or promise, not authorized by law, for official act	---	knowingly	---	misdemeanor
Note: See also, e.g., §13-546 (judicial officer).						
ARKANSAS (N) §41-2702	solicits, accepts or agrees to accept; offers, confers or agrees to confer	public servant at time of act benefit for past official act	---	not explicit ¹	not explicit ¹	misdemeanor
Note: See also, e.g., §41-2704 (soliciting unlawful compensation). Per §41-2702(2) it is no defense that the official act was otherwise proper.						
¹ Per §41-204(2): purposely, knowingly or recklessly.						
CALIFORNIA §70	receives or agrees to receive	executive or ministerial officer or state employee or appointee emolument, gratuity, reward or promise, not authorized by law, for official act	receives or agrees	knowingly	---	misdemeanor

COLORADO (N)
§18-8-303

solicits, accepts or
agrees to accept;
offers, confers or
agrees to confer

public servant at time of act
pecuniary benefit for past
official act

felony

Note: §§18-1-502, 18-1-503 refer to culpability.

CONNECTICUT (N)

NO GENERAL STATUTE ON GRAFT. But see, e.g., §29-9 (gifts to police officers).

DELAWARE (N)
§§1205; 1206

solicits, accepts or
agrees to accept;
offers, confers or
agrees to confer

public servant
personal benefit, not authorized
by law, for official act

knowingly

knowledge

misdemeanor

Note: See also §1211 (official misconduct).

FLORIDA
§838.016(1)

solicits, accepts or
agrees to accept;
offers, gives or
promises

public servant
pecuniary or other benefit, not
authorized by law, for past, present
or future official act or omission
corruptly

belief (offerer's) felony, bar to
that act or omission office
within competence of
public servant

Note: See also §839.25 (official misconduct). Per §838.016(3) it is no defense that the official act was not performed, or not within the competence of the public servant sought to be rewarded.

GEORGIA (N)

§§89-9909, 89-9910 takes
(Extortion)

public officer
fee not allowed by law
under color of office

takes

not explicit¹

misdemeanor,
dismissal

¹Per §§26-601 to 26-605 a criminal act must have an intention or criminal negligence.

HAWAII (N)

§84-11
(not penal code)

solicits, accepts or
receives

legislator or public employee
money, service or other valuable
thing or promise, reasonably in-
ferably intended to influence or
reward an official act

dismissal, action
voidable, fee
forfeit¹

¹Per §84-19 any favorable state action obtained in violation of these standards is voidable and fees, gifts, compensation or profit received as a result of such violation may be forfeited to the state.

IDAHO §18-1354	solicits, accepts or agrees to accept; offers, confers or agrees to confer	public servant at time of act pecuniary benefit for past official act	---	---	---	misdemeanor
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Note: See also, e.g., §18-1356 (gift to public servant).

ILLINOIS (N) §33-3(d)	solicits or accepts	public servant in official capacity fee or reward not authorized by law	---	knowingly	not explicit ¹ knowledge of illegality	felony, bar to office
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¹Per §4-3: knowledge or recklessness.

INDIANA (N) §4-2-6-5 (not penal code)	solicits or accepts	state officer or employee compensation, other than provided by law, for performance of duties	---	---	---	sanction deter- mined by ethics commission
§2-2.1-3.8 (not penal code)	pays or offers to pay	state officer, employee or legislator compensation, other than provided by law, for performance of duties, by person other than authorized paymaster	---	---	---	sanction deter- mined by ethics commission, legislator expelled

Note: See also, e.g., §33-2.1-8-9 (compensation to judicial officer).

IOWA (N)* §2102	requests or receives	public servant compensation, other than provided by law, for performance of duties under color of office	---	knowingly	---	misdemeanor
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*Code effective January 1, 1978.

Note: This statute also prohibits demands and other misconduct. See also, e.g., §68B.5 (gifts).

KANSAS (N) §21-3902(b) (part of Extortion)	receives	public servant illegal fee or reward for official act under color of office	receives	intentionally	--- knowledge of illegality	misdemeanor, dismissal
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KANSAS (N) continued
§21-3903

gives or offers

public servant

intentionally

misdemeanor

benefit, reward or consideration for
past official act (excludes personal
or trivial gifts)

Note: See also §§46-235 to 46-237 (official graft).

KENTUCKY (N)

NO GENERAL STATUTE ON GRAFT. But see, e.g., §61.310 (gratuities to peace officers).

LOUISIANA (N)

NO GENERAL STATUTE ON GRAFT. But see, e.g., §140, 141 (public contract fraud).

MAINE (N)

§604 (§605)

solicits, accepts or
agrees to accept;
offers, gives or
promises

public servant

--- (knowingly)

--- (knowledge)

misdemeanor

pecuniary benefit for past official
act (from person likely to be
interested in official act pending
or possible)

Note: See also §606 (improper compensation).

MARYLAND

NO GENERAL STATUTE ON GRAFT. But see, e.g., Agriculture §7-325 (gifts to tobacco inspectors).

MASSACHUSETTS

C. 268A §3

asks, solicits,
receives or agrees
to receive, etc.;
offers, gives or
promises

public servant

felony

valuable thing, other than as
provided by law, for official act
performed or to be performed

Note: See also, e.g., C. 268A §§4-5, 11-12, 17-18 (compensation to state, county and municipal employees or former employees).

MICHIGAN

NO GENERAL STATUTE ON GRAFT. But see, e.g., §4.1700(52) (conflict of interest in contract).

MINNESOTA (N)

§609.45

asks, receives or
agrees to receive

public servant

intentionally

knowledge

misdemeanor

fee or compensation greater than
provided by law
under color of office

MISSISSIPPI
§97-11-33

collects

judge, justice of the peace,
sheriff or other officer
money fee or reward not authorized
by law
under color of office

collects knowingly

misdemeanor

Note: See also, e.g., §67-1-33 (gratuity to alcoholic beverage control commissioner).

MISSOURI
§§558.020; 558.010
(part of Bribery)

accepts or receives;
gives

judge, legislator or public officer
money, goods, right in action,
promise or other valuable thing in
consideration for past official act

receives;
gives

felony or mis-
demeanor

§558.140
(part of Extortion)

receives

officer
fee or reward greater than or before
due, unlawful, for official act done
or to be done
under color of office

receives

willfully

misdemeanor

MONTANA (N)
§94-7-104 (§94-
7-105)

solicits, accepts or
agrees to accept;
offers, confers or
agrees to confer

public servant
pecuniary benefit for past official
act favorable to giver (from person
interested in official act)

knowingly

knowledge

misdemeanor

Note: See also §94-7-401 (official misconduct).

NEBRASKA
§28-706 (§28-708)
(part of Bribery)

receives (solicits or
agrees to receive);
gives (offers)

public officer
money, reward or promise for past
official act
unlawfully

receives;
gives

felony

§28-714
(part of Extortion)

asks or receives

public officer
fee or reward, not authorized by law,
for performance of duty

knowingly

misdemeanor

Note: See also, e.g., §§49-1103, 49-1104 (legislators and employees receiving unlawful compensation).

NEVADA

§197.170
(part of Extortion)

asks, receives or
agrees to receive

public officer
fee or compensation greater than
provided by law

felony

NEW HAMPSHIRE (N)

\$640:4 (\$640:5)	solicits, accepts or agrees to accept; offers, gives or promises	public servant or juror pecuniary benefit for past official act (from person interested in official act pending or possible)	---	--- (offerer knowingly)	--- (offerer has knowledge)	misdemeanor
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Note: See also \$640:6 (compensation for services).

NEW JERSEY

\$2A:105-1	receives or takes	judge, magistrate or public officer fee or reward, not allowed by law, for official act under color of office	receives	---	---	felony
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NEW MEXICO (N)

NO GENERAL STATUTE ON GRAFT. But see, e.g., \$14-9-6 (mayor or officer receiving fees).

NEW YORK (N)

\$§200.35; 200.30	solicits, accepts or agrees to accept; offers, confers or agrees to confer	public servant benefit, not authorized, for official act required	---	---; knowingly	---; knowledge	misdemeanor
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Note: See also §§200.20, 200.25 (reward for official misconduct).

NORTH CAROLINA

NO GENERAL STATUTE ON GRAFT.

NORTH DAKOTA (N)

\$12.1-12-01 (Bribery)	solicits, accepts or agrees to accept; offers, gives or agrees to give	public servant thing of value as consideration for official act or violation of duty, including past act or violation	---	knowingly	knowledge	felony
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Note: Per \$12.1-12-01(2) it is no defense that the recipient was not qualified.

OHIO (N)

\$2921.43	solicits or receives	public servant compensation or fee, greater than provided by law, for performance of duty	---	knowingly	---	misdemeanor, bar to office
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Note: See also, e.g., \$2921.41 (theft in office), \$2921.42 (interest in contract).

OKLAHOMA						
74 §1404 (§1409)	solicits or receives	state employee (legislator)	(receives)	---	---	dismissal, reprimand
(not penal code)		compensation impairing judgment in official act (not authorized by law, from source other than state)				

Note: See also, e.g., §386 (gift to juror).

OREGON (N)						
§244.040	solicits or receives;	public official or candidate or member of his household		---	---	fine, forfeiture
(not penal code)	offers	gifts with aggregate value over \$100 within year, from source interested in official act				

Note: See also §§162.405, 162.415 (official misconduct).

PENNSYLVANIA (N) NO GENERAL STATUTE ON GRAFT. But see, e.g., 16 §§7802, 4803 (receiving gratuities--1st class counties, 2nd class counties).

RHODE ISLAND						
§§11-7-3; 11-7-4	obtains or attempts	public servant		---	---	misdemeanor
(part of Bribery)	to obtain, accepts or agrees to accept; offers or gives	gift or valuable consideration as reward for past official act or omission corruptly				

Note: Per §11-7-6 injured person may recover double damages.

SOUTH CAROLINA						
§16-213	accepts	public officer	accepts	---	---	felony or misdemeanor
		rebate or compensation greater than provided by law				

SOUTH DAKOTA (N)						
§22-12A-8	asks or receives	public servant		---	---	misdemeanor, bar to office
		unauthorized gratuity, reward, emolument or consideration for official act				

Note: See also §22-12A-9 (solicitation of compensation for omission of duty).

TENNESSEE NO GENERAL STATUTE ON GRAFT.

TEXAS (N) \$36.07 (\$36.08; \$36.09)	solicits, accepts or agrees to accept; offers, confers or agrees to confer	public servant pecuniary benefit for favorable past official act (from person subject to jurisdiction of public servant)	---	intentionally or knowingly (---)	--- (knowledge of jurisdiction)	misdemeanor
--	---	--	-----	-------------------------------------	---------------------------------------	-------------

UTAH (N) \$76-8-105	solicits, accepts or agrees to accept; offers, gives or promises	public servant pecuniary benefit for past official act	---	recklessly	---	misdemeanor
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Note: See also \$76-8-201 (official misconduct) and, e.g., \$67-16-5 (ethics act: gift or loan).

VERMONT NO GENERAL STATUTE ON GRAFT.

VIRGINIA (N) \$§2.1-351, 2.1-354	accepts	public servant or juror gift, favor or service that might influence official duties	accepts	knowingly	---	misdemeanor
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WASHINGTON (N) \$42.22.040	receives or agrees to receive; gives	public officer unauthorized compensation from source other than state, for official services	receives or agrees; gives	---	---	misdemeanor
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Note: See also \$9A.68.030 (unlawful compensation) and, e.g., \$42.18.200 (gift to state employee).

WEST VIRGINIA \$61-5A-4 (\$61-5A-6)	solicits, accepts or agrees to accept; offers, confers or agrees to confer (accepts or agrees to accept)	public servant or juror pecuniary benefit for past official act or violation of duty (from person interested in official act)	---	---	---	misdemeanor
			(accepts or agrees)		(knowledge)	

WISCONSIN (N) \$946.12(5)	solicits or accepts	public servant valuable thing, greater or less in value than fixed by law, for performance of duty under color of office	---	intentionally	knowledge	misdemeanor
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Note: See also \$946.12(3) (official misconduct).

WYOMING

NO GENERAL STATUTE ON GRAFT.

DISTRICT OF COLUMBIA

§1-1181(d)

solicits or receives; public officer
offers or pays

--- --- ---
money in excess of that provided
by law for advice or assistance
in official capacity

misdemeanor

Note: See also, e.g., §4-129 (emolument to police).

GRAND JURY

ASPECTS OF GRAND JURY PRACTICE



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SUMMARY

¶1 The duty to testify before a grand jury is firmly established. Federal courts may summon a witness from anywhere in the nation, and most states have reciprocal agreements for summoning witnesses upon a showing of materiality and necessity. A witness may move to quash the subpoena in the court having jurisdiction over the grand jury. Orders denying a motion to quash are generally non-appealable, though state statutes may allow appeals. A witness may consult with counsel outside the grand jury room. An ordinary witness is entitled to no warnings prior to testifying, though he may invoke the Fifth Amendment. A potential defendant should be warned of his Fifth Amendment privilege and his right to consult with counsel. If a witness receives immunity, he can still refuse to answer a question based on unlawful electronic surveillance. A witness need not answer questions that violate a common-law or statutory testimonial privilege.

¶2 The federal policy of grand jury secrecy conflicts with the need for disclosure of federal grand jury minutes to state authorities combatting public corruption. The policy favoring secrecy of grand jury proceedings has existed for several hundred years,¹ and is "older than our nation itself."² Yet the policy "is not absolute, and cannot be applied blindly."³ The rationale behind grand jury secrecy is based on protecting the workings of the grand jury. Grand jury secrecy is not a right of the witness. The traditional reasons for secrecy often become inapplicable after the return of an indictment or after trial.

¶3 Rule 6(e) of the Federal Rules of Criminal Procedure governs the disclosure of federal grand jury minutes, and permits disclosure to be made "in connection with a judicial proceeding."

This is the primary avenue for state access to grand jury minutes. Even when disclosure would not be permitted under Rule 6(e), the courts have permitted it where a superior public interest is found. If the witness was granted immunity by the federal court, the testimony may still be used in a state civil proceeding. The fact that immunity was granted, may weigh heavily in favor of granting state access to the minutes.

¶4 In an involved grand jury investigation such as those looking into political corruption, a prosecutor may wish to subpoena those upon whom the investigation has focused as potential defendants in order to examine them as to allegedly criminal activities and suspicious transactions. The target witness is generally afforded less procedural and constitutional protection than a de jure defendant. The practice of subpoenaing a target has not been found to be violative of the target's Fifth Amendment rights. A target may consult his attorney outside the grand jury room, but he has no broader right to counsel than a mere witness. The courts have placed few limitations on the extent to which the target strategy may be used. Once the target is the subject of an indictment he can no longer be compelled to testify about the crime which is alleged in the indictment. Generally, the state courts provide greater protection than do the federal courts.

I. GRAND JURY BACKGROUND

¶5 The power to compel persons to appear and testify before grand juries has developed over centuries. Until the 16th century, juries in civil or criminal cases were supposed to find facts based on their own knowledge, and a witness who volunteered to testify risked being sued for maintenance.⁵ As juries became less able to find facts on their own, witnesses were allowed to testify in civil cases,⁶ and the freedom to

¹ For historical background, see R. Calkins, "Grand Jury Secrecy," 63 Mich. L. Rev. 455 (1964).

At its inception in 1166, the "Grand Assize" (as the grand jury was then called) was not protected by secrecy. By 1368, "le grande inquest" had evolved, and began the custom of hearing witnesses in private. R. Calkins, supra, at 456, 457. "However, the true independence of the grand jury and the institution of grand jury secrecy as a legal concept received their first real impetus in 1681, as a result of the Earl of Shaftesbury Trial." Id.

² Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

³ In re Cement-Concrete Block, Chicago Area, 381 F.Supp. 1108, 1109 (N.D. Ill. 1974).

⁴ A survey of Illinois, Massachusetts, California, Florida and Ohio case law produced little, if any, reference to any litigation surrounding the strategy herein described.

⁵ See, e.g., [1450] Y.B. 28 Hen. 6, 6, 1.

⁶ Stat. of Elizabeth, St., 1563, 5 Eliz. 1, c.9, §12.

testify soon became a duty. In 1612, Sir Francis Bacon in the Countess of Shrewsbury Trial⁷ asserted confidently:

You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and land, but of their knowledge and discovery. If there be anything that imports the king's service they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

In this country, the duty to testify before a grand jury is firmly established.⁸

7

[1612] 2 How. St. Tr. 769, 778.

8

Blair v. United States, 250 U.S. 273, 280-281 (1919):

At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment, a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, §30, 1 Stat. 73, 88), the mode or proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in §§861-865, Rev. Stats. By Act of March 2, 1793, c. 22, §6, 1 Stat. 333, 335, it was enacted that subpoenas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See 876, Rev. Stats. By §877, originating in Act of February 26, 1853, c. 80, §3, 10 Stat. 161,

II. OUT-OF-STATE WITNESSES

A. Background

¶6 The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings⁹ (hereinafter

8 (continued) 169, witnesses required to attend any term of the district court on the part of the United States may be subpoenaed to attend to testify generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§848, 855. And §§879 and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (Wilson v. United States, 221 U.S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see Brown v. Walker, 161 U.S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

⁹11 Uniform Laws Annotated, Crim. Law and Proc. §1.

CONTINUED

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the Act) has been enacted, with minor variations, in forty-eight states.¹⁰ The Act does not, of course, apply in federal court,¹¹ nor does it extend the jurisdiction of a state court, but operates on principles of comity.¹² It applies to witnesses sought in grand jury proceedings.¹³

B. Procedure

¶7 Sections 2¹⁴ and 3¹⁵ of the Act define the procedure for procuring attendance of a witness. Application must be made to a judge of the court having jurisdiction over the grand jury. He issues a certificate stating that the person sought is a material witness and that his presence will be

¹⁰See, e.g., Massachusetts: Mass. Ann. Laws ch. 233 §§13 A-D (Michie/Law. Co-op 1974); New Jersey: N.J. Stat. Ann. §§2A: 81-18 to 2A: 81-23 (West, 1969); New York: N.Y. Crim. Pro. L. §640.10 (McKinney 1975). Alabama does not follow the Act, whereas Iowa has similar but not identical provisions. The Act is also enacted in the District of Columbia, Puerto Rico, Panama Canal Zone, and the Virgin Islands.

¹¹

United States v. Monjar, 154 F.2d 954 (3d Cir.1946). There is nationwide service of a subpoena in federal court. See Fed. R. Crim. Proc. 17(e). Under 28 U.S.C. §1783(a), a U.S. citizen living abroad can be subpoenaed to appear before a federal grand jury.

¹²

Thus the Act is ineffectual except as between two states that have enacted it. See State v. Blount, 200 Or. 35, 264 P. 2d 419, cert. denied, 347 U.S. 962 (1954).

¹³

Uniform Act, supra note 9, §1.

¹⁴

"Summoning Witness in this State to Testify in Another State", Uniform Act, supra note 9, §2.

¹⁵

"Witness from Another State Summoned to Testify in This State", Uniform Act, supra note 9, §3.

required for a specified number of days.

¶8 The certificate is then presented to a judge in a court of record in the county where the witness is located.¹⁶ The judge in that county summons the witness to a hearing, at which he must determine that:

- a) The witness is material and necessary to the investigation;
- b) The witness will not suffer undue hardship by appearing before the grand jury;
- c) The laws of the demanding state will immunize the witness from arrest and service of civil or criminal process as to matters arising before his entry into the state.¹⁷

¶9 Following this determination, the judge issues a summons directing the witness to attend in the demanding state. The witness is compensated by the demanding state, and failure to appear and testify is punishable in the manner prescribed by the state in which the witness is located.¹⁸

16

The witness need not be a resident of that state. See People of the State of New York v. O'Neill, 359 U.S. 1 (1959) (upholding the constitutionality of the Act, in which an Illinois resident, vacationing in Florida, was issued a summons by a Florida court pursuant to an application from a New York court).

17

Section 4 of the Act provides that a witness entering or passing through the state pursuant to a summons under the Act shall be immune from arrest or service of civil or criminal process regarding matters arising before his entry into the state.

18

The witness is subject to punishment by the state having personal jurisdiction over him. If he is issued a summons by state A upon the request of state B, but fails to leave state A, he will be punished by state A. If he enters state B but fails to attend and testify, he will be punished by state B. See Uniform Act, supra note 9, §§2,3.

¶10 Some of the Act's provisions have caused confusion among the states. The primary source of confusion is the meaning of "material witness." The Act itself says that at the hearing on materiality, the certificate issued by the demanding state shall be "prima facie evidence - of all facts stated therein."¹⁹ While one court has held that a mere statement in the certificate that the witness is material is sufficient to cause a summons to issue,²⁰ the prevailing view is that the certificate must either be detailed²¹ or must be accompanied by an affidavit

¹⁹
Id. at §2.

²⁰
Epstein v. People of State of New York, 157 So. 2d 705, 707 (Fla. Dist. Ct. of App. 1963): [I]nasmuch as the certificate is issued by a judge of the requesting state who has satisfied himself as to the sufficiency of the evidentiary facts to establish the necessary conditions for the making of the certificate, it is not required that he give the basis of his decision in order to have a certificate that is prima facie good. See also In re Cooper, 127 N.J.L. 312, 22 A. 2d 532 (1941) (materiality is largely for the requesting state to determine.)

The language of Epstein is diluted by the fact that the certificate was accompanied by an affidavit of the assistant district attorney detailing why the witness was needed.

Contra, in In re Grothe, 59 Ill. App. 2d 1, 208 N.E. 2d 581 (1965) the court held that although a certificate is prima facie evidence of all facts stated therein, a mere statement that the witness is material is conclusory rather than factual and is insufficient to cause a summons to issue. See also Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 275 N.E. 2d 33 cert. denied 407 U.S. 914 (1971) (bare allegation of materiality is insufficient).

²¹
See In re Saperstein, 30 N.J. Super. 373, 375, 104 A. 2d 842, 843, cert. denied 348 U.S. 874 (1954) (certificate stated the subject of the grand jury investigation and explained how the witness was related to that investigation. This was cited by In re Grothe, supra note 20, as being sufficient).

explaining why the witness is needed.²² Testimony may also be added at the hearing itself.²³

C. Challenges to the Summons

¶11 Aside from challenging the showing of materiality, a witness can raise few objections to the summons. Since the hearing is not a criminal proceeding, he is not entitled to counsel or to cross-examine.²⁴ Matters of privilege are to be raised with the demanding state rather than at the hearing.²⁵ He, rather than the demanding state, has the burden of proof regarding undue hardship.²⁶ Low witness fees,²⁷ differences

²²

State of Florida v. Axelson, 80 Misc. 2d 419, 363 N.Y.S. 2d 200 (New York County, 1974) (witness sought for trial; attorney's affidavit details why he is needed); see also Epstein, supra note 20.

²³In re Pitman, 26 Misc.2d 332, 201 N.Y.S.2d 1000 (Ct. Gen. Sess., New York County 1960) (certificate plus testimony at hearing will be sufficient).

²⁴See Epstein, supra note 20, 157 So.2d at 707-708, Commonwealth v. Beneficial Finance Co., supra note 20, 360 Mass. at 306, 275 N.E.2d at 100-101.

²⁵Application of State of Washington in re Harvey, 10 App. Div.2d 691, 198 N.Y.S.2d 897 (1st Dep't), appeal dismissed, 8 N.Y.2d 865, 168 N.E.2d 715, 203 N.Y.S.2d 914 (1960); In re Pitman, supra note 23.

²⁶Terl v. State of Maryland ex rel. Grand Jury of Baltimore City, 237 So.2d 830 (Fla. Dist. Ct. of App. 1970) (proving a negative would be difficult for the state; the witness's willingness and ability to testify is a rebuttable presumption).

²⁷State of Florida v. Axelson, supra note 22, 80 Misc.2d at 420, 363 N.Y.S.2d at 202 (the witness fee of \$5/day is "woefully inadequate" but is for the legislature to change).

in immunity,²⁸ or interruption of work²⁹ do not suffice to show undue hardship. Yet if it appears that the summons (some states refer to it as a subpoena) is issued in bad faith and that the witness is really sought to be made a defendant, the summons will not issue.³⁰

D. Subpoena Duces Tecum

¶12 The Act is generally held to encompass a subpoena duces tecum,³¹ though a narrow reading limits it to a subpoena ad testificandum.³²

²⁸ Matter of State Grand Jury Investigation, 136 N.J. Super. 163, 171, 345 A.2d 337, 341 (Superior Ct. of N.J., App. Div. 1975) (witnesses argue that certificate should be quashed since use immunity of the demanding state is less than transactional immunity of their own state):

[W]e know of no authority, nor does justice or reason mandate that there be an identity of procedural or substantive rules in participating states in order for uniform acts to be applied.

²⁹ Axelson, supra note 22 (witness argued that his relationship with his patients would suffer; court answered that some burden is borne by all witnesses).

³⁰ In re Mayers, 169 N.Y.S.2d 839 (Ct. Gen. Sess., New York County, 1957); Wright v. State, 500 P.2d 582, 588 (Okla. 1972).

³¹ In re Saperstein, supra note 21, 30 N.J. Super. at 377, 104 A.2d at 846 (statute defines "summons" as including "subpoena", and New Jersey case law has included subpoena duces tecum under that term. Statutory protection afforded the witness may also be given to the materials under the subpoena duces tecum, thus it cannot be attacked in the demanding state). See also In re Bick, 82 Misc.2d 1043, 372 N.Y.S.2d 447 (New York County 1975) (citing Saperstein).

³² In re Grothe, supra note 20, 59 Ill. App.2d at 10, 208 N.E.2d at 586 (court distinguishes Saperstein, supra note 21, in that Illinois case law does not define "subpoena" as including "subpoena duces tecum").

E. Appeals

¶13 Although an appeal of the determination at the hearing is discouraged,³³ it has been allowed in certain cases.³⁴

III. QUASHING A GRAND JURY SUBPOENA

A. Federal Courts

1. Generally

¶14 The grand jury can subpoena any witness without having to give a reason.³⁵ The subpoena may call the witness to testify soon after it is served.³⁶ A United States attorney may not issue a subpoena that orders the witness to appear at his office and the prosecutor may not interrogate a witness

³³In In re Harvey, supra note 25, the court noted that appealability of the order is "gravely doubtful" but allowed the appeal. 10 App. Div.2d, 198 N.Y.S.2d at 898. The Court of Appeals, however, dismissed the appeal and directed the Appellate Division to dismiss the appeal taken to that court. 8 N.Y.2d at 866, 168 N.E.2d at 716, 203 N.Y.S.2d at 914.

³⁴See In re Saperstein, supra note 21, In re Grothe, supra note 20 (question of appealability not raised). In New York, a denial of a motion to quash might be appealed under N.Y. Civ. Prac. L. §2304, see note 73, infra, but this question has yet to be directly considered.

³⁵Fraser v. United States, 452 F.2d 616 (7th Cir. 1971) (the government is not required to show probable cause or reasonableness to compel a witness to testify); In re Dionisio, 442 F.2d 276 (7th Cir. 1971), rev'd on other grounds, United States v. Dionisio, 410 U.S. 1 (1972); See also National Lawyers Guild, Representing Witnesses Before Federal Grand Juries §3.5(e) (1976) [hereinafter cited as 1976 Guild] (advice concerning how a witness may learn the subject of the grand jury investigation).

³⁶1976 Guild, supra note 35, at §3.3(f).

outside the presence of the grand jury.³⁷ Once a subpoena has been properly issued and served a subsequent subpoena is not required to compel later appearances of the witness.³⁸ If the United States attorney has probable cause to believe a witness will avoid service or fail to comply with a subpoena, the government may make a material witness arrest.³⁹

2. Venue

¶15 A motion to quash a grand jury subpoena should be made in the district court having supervision over the grand jury.⁴⁰ Although this may cause hardship to a witness subpoenaed from another state, no direct authority has been found allowing a motion in a district other than that from which the subpoena issued.⁴¹

³⁷United States v. Thomas, 320 F.Supp. 527 (D.D.C. 1970); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Johns-Manville Corp., 213 F.Supp. 65 (E.D. Pa. 1962).

³⁸United States v. Snyder, 413 F.2d 288 (9th Cir.); cert. denied, 396 U.S. 907 (1969), Blackmer v. United States, 284 U.S. 421 (1932).

³⁹Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971) (the criteria for making a material witness arrest are that there be probable cause to believe that the witness's testimony is material and that it may be impracticable to secure the witness's presence by subpoena).

⁴⁰1976 Guild, supra note 35, at §66.

⁴¹Id.

3. Standing

¶16 In general, only the witness against whom the subpoena is directed has standing to move to quash it,⁴² but a person whose papers are in the temporary possession of a third-party custodian may move to quash the subpoena against the third party on Fifth Amendment grounds.⁴³

4. Grounds for challenges

¶17 There are several technical challenges that may be grounds to quash a subpoena. If the subpoena is not properly issued or served it may be quashed.⁴⁴ Rule 17(a) of the Federal Rules of Criminal Procedure and Rule 45(a) of the Federal Rules of Civil Procedure require that a subpoena be signed and sealed by the clerk of the court. A subpoena may be served by a United States Marshall, his deputy, a person not a party to the case,⁴⁵ or by an FBI agent.⁴⁶ Service must be made personally.⁴⁷ The witness may also claim

⁴²Application of Iaconi, 120 F. Supp. 589 (D. Mass 1954) (a defendant cannot object to grand jury subpoena or other witnesses. The court said, however, that it could quash under its supervisory power without a motion, responding to suggestions made by counsel, litigants, or strangers).

⁴³Couch v. United States, 409 U.S. 322, 333 (1973) (Fifth Amendment meant to prevent personal compulsion, which is not involved when a third-party custodian is subpoenaed. The Court recognizes that there may be situations: [W]here constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact).

⁴⁴United States v. Davenport, 312 F.2d 303 (7th Cir.), cert. denied, 374 U.S. 841 (1963).

⁴⁵Fed. R. Crim. Proc. 17(d); Fed. R. Civ. Proc. 45(c).

⁴⁶18 U.S.C. §3052 (1970).

⁴⁷Fed. R. Crim. Proc. 17(d); Fed. R. Civ. Proc. 45(c).

that the notice of subsequent appearances is unclear or ambiguous,⁴⁸ or that he is not competent to testify.⁴⁹ Failure to raise these procedural challenges prior to the witness' appearance may constitute a waiver of the defect.⁵⁰

¶18 Motions to quash a subpoena based on substantive challenges are often considered premature.⁵¹ A witness may still raise the issues in order to gain time for preparation and to alert the judge to the issues.⁵² A witness may claim that the composition of the grand jury is not representative of the population

⁴⁸1976 Guild, supra note 35, at §4.10(c).

⁴⁹See In re Loughram, 276 F. Supp. 393, 430 (C.D. Cal. 1967) (tests for determining a witness's competency are

(1) the witness must have sufficient understanding to apprehend the obligation of an oath, and to tell the truth before the grand jury.

(2) the witness must be capable of giving a reasonably correct account of the matters he has seen or heard.

(3) these two issues are to be determined by the court based upon the testimony of expert medical witnesses and upon the court's own examination

(4) the court must be assured that the witness's physical and mental health will not be harmed in any significant way).

⁵⁰In re Meckley, 50 F. Supp. 274 (M.D. Pa.), aff'd, 137 F.2d 310 (3d Cir.), cert. denied, 320 U.S. 760 (1943) (After the defendant failed to raise a procedural defect prior to the contempt hearing, the court held that the defendant's appearance before the grand jury constituted a waiver of the claim.); United States v. Johns-Manville Corporation, 213 F.Supp. 65 (E.D. Pa. 1962).

⁵¹1976 Guild, supra note 35, at §4.11.

⁵²Id. at §3.8(c).

of the district⁵³ or that the grand jury is prejudiced.⁵⁴ The witness may also raise First,⁵⁵ Fourth,⁵⁶ and Fifth⁵⁷ Amendment challenges. The witness may also raise challenges based on privilege.⁵⁸ Where a privilege objection is raised against a subpoena duces tecum, the court will inspect the materials to determine whether they are privileged.⁵⁹ A witness may also claim that the subpoena was issued for purposes that are not within the proper function of the grand jury.⁶⁰

⁵³Alexander v. Louisiana, 405 U.S. 625 (1972). (The Court quashed an indictment because Negro citizens were included on the grand jury list in only token numbers).

⁵⁴Lawn v. United States, 355 U.S. 339 (1958); 1976 Guild, supra note 35, at §4.11(b).

⁵⁵Branzberg v. Hayes, 408 U.S. 665 (1972), see infra ¶76; Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

⁵⁶United States v. Calandra, 414 U.S. 338 (1974) (The Fourth Amendment is inapplicable to grand jury proceedings), But see Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920) (A subpoena duces tecum may be quashed if it is the fruit of an illegal search).

⁵⁷1976 Guild, supra note 35, at §4.11(e). ("[A]ttempts by a witness to quash a subpoena requiring an appearance on Fifth Amendment grounds are generally unsuccessful.")

⁵⁸Infra, ¶¶ 59-87; See also 1976 Guild, supra note 35, at §4.11(f).

⁵⁹Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir.) cert. denied, 352 U.S. 833 (1956) (court appoints a master to examine documents to determine whether they are protected by attorney-client privilege).

⁶⁰In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956) (the grand jury investigation may not be used as a subterfuge to obtain records that could not have been obtained in a civil proceeding); In re National Window Glass Workers, 287 F.2d 19 (N.D. Ohio 1922) (the grand jury may not be used to prepare for a pending criminal trial):

¶19 A subpoena duces tecum may be quashed on Fourth Amendment grounds if it is "unreasonable," and Fed. R. Crim. P. 17(c) authorizes the court to quash if the subpoena is "unreasonable and oppressive." The authority under Rule 17(c) is not dependent on the Fourth Amendment,⁶¹ but courts usually consider them together,

¶20 To be reasonable, the subpoena must seek materials relevant to the grand jury inquiry,⁶² but courts are split on who bears the burden of proving relevance. It has been held that the government must make a minimal showing of relevance,⁶³ but the Second Circuit approach is that the witness must show there is

60(continued)

United States v. Remington, 191 F.2d 246 (2d Cir. 1951) (an investigation may not be called for the express purpose of intimidating witnesses); In re September 1971 Grand Jury (Mara), 454 F.2d 580, 585 (7th Cir. 1971), rev'd on other grounds, United States v. Mara, 410 U.S. 19 (1973) (the grand jury may not be used to pursue a "general fishing expedition").

⁶¹Application of Radio Corp. of America, 13 F.R.D. 167, 171 (S.D.N.Y. 1952) (Rule 17(c) gives the court powers in addition to those granted under the Fourth Amendment, but the tests are considered together).

⁶²See In re Grand Jury Subpoena Duces Tecum (Local 627), 203 F.Supp. 575, 578 (S.D.N.Y. 1961); United States v. Gurule, 437 F.2d 239, 241 (10th Cir.), cert. denied sub nom. Baker v. United States, 403 U.S. 904 (1970); In re Corrado Brothers, 367 F.Supp. 1126, 1130 (D.C. Del. 1973).

⁶³In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973). See also In re Corrado Brothers, Inc. supra note 62, at 1131; In re Grand Jury Subpoena Duces Tecum, 391 F.Supp. 991, 995, 997 (D.R.I. 1975) (government's prima facie showing of relevance is irrebuttable. Government need only show that there is an investigation and that the documents bear some possible relation, however indirect, to the subject of the investigation).

no conceivable relevance to any legitimate subject of investigation.⁶⁴ This may be an impossible burden.⁶⁵

¶21 A subpoena duces tecum may also be challenged on the grounds that it does not specifically describe the items called for.⁶⁶

In addition, the objects called for must cover a reasonable time period,⁶⁷ the burden of compliance must not be oppressive,⁶⁸ and the person served must have possession or control of the items sought.⁶⁹

⁶⁴ See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied 414 U.S. 867 (1973) (as to older documents, government must make minimal showing, but as to recent documents, witness must show there is no conceivable relevance); In re Morgan, 377 F. Supp. 281, 284 (S.D.N.Y. 1974) (citing Horowitz and noting that the Second Circuit dissents from Schofield on the question of relevance).

⁶⁵ Schofield, supra note 63, at 92, 93 (notes the difficulty a witness would have in showing irrelevance because of the secrecy of grand jury proceedings, and would allow the witness to utilize discovery to prove that there is no relevance). The District Court of Rhode Island, though following Schofield generally, would not allow discovery. In re Grand Jury Subpoena Duces Tecum, supra note 63, at 995.

⁶⁶ Hale v. Henkel, 201 U.S. 43 (1906); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Brown v. United States, 276 U.S. 134 (1928)..

⁶⁷ In re Eastman Kodak Company, 7 F.R.D. 760 (W.D.N.Y. 1947); In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947).

⁶⁸ In re Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); Application of Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949); cf. Petition of Borden Co., 75 F.Supp. 857 (N.D. Ill. 1948) (a subpoena requiring a search of files covering a twenty year period was not unreasonable).

⁶⁹ 1976 Guild, supra note 35, at §4.12(e).

5. Appeal

¶22 Denial of a motion to quash a subpoena is generally considered not appealable.⁷⁰ Appeals by the government have been allowed from orders granting a witness's motion to quash or modify.⁷¹ A witness seeking review may refuse to comply, be held in contempt, and appeal the contempt proceeding.⁷²

B. State Courts

¶23 Although Fed. R. Crim. P. 17(c) is not available in state courts, most federal cases dealing with subpoenas were decided on constitutional grounds, and there is thus little difference between state and federal law in this area. One important difference is that in New York, denial of a motion to quash a subpoena is appealable as of right if the subpoena

⁷⁰Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("To be effective, judicial administration must not be leaden-footed.") See also United States v. Ryan, 402 U.S. 530, 532-533 (1971) (the court notes that there is an exception to the rule of non-appealability in the case where a third-party custodian of records is not likely to risk contempt to judge validity of the subpoena. In that case, the owner can appeal the denial of a motion to quash. See, e.g., Schwimmer v. United States, *supra* note 59; United States v. Guterma, 272 F.2d 344 (2d Cir. 1959) (appeals allowed). See also 1976 Guild, *supra* note 35, at §4.8 (c)(e) (Advises witnesses to seek immediate certification for appeal from the district court).

⁷¹United States v. Judson, 322 F.2d 460 (9th Cir. 1963); 18 U.S.C. §3731; 28 U.S.C. §1291; United States v. Calandra, 455 F.2d 750 (6th Cir. 1972); United States v. Neiberger, 460 F.2d 290 (6th Cir. 1972) (government appeal from denial of application for order granting immunity allowed).

⁷²Cobbledick v. United States, *supra* note 70, at 327; See also 1976 Guild, *supra* note 35, at §3.14 (witness strategy on appeal from contempt proceedings).

was issued by a court having both civil and criminal jurisdiction.⁷³ In New Jersey, appeal does not lie as of right.⁷⁴

IV. OTHER MOTIONS AND OBJECTIVES

¶24 A witness may desire to delay testifying until the last possible moment hoping to avoid jail for as long as possible,

⁷³ A motion to quash a grand jury subpoena may be made under N.Y. Civ. Prac. L. §2304 if the court from which the subpoena issued has civil as well as criminal jurisdiction. Matter of Queens Republican County Committee, 49 App. Div. 2d 956, 374 N.Y.S.2d 57 (2d Dep't 1975). An order denying a motion to quash a subpoena issued out of a court having only criminal jurisdiction is not appealable, since appeal lies only by virtue of statute, and the Criminal Procedure Law does not permit appeal of such orders. In re Ryan, 306 N.Y. 11, 16, 114 N.E.2d 183, 185 (1953) (denying appeal in the Court of General Sessions, which has only criminal jurisdiction). If the court has civil as well as criminal jurisdiction, the order can be appealed as of right. Cunningham v. Nadjari, 39 N.Y.2d 314, 347 N.E.2d 915, 383 N.Y.S.2d 590 (1976) (supreme court); Boikess v. Aspland, 24 N.Y.2d 136, 247 N.E.2d 135, 299 N.Y.S.2d 163 (1969) (county court). N.Y. Civ. Prac. L. §2304 states that the motion to quash shall be made in the court in which the subpoena is returnable. In Massachusetts it is possible to appeal a final court order enforcing a subpoena. Finance Commission of Boston v. McGarh, 343 Mass. 754, 180 N.E.2d 808 (1962).

⁷⁴ Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 407, 120 A.2d 94, 98 (1956) (involving an appeal of an order refusing to quash a subpoena in pretrial discovery):

In passing upon pretrial discovery orders, such as a denial of a motion to quash or limit a subpoena, addressed to either a party or a non-party witness, this court has...approved the pertinent principles expounded in the federal cases and has held the orders to be interlocutory and non-appealable as of right.

The court then cites Cobbledick v. United States, supra note 69, that a witness may disobey the subpoena, be held in contempt, and appeal the contempt order. The court also suggests that appeal may be had by leave of court if not as of right. 20 N.J. at 409, 120 A.2d at 99-100.

to gain time for preparation, or to have the subpoena withdrawn or postponed.⁷⁵ The witness may therefore make a variety of motions. If the witness is called to testify soon after the subpoena is served, the witness may make a motion for a continuance.⁷⁶ Generally, these motions are denied.⁷⁷ A witness may also seek injunctive relief⁷⁸ or a protective order.⁷⁹ It is also possible for a third party to intervene to challenge the introduction of evidence or the purpose of the grand jury proceeding.⁸⁰

¶25 During the questioning, the witness may object to particular questions.⁸¹ A witness is not allowed to

⁷⁵ 1976 Guild, supra note 35, at §3.9(f), 3.12(d).

⁷⁶ Id. at §§3.8(b); 4.4.

⁷⁷ United States v. Polizzi, 323 F. Supp. 222, 225-226 (C.D. Cal.), rev'd on other grounds per curiam 450 F.2d 880 (9th Cir. 1971); 1976 Guild, supra note 35, at §4.4.

⁷⁸ 1976 Guild, supra note 35, at ch. 6.

⁷⁹ Id. at §5.3.

⁸⁰ 1976 Guild, supra note 35, at §3.8(d):

When the grand jury is investigating matters which have already been the subject of an indictment, the indicted defendant or defendants may seek to intervene to enjoin the proceedings or obtain a protective order. The basis for such a motion would be that the grand jury is being used to obtain evidence to be used in the trial of their case.

⁸¹ 1976 Guild, supra note 35, at §3.11:

[T]he attorney should look for objections raised by particular questions, such as questions which ask for an opinion, which infringe upon First Amendment protections, or which inquire into privileged communications.

challenge the relevancy of questions,⁸² but a witness may attempt to show prejudicial prosecutorial misconduct.⁸³

A prosecutor may not question a witness for the sole purpose of causing him to answer inconsistently and to commit perjury.⁸⁴

¶26 The ABA has drafted standards for prosecutorial conduct in grand jury proceedings.⁸⁵ These standards are not binding upon prosecutors or the courts, but they may be useful as guidelines for professional conduct and they may be used by witnesses to attack prosecutorial conduct.⁸⁶ The ABA Standards state:

⁸²United States v. Doe, 460 F.2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973); United States v. Weinberg, 439 F.2d 743, 750 (9th Cir. 1971); Blair v. United States, 250 U.S. 273, 282 (1919).

⁸³United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963) (presence of prosecutor during deliberations may be grounds for quashing the indictment); United States v. Whitted, 325 F.Supp. 520 (N.D. Neb.), rev'd on other grounds, 454 F.2d 642 (8th Cir. 1971) (when a witness is asked questions not pertinent to the investigator and which are prejudicial the indictment must be dismissed as violative of due process, but the court does not have the power to dismiss following the return of a verdict).

⁸⁴Brown v. United States, 245 F.2d 549 (8th Cir. 1957); See also States v. Schamberg, ___ N.J. Super ___ (1977) (Although expressing disapproval, the court held that it was not prosecutorial misconduct to state, before the grand jury, that the prosecutor had reason to believe that the witness had just perjured himself).

⁸⁵A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft, 1971) [Hereinafter cited as ABA Standards].

⁸⁶See 1976 Guild, supra note 35, at §10.3; United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970).

The prosecutor should not make statements or arguments to influence grand jury action in a manner which would be impermissible at trial before a petit jury.⁸⁷

The ABA Standards also provide guidelines for the examination of witnesses⁸⁸ and define the scope and quality of evidence that should be presented to the grand jury.⁸⁹

V. ROLE OF COUNSEL IN THE GRAND JURY

¶27 There is no constitutional right to counsel in the grand jury room,⁹⁰ even if a witness has already been indicted on a

⁸⁷ ABA Standards, supra note 85, at §3.5(b).

⁸⁸ ABA Standards, supra note 85, at §5.7.

⁸⁹ ABA Standards, supra note 85, at §3.6.

⁹⁰ The most often cited support for this proposition is dicta in In re Groban's Petition, 352 U.S. 330, 333 (1957). The rule applies to grand jury proceedings. United States v. Scully, 225 F.2d 113, 116 (2d Cir.), cert. denied, 350 U.S. 897 (1955) (no Sixth Amendment right to counsel, since the grand jury does not determine innocence or guilt); Gollaher v. United States, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960 (1969); People v. Ianiello, 21 N.Y.2d 418, 423, 235 N.E.2d 439, 442, 288 N.Y.S.2d 462, 467, cert. denied, 393 U.S. 827 (1968) (need for secrecy in grand jury proceedings, and statutory exclusion of all but authorized persons from grand jury room); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973); Commonwealth v. Gibson, 333 N.E.2d 400, 406 n.2 (Mass. 1975) (grand jury is non-adversary and not a "critical stage" in the prosecution, therefore no right to counsel). See also Fed. R. Crim. P. 6(d), which limits those who can be present in the grand jury room. Although there is no constitutional right to counsel in the grand jury room, five states do allow it. See Kan. Stat. Ann. §22-3009 (1974); Mich. Stat. Ann. §28: 943 (1972); S. Dak. Comp. Laws §23-30-7 (Supp. 1976); Utah Code Ann. §77-19-3 (Supp. 1975); Wash. Rev. Code. Ann. §10.27.120 (Supp. 1975).

charge separate from the subject of the investigation.⁹¹
Escobedo v. Illinois,⁹² Miranda v. Arizona,⁹³ and United States v. Wade,⁹⁴ indicated that one's right to counsel attached "at any stage of the prosecution formal or informal...where counsel's absence might derogate from the accused's right to a fair trial."⁹⁵ Such "critical" stages were to be determined by analyzing "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."⁹⁶ In the light of these cases, strong arguments have been made that the right to the presence of counsel ought to be extended to the

⁹¹United States v. George, 444 F.2d 310 (6th Cir. 1971) (a witness who had been indicted on an unrelated charge was not entitled to have counsel present in the room). The rule may be different if the witness has been indicted on a charge related to the grand jury's investigation. See United States v. Doss, 545 F.2d 548, 552 (6th Cir. 1976):

Where a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without counsel present without his being informed of the nature and cause of the accusation about a crime for which he stands already indicted, the proceeding... violates... the Sixth Amendment....

⁹²378 U.S. 478 (1964).

⁹³384 U.S. 436 (1966).

⁹⁴388 U.S. 218 (1967).

⁹⁵Id. at 226.

⁹⁶Id.

grand jury especially in the case of a target.⁹⁷ Indeed, it has been urged that such a result is nothing more than an extension of Escobedo in order to protect the rights of the suspect in a white collar criminal case.⁹⁸

¶28 In general, however, a witness is only allowed to consult with counsel outside of the jury room.⁹⁹ It is not clear that this is a right,¹⁰⁰ and an indigent witness is

⁹⁷ See W. Steele, "Right to Counsel at the Grand Jury State of Criminal Proceedings", 36 Mo. L. Rev. 193 (1971); R. Meshbesh, "Right to Counsel before Grand Jury", 41 F.R.D. 189 (1967); 1976 Guild, supra note 35, at §7.5.

⁹⁸ R. Meshbesh note 97 supra.

Typically the prime suspect of a crime of violence is taken to the police station for interrogation much more frequently than the prime suspect of a "white collar crime,"... is called before the grand jury. Thus, requiring counsel for a "suspect" in the grand jury room hardly constitutes a radical extension of Escobedo.

Id. at 195.

⁹⁹ See People v. Ianniello, supra note 90, 21 N.Y.2d at 423-424, 235 N.E.2d at 442, 288 N.Y.S.2d at 467 (practice in New York State and the Southern District of New York is to allow witness to leave the room and consult with counsel. When a witness demands to see his lawyer to discuss legal rights rather than strategy, he should be allowed to do so). See also United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969):

We think that the rule under which appellant was free to leave the Grand Jury room at any time to consult with counsel is a reasonable and workable accommodation of the traditional investigatory role of the grand jury... and the self-incrimination and right to counsel provisions of the Fifth and Sixth Amendments.

A recent case has held that a defendant on trial for extortion and perjury was not prejudiced by the introduction of a grand jury transcript which revealed that before answering two crucial questions the defendant left the room to consult with his attorney. United States v. Kopel, 21 Crim. L. Rptr. 2141 (7th Cir. 1977).

not entitled to have counsel appointed,¹⁰¹ though a witness in the posture of a defendant may be.¹⁰²

¶29 Generally, a witness will be allowed to consult with counsel outside the grand jury regarding the extent of immunity granted to him or any privilege he wished to raise.¹⁰³ If he should continue refusing to answer, forcing the state to seek a ruling in open court, counsel for the witness

¹⁰⁰ Justices Brennan and Marshall, concurring in United States v. Mandujano, 425 U.S. 564 (1976), reason that the Fifth Amendment privilege against self-incrimination is meaningless without the advice of counsel. There is also strong language to that effect in People in Ianniello, supra note 90, 21 N.Y.2d at 424, 235 N.E.2d at 443, 288 N.Y.S.2d at 468:

As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel.

Nevertheless, there is no case authority holding directly that an ordinary witness has a right to counsel outside the grand jury room.

¹⁰¹ United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972) (advising an indigent witness that he may consult counsel does not mean that one must be appointed, since the grand jury is not a "critical" stage of criminal proceedings). See also Mandujano, supra note 100, 425 U.S. at 581.

¹⁰² Perrone v. United States 416 F.2d 464 (2d Cir. 1969) (witness who had been arrested was warned of his right to consult with counsel outside the grand jury room and to have counsel appointed if he could not afford it. The questioning was related to the subject of his arrest).

¹⁰³ See People v. DeSalvo, 32 N.Y.2d 12, 16, 17, 295 N.E.2d 750, 752, 343 N.Y.S.2d 65, 68, cert. denied, 415 U.S. 919 (1973) (the witness should be permitted to consult with counsel regarding relevancy of questions, extent of immunity conferred, or existence of testimonial privilege. He should raise all privileges at once or risk waiving them). See also In re Goldman, 331 F. Supp. 509 (W.D. Pa. 1971) (witness can consult with counsel regarding applicability of attorney-client privilege).

may be present.¹⁰⁴ If the witness is threatened with contempt for refusal to answer, due process requires that he be allowed to have counsel present during the contempt proceeding.

¶30 An attorney will not himself be held in contempt for advising a witness, in good faith, to refuse documents on the ground that a privilege will be violated.¹⁰⁶

¶31 Although counsel cannot accompany the witness into the grand jury room, his advice can prevent his client from surrendering any of the privileges available to him.

VI. WARNINGS TO WITNESSES

A. Fifth Amendment--Miranda

1. Federal courts

¶32 A grand jury witness can claim the Fifth Amendment

¹⁰⁴Id.

¹⁰⁵Harris v. United States, 382 U.S. 162, 166 n.4 (1965).

¹⁰⁶Maness v. Meyers, 419 U.S. 449, 466 (1975):

A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege...

...We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert his Fifth Amendment privilege in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation." Id. at 468.

privilege against self-incrimination,¹⁰⁷ but he need not always be warned of the privilege. The Supreme Court has held that if the privilege is not cited in response to a question, and the witness answers the question, the privilege is considered waived as to that question.¹⁰⁸ If the witness is a defendant (under arrest, or has an information or indictment filed when he testifies) he must be warned of his Fifth Amendment privilege,¹⁰⁹ and of his right to counsel,¹¹⁰ before he testifies.

¹⁰⁷United States v. Monia, 317 U.S. 424 (1943) (Fifth Amendment is applicable to grand jury proceedings); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Blau v. United States, 340 U.S. 159 (1950); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) (the Fifth Amendment privilege also applies to a subpoena duces tecum where the documents are in the witness's possession and the documents would incriminate the witness); but see Fisher v. United States, 425 U.S. 391 (1976); see also Couch v. United States, 409 U.S. 322 (1973) (where another person received a subpoena for documents in that person's possession which belong to and would incriminate the witness, the witness generally cannot assert the privilege to prevent the other person from being forced to turn over the documents).

¹⁰⁸Rogers v. United States, 340 U.S. 367, 373 (1951) (once a witness makes an incriminating admission he cannot stop testifying by claiming the Fifth Amendment privilege and refuse to disclose details unless further disclosure would pose a real danger of further discrimination). See also United States v. Monia, 317 U.S. 424 (1943); United States v. Korbel, 397 U.S. 1 (1970); 1976 Guild, supra note 35, at §13.6 (advice for arguing against a waiver of the privilege).

¹⁰⁹United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y.) appeal dismissed sub nom. United States v. Roth, 208 F.2d 467 (2d Cir. 1953) (a witness against whom an information has been filed must be warned of his right against self-incrimination and consent to waive it before he answers an incriminating question).

¹¹⁰Perrone v. United States, supra note 102.

¶33 In three recent cases, United States v. Mandujano,¹¹¹
United States v. Wong,¹¹² and United States v. Washington,¹¹³
the Supreme Court has addressed the issue of the Fifth
Amendment privilege as applied to grand jury witnesses.
Although the impact of these recent decisions is not
yet settled, it appears that they would not justify
failure to warn a potential defendant or target. Never-
theless, Mandujano and Wong hold that failure to warn will
not affect the government's ability to press a perjury charge,
but it remains unclear whether some warning as to
his privilege and status may be necessary to render his
testimony admissible at trial for the substantive offense or
to support the validity of an indictment of the target on the
substantive charge.

¶34 The issue as to whether warnings were constitutionally
mandated, that is, making Miranda applicable to the situation
of the potential defendant questioned by a grand jury, has
generally not been reached by these cases. The question as
to the applicability of a constitutional warning requirement
similar to Miranda and the result of failing to so warn has
two separate aspects. The first relates to what effect such
a failure to warn, if required, would have on incriminating
evidence of the substantive charge in the form of documents
and admissions elicited from the target. The second relates

¹¹¹425 U.S. 564 (1976).

¹¹²21 Crim. L. Rptr. 3045 (Sup. Ct. May 23, 1977).

¹¹³21 Crim. L. Rptr. 3047 (Sup. Ct. May 23, 1977).

to the effect such a failure to warn might have on evidence elicited from the target supporting an independent charge of perjury (That is, the witness' own perjured testimony). Although the first aspect is important, the second aspect of perjury is perhaps more important as the prospect of eliciting damaging evidence from the sophisticated and well counselled target in a political corruption investigation is not very promising.

¶35 The Supreme Court was presented with the perjury issue in United States v. Mandujano.¹¹⁴ The defendant in that case was a target of a grand jury investigation and was subpoenaed by that grand jury. He was given a general warning as to his privilege not to incriminate himself¹¹⁵ and his right to have the assistance of counsel but that his attorney could not be present.¹¹⁶ But the defendant was not given the full Miranda warnings. During his testimony the defendant was asked about certain illegal transactions about which the prosecutor already knew. In response to the questions Mandujano offered perjured testimony, which became the basis for an indictment on perjury charges. The defendant moved to suppress his testimony. The District Court granted the motion.¹¹⁷

¹¹⁴425 U.S. 564 (1976).

¹¹⁵Id. at 567.

¹¹⁶Id. at 567-568.

¹¹⁷United States v. Mandujano, 365 F. Supp. 155 (W.D. Texas 1974).

¶36 On appeal the Fifth Circuit¹¹⁸ held that the defendant as a target before the grand jury was entitled to full Miranda warnings.¹¹⁹ In addition, where a target is unwarned and questioned about an alleged crime "already known to the satisfaction of the prosecuting agency...to be guilty of the precise crime,"¹²⁰ the perjured testimony elicited would be suppressed as having been gotten in violation of the defendant's due process rights. Hence, although the court found warnings necessary it based its suppression decision on what it saw as an abuse of the grand jury process.¹²¹

¶37 The Supreme Court reversed. All of the justices agreed that the Fifth Amendment did not permit one, even if he has a right to refuse to speak, to testify falsely.¹²² Such a result is nothing more than an affirmation of the doctrine established by the Court in United States v. Glickstein,¹²³ where it was stated that "the immunity afforded by the constitutional guarantee [privilege against self-incrimination] relates to the past, and does not endorse

¹¹⁸United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), rev'd, 425 U.S. 564.

¹¹⁹Id. at 1055.

¹²⁰Id. at 1058.

¹²¹Id. The court found the proceedings as described above to be "beyond the pale of permissible prosecutorial conduct" and "smacking of entrapment." Id. at n. 8.

¹²²No Majority Opinion was written; however, all three opinions agreed on this one point.

¹²³222 U.S. 139 (1911).

the person who testifies with a license to commit perjury."¹²⁴

Perjury, a crime committed while testifying, is never protected.¹²⁵ Hence, though a target's rights under the Fifth Amendment may include the right to warnings, failure to so warn did not give Mandujano the right to lie. Interestingly enough, the result reached by the Supreme Court in Mandujano is same as that which had been reached by most circuits previously.¹²⁶

¶38. In Mandujano, however, the Chief Justice in a plurality opinion went beyond the narrow holding necessary to decide this. The practice of calling the target to testify before the grand jury was endorsed,¹²⁷ and Chief Justice Burger indicated that Miranda, designed to offset the compulsion inherent in custodial interrogation, was inapplicable.

A target was not entitled to remain silent, rather, like any other witness he could be subpoenaed and must invoke his privilege when called upon to answer an incriminating question.¹²⁸ Because Miranda was inapplicable, he had no Fifth Amendment right to the presence of counsel and as a

¹²⁴Id. at 142.

¹²⁵United States ex rel. Annunziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

¹²⁶United States v. Di Giovanni, 397 F.2d 409, 412 (7th Cir.) cert. denied, 393 U.S. 924 (1968); Cargill v. United States, 381 F.2d 849, 853 (10th Cir. 1967); Kitchell v. United States, 354 F.2d 715 (1st Cir. 1966); United States v. Winter, 348 F.2d 204 (2d Cir. 1965).

¹²⁷Mandujano, supra note 114, at 573.

¹²⁸Id. at 580.

witness had no Sixth Amendment right to the presence of counsel.¹²⁹

¶39 Mandujano leaves many questions unanswered. While four justices (Burger, White, Powell, Rehnquist) state that Miranda does not apply, that statement is dicta in the sense that the case involved a conviction for perjury, which lack of Miranda warnings would not excuse. Justices Brennan, Marshall, Stewart, and Blackman concurred, solely on this perjury ground.¹³⁰ Brennan and Marshall also argued that a putative defendant¹³¹ must be earned that he is currently subject to possible prosecution and that he has a constitutional right to refuse to answer any and all questions that may tend to incriminate him.¹³²

¶40 The confusion is compounded by the fact that the witness was warned of his Fifth Amendment privilege and that he could consult with counsel.¹³³ The court deemed this warning "more than sufficient" to inform the witness of his rights,¹³⁴ but did not decide what, if any, warnings must be given to a

¹²⁹Id. at 581.

¹³⁰Id. at 584, 609.

¹³¹Justices Brennan and Marshall suggest that the test for a putative defendant should be whether the government has probable cause, measured by an objective standard, to suspect that person has committed a crime. Mandujano, supra note 114 at 598.

¹³²Id. at 600.

¹³³Id. at 567-568.

¹³⁴Id. at 580.

putative defendant.¹³⁵ Thus, it is unclear what warnings must constitutionally be given.

¶41 In United States v. Wong,¹³⁶ the Supreme Court again addressed the issue of Fifth Amendment warnings as related to an independent charge of perjury. In that case, no effective Fifth Amendment warnings were made.¹³⁷ The defendant was advised of her Fifth Amendment privilege prior to any questions being asked, but later moved to dismiss the indictment perjury on the ground that, as a result of her limited command of English, she did not understand the warning and believed her only choice was between self-incrimination and indictment. The Government did not challenge the finding of the district court that the defendant was unwarned of her Fifth Amendment privilege.¹³⁸ The district court granted the defendant's motion to suppress the grand jury testimony in the subsequent perjury trial.

¶42 On appeal the Ninth Circuit held that due process required suppression where "the procedure employed by the government was fraught with the danger...of placing [respondent] in the position of either perjuring or

¹³⁵The fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required.... [F]ederal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins. Id. at 582, n. 7.

¹³⁶21 Crim. L. Rptr. 3045 (Sup. Ct. May 23, 1977).

¹³⁷Id. at 3046.

¹³⁸Id.

incriminating herself."¹³⁹ The court concluded that due process required that the testimony be suppressed.¹⁴⁰

¶43 The Supreme Court reversed, in a unanimous decision, holding that the defendant's failure to understand the government's warning did not warrant the suppression of her grand jury testimony.¹⁴¹ The Court reiterated its position in Mandujano that the Fifth Amendment privilege does not protect perjury.¹⁴² The Court also rejected the due process argument quoting Bryson v. United States:¹⁴³ "Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them."¹⁴⁴

¶44 In United States v. Washington, the Supreme Court addressed the issue of whether a "target" witness must be warned of his status.¹⁴⁵ In that case, the defendant was called before the grand jury, but he was not advised that he might be indicted on a criminal charge relating to the grand jury investigation. The defendant was informed of his Fifth

¹³⁹United States v. Wong, No. 74-1636 (9th Cir. Sept. 23, 1974).

¹⁴⁰Id.

¹⁴¹21 Crim. L. Rptr. at 3047.

¹⁴²Id.

¹⁴³396 U.S. 64 (1969).

¹⁴⁴Id. at 72.

¹⁴⁵21 Crim. L. Rptr. 3047 (Sup. Ct. May 23, 1977).

Amendment rights.¹⁴⁶ The Superior Court of the District of Columbia suppressed the testimony and dismissed the indictment finding that the defendant had not waived his Fifth Amendment privilege and was not properly informed of his rights.¹⁴⁷

¶45 The District of Columbia Court of Appeals affirmed the suppression order, but refused to dismiss the indictment.¹⁴⁸

The court of appeals took the position that the prosecutor should inform the witness that he was a potential defendant.¹⁴⁹

¶46 The Supreme Court reversed, holding that a witness need not be informed that he is a potential defendant. The Court stated:

Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to First Amendment rights.¹⁵⁰

¶47 Justice Brennan, with whom Justice Marshall joined, dissented, taking the position that failure to warn a witness that he is a target was grounds for dismissal of the indictment when the:

grand jury inquiry became an investigation directed against the witness and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict him.¹⁵¹

¹⁴⁶Id. at 3048.

¹⁴⁷Id.

¹⁴⁸United States v. Washington, 328 A.2d 98 (1974).

¹⁴⁹Id. at 100.

¹⁵⁰21 Crim. L. Rep. 3050 (Sup. Ct. May 23, 1977).

¹⁵¹Id. at 3051.

¶48 The results in Mandujano, Washington, and Wong do not militate against the possibility that the Fifth Amendment requires some warning to be given. In Washington, the Court again sidestepped the issue of whether any warnings are constitutionally required.¹⁵²

¶49 Although the Supreme Court appears to be leaning away from requiring warnings, several circuit courts, at least prior to these recent decisions, have explicitly favored warning witnesses.¹⁵³ Warning the target of his status has been labelled prudent,¹⁵⁴ and further, many courts have often pointed to such warnings as supporting the basic fairness of the proceedings where a target has been called.¹⁵⁵

¹⁵²21 Crim. L. Rptr. at 3049.
The Court stated

[T]his Court has not decided that the grand jury setting presents coercive elements which compell witnesses to incriminate themselves. Nor have we decided whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses; moreover, we have no occasion to decide these matters today...

¹⁵³See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1971) (dicta suggesting that a potential defendant might be entitled to warnings as to his Fifth and Sixth Amendment rights); United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio, 1968), aff'd, 421 F.2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970) (the court suppressed the testimony of a target which was to be used at a trial because the target was not warned); United States v. Doss, 545 F.2d 548 (6th Cir. 1976) (the Court set aside a perjury conviction because the witness was not told that he was already under two sealed indictments).

¹⁵⁴United States v. Scully, 225 F.2d 113 (2d Cir. 1955).

¹⁵⁵See e.g., United States v. Friedman, 445 F.2d 1076, 1088 (9th Cir. 1971); United States v. Corallo, 413 F.2d 1306, 1330 (2d Cir.) cert. denied, 396 U.S. 958 (1969); Kitchell v. United States, 354 F.2d 715 (1st Cir. 1966).

¶50 In United States v. Jacobs,¹⁵⁶ the Second Circuit, acting in its supervisory capacity, ruled that the target was to be warned of his status. It did so in order to make uniform the practice of so warning targets throughout the circuit in addition to the general warnings as to one's right not to incriminate oneself usually given to all witnesses in the circuit. In establishing this rule for the circuit, the court pointed to the ABA Standards that recommend warning the target of his status¹⁵⁷ but explicitly refused to determine whether any warnings were mandated by the Constitution.¹⁵⁸

¶51 On the other hand, whether failure to warn will result in the quashing of the indictment is a different issue. A district court has found quashing the indictment to be the proper remedy,¹⁵⁹ and the Jacobs¹⁶⁰ case also resulted in the quashing of the indictment. But it must be remembered that there the court acted in its supervisory capacity to enforce a uniform practice throughout the

¹⁵⁶531 F.2d 87 (2d Cir. 1976), vacated and remanded, 97 S. Ct. 299 (1976) (remanded to the Court of Appeals for further consideration in light of United States v. Mandujano. Four justices dissented).

¹⁵⁷ABA Project on Standards for Criminal Justice Standards Relating to the Prosecution Function (tent. draft 1970), §3.6(d).

¹⁵⁸United States v. Jacobs, supra note 156, at 89.

¹⁵⁹United States v. Kreps, 349 F. Supp. 1049 (W.D. Mich. 1972).

¹⁶⁰See n. 156 and accompanying text supra.

circuit. It is unlikely that the Supreme Court would find the quashing of the indictment necessary where other evidence was heard by the grand jury and it is found that the target's rights were violated by failing to warn him of his rights. Previous decisions by the Supreme Courts have indicated that the validity of an indictment will not be questioned merely because the grand jury considered evidence obtained in violation of the defendant's constitutional rights,¹⁶¹ although such evidence will not be available at trial.¹⁶²

¶52 Given the lack of clarity as to the necessity of warnings as a constitutional matter, the fact that the practice of so warning targets is one which many courts have pointed to approvingly, the ABA Standards and the Second Circuit's recent ruling, the prudent course would be to warn all targets as to their right to refuse to answer incriminating questions, and their right to consult with counsel outside of the grand jury room.

¹⁶¹United States v. Calandra, 414 U.S. 338 (1974); United States v. Blue, 384 U.S. 251 (1966). As stated by the court in Calandra:

The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence; [cites omitted] or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Id. at 344-345.

¹⁶²See United States v. Lawn, 355 U.S. 339 (1958).

¶53 Finally, if a target is not warned any admissions he might make may be lost. Nevertheless, his testimony will still be available for the purpose of impeaching his testimony should he choose to take the stand on his own behalf.¹⁶³

2. State courts

¶54 While some state courts may require greater warnings than do federal courts,¹⁶⁴ the practice is generally similar to that of federal courts.

¶55 New York: Under the New York Constitution, Art., I §6, a prospective defendant called before a grand jury is automatically granted use immunity, thus no warning need be given (unless a waiver is sought).¹⁶⁵ Ordinary witnesses need not be given warnings. Any grand jury witness, ordinary or target, is automatically granted transactional immunity for responsive questions,¹⁶⁶ and cannot be compelled

¹⁶³ See Harris v. New York, 401 U.S. 222 (1971).

¹⁶⁴ See State ex rel. Pollard v. Criminal Court of Marion County, 329 N.E.2d 573 (Indiana 1975) (witness, whether or not he's a target, should be warned of his privilege against self-incrimination, since the grand jury may on its own shift the focus of the investigation).

¹⁶⁵ People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959); People v. Laino, 10 N.Y.2d 161, 170, 176 N.E.2d 571, 218 N.Y.S.2d 647, 654-655 (1961), cert. denied, 374 U.S. 104 (1963) (the scope of the inquiry rather than the prosecutor's intentions should determine whether the witness is a prospective defendant).

¹⁶⁶ N.Y. Crim. Pra. Law §190.40 (McKinney 1971).

to answer an incriminating question until he is told the extent of immunity granted to him.¹⁶⁷

¶56 New Jersey: In New Jersey a witness is not entitled to a warning of his privilege against self-incrimination unless he can show that the grand jury investigation is directed against him.¹⁶⁸ Failure to give warnings does not excuse perjury.¹⁶⁹

¶57 Massachusetts: There is little case law in Massachusetts, but state courts would find support for warning target witnesses of their Fifth Amendment privilege in United States v. Chevoor.¹⁷⁰

¹⁶⁷ People v. Franzese, 16 App. Div.2d 804, 228 N.Y.S.2d 644 (2d Dep't 1962), aff'd, 12 N.Y.2d 1039, 190 N.E.2d 25, 239 N.Y.S.2d 682 (1963) (witness cannot be held in contempt for refusing to answer questions until he is told the extent of immunity given to him). See also Lefkowitz v. Cunningham, No.76-260 (June 13, 1977) (The Court held unconstitutional the New York law which automatically stripped political party officers of their party jobs if they refused to waived immunity and testify before a grand jury).

¹⁶⁸ State v. Fory, 19 N.J. 431, 117 A.2d 499 (1955); See also State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960); State v. Williams, 59 N.J. 493, 284 A.2d 172 (1971); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973) (In view of the secrecy of grand jury proceedings, this burden of proof may be impossible to meet). See Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q, Winter 1977, at 24 (recommended procedures when questioning a target).

¹⁶⁹ State v. Cattaneo, supra note 168. The Fifth Amendment does not give one the right to commit perjury. Harris v. New York, 401 U.S. 222, 225 (1971).

¹⁷⁰ 526 F.2d 178, 181 (1st Cir. 1975) cert. denied, 400 U.S. 829 (1976). The court cites United States v. Scully (supra note 90) and United States v. Luxenberg (supra note 112) for the proposition that a putative defendant should be warned of his Fifth Amendment privilege, but this is dicta.

B. Perjury

¶58 There is no duty to warn a witness that he must tell the truth¹⁷¹ or that he can recant his perjurious testimony.¹⁷²

It is unclear whether the government must tell the witness that it has independent evidence that may contradict his testimony.¹⁷³ The government might, however, at least tell him that he has been under investigation.¹⁷⁴

VII. TESTIMONIAL PRIVILEGES OF GRAND JURY WITNESSES

A. Background

¶59 The duty to testify before a grand jury is subject to claims of privilege, whether established by the Constitution,

¹⁷¹United States v. Winter, 348 F.2d 204, 210 (2d Cir.) cert. denied, 382 U.S. 955 (1965) (warning would render oath meaningless). See also United States v. Mandujano, supra note 100, 425 U.S. at 581 (citing Winter), People v. Robinson, 66 Misc.2d 639, 323 N.Y.S.2d 573 (Kings County 1971).

¹⁷²United States v. Gill, 490 F.2d 233, 240-241 (7th Cir. 1973); United States v. Cuevas, 510 F.2d 848, 849-850 (2d Cir. 1975); United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975).

¹⁷³In State v. Redinger, 64 N.J. 41, 50, 312 A.2d 129 (1973) a perjury conviction was overturned where the prosecutor, at a pre-trial hearing, did not tell the witness that the state had testimony of other witnesses which would contradict his testimony. The court reversed the conviction "in the interest of fundamental fairness," describing the situation as "entrapment." But the Second Circuit, in United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) held that a witness, having been sworn to tell the truth, need not be told that the government has independent evidence.

¹⁷⁴United States v. Camporeale, Id.:

In any event, the prosecutor in the present case acted fairly, advising Camporeale at the outset of his grand jury testimony that his "activities had been under surveillance for a considerable period of time."

statutes, or the common law.¹⁷⁵ When a witness raises the Fifth Amendment as a ground for refusing to answer a question or produce materials, the prosecutor may immunize the witness and compel testimony.¹⁷⁶

B. Existence of Federal Privilege for Unlawful Surveillance

¶60 Nevertheless, an immunized witness may still be reluctant to testify. He may attempt to avoid testifying by claiming that the questions are based upon an unlawful electronic surveillance. Consequently, he may assert that his testimony may not be received in evidence under the exclusionary rule of 18 U.S.C. §2515.¹⁷⁷ When the witness makes this claim,

¹⁷⁵ United States v. Calandra, 414 U.S. 338, 346 (1974).

¹⁷⁶ See, e.g., Kastigar v. United States, 406 U.S. 441, 453 (1972) (18 U.S.C. §6002) (use immunity only--transactional immunity is not constitutionally required). See also 1976 Guild, §3.6 (a) (advice never to testify without immunity); §3.9(c) (general strategic considerations regarding immunity); §3.10 (objections to government's application for immunity); 13.13(k) (advice concerning subsequent prosecution of a witness who testified under immunity).

¹⁷⁷ Omnibus Crime Control and Safe Streets Act, Title III, §802, 18 U.S.C. §2515 (1968):

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury... or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

the government must affirm or deny the alleged unlawful act under 18 U.S.C. §3504 (a).¹⁷⁸ If the government meets this burden and adequately denies that the questions are based upon unlawful electronic surveillance, the witness must testify or be subject to a contempt proceeding.¹⁷⁹ If the government concedes that the questions are based upon an

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Section 2515 was included in Title III to protect the privacy of those affected by an unlawful surveillance. S. Rep. No. 1097, 90th Cong., 2nd Sess. 66 (1968). "The perpetrator must be denied the fruits of his unlawful actions." *Id.* at 69. No use whatsoever is to be made of the product of such surveillance. Consequently, the witness usually bases his claim here on an assertion that but for the unlawful electronic surveillance, he would not have been able to ask certain questions. He argues that because section 2515 calls for the exclusion of evidence which is the result of both direct and derivative use of the unlawful electronic surveillance, he need not answer the questions.

¹⁷⁸Organized Crime Control Act, Title VII, §702(a), 18 U.S.C. §3504(a) (1970):

In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of any unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act (emphasis added)...

For comparable state rules, see infra ¶¶72-75.

¹⁷⁹See, e.g., United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974) (witness's affidavit setting forth belief that he was the subject of electronic surveillance, identifying telephone numbers, and time period in question sufficient to trigger government's obligation to respond); United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974) (court, in absence of sworn written representation indicating agencies checked, unable to affirm government's denial); United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973) (government's denial was insufficient as it was conclusory, not concrete and specific); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972) (witness's mere assertion of unlawful surveillance required government to affirm or deny allegation).

unlawful electronic surveillance or fails to meet this burden, the witness may not be compelled to testify.¹⁸⁰

1. Adequacy of witness's claim

¶61 A grand jury witness may claim that the questions he is being asked are based upon an unlawful electronic surveillance by:

1. making a mere assertion; or
2. filing a factually based affidavit.¹⁸¹

In In re Evans,¹⁸² the Court of Appeals for the District of Columbia held that the mere assertion that an unlawful wiretap was used was adequate to trigger the government's obligation to respond.¹⁸³ It was argued that to require no more than a demand encouraged the elimination of unlawful intrusions, while it imposed only a minimal additional burden on the government; to require more could well impose a burden

¹⁸⁰Gelbard v. United States, 408 U.S. 41 (1972).

¹⁸¹See 1976 Guild, supra note 35, at §12.8(f) (Challenges to the Government's denial, involving specific showings of electronic surveillance of the witness).

¹⁸²452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

¹⁸³452 F.2d at 1247. Evans was followed in United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974). See also In re Grusse, 402 F. Supp. 1232, 1234 (D.C. Conn.), aff'd, 515 F.2d 157 (2d Cir. 1975).

upon defendants and witnesses that could rarely be met.¹⁸⁴
This argument is not always persuasive. In In re Vigil,¹⁸⁵
the Tenth Circuit rejected the "mere assertion" rule. The
court held that the claim asserted was insufficient since
the affidavit filed lacked any concrete evidence, or even
suggestions, of surveillance. To trigger a government response,
factual circumstances from which it can be inferred that the
witness was the subject of electronic surveillance must be
set forth. This conflict in the circuits is as yet unresolved
by the Supreme Court.¹⁸⁶

¹⁸⁴In Evans, Chief Judge Bazelon stated his belief that
because electronic surveillance functions best when its
object has no idea that his communications are being inter-
cepted, the burden upon defendants to come forward with
specific information would, in most instances, be impos-
sible to carry. He further stated that unless the govern-
ment was in the habit of conducting lawless wiretaps, it
could easily refute any ill-founded claims. He suggested
that any additional burden upon the government could well
be met through employing computers to record and sort
government wiretap records. 452 F.2d at 1247-50. Judge
Wilkey, in a dissenting opinion, vehemently disagreed,
citing House reports concerning the number of inquiries
and the time required to process each. 452 F.2d at 1255.

¹⁸⁵524 F.2d 209 (10th Cir. 1975), cert. denied, 425 U.S.
927 (1976).

¹⁸⁶See also In re Milloy, 529 F.2d 770 (2d Cir. 1976)
(government, in response to claim based upon knowledge
that some electronic surveillance was used in the inves-
tigation of other persons involved in the same activities
leading to examination of witness, submitted authorizing
orders to presiding judge; witness was not entitled to more
as section 3504 was not intended to turn investigations
by government into investigations of government).

¶62 When a grand jury witness claims that the basis of the questions he is being asked is an unlawful electronic surveillance of a third party (i.e., an attorney), the adequacy of the claim is generally measured by standards first set out in United States v. Alter, where the Ninth Circuit held that:

Affidavits or other evidence in support of the claim must reveal

(1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;

(2) the dates of the suspected surveillance;

(3) the outside dates of representation of the witness by the lawyer during the period of surveillance;

(4) the identity of persons by name or description together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and

(5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.¹⁸⁷

The witness does not, of course, have to plead or prove his entire case, but he must make a prima facie showing that

¹⁸⁷ 482 F.2d at 1026. See also In re Vigil, 524 F.2d 209, 216 (10th Cir. 1975) cert. denied, 425 U.S. 927 (1976) (knowledgeable U.S. attorney, in charge of investigation, provided court with assurance that there was no surveillance by filing a responsive, factual affidavit); United States v. D'Andrea, 495 F.2d 1170 (3d Cir.), cert. denied, 419 U.S. 855 (1974) (a check of all agencies involved with an accompanying affidavit not required); Korman v. United States, 486 F.2d 926 (7th Cir. 1973) (an official government denial by officer of a responsible government office, sworn to by the prosecutor in charge of investigation or government agency conducting the grand jury investigation, is required); In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (oral testimony that every government agency related to investigation was checked was sufficient denial).

good cause exists to believe that there was an unlawful electronic surveillance.

2. Adequacy of denial

¶63 When the witness's claim is adequate to trigger the duty to respond, the government then has the burden of affirming or denying the allegation. The government may:

1. deny that there was any surveillance;
2. deny that there was any unlawful surveillance;¹⁸⁸

or

3. concede the existence of the electronic surveillance and that it was unlawful.

The government's response could take the form of:

1. a general statement;
2. an affidavit;
3. testimony under oath; or
4. a plenary suppression hearing.

¶64 When the government denies the existence of surveillance, the practical difficulties of proving a negative arise.¹⁸⁹ This dictates a practical rather than a technical approach. The problem is ascertaining a minimum standard.

¹⁸⁸Note: If the language of the prosecution in responding under section 3504 to an objection is: "The questions are not based upon an unlawful electronic surveillance," the objecting witness will not be sure if there was a surveillance unless he has received a section 2518(8) (d) inventory notice.

¹⁸⁹See In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).

Proving a negative is, at best, difficult and in our review, a practical, as distinguished from a technical, approach is dictated.

Fortunately, there is a trend towards flexibility, and the necessary scope and specificity of a denial are tied to the concreteness of the claim.¹⁹⁰ As the specificity of the claim increases, the specificity required in response increases accordingly. Thus, a general claim may be met by a general response, but a substantial claim requires a detailed response. A detailed response means that the government agencies connected with the investigation must search their files scrupulously and a summarizing affidavit indicating the agencies contacted and their respective responses must be submitted to the court.¹⁹¹

¶65 Although this is the trend, some courts still adhere to the standards set out by the court in Alter for the govern-

¹⁹⁰In re Millow, 529 F.2d 770 (2d Cir. 1976) (where a substantial claim is made, the government agencies closest to investigation must file affidavits); In re Hodges, 524 F.2d 568 (1st Cir. 1975) (oral testimony of government attorney gave affirmative assurance that no information had come from unlawful surveillance where claim made one week after refusal to answer and 25 minutes before contempt hearing); In re Buscaglia, 518 F.2d 77 (2d Cir. 1975) (where only basis for claim was refusal of prosecutor to affirm or deny to witness's counsel that there had been surveillance, information tendered by prosecutor under oath to the court sufficient to establish no surveillance); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975) (where witness's claim was in general and unsubstantiated terms, government's unsworn general denial, given at the direction of the court, was sufficient); United States v. See, 505 F.2d 845 (9th Cir. 1074), cert. denied, 420 U.S. 992 (1975) (claim was vague to the point of being a fishing expedition); United States v. D'Andrea, 495 F.2d 1170 (3d Cir.), cert. denied, 419 U.S. 855 (1974) (where there is no evidence showing government's representations to be false, witness has no right to a hearing as to the existence of wiretap).

¹⁹¹See 1976 Guild, supra note 35, at §12.8(e) (defense challenges to the government's denial involving general factual showings of government inaccuracies or falsehoods concerning electronic surveillance).

ment's response.¹⁹² Generally, under Alter, if the government's position is a denial, it should be given in absolute terms by an authoritative officer speaking with knowledge of the facts and circumstances; the response must be factual, unambiguous, and unequivocal.¹⁹³ Usually, such a denial will take the form of an affidavit stating that all agencies authorized to carry on electronic surveillance or those connected with the investigation¹⁹⁴ have been checked, summarizing the respective responses.¹⁹⁵ The witness then contends that he should be granted a plenary suppression hearing to determine the existence of unlawful electronic surveillance. Such requests are universally denied.¹⁹⁶

¹⁹² 482 F.2d 1016, 1026 (9th Cir. 1973). Alter has engendered a great deal of confusion. It has been widely miscited for the proposition that it sets forth a checklist of requirements that must be met by a witness to establish a claim which will trigger the government's obligation to respond under section 3504. This is not the case. Alter applies only to a claim by the witness that the questions he is being asked are tainted by surveillance of conversations in which he did not participate. See United States v. Vielguth, 502 F.2d 1257, 1259 (9th Cir. 1974).

¹⁹³ 482 F.2d at 1027.

¹⁹⁴ In re Quinn, 525 F.2d 222 (1st Cir. 1975).

¹⁹⁵ Generally, the denial will be in the form of an affidavit as it facilitates the task of the presiding judge in inspecting the papers. But this is not an absolute requirement. The denial may be in such terms as satisfy the district court judge. See United States v. D'Andrea, 495 F.2d 1170, 1174 n. 12, (3d Cir.), cert. denied, 419 U.S. 855 (1974).

¹⁹⁶ In re Persico, 491 F.2d 1156, 1162 (2d Cir.), cert. denied, 419 U.S. 924 (1974). The request would have to be in the form of a motion to suppress under 18 U.S.C. §2518 (10) which provides:

¶66 When the government acknowledges the existence of a wiretap but denies that it was unlawful, the courts generally accept the production of an authorizing court order as an adequate denial of illegality, providing, of course, that the order is not facially defective.¹⁹⁷ At this point, witnesses usually contend that the order should be turned over to them to examine, while the government counters that an in camera inspection is sufficient. For the most part, the

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Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication,

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

But section 2518 does not provide for such a motion in the context of a grand jury proceeding. The legislative history specifically states:

Because no person is a party as such to a grand jury proceeding, the provision [section 2518 (10)] does not envision the making of a motion to suppress in the context of such a proceeding itself.

S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

¹⁹⁷ See, e.g., In re Marcus, 491 F.2d 901 (1st Cir. 1974) (witness precluded from raising defense that questions were based upon improperly authorized electronic surveillance after judge found the interception order was not facially defective); Cali v. United States, 464 F.2d 475 (1st Cir. 1972) (witness may not make motion to suppress in grand jury).

courts accept the government's position.¹⁹⁸ The proper procedure is described by Judge Gee in In re Grand Jury Proceeding (Worobyt):¹⁹⁹

The petitioner herein did not seek a full-blown adversary hearing... All that he sought was the opportunity to examine the underlying affidavits and the order authorizing the tap in short, a peek...

The relevant facts make this case indistinguishable from Persico, and we think the rule there the proper one. Where the only question raised is the facial regularity of a wiretap authorization, we prefer to rely on the district judge's in camera determination.²⁰⁰

This procedure, however, is not universally followed. The First Circuit, in In re Lochiatto,²⁰¹ has held that an in camera inspection is insufficient protection for the witness. Under Lochiatto, a witness is entitled to an opportunity to examine the authorizing application, affidavits, and orders for facial defects.

¹⁹⁸In re Grand Jury Proceedings (Worobyt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) (witness not entitled to inspect authorizing documents where district court judge has examined the facial regularity of the documents in camera); Droback v. United States, 509 F.2d 625 (9th Cir. 1974), cert. denied, 421 U.S. 964 (1975) (witness cannot delay grand jury proceeding to conduct a plenary challenge of electronic surveillance); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974) (grand jury witness not entitled to hearing to determine whether questions are based upon unlawful surveillance).

¹⁹⁹522 F.2d 196 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976).

²⁰⁰Id. at 197-98. Such a procedure protects the privacy of all parties while still protecting the interest of the grand jury witness.

²⁰¹497 F.2d 803, 808 (1st Cir. 1974).

¶67 At this point, the witness would like a plenary suppression hearing to determine the validity of the authorizing orders, but the courts generally refuse to grant such a request.²⁰²

¶68 When the government concedes that there was an unlawful surveillance or the judge finds the orders to be facially defective, the grand jury witness has the privilege not to answer questions based upon the unlawful surveillance.²⁰³

The problem then arises: how is the privilege vindicated?

There are three possibilities:

1. trust the prosecutor not to ask any questions based upon the surveillance, with the witness challenging any suspected questions on an ad hoc basis;
2. have the presiding judge in an in camera proceeding limit the scope of questioning; or
3. hold a plenary suppression hearing to determine the extent of the taint.

There are no definitive cases on this point.²⁰⁴

²⁰²In re Mintzer, 511 F.2d 471 (1st Cir. 1974); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

²⁰³Gelbard v. United States, 408 U.S. 41 (1972).

²⁰⁴Standing may be determined by an in camera inspection, Taglianetti v. United States, 394 U.S. 316 (1969), but Alderman v. United States, 394 U.S. 165 (1969) requires an adversary hearing to determine whether a conviction was tainted by the existence of an illegal wiretap.

See Giordano v. United States, 394 U.S. 310 (1969) (Alderman limited to situation where violation present). The argument is that a similar hearing would also be required to determine the extent to which the illegality taints the

3. Refusal to testify after an adverse finding

¶69 If a witness still objects to questions and refuses to answer after an in camera inspection or an adequate denial, he may be held in civil contempt by the court.²⁰⁵ At this

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questioning. See United States v. Seale, 461 F.2d 345, 365 (7th Cir. 1972) (sworn testimony, subject to cross-examination, of relevant government witnesses must be submitted to show lack of taint in a contempt proceeding where overheard conversation was link in communication from lawyer to defendant); United States v. Fox, 455 F.2d 131 (5th Cir. 1972) (a defendant who has been illegally overheard has a right not only to the intercept logs, but also to examine the appropriate officials to determine the connection between the records and the case made against him, but he is not allowed to rummage randomly through the government's files); United States v. Fannon, 435 F.2d 364 (7th Cir. 1970) (where there is conceded illegal surveillance of a co-defendant, neither an in camera inspection nor the unsworn answers of the prosecutor are adequate); United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975) (transmittal to the prosecutor of information obtained through unlawful surveillance must be shown).

But see, In re Mintzer, 511 F.2d 471 (1st Cir. 1974) (limits Alderman as a post-conviction case to trial evidence, refusing to allow grand jury witness opportunity to develop case to show the taps found to be unlawful, i.e., without authorizing order on a facially defective order, are arguably relevant to the question posed).

²⁰⁵ 28 U.S.C. §1826(a) (1970):

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

point, the witness will again usually argue that he be granted a plenary suppression hearing, urging that the contempt hearing is a "proceeding" within 18 U.S.C. §2518(10). A contemporaneous contempt proceeding was not, however, held to be different from a grand jury proceeding in In re Persico, and the witness was not granted a suppression hearing. In Persico, the court looked to Justice White's concurring opinion in Gelbard, in which he observed:

Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation... Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings.²⁰⁶

4. Disclosure

¶70 18 U.S.C. §§2518(8)(d), (9), and (10)²⁰⁷ give an aggrieved party only limited pretrial disclosure of papers and the product of surveillance. A grand jury witness objecting to

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- (1) the court proceeding, or
- (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Contempt that may be purged by compliance is civil. Shillitani v. United States, 384 U.S. 364 (1966). Grand jury witnesses who refuse to testify are usually held in civil contempt since imprisonment for criminal contempt, under federal statutes, is limited to six months absent a jury trial. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

²⁰⁶ 408 U.S. 41, 70-71 (1972).

²⁰⁷ 18 U.S.C. §2518(8)(d) (1968):

questioning and seeking to see the underlying documents or intercepted communications, therefore, will find himself

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Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercept communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of--

- (1) the fact of the entry of the order or application;
- (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
- (3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice...

18 U.S.C. §2518(9) (1968):

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved...

18 U.S.C. §2518(10) (a) (1968):

... The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

with highly limited rights.²⁰⁸ If the surveillance is terminated, he will receive notice in accordance with section 2518 (8) (d). But sections 2518 (9) and (10) are inapplicable to a grand jury proceeding or a contemporaneous civil contempt hearing.²⁰⁹ If there is a conceded illegality or a finding by the presiding justice that the surveillance was unlawful, it is unclear as to what type of disclosure the aggrieved witness is entitled to.²¹⁰ But this will be, hopefully, a rare situation. It is, therefore, likely that normally there will be limited disclosure, if any, in connection with the grand jury proceeding.

¶71 But if the contumacious grand jury witness is prosecuted for criminal contempt, he is entitled to:

1. full disclosure under section 2518 (9); and
2. a plenary suppression hearing.

If the wiretap is found to be unlawful, then the witness is arguably entitled to disclosure and an adversary taint hearing under:

1. section 2518 (10); or
2. Alderman.²¹¹

²⁰⁸In re Grand Jury Proceedings (Worobyt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

²⁰⁹In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

²¹⁰Supra note 204.

²¹¹394 U.S. 165 (1969). United States v. Fox, 455 F.2d 131 (5th Cir. 1972) elaborated upon Alderman; it granted an aggrieved party:

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- (1) a right to inspect the intercept logs;
- (2) a right to examine appropriate officials in regards to the connection between the records and case made against him; and
- (3) a right to find out who the appropriate officials are.

This is not, though, a right to rummage through all the government files.

Alderman, however, granted the right to an adversary hearing to determine the extent of taint in the context of pre-1968 surveillance. The Supreme Court has not reconsidered its holding in Alderman in light of Title III. See United States v. United States District Court, 407 U.S. 297, 324 (1972).

The question now left open is whether under Title III an in camera inspection procedure is authorized to determine whether unlawfully intercepted information is arguably relevant to a prosecution before the material must be turned over to the defendant. The issue of automatic disclosure versus an initial in camera proceeding cannot be settled by looking at a constitutional text. See Taglianetti v. United States, 394 U.S. 316 (1969) (not every issue raised by electronic surveillance requires an adversary proceeding and full disclosure).

It is unclear whether the decision in Alderman rested upon the Court's supervisory power over the admission of evidence or on the Constitution. It is a reasonable interpretation that it rested upon the supervisory power. If so, Alderman has arguably been superseded by Congress when it enacted Title III. The legislative history of Title III specifically states:

This provision [section 2518(10)(a)] explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the property of the interception of an aggrieved person's communications.

S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

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Disclosure of overheard conversations may harm persons who have completely innocent conversations with people later prosecuted, or who are merely mentioned in such conversations. See, e.g., Life Magazine, May 30, 1969, pp. 45-47 (excerpts from transcripts of conversations overheard through government electronic surveillances published there contained unflattering references to prominent entertainment figures, an elected official, and members of the judiciary, none of whom was a party to any of the published conversations); R. Conolly, "The Story of Patriarca Transcripts," Boston Evening Globe, September 2, 1971, p. 22 (transcripts, despite a protective order, appeared in the newspaper three weeks after disclosure). The lives and families of people identified in the conversations may be endangered. Pending investigations can be significantly impaired as disclosure frequently leads to flight by potential defendants and the destruction of evidence.

The argument against disclosure where the aggrieved person is overheard merely by happenstance is particularly strong as the interception is incidental and wholly irrelevant to the purpose of the surveillance. In this context, an in camera review will protect the defendant's interests because the judge is capable of determining that an interception has no relation to a prosecution.

18 U.S.C. §3504(a)(2) further provides for only limited disclosure for pre-1968 interceptions. This statute, although not applicable to post-1968 interceptions, can also be viewed as expressing a congressional intent to limit the holding in Alderman. The legislative history reveals an intent to overrule Alderman as it pertains to pre-1968 interceptions. See, e.g., 112 Cong. Rec. H9649 (daily ed. Oct. 6, 1970).

These arguments are particularly strong when made in the context of a national security surveillance. Secrecy is an absolute necessity. Disclosure will include location of the listening device which can be devastating. The identity of agents may also be revealed. To disclose may compromise national security. If the information cannot be disclosed under any circumstances, the entire investigation may have to be abandoned. Thus, there is a need to re-evaluate the present position on disclosure. Legality in the national security area is generally now determined through an in camera procedure. United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). See also 1976 Guild, supra note 35, at ch. 12.

In sum, a grand jury witness is not entitled to a hearing to determine if surveillance was conducted or to test the legality of any such surveillance. He may refuse to answer only where surveillance was conducted and there was no authorizing order, where the government concedes that the surveillance was unlawful, or where there was a prior judicial adjudication of illegality. Consequently, while Gelbard recognizes the testimonial privilege of the grand jury witness, that privilege is effective only when there is either a conceded illegality or when the court finds insufficient the authorizing order or the governmental denial of illegality. In other instances, i.e., where the government shows that the questions are not based upon unlawful electronic surveillance, the witness will be compelled to testify.

5. Wiretap privilege in New York

¶72 New York wiretap—grand jury practice is not as fully developed as its federal counterpart. Nevertheless, in New York, a grand jury witness need not answer questions which are based upon an illegal wiretap.²¹² Since section 3504 is not applicable to the states,²¹³ a slightly different procedure follows a recalcitrant witness's claim of unlawful

²¹²People v. Einhorn, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974).

²¹³H. Rept. No. 1549, 91st Cong., 2d Sess. 3 (1970).

As amended by the committee, the application of Title VII is limited to Federal judiciary and administrative proceedings.

interception. Upon the request of the witness²¹⁴ (which must be respectful), he is to be brought before the presiding justice who may make appropriate inquiry either in camera or in open court as to the soundness of the objection. Here, the inquiry by the presiding justice is not in the nature of a suppression hearing. Since lengthy suppression hearings are too disruptive of grand jury proceedings, they are not available to grand jury witnesses.²¹⁵ If the presiding justice finds that there was no wiretap or that there are no facial defects in the court order authorizing the wiretap, he may then compel the witness to testify or be subject to a contempt citation.

¶73 A prosecution for contempt in New York is generally

²¹⁴People v. Breindel, 73 Misc.2d 734, 739, 342 N.Y.S.2d 428, 434 (New York County 1973), aff'd, 35 N.Y.2d 928, 365 N.Y.S.2d 163 (1974):

I hold, therefore, that the People are under no obligation to disclose to a grand jury witness that the questions about to be propounded are the product of electronic surveillance. '[A] balance must be struck between the due functioning of the grand jury system and a defendant's rights under the eavesdropping statutes.' (People v. Mulligan, 40 App. Div.2d 165, 166, supra). The integrity of the grand jury's fact-finding process is what is at stake here. Providing an uncooperative or hostile witness with the type of information requested in this case permits him to tailor his testimony to matters already known to the grand jury, thereby defeating the purpose of calling him. Such disclosure also jeopardizes the secrecy of the investigation and hence its chances of success with respect to the targets thereof.

²¹⁵People v. Mulligan, 40 App. Div.2d 165 (1st Dept. 1972); In re O'Brien, 76 Misc.2d 303, 350 N.Y.S.2d 498 (Rockland County Court 1973).

criminal in nature.²¹⁶ Because it is, the witness being prosecuted is entitled to all applicable procedural safeguards: most importantly, a plenary suppression hearing.²¹⁷

²¹⁶N.Y. Penal Law §215.51 (McKinney 1975) provides:

A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, having been sworn as a witness, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree is a class E felony.

The legislative history of this statute provides clearly:

The intent of the new enactment, as expressed in the Governor's Memorandum of Approval, was to increase 'the penalty for refusal to... testify before a grand jury--after having been granted immunity--from a possible jail sentence of one year to a maximum prison sentence of four years... Recently, district attorneys investigating organized criminal activity have been confronted by witnesses who refuse to testify before grand juries, even after they have been granted immunity. The increase in penalty... should encourage otherwise uncooperative witnesses to assist grand juries in their investigations.'

Hechtman, Comment, Penal Law (McKinney 1971).

N.Y. Penal Law §275.50, providing for misdemeanor contempt, is still occasionally used. Criminal contempt prosecution is preferred over civil contempt prosecution because the contumacious witness can only be imprisoned for the term of the grand jury when found to be civilly contempt, but he can be imprisoned for up to four years when he is found to be criminally contempt. The civilly contempt witness may also purge himself of the contempt by testifying. The criminally contempt witness cannot. The crime for which he is charged was completed in the grand jury. The prosecuting attorney may, however, dismiss any charges brought against a contumacious or recalcitrant grand jury witness if that witness subsequently cooperates. This, of course, is solely a matter of the prosecutor's discretion. Thus, there is a strong double incentive to testify.

²¹⁷18 U.S.C. §2518(10) and N.Y. Crim. Pro. Law art. 710 (McKinney, 1971).

But to guard against vague and unsupported allegations, the Court of Appeals established a set of criteria to be met by a defendant making such a claim. In People v. Cruz,²¹⁸ the court said:

[The] defendant should have the burden of coming forward with the facts which reasonably lead him to believe that he or his counsel have been subjected to undisclosed electronic surveillance. The defendant's allegation should be reasonably precise and should specify, insofar as practicable

- [1] the dates of suspected surveillance,
- [2] the identity of the persons and their telephone numbers, and
- [3] the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.²¹⁹

Following such a showing, the people then have the burden of affirming or denying the allegations with a reasonably specific and comprehensive affidavit. The affidavit should specify:

- [1] [The] appropriate local, State, and if applicable, Federal law enforcement agencies contacted to determine whether electronic surveillance had occurred,
- [2] the persons contacted,
- [3] the substance of the inquiries and replies, and
- [4] the dates of claimed surveillance to which the inquiries were addressed.²²⁰

These guidelines are to apply only in the context of a criminal trial, not in the context of a grand jury proceeding.²²¹

²¹⁸ 34 N.Y.2d 362, 314 N.E.2d 39, 357 N.Y.S.2d 709 (1974).

²¹⁹ Id. at 369, 314 N.E.2d at 43, 357 N.Y.S.2d at 714.

²²⁰ Id.

²²¹ The standards set out in Cruz and in Einhorn are often confused and used interchangeably. See In re Myers, 173 N.Y.L.J. 17 (1975).

The right of a witness to raise this objection is not without limitation. There can be only one appearance before a justice to determine the existence or validity of a wiretap.²²² The right to object is not absolute and multiple challenges serve only to disrupt and delay the proceedings. The right is waivable.²²³ A witness may not testify in hope that such testimony is later suppressable. The proper procedure is to raise the objection and request to be taken before the presiding justice. If the challenge fails, the witness must still remain silent when questioned before the grand jury to preserve his objection.

6. Wiretap privilege in New Jersey

¶74 The New Jersey wiretap statute is modeled on Title III; its legislative history is explicit:

This bill is designed to meet the Federal requirements and to conform to the Federal act [Title III] in terminology, style and format which will have obvious advantages in its future application and construction.²²⁴

²²²People v. Langella, 82 Misc.2d 410, 370 N.Y.S.2d 381 (New York County 1975).

²²³People v. McGrath, 86 Misc.2d 249, 380 N.Y.S.2d 976 (New York County 1976). In McGrath, the presiding justice, upon inspection, found no facial defects with the authorizing order and ordered the defendant to testify. The defendant did so "under protest." His answers were evasive and a prosecution for contempt followed. The court then found that the wiretap orders were, indeed, invalid because they were issued without probable cause; however, the court also found that the defendant had waived this objection by testifying.

²²⁴N.J. Stat. Ann. 2A:156A-1 et seq. (West 1971); Rep. on S. No. 897, Electronic Surveillance, S. Committee on Law, Public Safety and Defense, Oct. 29, 1968, p. 21.

The New Jersey courts have not faced a question of a privilege before a grand jury based on an unlawful electronic surveillance. A reasonable inference may be drawn, however, that federal decisions would be considered persuasive authority. This is even clearer after the recent appellate decision in State v. Chaitkin.²²⁵ In response to a motion to suppress at trial, the court fashioned a procedural remedy to protect Fourth Amendment rights. The court said:

The right to move to suppress evidence is conditional upon

- (1) a claim by the person that he is aggrieved by an unlawful search and seizure; and
- (2) a showing of reasonable grounds to believe that the evidence will be used against him in some penal proceeding...

[In determining the reasonableness of each defendant's belief] the standards should be as follows:

- (1) Defendants's allegation should be reasonably precise;
- (2) The allegation should set forth, insofar as practicable:
 - (a) the dates of suspected surveillance,
 - (b) the identity of the persons and their telephone numbers, and
 - (c) the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.²²⁶

No standards were established defining the specificity required by the people's response, but in light of the heavy reliance upon Alter in formulating the standards in Chaitkin, a trial context, it is extremely likely that the New Jersey court would adopt Alter type standards in the grand jury context.

²²⁵135 N.J. Super. 179, 342 A.2d 897 (App. Div. 1975).

²²⁶Id. at 187-188, 342 A.2d at 902.

7. Wiretap privilege in Massachusetts

¶75 The question of whether a grand jury witness has the privilege to refuse to answer questions based upon an unlawful electronic surveillance has not been decided by any court in Massachusetts but there is no reason why they, too, will not draw heavily from the decisions in federal courts.²²⁷

C. Denial of Constitutional Newsman's Privilege

¶76 First Amendment claims of privilege are, for the most part, recognized in the context of a grand jury proceeding.²²⁸ In a five to four decision, the Supreme Court, in Branzburg v. Hayes,²²⁹ decided that the First Amendment guarantee of freedom of speech and press did not relieve a newsman of his obligation to appear or testify before a grand jury. The newsman's need to protect the confidentiality of his sources does not override the public's interest in the effective

²²⁷In Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819 (1975), the Massachusetts wiretap statute, Mass. Gen. Laws Ann. ch. 272, §99 (1975), was found to conform with the requirements of the comprehensive federal legislation. In so doing, the court set a standard for suppression questions. Suppression is required only where there has been a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of the extraordinary device. See 327 N.E.2d at 845. This approach follows the federal rule. See United States v. Giordano, 416 U.S. 505 (1974).

²²⁸See 1976 Guild, supra note 35, at ch. 11.

²²⁹408 U.S. 665 (1972).

administration of justice.²³⁰ Although Branzburg appears to be a flat denial of a constitutional newsman's privilege, it is not without qualification. The relationship between the need for the information and the subject of the investigation must not be remote or tenuous.²³¹ Indeed, the Ninth Circuit, in Bursey v. United States,²³² held that where the grand jury activity collides with the First Amendment, the government must establish that its interests are substantial, legitimate, and compelling and that the infringement be no

²³⁰The Court's decision is in accordance with the criteria set out by Wigmore which should be met before a communication is recognized to be privileged. See 8 J. Wigmore, Evidence §§2285-296 (McNaughton Rev. 1961) [hereinafter cited Wigmore]. Although this communication did originate in a confidence which was essential to the satisfactory maintenance of the relation which would be injured by disclosure, the opinion of the community was that the relation was not to be fostered at the expense of impeding the grand jury function.

²³¹408 U.S. at 710:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions (emphasis added).

Although the opinion seems to limit itself to criminal proceedings, the opinion has not been so construed. It has been applied in both civil and criminal judicial proceedings. See Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) cert. denied, ___ U.S. ___ (non-grand jury case); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed pursuant to Rule 60, 417 U.S. 938 (1974) (action for libel based on newspaper column); United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972) (need of society asserted by counsel for defense in criminal proceeding for impeachment of a witness).

²³²466 F.2d 1059 (9th Cir. 1972).

greater than is essential.²³³ Bursey states the general law.²³⁴

¶77 The court in Branzburg did not limit the power of a state to recognize a privilege by statute. Both New York and New Jersey have enacted statutes dealing with the newsman's privilege.²³⁵ Nevertheless, these statutes are strictly construed. In In re WBAI-FM,²³⁶ a New York court narrowly construed the statute against the policy of the privilege.

²³³ 466 F.2d at 1083.

²³⁴ See also In re Lewis, 377 F. Supp. 227 (C.D. Cal.), aff'd, 501 F.2d 418 (9th Cir. 1974), cert. denied, 420 U.S. 913 (1975).

²³⁵ N.Y. Civil Rights Law §79-h (McKinney 1976):

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature, or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any news or the source of any news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a newsgathering capacity.

N.J. Stat. Ann. 2A:84A-21 (West 1971):

[A] person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.

²³⁶ 68 Misc.2d 355, 326 N.Y.S.2d 434 (1971), aff'd, 42 App. Div.2d 5, 344 N.Y.S.2d 393 (3d Dept. 1973). See also

The information at issue there was from a letter. As there were no confidences involved and the information was not obtained as the result of questioning, the appellate court for the Third Department held that the privilege did not apply.

D. Denial of Privilege for Freedom of Worship

¶178 The privilege to refrain from testifying before a grand jury is sometimes asserted on grounds of freedom of worship. When such a claim is made, the interest of the individual in a right of religious worship must be balanced against the interest of the State.²³⁷ In this process, the courts attempt to make a sensible and feasible accommodation of all interests. In so doing, the courts do not allow this privilege to nullify society's interest in a thorough investigation.²³⁸ The right is not absolute. Although the claim may delay the taking of testimony, it will seldom entirely shield the claimant.

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In re Bridges, 120 N.J. Super. 460, 295 A.2d 3 (1972), cert. denied, 410 U.S. 991 (1973). There is no newsman's privilege in Massachusetts. In re Pappas, 266 N.E. 2d 297 (1971), aff'd, 408 U.S. 665 (1972). This was one of the three cases decided by the Supreme Court in Branzburg.

²³⁷Sherbert v. Verner, 374 U.S. 398 (1963). See also Wisconsin v. Yoder, 406 U.S. 205 (1972). See also 1976 Guild, supra note 35, at §11.8.

²³⁸Smilow v. United States, 465 F.2d 802 (2d Cir.), vacated and remanded on other grounds, 409 U.S. 944 (1972), on remand, 472 F.2d 1193 (2d Cir. 1973). See also United States v. Huss, 482 F.2d 38 (2d Cir. 1973); People v. Woodruff, 26 App. Div.2d 236, 272 N.Y.S.2d 786 (1966), aff'd mem., 21 N.Y.2d 848, 288 N.Y.S.2d 1004 (1968).

E. Legislative Privilege

¶79 The Speech or Debate Clause of the Constitution²³⁹ grants a limited privilege which may be asserted by Senators, Representatives, or their aides.²⁴⁰ The privilege is not absolute. It does not exempt members of Congress or their aides from the service or obligations of a subpoena if the subpoena is properly served.²⁴¹ Consequently, a motion to quash a subpoena based upon the assertion of this privilege will be denied. But it may be modified. The privilege does allow a member of Congress or his aide to refuse to answer questions concerning the "due functioning of the

²³⁹Article I, §6, cl. 1, of the Constitution:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

²⁴⁰Gravel v. United States, 408 U.S. 606 (1972). The aide is protected only insofar as his conduct would be a protected legislative act if performed by the Member himself. *Id.*, at 618. See also Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880). The privilege does extend to state legislative officers, United States v. Craig, 528 F.2d 773 (7th Cir. 1976) (court recognized a common law privilege, but found that the officer had waived the privilege by testifying), but not to executive officers, United States v. Mandel, 415 F. Supp. 1025 (D.C. Md. 1976) (purpose of privilege, preserving the independence of the legislature, would not be promoted by extending immunity to acts, although legislative in nature, done by the governor).

²⁴¹United States v. Cooper, 4 U.S. (4 Dall.) 341 (1800).

legislative process."²⁴² The court may, therefore, issue a protective order limiting the scope of the questioning.²⁴³ The privilege at no time extends to acts or communications having no connection with the legislative process.

F. Denial of privilege for illegal searches and seizures
¶80 Under United States v. Calandra,²⁴⁴ a grand jury witness cannot avoid testifying before a grand jury by objecting to the questions as fruits of an illegal search and seizure. The exclusionary rule does not extend to the grand jury.²⁴⁵ Historically, the character of the evidence presented to a grand jury did not affect the validity of an indictment.²⁴⁶

²⁴²Gravel v. United States, 408 U.S. at 622.

²⁴³Id. at 629. The Supreme Court narrowed the scope of inquiry by not permitting questions concerning:

1. the Senator's conduct, or the conduct of his aides at the subcommittee meeting;
2. the motives and purposes behind such conduct;
3. communications between the Senator and his aide during term of employment and related to legislative acts of the Senator; and
4. acts performed in preparation for meetings unless the acts are criminal or relevant to a third party crime.

²⁴⁴414 U.S. 338 (1974).

²⁴⁵A witness may attack a subpoena duces tecum on Fourth Amendment grounds. See United States v. Dionisio, 410 U.S. 1, 11 (1973); 1976 Guild, supra note 35, at §12.15.

²⁴⁶United States v. Blue, 384 U.S. 251 (1966) (grand jury may consider evidence obtained in violation of the Fifth Amendment); Lawn v. United States, 355 U.S. 339 (1958) (no hearing to determine the source of evidence); Costello v. United States, 350 U.S. 359 (1956) (grand jury may rely upon hearsay or otherwise inadmissible evidence). The rule may be different in states by virtue of case law or statute. See, e.g., People v. Glen, 173 N.Y. 395, 400, 66 N.E. 112, 114 (1903) (power always asserted to set aside indictments when it appears that they have been found without evidence, or upon illegal and incompetent testimony).

To impose this additional burden upon the grand jury, the court reasoned, would seriously impede its functioning without significantly furthering the goals of the exclusionary rule.²⁴⁷

G. Attorney-Client privilege

¶81 The oldest of the common law privileges is that of attorney-client.²⁴⁸ It exists in some form in all jurisdictions.²⁴⁹ The privilege developed to provide "subjectively for the client's freedom of apprehension in consulting his legal advisor."²⁵⁰ This is the client's privilege.²⁵¹

²⁴⁷The purpose of the exclusionary rule is to deter police misconduct. United States v. Calandra, 414 U.S. at 351.

²⁴⁸The first reported case dealing with the privilege is Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), where a solicitor was exempted from examination. The case rests on the policy that at that time the attorney was viewed as having a duty not to disclose the secrets of his clients.

²⁴⁹J. Wigmore, Evidence, §2292.

²⁵⁰Fed. R. Evid. 1101(c):

The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

Fed. R. Evid. 1101(d):

The rules (other than with respect to privileges) do not apply in the following situations...

(2) Proceedings before grand juries.

Fed. R. Evid. 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.

²⁵¹J. Wigmore, Evidence, §2321.

Thus, only the client may waive the privilege and unless the client does, the attorney must assert it.²⁵² This privilege may be claimed before a grand jury.²⁵³ The privilege is not without qualification. For the privilege to exist, legal advice must be sought from an attorney with the communications made in confidence relating to that purpose.²⁵⁴ If the communications pertain to actual collusion to commit a crime, a continuing illegality, or contemplated future crimes, the communications are not privileged.²⁵⁵ The attorney

²⁵² ABA Canons of Professional Ethics No. 37. See also United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965), vacated on other grounds, 384 U.S. 364 (1966) (the attorney-client privilege is not destroyed by a grant of immunity); 1976 Guild, supra note 35, at §§15.3-15.12.

²⁵³ See supra note 249.

²⁵⁴ J. Wigmore, Evidence, §2292.

²⁵⁵ See Clark v. United States, 289 U.S. 1, 15 (1933), where Mr. Justice Cardozo, speaking for the Court, observed: "The privilege takes flight if the relation is abused." The privilege will not shelter consultations concerning how to commit a crime. The conflict between the need for full disclosure to enable justice to prevail and the need for secrecy to promote effective representation must here be decided in favor of disclosure. United States v. Friedman, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) (where attorneys were co-perpetrators of crime, the communications concerning the criminal conduct were not privileged); Commonwealth v. Dyer, 243 Mass. 472, 505, 138 N.E. 290, 312 (1923) (there is no privilege where conferences concern proposed crimes); In re Selser, 15 N.J. 393, 105 A.2d 395 (1954) (attorney-client privilege is lost when advice is sought to aid commission of crimes; attorney cannot be consulted professionally for advice to aid in committing a crime; questions asked by grand jury must be answered). See also People ex rel. Vogelstein v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (N.Y. County), aff'd, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dept. 1934) (attorney found guilty of contempt for refusing to give name of client to grand jury as the fact of employment is not a privileged communication).

is, at that time, viewed not as an attorney, even though he may be giving legal advice, but rather as a co-conspirator or co-participant. As such, there can be no attorney-client relationship or privilege. But, when the communications pertain to past crimes or activities, the communications are privileged²⁵⁶ and, in certain circumstances, will provide an effective means of avoiding testifying before a grand jury.

¶82 The mere assertion of fraudulent or criminal abuse of the attorney relationship is not sufficient, however, to compel disclosure.²⁵⁷ Some quantum of evidence must be produced by the government to show that illegality was involved in the subject matter of the communications. Wigmore suggests that some evidence of crime or fraud, along with evidence that there have been transactions with the attorney, should be sufficient to shift the burden of proof to the attorney "to satisfy the court (apart from jury) that the transaction has to his best belief not been wrongful before a claim of privilege is allowed."²⁵⁸ But the courts do not apply this rule. Rather, the accepted rule, as laid out by Justice Cardozo in Clark v. United States,²⁵⁹ is that in order to "drive the privilege away, there must be something

²⁵⁶ J. Wigmore, Evidence, §2299. The attorney-client privilege applies only to communications. An attorney cannot claim the privilege as justification for refusing to appear. Losavio v. Kikel, 188 Colo. 127, 533 P.2d 32 (1975).

²⁵⁷ Clark v. United States, 289 U.S. 1, 14 (1933).

²⁵⁸ J. Wigmore, Evidence, §2299.

²⁵⁹ 289 U.S. 1 (1933).

to give color to the charge; there must be prima facie evidence that it has some foundation in fact."²⁶⁰ Proof need not be beyond a reasonable doubt before the privilege is defeated; rather it merely needs to be sufficient to sustain such a finding of fact.²⁶¹ When such a showing is made, the communications are held to be not privileged.

¶83 If a lawyer's grand jury testimony breaches the attorney-client privilege, the resulting indictment, however, is not subject to dismissal.²⁶² If there is no constitutional right to dismissal of an indictment based in part upon evidence obtained unconstitutionally,²⁶³ then a fortiori this remedy cannot exist for violation of a mere common law privilege. The privilege is protected by the client's right to assert it at trial and the secrecy of grand jury proceedings. Dismissal is not, therefore, a proper remedy. There is a qualified privilege for work product materials prepared by an attorney acting for his client in anticipation of litigation.²⁶⁴

²⁶⁰Id. at 15.

²⁶¹In re Sesler, 15 N.J. 393, 105 A.2d 395 (1954). A showing that the attorney had held extraordinarily frequent conferences with his client, coupled with a clear showing of ongoing criminal activity on the part of the client, was held sufficient to make out a prima facie case and thus compel the attorney to testify Arguably, a showing of ongoing criminal activity at a time when there was a continuous attorney-client relationship is sufficient evidence to force disclosure of all relevant communications.

²⁶²United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975).

²⁶³See supra note 246.

²⁶⁴Hickman v. Taylor, 329 U.S. 495 (1947).

This doctrine, although most frequently asserted as a bar to discovery in civil litigation, also applies to criminal proceedings under United States v. Nobles.²⁶⁵ The courts are now moving to allow the privilege to be asserted by grand jury witnesses.²⁶⁶ But all that is protected is the work product of the attorney as defined in Hickman.

¶84 Electronic surveillance presents special problems in the context of the attorney-client privilege. Confidential attorney-client communication may be intercepted in the course of an investigation. The communications may be overheard in one of two ways:

1. There may be enough evidence prior to an application for an eavesdropping order to show probable cause that the attorney is a co-conspirator or otherwise involved in a crime; or

2. The communications may be incidentally overheard during an electronic surveillance authorized for another purpose. Of the twenty-four jurisdictions that have eavesdropping statutes, all but four have a provision relating to privileged communications.²⁶⁷ Twelve of the remaining twenty statutes, including the federal statute, contain only a provision to the

²⁶⁵422 U.S. 225 (1975). Although the court recognized that indeed the privilege did exist in criminal proceedings, it held that it had been waived, leaving its scope open to definition.

²⁶⁶In re Grand Jury Proceedings (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976). See also In re Grand Jury Proceedings (Duffey), 473 F.2d 840 (8th Cir. 1973); In re Langswager, 392 F. Supp. 783 (D.C. Ill. 1975).

²⁶⁷The four jurisdictions and their respective statutes are: Ariz. Rev. Stat. Ann. §§13-1051-1061 (Supp. 1973); Md. Cts. & Jud. Proc. Code Ann. §§10-401 to 408 (1974); Ore. Rev. Stat. §§141.720-.990 (1973); Wash. Rev. Code Ann. §§9.73.030-100 (Supp. 1974).

effect that a privileged communication does not lose its privileged character by virtue of having been intercepted.²⁶⁸ The remaining eight state jurisdictions have more individualized statutes that place greater restrictions on obtaining a warrant or amendment to allow eavesdropping on attorney-client communications.²⁶⁹

¶85 A client either seeking legal advice or preparing for litigation may give documents and papers in his possession to his attorney. Such documents and papers are not automatically privileged. The Supreme Court, in Fisher v. United States,²⁷⁰ carefully set out the limits of the attorney-client privilege. The Court held that the privilege protects only those disclosures necessary to obtain informed legal advice which might not be made absent the privilege.²⁷¹

²⁶⁸The twelve jurisdictions and their respective statutes are: 18 U.S.C. §§2510-20 (1960); Colo. Rev. Stat. Ann. §§16-15-101 to 104, 18-9-301 to 310 (1973); Fla. Stat. Ann. §§934.01-.10 (Supp. 1975); Ga. Code Ann. §§26-3001 to -3010 (Spec. Supp. 1971); Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1975); Neb. Rev. Stat. §§86-701 to 707 (Supp. 1973); Nev. Rev. Stat. §§179.410-.515, 200.610-.690 (1973); N.H. Rev. Stat. Ann. §§570-A:L to A:11 (Supp. 1973); N.M. Stat. Ann. §§40.A-12-1.1 to 1.10 (Supp. 1973); S.D. Compiled Laws Ann. §23-13A-1 to 11 (Interim Supp. 1975); Va. Code Ann. §§19.1-89 to 89.10 (Supp. 1975); Wis. Stat. Ann. §§968.27-.33 (Supp. 1975).

²⁶⁹New York's statutes, N.Y. Crim. Pro. Law §700.20 (McKinney 1971), N.Y. Penal Law §§250.00-.20 (McKinney 1967), require that the application for an eavesdropping warrant contain a statement that communications to be intercepted are not legally privileged. This creates a serious potential hazard to the surveillance because a subsequent defendant who can show that an intercepted communication was, in fact, privileged will have grounds to attack the good faith of the government, the sufficiency of the application and the legality of the eavesdropping order. This is potentially far more hazardous to the investigation than would be an attack on an item of intercepted conversation with the object of suppressing damaging evidence.

²⁷⁰Fisher v. United States, 425 U.S. 391 (1976).

²⁷¹Id. at 403.

Pre-existing documents which could be obtained from the client can also be obtained from the attorney. The simple act of transferring the papers to the attorney does not give otherwise unprotected documents protection. But if the documents are unobtainable from the client, they are still protected, by the attorney-client privilege.²⁷²

H. Spousal Privilege

¶86 As a rule, confidential communications made from one spouse to another during marriage are privileged.²⁷³ The

²⁷²In *Fisher*, the taxpayers gave to their attorneys their accountants' work papers in connection with an I.R.S. investigation. The I.R.S. then served summonses upon the attorneys directing them to produce the papers. The attorneys challenged the summonses.

The Supreme Court, in *Couch v. United States*, 409 U.S. 322 (1973) ruled that documentary summonses directed to the taxpayer's accountant directing the production of the taxpayer's own records in the possession of the accountant did not violate the taxpayer's Fifth Amendment rights. [T]he ingredient of personal compulsion against an accused is lacking." *Id.* at 329. As there is no accountant-client privilege under federal law, the documents were unprotected. *Id.* at 335.

The Court relied upon *Couch* in holding that the taxpayer's Fifth Amendment rights were not violated by compelling production.

The Court, distinguishing *Boyd v. United States*, 116 U.S. 616 (1886), held that the papers were not privileged in the hands of the taxpayer and, therefore, were not protected by the attorney-client privilege.

Protection may be gained for the accountant's work papers only if the taxpayer first goes to an attorney to obtain legal advice and then has the attorney hire the accountant to prepare the papers.

²⁷³J. Wigmore, *Evidence*, §§2332-41; See also 1976 *Guild*, supra note 35, at §15.13.

protection of marital confidences is regarded as so essential to the preservation of the marriage as to outweigh any disadvantages to the administration of justice.²⁷⁴ This rule of privilege extends to grand jury proceedings.²⁷⁵ Thus, a grand jury witness may withhold testimony which would incriminate his spouse on the basis of the marital privilege.²⁷⁶ But the privilege is not absolute. Two important exceptions have emerged. Testimony may be compelled where both spouses are granted immunity.²⁷⁷ As neither spouse can be prosecuted for what is then said, the underlying precept of preservation of the family is maintained. Testimony may also be compelled under the co-conspirator exception.²⁷⁸ If the husband and wife are co-conspirators or co-participants in

²⁷⁴Wolfle v. United States, 291 U.S. 7 (1934).

²⁷⁵Supra note 249.

²⁷⁶Blau v. United States, 340 U.S. 332 (1951). See also Hawkins v. United States, 358 U.S. 74 (1958) (privilege serves goal of preserving family by preventing either spouse from committing the unforgivable act of testifying against the other in a criminal trial).

²⁷⁷United States v. Doe, 478 F.2d 194 (1st Cir. 1973). See also In re Snoonian, 502 F.2d 110 (1st Cir. 1974) (where wife was not a target of investigation and prosecutor filed an affidavit that he would not prosecute wife, husband's claim of marital privilege was overruled).

²⁷⁸This is not really an exception to the privilege. Communications between co-conspirators are not confidential marital communications; they are not, therefore, within the privilege.

a crime, the privilege does not apply.²⁷⁹ The privilege still applies, though, where the spouse has merely seen or heard evidence of a past crime.²⁸⁰

I. Priest-Penitent Privilege

¶87 Another privilege which may be successfully used as a means of not testifying before the grand jury is that of priest-penitent. There are few cases on the subject. Two recent cases arose where the privilege was claimed by ministers acting in the capacity of counselors. The court, in In re Verplank,²⁸¹ held that draft counseling services performed by a clergyman and his staff were performed in the course of functioning as a clergyman and thus the privilege

²⁷⁹United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974) (where wife was an unindicted participant and was called as a witness by the government in a prosecution for illegally transporting aliens, the court held that the privilege did not extend to instances where the spouse was a party to the crime). In United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), reversed on other grounds, 415 U.S. 143 (1974), a wiretap order was issued authorizing interception of Kahn's telephone conversations with the objective of obtaining information concerning Kahn's illegal gambling activities. Some of the conversations overheard were with his wife. The surveillance terminated with the attainment of this objective. Both Kahn and his wife were indicted. They filed a motion to suppress, arguing that the surveillance violated their marital privilege. The court ruled that the intercepted conversations were not privileged because they had to do with the commission of a crime, not with the privacy of the marriage. See also "Future Crime or Tort Exception to the Communications Privileges," 77 Harv. L. Rev. 730, 734-35 (1964).

²⁸⁰Ivey v. United States, 344 F.2d 770, 772 (5th Cir. 1965) (admission of a past crime).

²⁸¹329 F. Supp. 433 (C.D. Cal. 1971).

could be asserted when questioned before a grand-jury. This issue was again raised in United States v. Boe,²⁸² but the case was decided on other grounds.

²⁸²491 F.2d 970 (8th Cir. 1974). Both Boe and Verplank rely upon Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (admission of defendant to minister that she had abused her children was privileged and testimony by minister was inadmissible).

VIII. STATE ACCESS TO FEDERAL GRAND JURY MINUTES

A. Statutory Background

¶88 Rule 6(e) of the Federal Rules of Criminal Procedure, adopted in 1946,²⁸³ governs secrecy and disclosure of federal grand jury proceedings. 18 U.S.C., Rule 6(e) provides:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

¶89 The rule was intended to continue "the traditional practice of secrecy on the part of members of the grand jury except when the court permits disclosure...."²⁸⁴ Disclosure

²⁸³For an historical account of the adoption of Rule 6, see L. Orfield, Criminal Procedure Under the Federal Rules §6:1 (1966).

18 U.S.C. §554 (1946 ed.) was the predecessor of Rule 6(e).

²⁸⁴Note 1, Advisory Committee on Rules, 18 U.S.C.A. Rule 6, n. 1 at 268 (1975 ed.).

Typically, particularized need exists where grand jury testimony is used to impeach witnesses, attack credibility, or refresh recollection.²⁸⁸ These are the routine cases.²⁸⁹

Since Rule 6(e) continues the common law policy of secrecy,²⁹⁰ the "tougher" cases must be resolved by analyzing the reasons for secrecy and weighing them against the need for disclosure.²⁹¹

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In Pittsburgh Plate Glass, another antitrust case, the court was confronted with a direct request under Rule 6(e). It held that a party seeking disclosure must show that a particularized need exists which outweighs the policy of secrecy. 360 U.S. at 400. The court affirmed the trial judge's refusal to permit inspection of the minutes because the defendant failed to show particularized need.

Taken together, Proctor & Gamble and Pittsburgh Plate Glass indicate that a showing of particularized need is required before grand jury minutes may be disclosed, regardless of whether the request is made under (Criminal) Rule 6(e) or (Civil) Rule 34. The "good cause" requirement which formerly existed in Rule 34 merely incorporated Rule 6(e) in such cases.

The father of Proctor & Gamble and Pittsburgh Plate Glass was United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234, rehearing denied, 310 U.S. 658 (1940). This was a pre-Rule 6(e) case in which the court stated that after a grand jury has ceased functioning, disclosure is proper where the ends of justice require it. The court allowed use of the grand jury testimony to refresh the recollection of witnesses under the facts of the case.

²⁸⁸ See, e.g., Dennis v. United States, 384 U.S. 855, 870 (1966).

²⁸⁹ These routine exceptions to the secrecy rule will not be dealt with in detail.

²⁹⁰ See In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir.) (1962).

²⁹¹ In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974); see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. at 403 (Brennan, J., dissenting); cf. Dennis v. United States, 384 U.S. 855, 870, 872-73 (1966).

under Rule 6(e) is committed to the discretion of the trial judge²⁸⁵ and may be ordered under one of the three exceptions to secrecy provided in the rule or under other special statutory provisions.²⁸⁶ In defining the parameters within which the trial judge's discretion may operate, the Supreme Court has held that there must exist a "particularized need" for disclosure which outweighs the policy of secrecy.²⁸⁷

²⁸⁵Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

²⁸⁶The Jencks Act, 18 U.S.C. §3500, was amended in 1970 to allow a defendant to move at trial for production of portions of a witness' grand jury testimony. See 18 U.S.C. §3500(e)(3). Prior to the amendment, a defendant was not entitled to the testimony. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

Rule 16(a)(1)(A) of the Federal Rules of Criminal procedure, 18 U.S.C., allows a defendant to "discover" his own recorded testimony before the grand jury.

²⁸⁷United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959).

Procter & Gamble actually involved a discovery request under Rule 34 of the Federal Rules of Civil Procedure, which required a showing of good cause. A federal grand jury failed to return a criminal indictment against the defendant. The Government then initiated a civil anti-trust suit against the defendant. Defendant moved under Rule 34 for production of the criminal grand jury transcripts. The court, looking to the policy of secrecy expressed in Rule 6(e) and the reasons behind secrecy, held that the defendant failed to show the requisite good cause:

We only hold that no compelling necessity has been shown for the wholesale discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discrete showing of need is necessary to establish good cause. 356 U.S. at 683 (court's emphasis).

B. The Rationale Behind Secrecy

¶90 The five modern²⁹² reasons most often cited in support of grand jury secrecy are:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.²⁹³

²⁹²The modern rationale for secrecy is somewhat different from the original rationale:

In examining the evolution of grand jury secrecy, it is important to note that the common law concept of secrecy that was imported to American jurisprudence arose initially from a need to protect the grand jurors and private citizens from the oppression of the state. It was not intended to aid the prosecution in its discovery of facts or to protect the prosecution's case from disclosure." R. Calkins, supra note 1, at 458.

²⁹³This formulation of the reasons for secrecy originally appeared in United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931). It has since been cited with approval by many courts considering the issue. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 667, 682 n. 6 (1958); United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954); In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974); United States v. Badger Paper Mills, Inc., 243 F. Supp. 443, 445 (E.D. Wisc.) (1965). For a similar formulation, see United States v. American Medical Association, 26 F. Supp. 429, 430 (D.D.C. 1939).

¶91 Significantly, four of the five reasons have nothing to do with protecting the accused.²⁹⁴ In other words, secrecy of grand jury proceedings is not a right of the accused;²⁹⁵ it is a policy designed to protect the workings

²⁹⁴United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931).

²⁹⁵In fact, California has no secrecy requirement in certain cases. Under California Penal Code §938.1 (1961), transcripts of witness's testimony before a grand jury are deposited under seal with the county clerk. District attorneys may have access to them. The defendant receives a copy of the transcript after indictment. California Penal Code §939.1 permits a grand jury to hold public sessions in public corruption cases. The provision is rarely used. See A. Sherry, "Grand Jury Minutes: The Unreasonable Rules of Secrecy," 48 Va.L. Rev. 668, 679 (1962):

Where it is known that the grand jury has been inquiring into alleged official misconduct, its failure to take action where the evidence is insufficient or the charges unfounded is not readily or officially explainable if its proceedings must be secret. The loss of public confidence in the integrity of local government may be deepened instead of dissipated, and the reputation of blameless public servants irreparably damaged. Public sessions in such cases serve well to inform the public and to minimize misunderstanding. It should be added too, that the prospect of being called to account publicly for the conduct of public affairs may have a salutary effect on the performance of official duty." 48 Va. L. Rev. at 680.

Professor Sherry goes on to suggest that the California system proves "[n]one of the dire forebodings of the defenders of grand jury secrecy have been borne out." 48 Va. L. Rev. at 684.

The primary focus of the Sherry article is on the unfairness of not permitting a defendant to have free access to grand jury minutes to prepare for trial. (The article was written before the 1970 amendments to the Jencks Act. See note 289, supra). Problems raised by permitting governmental authorities to use minutes in subsequent proceedings were not dealt with.

of the grand jury itself.²⁹⁶ Even policy formulations giving greater weight to personal interests of a witness or the accused do not raise these interests to the level of a constitutional right.²⁹⁷

¶92 Courts have pointed out that four of the five traditional reasons for secrecy become inapplicable after return of an indictment²⁹⁸ or after trial.²⁹⁹ The argument is that after

²⁹⁶ See, e.g., Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959):

To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused.

²⁹⁷ See In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973) for Judge Friendly's statement of the secrecy rationale:

The tradition rests on a number of interests --the interest of the government against disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely; the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial brow-beating without the protection of counsel; the similar interests of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor; protection of witnesses against reprisal; and the interests and protection of the grand jurors themselves.

²⁹⁸ Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933); In re Report and Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C. 1974). See also R. Calkins, supra note 1 at 458-461.

²⁹⁹ In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill., 1974); United States v. Scott Paper Company, 254 F. Supp. 759 (W.D. Mich. 1966).

indictment, the grand jurors and witnesses are no longer subject to tampering since the grand jury functions have ended. The accused has been indicted, so the interest in protecting an exonerated party does not apply. "Tipping off" the target, allowing him to escape, is obviously not a factor once the indictment has been announced or the target has been taken into custody. The only remaining reason supporting post-indictment (or post-trial) secrecy, therefore, is the desire to encourage "free and untrammelled disclosures"³⁰⁰ by witnesses.³⁰¹ The argument may be questionable in some respects. After indictment, there is no danger of tampering with witnesses insofar as their grand jury testimony is concerned, but there is still danger of tampering insofar as trial testimony is concerned. A witness giving inconsistent trial testimony may, of course be impeached with his grand jury testimony, but that is of little comfort to the prosecutor who loses the case due to the actions of that witness. Tampering may also result in witness conduct on the stand that does not involve giving testimony inconsistent with grand jury testimony. To the extent that pre-trial, post-grand jury tampering is a concern, the danger may be eliminated by requiring state officials to wait until the federal proceedings have terminated before allowing them to inspect the grand jury

³⁰⁰ United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931).

³⁰¹ See In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1109 (N.D. Ill. 1974).

minutes.³⁰² Another problem with the argument is that a grand jury may investigate several parties but only indict some of them. The fifth reason for secrecy--protecting the exonerated accused--would, therefore, remain in force, even after indictment, with respect to some parties. In addition, some of the interests favoring secrecy do not become inapplicable after indictment or trial. Finally, the argument is of little help in cases where the minutes sought are those of a grand jury that returned no indictment.

¶93 To be sure, encouragement of witnesses is, to many courts, a very powerful reason for secrecy.³⁰³ Yet this reason fails too, after a witness has given his testimony in open court.³⁰⁴ Indeed, there is some question whether

³⁰²Cf. In re Petition For Disclosure of Evidence Before Oct. 1959 Grand Jury of This Court, 184 F. Supp. 38, 41 (E.D. Va. 1960).

³⁰³See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958), where the court emphasized the importance of encouraging witnesses to come forward in anti-trust cases. Witnesses in such suits may be "employees or even officers of potential defendants, or their customers, their competitors, their suppliers," who might not step forward if secrecy was not guaranteed.

See also United States v. Skurla, 126 F. Supp. 713 (W.D. Pa. 1954), where the court refused to order a United States Attorney to produce grand jury minutes for court review in a vote fraud case, saying that witnesses may hesitate to "testify against one in an official or exalted position" absent a guarantee of secrecy.

See also United States v. Scott Paper Co., 254 F. Supp. 759, (W.D. Mich. 1966).

³⁰⁴Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 at 403 (Brennan, J., dissenting); R. Calkins, supra note 1, at 461; But see In re Grand Jury Transcripts, 309 F. Supp.

this reason is valid at all, since the names of grand jury witnesses are not secret in most jurisdictions.³⁰⁵ "Reprisals against witnesses can and do occur,"³⁰⁶ but the name of a witness (or grand juror) is all the would-be tamperer needs. Hence, a witness may not be encouraged to step forward by promise that his testimony will be kept secret, when he knows that his name may not be kept secret, and he expects that his testimony will eventually be required at a public trial.³⁰⁷

¶94 In sum, grand jury secrecy is not an end in itself.³⁰⁸ It is a policy that should be applied only when there is some reason to apply it,³⁰⁹ and it must be weighed against other

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1050, 1052 (S.D. Ohio 1970), where the court refused to order turn over to state authorities of federal grand jury testimony of two witnesses precisely because their grand jury testimony was the same as their trial testimony and the latter was readily available.

³⁰⁵R. Calkins, supra note 1, at 462; L. Orfield, supra note 286, at §6:120. Cf. In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960).

See, e.g., Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598 (N.D. Ill. 1974), where the court notes that under its Local Criminal Rule 1.04(e) (1971), names of grand jury witnesses are a matter of public record.

³⁰⁶See Note, "Administrative Agency Access to Grand Jury Materials," 75 Col. L. Rev. 162, 183 (1975), and the authorities cited therein.

³⁰⁷See note 313, infra.

³⁰⁸Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403 (1958) (Brennan, J., dissenting).

³⁰⁹"Where the ends of justice can be furthered thereby and when reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised." Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933).

relevant interests.³¹⁰

C. Reasons for Seeking Access to Federal Grand Jury Minutes

¶95 As previously noted,³¹¹ testimony of a witness at trial will presumably be the same as his testimony before the grand jury. Any inconsistency may be disclosed anyway, through impeachment.³¹² Trial testimony is readily available, so why would state authorities want to obtain grand jury testimony?

¶96 In cases where the witness has appeared both before the grand jury and at trial, the simple answer is that his grand jury testimony may be much broader in scope than his trial testimony. Testimony given before the grand jury may have been irrelevant at the trial. For example, a witness may have given testimony before a grand jury implicating a third party not involved in the federal prosecution. Such testimony might be irrelevant at the federal trial. Or, the witness may have given hearsay testimony before the grand jury, not admitted at trial, which would give state authorities a valuable investigative lead. Note, however,

³¹⁰ See, e.g., In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974):

In considering applications for disclosure of grand jury minutes, the court's task is to scrutinize the request against the reasons for the rule of secrecy.

³¹¹ Supra ¶93.

³¹² Supra ¶92.

that the state's reason for seeking the federal grand jury minutes in this instance may be the very reason for not allowing its access.³¹³ Unless the state proceedings in which the federal grand jury minutes are to be used provides adequate due process, Sixth Amendment, and evidentiary safeguards, use of the federal grand jury minutes may prove to be unconstitutional.³¹⁴ The manner in which the state intended to use the minutes would be highly relevant. For example, use as an investigative tool in preparation for a proceeding that has adequate evidentiary safeguards would be less offensive than admission of the grand jury transcript itself in the state proceeding, since there is no opportunity for cross-examination in that case. As shall be seen, courts have been sensitive to this problem, and they have dealt with it by tailoring the definition of "judicial proceeding" in Rule 6(e).

¶97 In addition, use of the grand jury minutes would save investigative time, effort, and expense.³¹⁵ Perhaps the

³¹³In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973), the court recognized "the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial brow-beating without the protection of counsel"

³¹⁴See Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 898 (7th Cir. 1973).

³¹⁵Mere convenience may not be a sufficient ground to justify disclosure. Cf. In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962); Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229, 1232 (N.D. Cal. 1968). But cf. Smith v. United States, 423 U.S. 1303, stay vacated, 423 U.S. 810 (1975).

witness never testified at trial. He may not have been called as a witness at trial. Or, there may have been no trial because the defendant pleaded guilty or nolo contendere,³¹⁶ the government dropped the charges, the grand jury returned no indictment,³¹⁷ or the indictment was dismissed.³¹⁸

¶98 Whether the reason in inadequacy of trial testimony or nonexistence of trial testimony, state authorities may have a legitimate need for grand jury minutes. State police authorities may want access to federal grand jury minutes to investigate possible violations of departmental regulations prohibiting officers from refusing to cooperate fully with grand juries.³¹⁹ State prosecutors, bar authorities, legislative committees, and police boards may want to see if facts adduced before the grand jury suggest violations of state law, disciplinary rules, or codes of ethics.³²⁰

³¹⁶Cf. In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108 (N.D. Ill. 1974).

³¹⁷Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958) (L. Hand, J.).

³¹⁸Cf. Application of Scro, 200 Misc. 688, 108 N.Y.S.2d 305 (Kings Co. Ct. 1951) (Leibowitz, J.), involving an analagous problem of access to state grand jury minutes by police disciplinary authorities.

³¹⁹Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 895 (7th Cir. 1973).

³²⁰In re Holovachka, 317 F.2d 834 (7th Cir. 1963) (bar disciplinary proceeding); Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958) (bar disciplinary proceeding); In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970) (police misconduct); In re Bullock, 103 F. Supp. 639 (D.D.C. 1952) (police misconduct); In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974)

State prosecutors may prefer to use federal grand jury minutes as investigative tools rather than calling a particular witness before a state grand jury. This would be an important reason if state law only provided for transactional immunity,³²¹ or provided automatic immunity for certain classes of state grand jury witnesses,³²² or provided that targets could not be called to testify.³²³ Certain witnesses who appeared before the federal grand jury may have died or disappeared, or may not be subject to service of process in the state. Other witnesses may no longer be subject to criminal prosecution, either because their federal grand jury testimony was immunized, or the statute of limitations has run.³²⁴ If these witnesses are corrupt public officials, lawyers, political figures, or policemen, the only way to remove them from the system may be via state proceedings.

³²⁰(continued)
(presidential impeachment); In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960) (criminal investigation of city officials); United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961) (criminal investigation of state employee); United States v. Crolich, 101 F. Supp. 782 (S.D. Ala. 1952) (Misconduct of election officials).

³²¹See, e.g., N.Y. Crim. Proc. Law §190.40 (McKinney 1971).

³²²See, e.g., In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960). A Virginia statute gave automatic immunity to grand jury witnesses testifying in bribery and gambling cases. The commonwealth attorney's desire to use federal grand jury minutes in his state criminal investigation might have been motivated by his desire to avoid calling certain people before a state grand jury, thereby immunizing them. The court granted his request for access to the federal minutes.

³²³Supra note 324.

³²⁴See note 320, supra.

¶99 Finally, a federal grand jury may request that evidence or testimony produced before it be turned over to state authorities.³²⁵ Obviously, that gives state authorities a good reason to request access to the minutes.

D. The Approach Taken by Courts

¶100 Under Rule 6(e), disclosure may be made (a) "to attorneys for the government" or (b) "preliminarily to or in connection with a judicial proceeding" or (c) "at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment...."³²⁶

¶101 In order for state authorities to gain access to federal grand jury minutes, their request must fit in one of these categories.³²⁷ Obviously, the third category is inapplicable. All courts construing the phrase "attorneys for the government" in Rule 6(e) have held that it does not include municipal, county, or state attorneys.³²⁸ Thus, the only remaining avenue

³²⁵In Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958), a federal grand jury failed to indict the defendant but voted that his activities be referred by the U.S. Attorney to the grievance committee of the New York City Bar Association. The grievance committee's subsequent request for the minutes was granted. Other cases involving similar requests by federal grand jurors include In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960) and In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974).

³²⁶18 U.S.C., Rule 6(e).

³²⁷But see ¶109, infra.

³²⁸In re Holovachka, 317 F.2d 834, 836 (7th Cir. 1963); United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961); cf. In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962); Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598, 601 (N.D. Ill. 1974).

for state access under Rule 6(e) is "in connection with a judicial proceeding."

¶102 "The largest breach in the wall of secrecy has been wrought by (this) exception."³²⁹ This has been accomplished through a broad construction of the term "judicial proceeding."³³⁰ The seminal case in this area is Doe v. Rosenberry,³³¹ in which Judge Learned Hand defined "judicial proceeding" as used in Rule 6(e) to include: "any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime."³³² Thus, the court held that a proceeding before the Appellate Division of the New York State Supreme Court to discipline an attorney was a "judicial proceeding" within Rule 6(e), and a bar association grievance

³²⁹In re Biaggi, 478 F.2d 489, 492 (2d Cir. 1973). See also Note, "Administrative Agency Access to Grand Jury Materials," 75 Col. L. Rev. 162 at 169, 170 (1975):

. . .[I]t is through this exception that the largest inroads into secrecy have been made. Much of this is due, of course, to the court's increasing willingness to permit defendants access to grand jury materials in the preparation of their defense. An equally significant factor, however, is the expanding interpretation which has been given to 'judicial proceeding,' resulting in the use of grand jury transcripts in a wide range of federal, state, and local proceedings. (footnotes omitted).

³³⁰Id.

³³¹255 F.2d 118 (2d Cir. 1958).

³³²255 F.2d at 120.

committee hearing was "preliminary to" a "judicial proceeding."³³³

¶103 Other courts, following the lead of Doe, have held that state criminal investigations³³⁴ and police department disciplinary proceedings³³⁵ fall within the "judicial proceeding" exception to Rule 6(e).

¶104 Not all courts, however, have taken the Doe approach. Some courts have held that the term "judicial proceeding" in Rule 6(e) refers only to pending federal court proceedings,

³³³Id. at 119-120. Doe involved charges of corruption against an attorney who was a former IRS group chief. See note 328 supra.

³³⁴In re Petition for Disclosure of Evidence, 184 F. Supp. 38, 41 (E.D. Va. 1960) was a public corruption case in which the court held that a state criminal investigation was preliminary to a judicial proceeding, and therefore ordered turnover of the minutes to the state prosecutor.

Interestingly, the court refused to order turnover of minutes for use in a state administrative disciplinary proceeding. Since the court adopted the Doe definition of "judicial proceeding," it is doubtful whether the court meant to hold that an administrative action was not a judicial proceeding under Rule 6(e). More likely, the court was simply exercising its discretion (in not turning over the minutes) because particularized need was not shown by the administrative authorities. The court may have felt that disclosure to the prosecutor was adequate to handle the problem.

³³⁵In Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), the court upheld a turnover of federal grand jury minutes to the Chicago Superintendent of Police in connection with a police department inquiry. The department was investigating charges that several policemen violated departmental regulations by refusing to answer questions before the grand jury, which was investigating police corruption.

The Court noted that the departmental hearing regulations allowed policemen to appear with counsel, present evidence, and present and cross-examine witnesses. Furthermore, there was a right of extensive judicial review. This extensive power of judicial review was central to the court's holding that the departmental hearing was a "proceeding determinable by a court" within the Doe definition, and therefore a judicial proceeding under Rule 6(e).

not state proceedings. In United States v. Crolich,³³⁶ a federal grand jury had indicted defendants for vote fraud. They pleaded nolo contendere. The court refused to turn over the federal grand jury minutes to the state election board charged with the duty of appointing election officials, saying the "judicial proceeding" exception in Rule 6(e) contemplates a proceeding pending in a federal district court "which would necessitate the disclosure of matters occurring before a grand jury impanelled by that court."³³⁷

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In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970) involved facts very similar to Conlisk. The Columbus, Ohio, Chief of Police sought access to federal grand jury testimony of certain witnesses for use in proceedings before the Director of Public Safety with respect to charges against policemen who were defendants in the federal case. The court held that the "quasi-judicial" nature of the proceedings before the Director of Public Safety brought these proceedings within the exception of Rule 6(e). Here, as in Conlisk, judicial review of the administrative proceeding was clearly contemplated.

Having held that the "proceedings" requirement of Rule 6(e) was met, the court then considered whether particularized need was shown. It concluded that particularized need was shown as to the grand jury testimony of a witness who gave inconsistent trial testimony and who "took the fifth" before the Public Safety Board, but not as to the testimony of two other witnesses whose trial testimony was consistent with their grand jury testimony.

Note that the Conlisk court expressly declined to follow the "quasi-judicial" approach of the In re Grand Jury Transcripts court, saying that the holding in Doe "was not framed simply on the Grievance Committee's quasi-judicial nature, but rather on the fact that judicial action on charges predicated on the Committee's findings necessarily followed the Committee's hearings." 490 F.2d at 896, 897.

³³⁶ 101 F. Supp. 782 (S.D. Ala. 1952).

³³⁷ Id. at 784

¶105 A similar result was reached in United States v. Downey.³³⁸ A secretary in the governor's office was convicted of federal income tax evasion. The offense had nothing to do with state funds. In denying a motion for disclosure of the federal grand jury minutes to the state attorney general, the court said that the Federal Rules of Criminal Procedure govern procedures in federal courts only and that the term "judicial proceeding" in Rule 6(e) refers to federal proceedings.³³⁹ The court, however, went on to say that:

movants are not entitled as a matter of court discretionary right to have the transcript until an adequate showing is made with factual reasons to justify disclosure.³⁴⁰

This sounds very much like a holding that particularized need was not shown. (The court was concerned about the fact that the state attorneys produced no facts showing a possible violation of state law; it was a "fishing expedition.") An inquiry into particularized need, however, is not necessary until after a court has decided that disclosure is sought in connection with a judicial proceeding. If there is no judicial proceeding, even an "adequate showing" of factual reason for disclosure would not permit disclosure.³⁴¹

³³⁸195 F. Supp. 581 (S.D. Ill. 1961).

³³⁹Id. at 583.

³⁴⁰Id. at 588.

³⁴¹This confusion in the Downey opinion may no longer be significant. To the extent that Downey held that state pro-

ceedings cannot be "judicial proceedings" within the meaning

¶106 These cases are of questionable validity.³⁴² The history of the adoption of Rule 6(e) and the decisional trend seem to support the broader construction of "judicial proceeding."³⁴³

¶107 The "judicial proceeding" exception to secrecy is not always available to accomplish disclosure in cases where courts feel disclosure is desirable: "[The] difficulty in application of Rule 6(e) to specific fact situations likely arises from the fact that its language regarding 'judicial proceedings' can imply limitations on disclosure much more extensive than were apparently intended."³⁴⁴ Some courts, recognizing this problem, have granted disclosure requests where there is no "judicial proceeding" within the meaning of Rule 6(e).³⁴⁵

¶108 In In re Bullock,³⁴⁶ District of Columbia Commissioners requested access to federal grand jury minutes to see if a

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of Rule 6(e), it was overruled sub silentio by Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973).

342 Id.

343 Cf. In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C.) [hereinafter cited as In re Report], aff'd sub nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

344 In re Report, supra note 343, 370 F. Supp. at 1229.

345 In re Biaggi, 478 F.2d 489 (2d Cir. 1973); In re Bullock, 103 F. Supp. 639 (D.D.C. 1952); In re Report, supra note 343 (involving a grand jury report rather than actual minutes).

346 103 F. Supp. 639 (D.D.C. 1952).

police official was guilty of dereliction of duty. The court found that none of the Rule 6(e) exceptions to secrecy applied--including the judicial proceeding exception³⁴⁷--but ordered the minutes turned over anyway.³⁴⁸ The court thought the public interest in the integrity of the police force overrode the policy of secrecy.³⁴⁹

³⁴⁷ Bullock was decided in 1952, before Doe v. Rosenberry. If Bullock arose today, the court would probably reach the same result by holding that disclosure was "preliminary to or in connection with a judicial proceeding," Rule 6(e), 18 U.S.C., following the approach of Conlisk and In re Grand Jury Transcripts (see note 338 supra).

³⁴⁸ The court said, 103 F. Supp. at 641:

. . .by way of interpretation the Federal Courts have extended their jurisdiction so that they may remove the seal of privacy from Grand Jury proceedings when in the court's discretion the furtherance of justice requires it. (court's emphasis).

³⁴⁹ In cases of this nature, the sole question to be resolved is which policy shall be served to bring about justice, the one requiring secrecy or the other permitting disclosure. . . .Where public interest is superior to the purpose of the secrecy of Grand Jury testimony, the latter protection will be disregarded and the minutes divulged within limits proscribed by law.

103 F. Supp. at 642, 643. Cf. Application of Scro, 200 Misc..688, 108 N.Y.S.2d 305 (Kings Co. Ct. 1951) (Leibowitz, J.), which involved an analagous situation in which a local Police Commissioner sought, and won, access to state grand jury minutes:

If they were guilty of the reprehensible conduct attributed to them, namely of accepting graft in return for protecting Gross in his illegal business, their continued retention on the police force would have made law enforcement a mockery. Public interest, therefore, required that this testimony be made available to the Police Commission, to be used by him within limits prescribed by law.

¶109 Bullock may be viewed as creating a "public interest" exception to secrecy.³⁵⁰ Even where disclosure would not be permitted under Rule 6(e), a court may permit it where it finds a superior public interest.³⁵¹

¶110 Alternatively, Bullock may be viewed in combination with In re Biaggi³⁵² and In re Report and Recommendation of June 5, 1972 Grand Jury (hereinafter In re Report)³⁵³ as

³⁵⁰In fact, courts have viewed it that way. See, e.g., In re Biaggi, 478 F.2d 489 (2d Cir. 1973); In re Report, 370 F. Supp. 1219 (D.D.C. 1974); In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108 (N.D. Ill. 1974).

See also Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897 (7th Cir. 1973) and In re Grand Jury Transcripts, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970), in which the courts, after holding that the literal requirements of Rule 6(e) were met, alternatively found (citing Bullock) that even if they were not met, the public interest in police force integrity warranted disclosure.

³⁵¹Cf. In re Grand Jury Transcripts, 309 F. Supp. at 1052.

³⁵²478 F.2d 489 (2d Cir. 1973). In Biaggi, newspaper reports indicated that a congressman "took the fifth" before a federal grand jury. The congressman denied it, and sought a court order requiring the grand jury minutes to be made public. None of the exceptions to Rule 6(e) were applicable; there was no judicial proceeding in which the minutes were relevant. The Court of Appeals, per Friendly, J., affirmed a lower court order allowing disclosure of relevant portions of the minutes, with names of third parties deleted. The court essentially found that none of the reasons for grand jury secrecy applied under the facts of the case.

³⁵³370 F. Supp. 1219 (D.D.C. 1974). The court ordered contents of a grand jury report disclosed, subject to safeguards, to the Impeachment Committee of the House of Representatives. None of the Rule 6(e) exceptions applied, since a legislative committee investigation is not preliminary to or in connection with a judicial proceeding, etc. The court found that the reasons favoring secrecy were not offended by disclosure under the circumstances. It is open to question whether the court could have found that an impeachment proceeding, being in essence a trial, was a "judicial proceeding" and therefore the House investigation was preliminary to a judicial proceeding.

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part of a more broadly based exception to Rule 6(e). This broad exception was pinpointed by Judge Sirica in In re Report:³⁵⁴

The phrase in the Rule, "preliminarily to or in connection with a judicial proceeding", evidently derived from the fact that the Advisory Committee had in mind only cases where the disclosure question arose at or prior to trial. It left the courts their traditional discretion in that situation and apparently considered no others. It affirmed judicial authority over persons connected with the grand jury in the interest of necessary secrecy without diminishing judicial authority to determine the extent of secrecy. The Court can see no justification for a suggestion that this codification of a "traditonal practice" should act... to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance.

¶111 In other words, Rule 6(e) was intended to codify the traditional practice of allowing a court, in its discretion, to order disclosure of grand jury minutes (in certain circumstances) at or prior to trial.³⁵⁵ The rule was not intended to preclude, in other instances, the traditional common law balancing of secrecy against the need for disclosure. Bullock may simply be an illustration of this principle as applied to cases involving disclosure to state authorities.

³⁵⁴Id. at 1228.

³⁵⁵Cf. note 287 supra.

E. Special Problems when Immunity is Involved

¶112 State access to grand jury testimony given by a witness testifying under a grant of immunity³⁵⁶ may pose Fifth Amendment problems.

³⁵⁶Immunity of grand jury witnesses is governed by 18 U.S.C. §6002:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

A U.S. Attorney may request an immunity order under the terms of 18 U.S.C. §6003:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to

¶113 "The accomodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute."³⁵⁷ Of necessity, the protection afforded by a grant of immunity must be no less than that afforded by the Fifth Amendment.³⁵⁸ The Fifth Amendment requirement is met by the current federal statute providing for use and derivative use immunity.³⁵⁹

¶114 In Murphy v. Waterfront Commission of New York Harbor,³⁶⁰ the Supreme Court held, "that the constitutional

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give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6003 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

³⁵⁷United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974).

³⁵⁸Counselman v. Hitchcock, 142 U.S. 547, 584-86 (1892); Kastigar v. United States, 406 U.S. 441 (1972).

³⁵⁹Kastigar v. United States, 406 U.S. 441 (1972).

³⁶⁰378 U.S. 52 (1964).

privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."³⁶¹ Hence, grand jury testimony given by a witness testifying under federal use immunity, or its fruits, may not be used against the witness in a subsequent state criminal proceeding.³⁶²

¶115 The Fifth Amendment only protects a witness from having to give testimony which may subject him to a criminal charge.³⁶³ Thus, testimony given pursuant to a federal grant of immunity may be used against a witness in a state civil proceeding.³⁶⁴ Courts have, in fact, allowed the use

³⁶¹Id. at 77-78. In Murphy, witnesses appearing in a state proceeding under a state immunity grant refused to testify on the ground that their answers might incriminate them under federal law. The court's holding, however, also covered the situation in which a witness testifying in a federal proceeding under federal immunity refused to testify, claiming possible incrimination under state law. Even though the latter situation was not before the court, the court was able to decide it because the Fifth Amendment was fully applied to the states the same day in Malloy v. Hogan, 378 U.S. 1 (1964).

³⁶²Brown v. Walker, 161 U.S. 591 (1896); Ullmann v. United States, 350 U.S. 422, 431 (1956).

³⁶³Hale v. Henkel, 201 U.S. 43, 67 (1906).

³⁶⁴The federal immunity statute, 18 U.S.C. §6001, et seq., was intended to allow such a result. See 1970 U.S. Code Cong. & Ad. News 4007, 4017:

No oral testimony or other information secured from a witness can be used against him in a criminal proceeding. This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. (emphasis added).

of immunized federal trial testimony in state civil proceedings.³⁶⁵ Obviously, there is no Fifth Amendment prohibition against the use of immunized federal grand jury testimony in state civil proceedings;³⁶⁶ the question simply reduces itself to one of whether the state can gain access to the grand jury testimony in the face of Rule 6(e).

¶116 The state should be given access to federal grand jury minutes for use in state civil proceedings, especially if immunity has been granted in federal court. If a corrupt public official, policeman, lawyer, etc., testifies under federal use immunity, federal or state criminal prosecution becomes virtually impossible without wholly independent

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See also II National Commission on Reform of the Federal Criminal Laws, Working Papers 1432, 1433 (1970):

Because of the major public interest considerations involved in the various fields of licensing, particularly in the areas of health and safety, there should be an effort to avoid immunity statute clauses which may be construed not only to bar punitive action, but also to bar remedial actions to protect the public It would seem to be sufficient for an immunity statute to be formulated as is the Fifth Amendment itself. . . in terms of protection against "incriminatory" consequences of compelled disclosure.

³⁶⁵In re Daley, 549 F.2d 469 (7th Cir. 1977) (allowing use of immunized federal testimony in State bar proceedings); Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976) (allowing use of federally immunized testimony in state proceedings for revocation of engineer's license).

³⁶⁶Cf. Napolitano v. Ward, 457 F.2d 279 (7th Cir.), cert. denied, 409 U.S. 1037 (1972), where the court held that the Fifth Amendment was not violated when a state grant of transactional immunity before a state grand jury did not protect the witness (a judge) from state proceedings for removal from the bench based on the immunized grand jury testimony.

evidence. Consequently, the only way to remove him from the system may be via state civil disciplinary proceedings. The very fact that the witness received a grant of immunity may be the factor that weighs most heavily in favor of disclosure of the federal grand jury testimony to state authorities. Under these circumstances, there may be a "particularized need" for the grand jury testimony, and disclosure may be accomplished by using the "judicial proceeding" or "public interest" exceptions to Rule 6(e).³⁶⁷

¶117 In several cases, grand jury witnesses have refused to testify notwithstanding federal immunity grants, alleging that under the circumstances of the case, the immunity did not afford them protection coextensive with the Fifth Amendment. These cases fall into two categories. In one category, the claim was that the testimony, if given, would subject the witness to extradition and prosecution by foreign nations.³⁶⁸ In the other category, the claim was that the testimony, if given, could be used against the witness in subsequent prosecutions (for prior false statements) under 18 U.S.C. §1001.³⁶⁹

³⁶⁷ See ¶¶109-111, supra.

³⁶⁸ In re Tierney, 465 F.2d 806 (5th Cir. 1972); In re Parker 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970); In re Weir, 377 F. Supp. 919 (S.D. Cal.), cert. denied, 419 U.S. 1038 (1974); In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

³⁶⁹ United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); In re Weir, 377 F. Supp. 919 (S.D. Cal.), cert. denied, 419 U.S. 1038 (1974). Cf. In re Lysen, 374 F. Supp. 1122 (N.D. Ill. 1974).

¶118 The correct approach to both situations is for the court to determine whether subsequent prosecution is possible.³⁷⁰ If it is legally possible, the Fifth Amendment should apply to allow the witness to remain silent with respect to the specific questions which raise the possibility of subsequent prosecution.³⁷¹

¶119 Unfortunately, several courts have compelled the testimony in these cases, on the ground, inter alia, that Rule 6(e) will prevent disclosure, and the subsequent prosecutions will therefore never materialize.³⁷² The use of Rule 6(e) and the concept of secrecy to resolve a Fifth Amendment problem may be wholly inappropriate. It may

³⁷⁰ In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) the court found that the witness' fear of a subsequent Mexican prosecution was reasonable. The court thought Rule 6(e) could not be relied upon as effective protection. Thus, the court simply required the prosecutor to refrain from asking particular questions in a context that might make the answers incriminating under foreign law.

In United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973), the court held that the witness' fear of subsequent prosecution (under 18 U.S.C. §1001) for giving a false statement to a government agency was unfounded. This holding was based on the court's construction of 18 U.S.C. §6002 as requiring immunity to extend to all criminal prosecutions except a prosecution for perjured testimony given in response to the command to testify. In other words, the testimony could not be used against the witness in any prosecution for false statements made to anyone outside of the grand jury. But see United States v. Tramunti, 500 F.2d 1334, 1342-1346 (2d Cir. 1974).

³⁷¹ Id.

³⁷² In re Tierny, 465 F.2d 806 (5th Cir. 1972) (Bell, J.); In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970); In re Weir, 377 F. Supp. 919 (S.D. Cal.) cert. denied, 419 U.S. 1038 (1974); In re Lysen, 374 F. Supp. 1122 (N.D. Ill. 1974).

unnecessarily complicate the disclosure question, may not adequately answer the Fifth Amendment question, and may not be the least drastic way to accomodate the rights of the witness, the needs of the prosecutor, and the interest in disclosure in appropriate cases.

F. Observations and Conclusions

¶120 Given that state authorities have legitimate reasons for seeking access to federal grand jury minutes, they should be permitted such access when the reasons for secrecy are no longer applicable or are outweighed by greater public policy interests.

¶121 Typically, disclosure should occur:

(1) in cases involving corruption of public officials or employees, attorneys, judges, policemen, political leaders, i.e., cases where the strong public interest in removing these people from their positions outweighs the policy of secrecy (the public interest would, in effect, supply the requisite "particularized need");

(2) where the federal proceedings have ended and most of the reasons for secrecy have therefore become inapplicable; and

(3) where the party against whom the minutes are to be used was not a witness or subject in the grand jury proceeding, and again the reasons for secrecy become inapplicable.

¶122 Disclosure may be accomplished by convincing the court that:

(1) the state proceeding for which the minutes are sought falls within the "judicial proceeding" exception to Rule 6(e), and that a "particularized need" exists;

(2) a public interest exception should be engrafted onto Rule 6(e); or

(3) although Rule 6(e) only applies to disclosure at or prior to the federal trial, a common law balancing of policy interests should be made.

¶123 The lack of strict evidentiary standards, presence of counsel, and cross examination in grand jury proceedings suggests that, when available, federal grand jury minutes must be used in a manner consistent with the constitutional rights of the party against whom they are being used. The proceedings in which they are used should afford adequate due process and Sixth Amendment protection--notice, hearing, right to counsel, cross examination, reasonable evidentiary standards and judicial review. (The "judicial proceeding" exception is, in reality, one way of ensuring compliance with these standards.) In camera inspection by the federal court may be necessary prior to disclosure to ensure that illegally seized evidence is not made available to state authorities. Portions of the transcript irrelevant to the state inquiry should be excised, and the transcript should be edited where necessary to protect innocent parties and witnesses.

¶124 In the special case where a witness's immunized testimony is sought for use against him, the very fact that he has been immunized from criminal prosecution may favor the disclosure of the testimony for use in a civil

proceeding. This should not cause witnesses to "clam up" as the more information the witness gives, the greater the scope of the use immunity. Should a criminal prosecution result, the witness may then be faced with the same civil disciplinary proceeding he sought to avoid in the first place. Thus, the incentive to cooperate provided by use immunity should prevent any chilling effect caused by use of the minutes in civil proceedings.

¶125 Subject to these procedural and constitutional safeguards, federal courts should be liberal in allowing state access to grand jury minutes where the reasons for secrecy are inapplicable. Courts should no longer assume that protection or encouragement of witnesses is a justification for secrecy in all cases. As previously noted, this reason for secrecy is weaker than it appears to be at first glance. The government should instead be permitted to show, in particular cases, that protection or encouragement of witnesses is a relevant factor weighing against disclosure.

¶126 Unfortunately, courts have shown a tendency to simply repeat the "five reasons for secrecy" formula, and apply it in an unthinking fashion, without determining whether the formula reasons are the real reasons for secrecy, or whether they apply to the specific facts of the case before them. An approach that started out as a legitimate interest analysis has evolved into a pat, formularized approach. Hopefully, courts will begin taking another look at this problem, to insure that the policy of grand jury secrecy does not stand in the way of legitimate state action in public corruption cases.

IX. THE GRAND JURY AS AN INVESTIGATIVE TOOL

A. Distinction: Target, De Jure Defendant and Mere Witness

¶127 Three possible categories of witnesses must be identified.

A mere witness is one called to testify before the grand jury because it is thought that he may have some relevant information. At the time he is called he is suspected of no crime that the grand jury is investigating. At the other extreme is the de jure defendant who has already been indicted or against whom formal charges have been filed.³⁷³ Between these two extremes lies a middle category of witnesses who are generally referred to as targets or subjects of the investigation, virtual or potential defendants or de facto defendants (hereinafter referred to as target).

¶128 For one to be classified as a target more than a "mere possibility that the witness may later be indicted" ³⁷⁴ must exist. At the time that he is called it must appear that investigation has focused upon him as someone whom the government suspects of wrongdoing and plans to indict.³⁷⁵

The determination of one's target status depends not upon the subjective intent of the prosecutor but rather it rests upon an objective examination as to the scope of the inquiry, the matters and transactions sought to be discussed and the

³⁷³ 53 Texas L. Rev. 156, 158 (1975).

³⁷⁴ United States v. Scully, 225 F.2d 113 (2d Cir. 1955).

³⁷⁵ See United States v. Mandujano, 496 F.2d 1050, 1053, rev'd 425 U.S. 564 (1976); State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960).

nature of the questions put to the witness.³⁷⁶

B. The Rights and Obligations of a Mere Witness and a
De Jure Defendant

¶129 The de jure defendant occupies the most protected status. He may not be compelled to appear before a grand jury investigating matters related to the crime with which he is charged. His appearance requires a knowing and intelligent waiver of his rights,³⁷⁷ which include a right to remain silent and to have counsel present at any questioning.³⁷⁸ Hence, in United States v. Doss, the Sixth Circuit Court of Appeals held that a grand jury proceeding where the witness was already the subject of two sealed indictments but was not informed of this, the proceedings were held to be in violation of the defendant's Sixth Amendment right to counsel and due

³⁷⁶People v. ..., 10 N.Y.2d 161, 170, 176, 218 N.E.2d 571, 218 N.Y.S.2d ... 655 (1961); State v. Sibilila, 88 N.J. Super. 546, 212 A.2d 869 (Essex Co. 1965).

³⁷⁷As Justice Brennan wrote:

It is clear that the government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged.

United States v. Mandujano, 425 U.S. 564, 594 (1976) (Concurring Opinion); accord, United States v. Doss, 545 F.2d 548 (6th Cir. 1976).

³⁷⁸Massiah v. United States, 377 U.S. 201 (1964) (6th Amendment right to presence of counsel at all post-indictment interrogation); United States v. Doss, 545 F.2d at 552. But see Fed. R. Crim. P. 6a (restricting those who may be present in grand jury to only the government's attorneys and not witnesses' attorney).

process rights and were void.³⁷⁹ As a result, indictments for perjury resulting from his testimony were quashed.³⁸⁰ Similarly, it has been stated that the examination of an indicted defendant before a grand jury for the purpose of "freezing" his testimony at trial is an improper use of the grand jury.³⁸¹

¶130 In contrast, a mere witness may not refuse to appear if subpoenaed.³⁸² He is entitled to the protection of his privilege against self-incrimination³⁸³ but he must claim it and if he fails to so it is waived.³⁸⁴ Further, the prosecutor is under no duty to inform him of his rights.³⁸⁵

³⁷⁹United States v. Doss, 545 F.2d 548 (6th Cir. 1976). Doss did not deal with the situation whereby an indicted defendant is subpoenaed to testify in a grand jury investigation of unrelated crimes. Id. at 552 n.1.

³⁸⁰Id.

³⁸¹United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972).

³⁸²Blau v. United States, 250 U.S. 273 (1919).

[T]he giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person... is bound to perform upon being duly summoned.

Id. at 281.

³⁸³In re Groban, 352 U.S. 330, 332 (1957).

³⁸⁴See Rogers v. United States, 340 U.S. 367 (1951).

³⁸⁵United States v. Zeid, 281 F.2d 825, 830 (3d Cir. 1960); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955); State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960); People v. Smith, 257 Mich. 319, 241 N.W. 186, 188 (1932). But see Comm. v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971).

The mere witness has no right to have counsel present.³⁸⁶

Nevertheless, as discussed previously, the general practice is to allow the witness to have counsel present outside the grand jury room and to allow him to leave the room to consult with his attorney should he have any questions as to the exercise of his privilege against self-incrimination.³⁸⁷

¶131 The question that now must be addressed is whether a target is to be treated as a mere witness or whether he is to be afforded the broader protections given to a de jure defendant.

C. The Target Strategy under Federal Law

1. The propriety of subpoenaing a target

¶132 The issues surrounding the use of the target strategy have been litigated in the federal courts more extensively than in any state. Upon review of the federal law in the area, the only conclusion to be reached is that the target is not treated as a de jure defendant but rather is afforded much less protection and is generally to be treated like a mere witness.

¶133 The basic practice at issue here, the target strategy, has not been found to be in any way violative of the

³⁸⁶In re Groban, 352 U.S. 330 (1957); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973); People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968); See also People v. Blachura, 59 Mich. App. 664, 229 N.W.2d 877 (Div. 2, 1975) (no right to presence of counsel before a citizen's grand jury).

³⁸⁷See ¶28, supra.

target's Fifth Amendment rights.³⁸⁸ Indeed, the practice of calling "those persons who appear to know most about the matters under inquiry"³⁸⁹ has been seen as an entirely proper means by which the grand jury may fulfill its function as a shield against arbitrary accusation. The duty of the grand jury to investigate completely may not be carried out fully without questioning those implicated in order to give them an opportunity to explain or implicate others.³⁹⁰ Such a strategy has been recognized as particularly relevant in investigations involving political corruption³⁹¹

³⁸⁸United States v. Mandujano, 425 U.S. 564, 573 (1976) (opinion by Burger C.J. with three justices concurring); United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir. 1971); Kitchel v. United States, 354 F.2d 715 (1st Cir. 1966); United States v. Winter, 348 F.2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

³⁸⁹United States v. Sweig, 441 F.2d 114, 121 (2d Cir. 1971).

³⁹⁰Id. as stated by Chief Justice Burger in the Mandujano case:

It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it person suspected of criminal activity so that the investigation can be completeIt is entirely appropriate--indeed imperative--to summon individuals who may be able to illuminate the shadowing precincts of corruption and crime....[I]t is unrealistic to assume that all witnesses capable of providing useful information will be pristine pillars of the community untainted by criminality.

425 U.S. at 573.

³⁹¹The technique of subpoenaing the target has been utilized in many political corruption cases. See,

where the subject involves "a long devious and complicated conspiracy" and "sophisticated people, with varying motives to save themselves."³⁹² Though the procedure is generally accepted by the courts, the procedures surrounding its use and the limits of its application are not quite so clear and must be examined.

2. A target's right to counsel

¶134 A target's right to counsel appears to be no broader than that afforded a mere witness called before a grand jury. He may take advantage of the practice of consulting with counsel outside of the grand jury room.³⁹³ Thus, the witness, a target against whom the investigation is proceeding and who will, no doubt, be asked questions directed at eliciting further evidence of his criminality, may permissibly be left alone to decide which questions are potentially incriminating and when he should ask to see his attorney. Moreover, although allowing the witness to consult with his attorney outside is a common practice, it is doubtful whether such a practice is required as a Sixth Amendment

391(continued)

e.g., United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974); United States v. Sweig, 441 F.2d 114 (2d Cir. 1971); United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969); United States v. Addonizio, 313 F. Supp. 486 (D. N.J. 1970), aff'd 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

³⁹²United States v. Corallo, 413 F.2d at 1328.

³⁹³United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969); United States v. Levinson, 405 F.2d 971 (6th Cir. 1968); United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968).

right to counsel in the grand jury setting.³⁹⁴

¶135 The limited scope of attorney availability to the witness may give the prosecution a distinct advantage, but it must be remembered that in political corruption cases the targets will be sophisticated people who will probably have sought out legal advice prior to testifying.³⁹⁵

3. Limits on the strategy

¶136 Just as it appears that the federal courts have readily accepted the use of the strategy, it also appears that the courts have placed few limitations on the extent to which the strategy may be used. Indeed, there are very few ways by which a reluctant target can resist an appearance before the grand jury, even if such an appearance would only result in his claiming his Fifth Amendment privilege. The ABA Standards state:

(e) The prosecutor should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify.³⁹⁶

³⁹⁴See United States v. Mandujano, 425 U.S. at 581; United States v. Winter, 348 F.2d at 208; Langello v. Comm. of Corrections, State of N.Y., 413 F. Supp. 1214, 1220 (S.D.N.Y. 1976). No federal case has decided whether a witness has a constitutional right to consult with his attorney during questioning. But see People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968); 1976 Guild, *supra* note 35, at §7.5 (arguments in favor of the right to counsel).

³⁹⁵See 1976 Guild, *supra* note 35, at §3.6(a) (Advising and preparing witnesses prior to appearance before the grand jury so as to limit the prosecutorial advantage of limited attorney availability).

³⁹⁶ABA Standards §3.6(e).

Clearly, however, this rule has not received widespread recognition by federal courts. On the contrary, it appears to be the rule that a target may be forced to appear before the grand jury even though he intends to assert his privilege against self-incrimination and communicates his intentions to the prosecuting agency.³⁹⁷ Only one district court appears to have adopted the ABA Standard and quashed the subpoena of a target who had informed the Justice Department of his intention to assert his Fifth Amendment privileges if compelled to appear.³⁹⁸

¶137 The rationale for the ABA Standard §3.6(e) lies in attempting to avoid prejudicing the target in the eyes of the grand jury by compelling him to exercise his privilege.³⁹⁹ But even as to this issue the federal courts appear to be less sympathetic. Although the better practice is to have the prosecutor instruct the grand jury to draw no inferences from the target's assertion of his constitutional privilege,⁴⁰⁰ failure to do so will not result in the dismissal of the

³⁹⁷United States v. Wolfson, 405 F.2d 779, 784 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969); United States v. Fortunato, 402 F.2d 79 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); United States v. Addonizio, 313 F. Supp. 486 (D. N.J. 1970), aff'd 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972); United States v. Isaacs, 347 F. Supp. 743 (E.D. Ill. 1972); United States v. De Sapio, 299 F. Supp. 436 (S.D.N.Y. 1969).

³⁹⁸In re Possible Grand Jury Investigation, 17 Crim. L. Rptr. 2398 (D.D.C. 1975).

³⁹⁹ABA Standards at 90 (commentary).

⁴⁰⁰See United States v. Wolfson, 405 F.2d 779, 785 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

indictment.⁴⁰¹

¶138 The proper time for subpoenaing the target is controlled by only one outer limit. Once the grand jury indicts the target he becomes a de jure defendant and becomes entitled to all the protection afforded by the Constitution.⁴⁰² Once the subject of an indictment, he can no longer be compelled to appear before the grand jury investigating the crime charged, even where the target is as yet unaware of the indictment.⁴⁰³ Indeed, the use of the grand jury to adduce further evidence against a defendant already indicted is considered improper even where it seeks such evidence from sources other than the target.⁴⁰⁴ But one indicted for one crime may be brought before the grand jury as a target where the investigation involves a similar but separate offense.⁴⁰⁵

¶139 Beyond this one time limit, there appears to be little else which would require the prosecutor to subpoena the target at any particular point. The grand jury is under no duty to cease its investigation once it has

⁴⁰¹United States v. De Sapio, 299 F. Supp. 436, 440 (S.D.N.Y. 1969).

⁴⁰²See notes 380-384 and accompanying text supra.

⁴⁰³See United States v. Doss, 545 F.2d 548 (1976).

⁴⁰⁴United States v. Sellaro, 514 F.2d 114, 122 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1964).

⁴⁰⁵United States v. George, 444 F.2d 310 (6th Cir. 1971). In this case, the defendant was afforded the right to consult with his attorney outside of the grand jury room after each question.

developed enough information to support an indictment.⁴⁰⁶

Hence, the questioning of the target may be delayed until the end of the investigation.

¶140 The advantages of waiting until the end are obvious. Once independent evidence has established or indicated the criminality, more focused questions can be put to the target. More important, with information supporting a conclusion of criminality, questions directly aimed at the criminal transactions may induce the target to perjure himself providing a second criminal charge, which may be joined with the substantive charge,⁴⁰⁷ and it is easily proved if the substantive crime is proved. The practice of questioning the target about transactions when the government already has independent evidence, without disclosing the existence of such evidence to the target, in the hope or expectation that he will perjure himself was found by the court of appeals in Mandujano as being violative of due process.⁴⁰⁸ But this view was not shared by the Supreme Court.⁴⁰⁹ Nor have other circuits shared this view. Indeed, the practice described above has been explicitly upheld in

⁴⁰⁶United States v. Sweig, 441 F.2d at 121.

⁴⁰⁷See United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

⁴⁰⁸See ¶40, supra.

⁴⁰⁹425 U.S. at 583; 425 U.S. at 609 (Stewart, concurring).

both the Second and Seventh Circuits.⁴¹⁰

¶141 A final caveat as to the application of the target strategy is necessary. Where a target's testimony is sought, the government may be tempted to grant him use immunity⁴¹¹ and still hope to indict him on the basis of independent evidence before the grand jury. Although the propriety of such a procedure has not been tested at least one circuit has indicated the validity of such an indictment would be questionable.⁴¹²

4. A note on the use of the subpoena duces tecum

¶142 Although it is still true that the cost of producing documents rests primarily upon the witness,⁴¹³ there is some recent authority supporting the proposition that where the cost of production becomes financially unreasonable and

⁴¹⁰United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975) (target questioned about statements he made which the government had recorded without disclosing this fact to the target); United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974), cert. denied, 426 U.S. 911 (1976).

⁴¹¹18 U.S.C. §6002 (1974); See also 1976 Guild, supra note 35, §3.7 (Advises witness never to testify without immunity).

⁴¹²Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973). In Goldberg the Court stated:

despite any instructions from the judge it would be well nigh impossible for the grand jury to put Goldberg's [the target] answers out of their minds.

But the subsequent decision of the Supreme Court in Calandra may affect such a decision today. See note 399 and accompanying text supra.

⁴¹³See Application of Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952).

burdensome, the government may be liable for the cost. This is true where the government seeks documents held by a third party (e.g. bank records)⁴¹⁴ or where the records sought are in the target's custody.⁴¹⁵

D. Aspects of Selected State Law

1. Michigan

¶143 Michigan law requires that a target be informed of his right against self-incrimination.⁴¹⁶ Failure to do so will not necessarily result in quashing the indictment. Rather, the court will apply an exclusionary rule as to the target's testimony and then decide whether sufficient independent evidence existed to support the indictment.⁴¹⁷ Like the federal system, perjury is not excused by a failure to warn.⁴¹⁸ Further, no witness is entitled to the presence of counsel before a citizen's grand jury.⁴¹⁹ Nevertheless,

⁴¹⁴ See United States v. Dauphin Deposit Trust Company, 385 F.2d 129, 130 (3d Cir. 1967); cert. denied, 390 U.S. 996 (1968); United States v. Farmers Merchant Bank, 397 F. Supp. 418 (C.D. Calif. 1975).

⁴¹⁵ In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975). Of course, generally the target's Fifth Amendment privilege would protect most of his papers. In this case, however, the target was a corporation.

⁴¹⁶ People v. Smith, 257 Mich. 319; 241 N.W. 186, 188 (1932); People v. Di Ponio, 48 Mich. App. 128, 210 N.W.2d 105 (Div. 2, 1973).

⁴¹⁷ People v. Di Ponio, 48 Mich. App. 128, 210 N.W.2d 105, 107 (Div. 2, 1973).

⁴¹⁸ People v. Blachura, 59 Mich. App. 664, 229 N.W.2d 877 (Div. 2, 1975).

⁴¹⁹ Id.

where a witness is called before a "one-man grand jury" he is afforded the statutory protection of the right to have an attorney present.⁴²⁰

2. Pennsylvania

¶144 Pennsylvania law makes no distinction between a mere witness and a target. Neither has a right to refuse to appear nor an unqualified right to remain silent.⁴²¹ Under the Pennsylvania Supreme Court decision in Commonwealth v. McCloskey⁴²², however, all witnesses are entitled to a warning that they have a right to consult with an attorney before and after testifying and should he have a question as to whether he may properly refuse to answer any question he may go before the court accompanied by his counsel to obtain a ruling. This right to a warning is constitutional and failure to so warn may result in quashing an indictment where testimony is taken and the indictment is based in "any way" upon such tainted testimony.⁴²³ A failure to give the warning required by McCloskey, however, will not immunize perjured testimony.⁴²⁴

⁴²⁰Mich. Stat. Ann. §28.943 (1972).

⁴²¹Commonwealth v. Columbia Investment Corp., 457 Pa. 353, 325 A.2d 289 (1974).

⁴²²443 Pa. 117, 277 A.2d 764 (1971).

⁴²³Id.

⁴²⁴Commonwealth v. Good, 461 Pa. 482, 337 A.2d 288 (1975).

3. New Jersey

¶145 It is the rule in New Jersey that where it is clear that the purpose of the proceeding is directed at "securing the potential defendant's indictment"⁴²⁵ or the witness's "criminal liability is the object of the grand jury inquiry"⁴²⁶ the target is entitled to be warned of his privilege against self-incrimination. In addition, there is some indication that the target is also entitled to be apprised as to the nature of the investigation so that he may exercise his privilege intelligently.⁴²⁷

¶146 Nevertheless, the test for determining one's status as a target may require a more direct and purposeful focus on the witness and a more specific purpose for his presence before the grand jury. Some of the cases speak of the need to show that the proceeding was merely "a ruse by which it is sought to induce [the target] unwittingly to give evidence against himself."⁴²⁸ But generally, where the witness has been found to be the target, the court tended to follow the same approach as other jurisdictions, looking to the nature

⁴²⁵State v. Browning, 19 N.J. 424, 117 A.2d 505 (1955).

⁴²⁶State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960).

⁴²⁷State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (Law.Div. 1967); State v. Rosania, 96 N.J. Super. 515, 233 A.2d 413 (Law.Div. 1967). See also Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q., Winter 1977, at 23-25 (recommended warnings for target witnesses).

⁴²⁸State v. Fary, 19 N.J. 431, 117 A.2d 499, 503 (1955); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (App. Div. 1973).

and scope of the questions posed in relation to transactions to which the witness was a party.⁴²⁹ Like the federal rule, a target cannot refuse to appear⁴³⁰ and is not entitled to the presence of an attorney merely because of his status as a target.⁴³¹

¶147 Although some earlier cases pointed to the dismissal of the indictment as the proper remedy for the failure to warn,⁴³² recently this remedy was rejected by an appellate court. In State v. Vinegra,⁴³³ the court stated that the Supreme Court's decision in Calandra indicated that assumptions as to the scope of the Fifth Amendment privilege inherent in the earlier New Jersey cases may have been unwarranted. Hence, indictments procured in violation of the target rule were not per se invalid. Rather, the target's rights could be adequately protected by the application of the exclusionary rule as to his testimony at trial.⁴³⁴

⁴²⁹ See State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (Law.Div. 1967); State v. Sibilis, 88 N.J. Super. 546, 212 A.2d 869 (1965).

⁴³⁰ State v. Browning, 19 N.J. 424, 117 A.2d at 507; State v. Sarcone, 96 N.J. Super. at 502, 233 A.2d at 407.

⁴³¹ State v. Cattaneo, 123 N.J. Super 167, 302 A.2d 138 (App. Div. 1973).

⁴³² State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955); State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (1967); State v. Sibilis, 88 N.J. Super. 546, 212 A.2d 869 (1965). But note the court in Fary left open the possibility that where many other witnesses gave evidence as well as the target the indictment may not be invalid.

⁴³³ 134 N.J. Super 432, 341 A.2d 673 (App. Div. 1975).

⁴³⁴ Id. 341 A.2d at 676.

¶148 One further aspect of New Jersey law in the context of political corruption cases is worth noting. Generally, immunity in New Jersey must be conferred by the court after the witness has invoked his privilege, but this is not true for public employees. A public employee is under a duty to testify upon all matters related to the conduct of his office in return for which he is entitled to a self-executing grant of use of immunity as to his testimony.⁴³⁵ A refusal to testify will result in his removal from the office or job.⁴³⁶ Hence, any public employee will be automatically compelled to testify and such testimony, if perjured, is not immunized.⁴³⁷ Moreover, it appears that the requirement as to warning a target will not apply where the individual is protected by the immunity granted to public employees.⁴³⁸

4. New York

¶149 Unlike other jurisdictions the target strategy described in these materials is rendered considerably less effective in New York by the state constitution and the state's immunity statute for witnesses testifying before the grand jury.

¶150 The state's privilege against self-incrimination as

⁴³⁵ N.J. Stat. Ann. §2A:81-17.2a-2. (West 1969).

⁴³⁶ N.J. Stat. Ann. §2A:81-17.2a-1. (West 1969).

⁴³⁷ State v. Mullen, 67 N.J. 134, 336 A.2d 481 (1975).

⁴³⁸ State v. Vinegra, 134 N.J. Super. 432, 341 A.2d 673 (App. Div. 1975). But see Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q., Winter 1977 at 26-27 (recommended warnings for public-employer target witnesses).

interpreted by the New York Court of Appeals has given rise to an extremely broad protection of the target. As the Court stated in People v. Steuding:⁴⁴⁰

By virtue of the constitution of this State (art. I §6)--and it is solely the constitution of New York with which we are now concerned--a prospective defendant or one who is a target of an investigation may not be called and examined before a grand jury, and, if he is, his constitutionally conferred privilege against self-incrimination is deemed violated even though he does not claim or assert his privilege.⁴⁴¹

The result of any such violation is use immunity for any testimony given by the target⁴⁴² and the dismissal of any indictment returned by the grand jury before which he testified⁴⁴³ unless the witness expressly waives his privilege before testifying.⁴⁴⁴ Clearly, the protection afforded by the New York rule is broader than that required by the federal constitution.⁴⁴⁵ Nevertheless, like the

⁴³⁹ N.Y. Const. Art. I §6.

⁴⁴⁰ 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

⁴⁴¹ Id. at 216-217, 189 N.Y.S.2d at 167; accord, People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961).

⁴⁴² Id.

⁴⁴³ People v. Avant, 33 N.Y.2d 265, 352 N.Y.S.2d 161 (1973); People v. Steuding, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

⁴⁴⁴ People v. Ianniello, 21 N.Y.2d 418, 421, 235 N.E.2d 439, 288 N.Y.S.2d 462, 468 (1968).

⁴⁴⁵ See United States ex rel. Laino v. Warden of Wallkill, 246 F. Supp. 72, 77-78 (S.D.N.Y. 1965), aff'd, 355 F.2d 208 (2d Cir. 1966).

federal privilege against self-incrimination, perjury is not protected by the broader New York rule.⁴⁴⁶

¶151 Beyond the target rule lies the even greater obstacle of the New York immunity statute for grand jury witnesses. Any witness subpoenaed by a grand jury must give any evidence requested in return for which he receives an automatic grant of immunity so long as: (1) no written waiver as to his privilege has been made; (2) the evidence is responsive to a question or request; and (3) such evidence did not consist of documents of an enterprise to which the witness did not possess a privilege against self-incrimination.⁴⁴⁷ The immunity conferred is transactional.⁴⁴⁸

¶152 Nevertheless, perjury is not protected by the statute,⁴⁴⁹ and a prosecutor is under no duty to disclose the existence of evidence or recordings that he uses as a basis on which to question the target.⁴⁵⁰ Hence, if it is decided that the target's testimony is important with respect to the entire

⁴⁴⁶People v. Tomasello, 21 N.Y.2d 143, 234 N.E.2d 190, 287 N.Y.S.2d 1 (1967).

⁴⁴⁷N.Y. Crim. Proc. Law §190.35 (McKinney, 1977).

⁴⁴⁸Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); N.Y. Crim. Proc. Law §50.10 (1971).

⁴⁴⁹N.Y. Crim. Proc. Law §50.10 (1971).

⁴⁵⁰People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428, aff'd 45 App. Div.2d 691, 356 N.Y.S. 626, aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

investigation, the substantive charge may be foregone and the target may be questioned extensively as to his own actions, and his dealings with others, about which the prosecutor may already have evidence. Should he lie, a conviction for perjury may be possible. Moreover, if he is a public official and chooses the route of a refusal to testify despite the possibility of contempt, he may be removed from office.⁴⁵¹

APPENDIX

Warnings to Witnesses:

- A. Ordinary Witness (one against whom the investigation is not directed):

No warnings are constitutionally required.⁴⁵²

- B. Defendant:⁴⁵³

Your have the right to refuse to answer any question that may tend to incriminate you.⁴⁵⁴ You have the right to

⁴⁵¹People v. Avant, 34 N.Y.2d 271, 352 N.Y.S.2d 161 (1973). But see Lefkowitz v. Cunningham, No. 76-260 (June 13, 1977) (The Supreme Court held unconstitutional the New York statute which removed public officials from office if they refused to waive immunity and testify).

⁴⁵²See note 164, supra (states may have different requirements).

⁴⁵³See note 109, supra.

⁴⁵⁴Id.

consult with counsel outside the grand jury room⁴⁵⁵ when you so desire, and counsel will be appointed if you cannot afford it.⁴⁵⁶

C. Putative Defendant (Target Witness):⁴⁵⁷

You have the right to refuse to answer any question that may tend to incriminate you. You are a subject of the grand jury's investigation,⁴⁵⁸ and you have been under investigation.⁴⁵⁹ You may consult with counsel outside the grand jury room when you so desire.⁴⁶⁰

⁴⁵⁵ See note 102, supra. But see United States v. Doss, note 91, supra (defendant may have right to counsel in the grand jury room).

⁴⁵⁶ See note 102, supra.

⁴⁵⁷ For a definition of "putative defendant", see ¶127-128 infra.

⁴⁵⁸ This is the practice in the Second Circuit. See United States v. Jacobs, supra note 156, 158.

⁴⁵⁹ See note 174, supra.

⁴⁶⁰ See United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969). See also United States v. Daniels, supra note 101 (no right to have counsel appointed).

IMMUNITY

Immunity

Outline

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Summary

¶1 Federally, immunity is "use"; it prevents the use of any compelled testimony, and its fruits, in any subsequent criminal proceeding against the witness, other than for perjury or contempt committed under the immunity order. Use immunity squares with the Constitution. The constitutional rule is also that an immunity grant must protect against the use of immunized testimony between states and between a state and the federal system, no matter where the immunity was granted. Immunized truthful testimony may never be used criminally against the witness; untruthful testimony given under an immunity grant is not immunized. Corporations and associations have no privilege against self-incrimination; no immunity is necessary to compel production of their records. Partnerships may or may not have a privilege. No immunity is necessary when the crime about which the witness testified is one for which he cannot be prosecuted. Immunized evidence may be used against the witness in proceedings imposing only other than criminal sanctions. In general, real evidence, even if obtained under an immunity grant, is not immunized. In New York, a broad transactional immunity is provided for witnesses by statute. A witness may not be prosecuted for any crime concerning which he gave evidence other than for perjury or contempt committed by the witness while testifying under the immunity order. During grand jury proceedings, this immunity automatically protects any "responsive" answer by a witness; he need not first assert his privilege against self-incrimination. New York's constitutional immunity is use immunity, and protects a

a witness compelled to give incriminating evidence without previous compliance by the government with the immunity statute. New Jersey's statute provides use immunity. The Massachusetts statute of 1970 provides a witness with transactional immunity.

I. Federal Immunity--Generally

¶2 The general immunity statutes for federal proceedings are found in 18 U.S.C. §§6001-6005. The scope of federal statutory immunity is defined by section 6002:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

This statute provides "testimonial" or "use" immunity. A witness may be tried for a crime disclosed by his immunized testimony, but neither the testimony itself nor any information directly or indirectly derived from it may be used against him. Testimonial immunity affords, the Supreme Court held in Kastigar v. United States,¹ a witness protection coextensive with the Fifth Amendment privilege

¹406 U.S. 441 (1971).

against self-incrimination; consequently, it provides a sufficient basis for compelling testimony over a claim of the privilege.

¶3 When a person is prosecuted for a crime disclosed by his immunized testimony, however, the burden of proving that the testimony is not used, even indirectly, is on the prosecution. The Court in Kastigar observed:

[O]n the prosecution [rests] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.²

¶4 The standard of proof the government must meet in carrying this burden is a "heavy" one of showing that all evidence sought to be admitted is from independent sources.³ Once the defendant shows he gave testimony under an immunity

²Id. at 460.

³United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974). See also Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973), where burden of proof required is "substantial." The most recent, and most novel, case illuminating the "independent source" requirement is the Second Circuit's decision in United States v. Kurzer, 19 Crim L. Rptr. 2121 (Apr. 14, 1976). There, testimony of one Steinman led to the indictment of the defendant, Kurzer. Previously, Kurzer had testified under an immunity grant (use immunity) against Steinman. Kurzer challenged his own indictment on the ground that Steinman's decision to cooperate, and hence his testimony, was based on Steinman's own indictment, to which Kurzer's testimony had contributed. If this were true, then Steinman's testimony was not "derived from a legitimate source wholly independent of [Kurzer's] compelled testimony," as required by Kastigar. The government claimed that Steinman would have testified against Kurzer because of the case the government had developed against him entirely apart from Kurzer's information, even if the prior indictment to which Kurzer had contributed never existed. The court held that if the government could prove that proposition to the satisfaction of the trier of fact, it would carry its burden of showing that Steinman was a source "wholly independent of the [immunized] testimony."

grant, he is entitled to a pretrial evidentiary hearing⁴ or other hearing⁵ at which the government must prove lack of taint. By the same token, the government must be allowed the chance to prove lack of taint.⁶

¶5 In Kastigar, the Court also elaborated on the ban which section 6002 imposes on the use of compelled testimony; the Court observed:

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.⁷

The "fruit of the poisonous tree" doctrine, developed by the federal courts as a rule for determining whether government evidence was obtained in a manner prejudicial to an accused's other constitutional rights, applies, therefore, with full force in the immunity context.⁸

⁴United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

⁵United States v. DeDiego, 511 F.2d 822 (D.C. Cir. 1975).

⁶Id.

⁷406 U.S. at 460.

⁸For a discussion of this doctrine and the occasionally countervailing doctrines of "independent agent" and "attenuation of taint," see the Cornell Institute on Organized Crime memorandum on defending evidence against charges of illegality. Generally, a use-immunized witness is entitled to a copy of the immunized testimony. In re Minkoff, 349 F. Supp. 54 (D.R.I. 1972). Access may also be had to the minutes of an indicting grand jury. United States v. Dorhau, 356 F. Supp. 1091 (S.D.N.Y. 1973). The prosecution's burden to show no subsequent use may not be met with conclusory assertions. United States v. Seiffert, 463 F.2d

II. Federal Immunity--Effect on Other Jurisdictions

A. States

¶6 The Supreme Court resolved a long-standing controversy in immunity theory with its 1963 opinion in Murphy v. Waterfront Commission:⁹

[T]here is no continuing legal validity to, or historical purpose for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. . . . We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.¹⁰

The Murphy case dealt with testimony compelled under a state grant of immunity, and held that the witness received, under the Fifth Amendment itself, testimonial immunity against any federal prosecution. The broad language of the opinion also indicates that evidence procured under the federal immunity statutes may not be used against the witness

8 (continued)

1089 (5th Cir. 1972). Proof must be made. United States v. Seiffert, 357 F. Supp. 801 (S.D. Tex. 1972). Mere prosecutor exposure, however, has been held to warrant dismissal of an indictment. United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). This goes too far. Other untainted prosecutors could handle taint-free evidence. See Watergate: Special Prosecution Force Report 208 (1975) (filing of taint papers in reference to John Dean).

⁹ 378 U.S. 52 (1963).

¹⁰ Id. at 77-78.

in a state prosecution.¹¹

B. Foreign Jurisdictions

¶7 A sovereign's administration of justice and enforcement of municipal law cannot be interfered with by any external authority. "[A] state is powerless to grant immunity against foreign prosecution."¹² The United States is not precluded from enforcing its laws by the grant of immunity of another sovereign,¹³ and any foreign state most likely would take a similar position.

¶8 The question, therefore, arises whether a grant of immunity which is only domestically effective is truly co-extensive with the scope of the Fifth Amendment privilege. To date, the cases indicate that domestic immunity is adequate, since "the privilege protects against real dangers, not remote and speculative possibilities."¹⁴ Other rationales

¹¹See United States v. Watkins, 505 F.2d 545 (7th Cir. 1974). Between any two jurisdictions (i.e. federal-state or state-state) the immunity is testimonial or use immunity. Thus, even though a New York witness may be granted transactional immunity, another jurisdiction may prosecute him abiding by only use immunity; that is, he may be prosecuted for a crime arising out of a transaction to which his New York immunized testimony related, so long as the foreign jurisdiction makes no use of that immunized testimony or its fruits.

¹²8 Wigmore, Evidence 346 (McNaughton Rev. 1961).

¹³United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974).

¹⁴Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972).

are sometimes used to allow compulsion of a witness, under domestic immunity, to give evidence concerning his activities within the United States. It is sometimes suggested that since criminal laws have no extraterritorial effect, Fifth Amendment "compulsion" (and hence immunity) should only include domestic laws.¹⁵ It is also argued (and followed by three circuits) that the secrecy of grand jury proceedings is a sufficient protection of the witness's privilege.¹⁶

¶9 In re Cardassi¹⁷ is an exception to this line of cases. There, it was held that grand jury secrecy rules were insufficient protection against disclosure of grand jury testimony to foreign prosecuting authorities, that the Fifth Amendment privilege can be asserted against a genuine danger of foreign prosecution, and that a witness in such danger may refuse to answer questions despite a grant of immunity.

¶10 The two sides seemingly stand in equipoise. It may be argued that since an immunity grant need be no broader than the Fifth Amendment privilege,¹⁸ and the amendment

¹⁵United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

¹⁶In re Tierney, 465 F.2d 806 (5th Cir. 1972); In re Morahan, 359 F. Supp. 858, aff'd., 465 F.2d 806 (5th Cir. 1972); United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973); In re Weir, 377 F. Supp. 919 (S.D. Cal. 1974), aff'd., 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); In re Parker, 411 F.2d 1067 (10th Cir. 1969).

¹⁷351 F. Supp. 1080 (D. Conn. 1972).

¹⁸See Kastigar v. United States, 406 U.S. at 449.

imposes limitations only on actions within the United States, protection against actions of foreign governments is not constitutionally required. On the other hand, it is the action of the American court which compels the evidence, and under the Fifth Amendment, an American court may not compel any person to be a witness against himself in any criminal case. All that remains to be determined is whether a possible foreign prosecution is "any criminal case" within the meaning of the Fifth Amendment.

III. Federal Immunity--Effect of Non-Compliance with the Immunity Agreement

A. Perjury

¶11 18 U.S.C §6002 specifically provides that evidence given under a grant of immunity may be used in a subsequent "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."¹⁹ Clearly, such an exception is constitutional. Indeed, the Supreme Court has held²⁰ that perjurious testimony given under immunity could be used in a subsequent trial for perjury, even though the statute then before the court did not specifically pro-

¹⁹The exception both for perjury and for giving a false statement, though seemingly redundant, is necessary. Technically, perjury is giving a false statement under oath (Black's Law Dictionary, 1968 4th rev. ed.). Since immunity may be granted in certain administrative proceedings under 18 U.S.C. §6004, and possibly the witness would not be under oath, there is a need to include false statements as a separate exception.

²⁰Glickstein v. United States, 222 U.S. 139 (1911).

vide a perjury exception.²¹ The cases hold that the perjury which is committed is a breach of that particular immunity agreement.²² The best discussion of the rationale underlying this exception to an immunity grant is found in the Second Circuit's opinion in United States v. Tramunti:²³

The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to

²¹The Court reasoned:

[I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances, and safeguards as to compel it to be truthful. . . . [S]ince the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word. 222 U.S. at 142-43.

See also United States v. Mandujano, 19 Crim. L. Rptr. 3087 (U.S. May 19, 1976) (perjury in grand jury subject to prosecution even if testimony taken in violation of Fifth Amendment).

²²United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); United States v. Watkins, 505 F.2d 545 (7th Cir. 1974); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (2d Cir.), cert. denied, 415 U.S. 989 (1974); In re Grand Jury Proceedings, 509 F.2d 1349 (5th Cir. 1975).

²³500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions The immunity granted by the Constitution does not confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend in futuro (footnotes deleted).²⁴

B. Contempt

¶12 The same reasoning that allows perjurious testimony given under oath to be used in a later trial for perjury allows conduct that amounts to failing to comply with the immunity order to be used in a later contempt hearing. The Supreme Court held, in United States v. Bryan, that it was proper to use a witness's otherwise-immunized testimony, in which she stated she refused to comply with a subpoena to produce records, in a subsequent trial for contempt based on such refusal.²⁵ This was permitted, even though the statute granting immunity did not make an exception for the use of such testimony in a contempt proceeding. In United States v. Cappetto,²⁶ the use of testimony given

²⁴Id. at 1342-44.

²⁵339 U.S. 323 (1950).

²⁶502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

under a grant of immunity, per 18 U.S.C. §6002, in a subsequent contempt proceeding based on the witness's refusal to testify despite the grant of immunity was also held to be proper.²⁷

IV. Federal Immunity--Inconsistent Statements in Other Proceedings

¶13 18 U.S.C. §1623 provides that a prosecution for false declarations may be based on irreconcilably contradictory statements made under oath.²⁸

False Declarations Made Before Grand Jury or Court

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

- (1) each declaration was material to the point in question, and
- (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.^[29]

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information

²⁷ See also United States v. Leyva, 513 F.2d 774 (5th Cir. 1975).

²⁸ Note the recantation provision of subsection (d), which permits avoidance of such prosecution.

²⁹ The statute of limitations is five years. 18 U.S.C. §3282 (1961).

made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

A. Generally

¶14 Immunized truthful testimony can never be used in any way against the witness; neither in prosecutions for past³⁰ nor future³¹ crimes. To prove an immunized statement false, (1) non-immunized contradictory testimony of the witness or (2) other independent circumstantial evidence must be used. Once a statement made under a grant of immunity is shown to be false, however, that statement may be used in a variety of ways. The false immunized statement may be a basis for a witness's perjury

³⁰ United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd, 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

³¹ Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973); Kronick v. United States, 343 F.2d 436 (9th Cir. 1965).

conviction.³² Additionally, a false immunized statement may be used in other criminal trials not based on the original perjurious statement, or subsequently to impeach a witness's credibility, or to show prior similar acts.³³

B. Specific Situations

¶15 In determining the range of application of section 1623, it is helpful to view, one-by-one, the specific situations to which section 1623 would, at first, seem applicable. For this purpose, assume that a witness made two different statements before a court or grand jury, both statements being under oath. An immunity grant will raise the following problems:

(1) Neither Statement Immunized

¶16 If neither statement is immunized, section 1623

³²United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

. . . If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed (footnotes omitted). Id. at 1343-44.

³³Id. at 1345, the court said:

. . . The failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use. To hold otherwise in this situation, one not readily foreseeable by the legislature, would be to frustrate the purpose which this statute was designed to achieve (emphasis added).

In reaching this conclusion, the court cited Glickstein v. United States, 222 U.S. 139 (1911) and United States v. Bryan, 339 U.S. 323 (1950).

will apply directly and allow prosecution for any inconsistency if it is to the degree that one of the statements is necessarily false.

(2) Both Statements Immunized

¶17 (a) First statement false, second statement true: the second immunity grant, under which the witness testified truthfully, protects the witness from the use of that truthful testimony to show any past perjury (or any other past crime).³⁴

¶18 (b) First statement true, second statement false: likewise, the first immunized truthful testimony can never be used to prove the falsity of any later statement.³⁵

(3) Only First Statement Immunized

¶19 (a) First statement false, second statement true: there is no clear authority on this situation, but it seems that before application of section 1623 would be allowed, besides the two statements there would have to be some independent evidence either of the falsity of the first statement or the truth of the second statement. Otherwise, it would be possible to assume from the statements' inconsistency that actually the first statement was true (therefore protected by immunity grant) and the second statement was false. If there were some evidence of the falsity of the first statement, however, its immunized

³⁴United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

³⁵Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973).

status would disappear. This evidence could either be direct evidence of its falsity, or by implication from direct evidence of the truth of the inconsistent statement.

¶20 (b) First statement true, second statement false: the immunized truthful testimony may never be used against the witness for prosecution,³⁶ so that if it were the only statement available, section 1623 would have no application here.

(4) Only Second Statement Immunized

¶21 (a) First statement false, second statement true: the immunity grant, under which the truthful testimony was given, protects the witness from the use of that testimony to establish past perjury.³⁷ Hence, section 1623 would not allow a prosecution for these two inconsistent statements.

¶22 (b) First statement true, second statement false: this situation, as with (3) (a) (¶19) above, presents problems. Section 1623 allows a prosecution without the necessity of proving which of the two inconsistent statements was false. Unless, however, the first statement was independently shown to have been truthful, or the second statement was independently shown to have been false, the mere inconsistency of the two statements would not prove the second statement false. Until the immunized statement

³⁶ United States v. Hockenberry, supra.

³⁷ United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd. 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

itself is shown to be false, the witness is protected from its use against him in any prosecution. Once the immunized testimony is shown to to be false, however, it may be used against the witness under section 1623, and in any other prosecution.³⁸

V. Federal Immunity--Application to Corporations, Partnerships, and Associations

A. Corporations

¶23 If the privilege against self-incrimination does not apply to an entity, no immunity is required to compel its testimony. As the Supreme Court observed in Campbell Painting Corporation v. Reid:

. . . It has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is "essentially a personal one, applying only to natural individuals." It "cannot be utilized by or on behalf of any organization, such as a corporation."³⁹

Thus, neither a corporation nor those who hold its documents have to be given immunity in return for the production of those documents.⁴⁰ Even when the corporation is the mere

³⁸United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

³⁹392 U.S. 286 at 288-89 (1967), citing inter alia, Hale v. Henkel, 201 U.S. 431 (1906).

⁴⁰Curcio v. United States, 354 U.S. 112 (1956) (union); United States v. Lay Fish Co., 13 F.2d 136 (2d Cir. 1926).

alter-ego of its owner, no privilege attaches to the corporation's documents.⁴¹

¶24 A corporate officer (regarding his personal knowledge of the business of the corporation), however, is entitled to the privilege against self-incrimination. If he claims his privilege as to that knowledge, he cannot be compelled to reveal it unless granted immunity.⁴² Additionally, the officer cannot be forced to reveal the location of subpoenaed corporate records if they would tend to incriminate him.⁴³ Nevertheless, the officer could be subject to contempt for his failure to comply with the subpoena duces tecum for those records.⁴⁴

B. Associations

¶25 Unincorporated associations and labor unions are

⁴¹A sole owner of a corporation, by his choice of corporate form of doing business, relinquishes his personal privilege as to corporate documents. United States v. Fego, 319 F.2d 791 (2d Cir.), cert. denied, 375 U.S. 906 (1963); Hair Industry Ltd. v. United States, 340 F.2d 510 (2d Cir. 1965).

⁴²United States v. Molasky, 118 F.2d 128 (7th Cir. 1941), rev'd. on other grounds, 314 U.S. 513 (1942).

⁴³Absent a grant of immunity, to compel the corporate officer to reveal the location of incriminating records would force him "to condemn himself by his own oral testimony," and thus violate his Fifth Amendment privilege. Curcio v. United States, 354 U.S. 118, 124 (1956).

⁴⁴Id. The Supreme Court recently reviewed the principles governing the production of documents in Fisher v. United States, 19 Crim. L. Rptr. 3018 (April 21, 1976) (production by attorney of client's records). Fisher merits close examination by those in litigation over the production of all types of records.

treated similarly.⁴⁵

C. Partnerships

¶26 Partnerships may or may not be entitled to the privilege against self-incrimination. While older cases flatly held that there was such a privilege as to partnership records,⁴⁶ the Supreme Court set out a test in United States v. White⁴⁷ to determine whether the group documents are or are not within the scope of the privilege:

The test, . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

¶27 The lower courts, of course, quickly followed this test⁴⁸ and in 1974 the Supreme Court reaffirmed White in

⁴⁵United States v. Fleischman, 339 U.S. 349 (1950); United States v. White, 322 U.S. 694 (1943); United States v. Gasoline Retailers Ass'n., Inc., 285 F.2d 688 (7th Cir. 1961); Lumber Products Ass'n. v. United States, 144 F.2d 546 (9th Cir. 1944), rev'd. on other grounds, 330 U.S. 395 (1947).

⁴⁶See, e.g., United States v. Brasley, 268 F. 59 (W.D. Pa. 1920).

⁴⁷322 U.S. 694, 701 (1943).

⁴⁸The cases held that a partnership, because of its size and the way business was conducted, was an impersonal business entity. Concluding that the individual partners had no private or personal interest in the partnership records, it was held that neither the partners nor the partnership could claim the privilege against self-incrimination as to the partnership books or records. See, e.g., United States v. Wernes, 157 F.2d 797 (5th Cir. 1946); United States v. Silverstein, 314 F.2d 789 (2d Cir.), cert. denied, 374 U.S. 807 (1963).

Bellis v. United States.⁴⁹ The Bellis Court held that a three-man law partnership, which employed six other people and was in existence for almost fifteen years, had an established institutional identity of its own, independent of the partners. Thus, its records and books could be subpoenaed and no claim of privilege would attach to them. Several factors, supported the conclusion that the partnership was a separate entity. It had its own bank account, filed its own tax returns, and it could be sued in its own name. Further, the books reflecting receipts and disbursements of the partnership did not contain personal information and therefore were held in a representative, not personal, capacity.

¶28 The Court, however, did not abrogate the privilege

⁴⁹ 417 U.S. 85, 93-94 (1974):

We think it is similarly clear that partnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records. Some of the most powerful private institutions in the Nation are conducted in the partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration. The personal interest of any individual partner in the financial records of a firm of this scope is obviously highly attenuated. It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from S.E.C. scrutiny solely because it operates as a partnership rather than in the corporate form. Although none of the reported cases has involved a partnership of quite this magnitude, it is hardly surprising that all of the courts of appeals which have addressed the question have concluded that White's analysis requires rejection of any claim of privilege in the financial records of a large business enterprise conducted in the partnership form.

against self-incrimination of all partnerships.⁵⁰ Each partnership must be examined individually to see whether or not its records are covered by the privilege.⁵¹

VI. Federal Immunity--Civil Liabilities

¶29 18 U.S.C. §6002 specifically provides that immunized evidence may not be used against the witness in any criminal case. By negative implication, the use of such evidence in a civil action would be allowed. The Supreme Court holds that immunity statutes need not protect against penalties of a non-criminal nature in order to be constitutional.⁵² Thus, while immunized evidence may be used

⁵⁰The court intimated that temporary associations to carry out a few short-duration projects, or small family partnerships, or a partnership with some pre-existing relationship of confidentiality among the partners could present different cases. Bellis v. United States, 417 U.S. 85 (1974).

⁵¹If the partnership records are found to be personal and covered by the Fifth Amendment, the question arises: may one partner produce them, over the objections of the other? Couch v. United States, 409 U.S. 322 (1973) (accountant compelled to produce client's records) indicates that the answer would be yes. Cf. Fraiser v. Cupp, 394 U.S. 731 (1969) (consent by joint use of bag) and United States v. Matlock, 415 U.S. 164 (1974) (joint illicit relationship). Two Fourth Amendment cases also point toward an affirmative answer. But see In re Subpoena Duces Tecum, 81 F. Supp. 418 (W.D. Cal. 1948).

⁵²Ullmann v. United States, 350 U.S. 422 (1956). There, the witness was granted full transactional immunity and asked to testify about his Communist Party membership. He refused to answer, saying the statutory immunity was insufficient since he could become subject to the loss of his job, expulsion from labor unions, restricted passport eligibility, and public opprobrium. The Court responded that the Fifth Amendment only applies where the witness is required to give testimony that might expose him to a criminal charge. Ullmann's contempt conviction was affirmed. See also In re Michaelson, 511 F.2d 892 (9th Cir. 1975); In re Bonk, 527 F.2d 120 (7th Cir. 1975).

against a witness in a civil action,⁵³ if there is a possibility that the evidence will be used against the witness in a criminal proceeding, the privilege applies.⁵⁴ The main consideration is not the context in which the testimony is given, but the use to which the testimony may be put,⁵⁵ criminal or non-criminal.

¶30 If the privilege applies, i.e. there is a possibility of criminal use of the testimony, the witness may be penalized neither civilly nor criminally for asserting his privilege against self-incrimination.⁵⁶ If immunity is granted, however, thus removing the constitutionally-prohibited criminal sanction, civil or other penalties may be imposed on the witness.⁵⁷ Once the possibility of criminal use is removed, the testimony itself may be used in a proceeding

⁵³United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

⁵⁴Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Boulevard v. Battaglia, 344 F. Supp. 889 (D. Del. 1972), aff'd., 478 F.2d 1398 (2d Cir. 1973).

⁵⁵Clearly, the mere labelling of an action or penalty as civil or criminal is not decisive. Boyd v. United States, 116 U.S. 616 (1886). See also United States v. United States Coin & Currency, 401 U.S. 715 (1971).

⁵⁶Lefkowitz v. Turley, 414 U.S. 70 (1973) (loss of government contracts); United States v. United States Coin and Currency, 401 U.S. 715 (1971) (loss of money seized in a gambling raid); Gardner v. Broderick, 392 U.S. 273 (1968) (loss of public employment); Sperack v. Klein, 385 U.S. 511 (1967) (disbarment proceedings); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (divestiture of a property interest in a building).

⁵⁷Gardner v. Broderick, supra.

imposing a penalty on the witness. Thus in the case of Gardner v. Broderick,⁵⁸ the Supreme Court said that if a public employee, called to testify concerning the performance of his public trust, were given immunity he could be dismissed from his job on the basis of his compelled testimony.

¶31 Two recent state court decisions⁵⁹ hold that the testimony of a lawyer, given under a grant of immunity, could be used against that lawyer in a disbarment proceeding. The rationale was that a disbarment proceeding is not a criminal case within the meaning of the immunity statutes involved or the Fifth Amendment. Additionally, it was said, the purpose of disbarment was not to inflict punishment but to protect the public.

VII. Federal Immunity--Effect on Prior Convictions

A. Convictions

¶32 The grant of immunity under 18 U.S.C. §6002 has no effect on a prior conviction, even though the witness may be forced thereby to admit his involvement in the crime

⁵⁸Id.

⁵⁹Maryland State Bar Ass'n. Inc. v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), cert. denied, 420 U.S. 974 (1975) (18 U.S.C. §6002 involved); Committee on Ethics of West Virginia State Bar v. Graziani, 200 S.E.2d 353 (W. Va. Sup. Ct. App. 1973), cert. denied, 416 U.S. 995 (1974) (state immunity statute involved).

for which he was convicted.⁶⁰ Since 18 U.S.C. §6002 is a testimonial, or use, immunity statute, it merely requires that compelled evidence (or any evidence derived therefrom) not be used against the witness in any criminal case.⁶¹

¶33 When pronouncing sentence for the prior conviction, the judge may not in any way use the intervening immunized testimony of the defendant.⁶² Even though the conviction is on appeal, this is not a reason for denying a grant of immunity since the appeal can only be based on the trial record.⁶³

B. Guilty Pleas

¶34 A guilty plea waives the privilege against self-incrimination as to that crime. Questioning of a defendant about facts relating to the crime to which the guilty plea relates necessitates no grant of immunity. The guilty plea, however, is not a waiver of the privilege concerning other crimes, even those based on the same set of facts. To question a person who pleads guilty to a crime, immunity must be granted if the testimony could provide evidence

⁶⁰Kastigar v. United States, 406 U.S. 441, 461 (1972). See also In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974). A similar rule obtained under the old federal transaction immunity statutes. See, e.g., Katz v. United States, 389 U.S. 347 (1967).

⁶¹In re Bonk, 527 F.2d 120 (7th Cir. 1975).

⁶²United States v. Laca, 499 F.2d 922 (5th Cir. 1974); United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973) (defendant entitled only to resentencing by a judge who is unaware of the immunized testimony).

⁶³In re Lysen, 374 F. Supp. 1122 (N.D. Ill. 1974). See also Katz v. United States, 389 U.S. 347 (1967) (transaction immunity grant).

that could be used in another prosecution for either a federal or state crime.⁶⁴

VIII. Federal Immunity--Non-Testimonial Evidence

¶35 18 U.S.C. §6002 provides that "no testimony or other information" compelled under the immunity grant may be used against the witness. 18 U.S.C. §6001(2) states that "other information" includes any "book, paper, document, record, recording, or other material." The legislative history indicates that "other information" is to include all information "given as testimony."⁶⁵

¶36 The "given as testimony" qualification on immunity is consistent with Supreme Court decisions that some evidence is not testimonial, but real, and thus is not entitled to the privilege against self-incrimination. The privilege is only to protect against compulsion of the accused's communications and not compulsion which makes the accused

⁶⁴United States v. Stephens, 492 F.2d 1374 (6th Cir. 1974); United States v. Seavers, 472 F.2d 607 (6th Cir. 1973); In re Sadin, 502 F.2d 1252 (2d Cir. 1975).

⁶⁵H. Rep. No. 61-1549, 91st Cong., 2d Sess. 42 (1970) observes:

Subsection (2) defines "other information" to include books, papers, and other materials. The phrase is used in contradistinction to oral testimony. It would include, for example, electronically stored information on computer tapes. Its scope is intended to be comprehensive, including all information given as testimony, but not orally.

a source of real or physical evidence.⁶⁶ Thus, even when given under a grant of immunity, any real or physical evidence which (under prevailing decisions) is not entitled to the protection of the Fifth Amendment privilege may be used in a criminal proceeding.⁶⁷ The wise prosecutor, however, will avoid this issue altogether by obtaining all real and physical evidence in a non-immunizing context.

IX. Federal Immunity--How Immunity is Conferred

A. Statutory Immunity

¶37 When a witness refuses to give evidence on the basis of his privilege against self-incrimination, he may be compelled to testify under an order of immunity, as provided

⁶⁶Or this basis it has been held that a witness-accused has no Fifth Amendment privilege to refuse to:

(1) exhibit his physical characteristics. Holt v. United States, 218 U.S. 245 (1910) (put on clothing to ascertain its fit); United States v. Wade, 388 U.S. 218 (1963) (appear in line-up, perform movements, and speak certain phrases);

(2) submit to standardized medical tests. Schmerber v. California, 384 U.S. 757 (1966) (taking blood samples);

(3) furnish handwriting exemplars and submit to fingerprinting. Gilbert v. California, 388 U.S. 263 (1967); or

(4) submit voice exemplars. United States v. Dionisio, 410 U.S. 1 (1972).

⁶⁷This must be so since "[t]his statutory immunity is intended to be as broad as, but no broader than the privilege against self-incrimination." S. Rep. No. 91-617, 91st Cong., 1st Sess. 145 (1969). See also, United States v. Hawkins, 501 F.2d 1029 (9th Cir. 1974), cert. denied, 419 U.S. 1079 (1974).

in 18 U.S.C. §§6001-6005. Sections 6003-6005 provide that an order may be issued even though the witness has not actually refused to testify, but the order does not become effective, under section 6002, until and unless there is a refusal grounded on the privilege against self-incrimination.⁶⁸

¶38 1. Court or Grand Jury Proceedings, Section 6003:

Orders to compel the testimony of witnesses or the production of information may be obtained prospectively from a district court by the United States Attorney, for the judicial district in which the proceeding is to be held, "with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General." The United States Attorney must indicate that in his judgement:

1. The witness's testimony or information may be necessary to the public interest; and
2. The witness has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination.

The district court "shall issue" an immunity order upon receipt of such an application. The court is without discretion and its function is purely ministerial.⁶⁹

The judge cannot initiate an immunity order.⁷⁰ Witnesses

⁶⁸United States v. Seavers, 472 F.2d 607 (6th Cir. 1973).

⁶⁹United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); In re Grand Jury Investigation, 486 F.2d 1013 (3d Cir. 1973), cert. denied, 417 U.S. 919 (1974). The court also may not question the judgment of the United States Attorney that the testimony is necessary or that a refusal to testify is probable. In re Lochiatto, 497 F.2d 803 (1st Cir. 1974).

⁷⁰For that reason, a defendant cannot demand that a judge grant immunity to a defense witness. Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975).

whom the government seeks to immunize have neither a right to notice and a hearing, nor standing to contest the immunity order.⁷¹ Minor variations in procedure are permissible so long as all statutory procedural requirements are satisfied by the time of the hearing to grant immunity.⁷²

¶39 2. Proceedings Before Administrative Agencies, Section 6004:

Federal administrative agencies with power to issue subpoenas and take sworn testimony are empowered to issue immunity orders with the approval of the Attorney General. Since, however, the statute requires neither that the witness appear under subpoena nor that he testify under oath, absence of these factors should not render a witness's immunity ineffective.⁷³ Some agencies not covered by section 6004 are, in other sections of the U.S.C. given power to

⁷¹United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

⁷²The statute envisions a United States Attorney first obtaining the approval of the Attorney General, a Deputy, or a designated Assistant, and then proceeding to a district court for the issuance of an immunity order. In In re Di Bella, 499 F.2d 1175 (2d Cir. 1974), cert. denied, 419 U.S. 1032 (1974), however, a Special Attorney, attached to a Strike Force, sought Justice Department approval for an immunity order without the knowledge of the local United States Attorney. Only at the hearing on the application did the United States Attorney appear and sign the application for the order. The immunity order which issued was held valid since all of the statutory requirements were satisfied.

⁷³United States v. Welden, 377 U.S. 95 (1963)...

grant immunity in connection with specific types of reports.⁷⁴

¶40 3. Congressional Hearings, Section 6005:

The Houses of Congress and their committees may initiate a grant of immunity. A "duly authorized representative" of the House or the committee must apply to a United States district court and show:

1. The House or committee has approved the request for an immunity order by an affirmative vote of
 - a. a majority of the "members present" of the House, or
 - b. two-thirds of the full membership of the committee; and
2. That the Attorney General has been given at least ten days notice of an intention to request an immunity order.

Here, unlike Sections 6003 and 6004, the Attorney General has no veto, but he may [under Section 6005(c)] delay the issuance of an order for up to twenty days from the date of the request. The court, again, has no discretion to pass on the necessity or wisdom of the requested grant of immunity.⁷⁵

⁷⁴For example: Environmental Protection Agency (records relating to the distribution of certain poisons) 7 U.S.C. §135c(1947); Department of Health, Education and Welfare (records concerning interstate shipments of hazardous substances) 15 U.S.C. §127 (1970); Commissioner of Immigration and Naturalization (records pertaining to the keeping of an alien woman for immoral purposes) 18 U.S.C. §2424 (1948); Food and Drug Administration (records concerning interstate movement of food, drugs, devices, and cosmetics) 21 U.S.C. §373 (1970).

⁷⁵The courts have, however, indicated some willingness to let the procedure of application serve as

. . . a sort of declaratory judgement proceeding not on the wisdom of conferring immunity or not, but on the question of constitutional jurisdictions of Congress over the inquiry area, statutory (or resolution) jurisdiction of the particular agent of Congress over the inquiry, and relevance of the information sought to the authorized inquiry.

B. Constitutional Immunity

¶41 1. Indicted Witness

In the federal system, when the government calls an indicted defendant before a grand jury and interrogates him concerning the subject matter of the crime for which he already stands formally charged, there must be an intentional and knowing waiver of the privilege against self-incrimination by the defendant. Otherwise, the testimony and its fruits may not be used against him.⁷⁶

¶42 2. Unindicted Witness

Even absent a statutory grant of immunity, a defendant may be entitled to constitutional immunity in the form of suppression of his incriminating testimony.⁷⁷ Based directly on the Fifth Amendment's prohibition of compulsion of a witness to testify against himself, this immunity is held, however, to apply only to situations similar to that of the Miranda case. That is, even absent an assertion of the privilege, any incriminating testimony will be barred from use against the defendant only if, when given, the defendant was the object of custodial interrogation.⁷⁸ As a rule,

⁷⁶ United States v. Calandra, 414 U.S. 338, 345-46 (1974); United States v. Mandujano, 19 Crim. L. Rptr. 3087 (U.S. May 19, 1976).

⁷⁷ See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966).

⁷⁸ Garner v. United States, 44 U.S.L.W. 4323, 4326 (U.S. March 13, 1976); United States v. Mandujano, 19 Crim. L. Rptr. 3087 (U.S. May 19, 1976). See also United States v. Luther, 521 F.2d 408 (9th Cir. 1975); United States ex rel. Sanney v. Montayne, 500 F.2d 411 (2d Cir. 1974); State v. Hall, 421 F.2d 540 (2d Cir. 1969).

therefore, when an unindicted witness is called before a grand jury, if he reveals information instead of claiming his privilege, he has lost the benefit of the privilege.⁷⁹ The privilege must be asserted, the rationale generally being that a subpoena to testify is insufficient government "compulsion" to bring the privilege against self-incrimination automatically into play.⁸⁰ The Supreme Court case of Garner v.

⁷⁹Garner v. United States, 44 U.S.L.W. 4323, 4325 (U.S. March 13, 1976), citing United States v. Kordel, 397 U.S. 1 (1970). The Court said, however, that this principle frequently has been recognized in dictum, citing Maness v. Meyers, 419 U.S. 449, 466 (1975); Rogers v. United States, 340 U.S. 367, 370-71 (1951); Smith v. United States, 337 U.S. 137, 150 (1949); United States v. Monia, 317 U.S. 424, 427 (1943); Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112-13 (1927).

⁸⁰In Garner, supra, note 79, the Court said at 4323:

These decisions stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not "compelled" him to incriminate himself.⁹

The Court's footnote 9 reads:

This conclusion has not always been couched in the language used here. Some cases have indicated that a nonclaiming witness has "waived" the privilege, see, e.g., Vajtauer v. Commissioner of Immigration, 273 U.S. 102, 113 (1927). Others have indicated that such a witness testifies "voluntarily," see, e.g., Rogers v. United States, 340 U.S. at 371. Neither usage seems analytically sound. The cases do not apply a "waiver" standard as that term was used in Johnson v. Zerbst, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. See Schneckloth v. Bustamonte, 412 U.S. 218, 222-227, 235-240, 246-247 (1973). Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege, see, e.g., Smith v. United States, 337 U.S. 137, 150 (1949). The concept of "voluntariness" is related to the concept of "compulsion." But it may promote clarity to use the latter term in cases where disclosures are required in the face of a claim of privilege. . . .

United States,⁸¹ restating these principles, involved the assertion of the privilege in the context of a voluntarily filed tax return. Significantly, the Court said:

. . . the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment--the preservation of an adversary system of criminal justice. See Tehan v. Shott, 382 U.S. 406, 415 (1966). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures. In areas where the government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings.⁸²

¶43 A prosecutor has discretion as to when to charge a putative defendant with a crime. Suppose the putative defendant, not yet indicted, were subpoenaed before the grand jury and, without asserting his privilege against self-incrimination, unwittingly gave incriminatory testimony. Under the general federal rule, since there was no constitutional "compulsion," that testimony may be used against that defendant. Yet it can be argued that the witness has been compelled to incriminate himself.

¶44 Nevertheless, when the Supreme Court was faced with a closely related issue, in United States v. Mandujano,⁸³ it followed the traditional approach. There, Mandujano was subpoenaed before a grand jury investigating local

⁸¹Id. at 4323.

⁸²Id. at 4326.

⁸³19 Crim. L. Rptr. 3087 (U.S. May 19, 1976).

narcotics traffic as a result of information concerning his attempted sale of heroin to an agent. He was warned by the prosecutor: he need not answer incriminating questions, all other questions must be answered truthfully on pain of perjury charges, and he could have a lawyer, though not inside the grand jury room. Later, Mandujano was charged with perjury for admittedly false statements made to the grand jury about his involvement in the attempted heroin sale. Reversing the Fifth Circuit, the plurality opinion held that Miranda warnings need not be given a grand jury witness called to testify about criminal activities in which he may have been personally involved. It was held, therefore, that the failure to give such warnings is no basis for having the false statements suppressed in the subsequent prosecution of the witness for perjury based on those statements.

¶45 Part of this holding in the plurality opinion was unnecessary to the decision of the case. Even if the subpoena to a putative defendant were held to be "compulsion," thereby protecting by constitutional immunity all statements from use against the witness, perjurious statements would not be so protected.⁸⁴ With this principle, the four concurring justices⁸⁵ agreed. The implication of the holding that no Miranda warnings were required before grand jury testimony of a putative defendant were taken is unnecessary

⁸⁴ See discussion of perjury in this memorandum, §3A, supra.

⁸⁵ Brennan, J., joined by Marshall, J. filed a separate concurring opinion. Stewart, J., joined by Blackmun, J. also filed a separate concurring opinion.

to the result, is far-reaching, and was not approved of by the four concurring justices. The implication is that the compulsion exerted over a putative defendant when subpoenaed before a grand jury is constitutionally insufficient to bring the Fifth Amendment privilege to bear. Hence, if he does not affirmatively assert the privilege his incriminating statements may be used against him. In Mandujano's case, then, his testimony could be used not only for his perjury conviction but also at a trial for attempted sale of heroin.⁸⁶

¶46 All eight participating justices⁸⁷ agreed the testimony should be used to prove perjury. The justices split evenly on whether testimony in these circumstances, absent perjury, should be otherwise used against the witness.⁸⁸

A wise prosecutor, therefore, when calling a grand jury witness whom the prosecutor has probable cause to suspect committed a crime about which the witness will be asked to testify, will obtain an intentional waiver by the witness of his privilege against self-incrimination.

⁸⁶ Indeed, Mandujano was convicted for attempting to distribute heroin. His grand jury testimony, however, was not utilized by the prosecution at the trial. Thus, Mandujano did receive a sort of immunity from the use of his statements, except with regard to the perjury conviction. This outcome is consistent with that of a statutory immunity grant.

⁸⁷ Justice Stevens took no part in the consideration or decision of the case.

⁸⁸ Justice Brennan, joined by Justice Marshall, argued that a putative defendant subpoenaed before a grand jury was under constitutional compulsion. In the absence of an intentional and intelligent waiver of the Fifth Amendment privilege by the witness, none of his testimony should be used against him; they also argued that the witness had the right to a lawyer inside the grand jury room.

X. New York Immunity--Generally

A. Statutory Immunity--Transactional

¶47 The basic definition of the scope of statutory immunity in New York appears in section 50.10 of the N.Y. Crim. Pro. Law (McKinney 1971) which provides:

1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty, or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

This statutory immunity is "transactional"; a witness cannot be convicted of any crime "concerning which" he gives evidence under circumstances rendering a grant of immunity effective. This is true even if the state is able to prove his guilt by evidence obtained wholly independently of the immunized evidence. Although this type of immunity is broader than that necessary to protect the privilege against self-incrimination,⁸⁹ transactional immunity prevails in New York.⁹⁰

¶48 To determine the exact scope of New York's statutory immunity, the critical question always is: how much must

⁸⁹ People v. La Bello, 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969). New York's privilege against self-incrimination is found in the New York Constitution, Article I §6.

⁹⁰ Matter of Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969).

a witness say about a crime to have given evidence "concerning" that crime, and thereby receiving total immunity?

¶49 The answer is: very little. In 1903, in People ex rel. Lewisohn v. O'Brien,⁹¹ a leading decision, Lewisohn was questioned during the course of an investigation of another's conducting a gambling establishment at certain premises. Lewisohn was asked whether he had ever in his life been at that address. He refused to answer, but his subsequent conviction for contempt for such refusal was reversed. The court stressed that to invoke his constitutional privilege a witness need not be asked for an admission of guilt, but could refuse to supply any information which might constitute a link in an incriminatory chain of evidence.⁹²

¶50 The scope of the implications of O'Brien is illustrated by People ex rel. Coyle v. Truesdell.⁹³

One of the co-relators in that case, a grocer, appeared under subpoena before a grand jury investigating corruption in the purchase of foodstuffs by city relief officers. He was later indicted for bribery. Before the grand jury he gave his address, and when asked if that was his store or residence, he replied, "residence and store both." In explaining why this testimony gave him immunity from the bribery charges, the court said:

⁹¹176 N.Y. 253, 68 N.E. 353 (1903).

⁹²176 N.Y. at 264-65, 68 N.E. at 356. See also People ex rel. Taylor v. Forbes, 143 N.Y. 219 (1894).

⁹³259 App. Div. 282, 18 N.Y.S.2d 947 (2d Dept. 1940).

Thus it was established that he had a store at "101 Liberty Street." It is quite conceivable, in the light of the nature of the charge, that witnesses would be called to testify that directions were given them, attributable to [the allegedly corrupt official] Sloan, to go to this store to secure commodities. By this testimony, the appellant admits that it is his store. This may very well be a link in the chain of proof against him.⁹⁴

The implicit premise is that if the nexus between solicited testimony and the crime with which the witness is later charged were sufficient to permit the witness, absent an immunity order, to refuse to respond on the basis of his constitutional privilege, then the nexus is also sufficient to extend immunity to that crime if a response is compelled under an immunity order.

¶51 This standard presents vexing practical difficulties to a prosecutor. Whether evidence given by a defendant might constitute a link in the chain of evidence tending to convict him of a particular crime ultimately depends on the degree of ingenuity a judge is prepared to use in fashioning a hypothetical chain. Fortunately, however, the courts have been loathe to indulge in liberal applications of the "any link" standard. A few months later the Second Department spoke again, saying:

Relator testified to nothing before the grand jury except his name and address. Such evidence would not constitute a link in the chain of evidence against him. . . and did not entitle him to immunity.⁹⁵

⁹⁴Id. at 285-86, 18 N.Y.S.2d at 950.

⁹⁵People ex rel. Bekoris v. Truesdell, 259 App. Div. 1091 (2d Dept. 1940).

¶52 The result is that New York statutory immunity gives a witness "complete immunity as to any and all crimes to which [his] testimony relate[s]." ⁹⁶

¶53 In a grand jury proceeding, this immunity automatically protects any "responsive" answer by any witness; the witness need not assert his privilege before receiving immunity.

B. Constitutional Immunity--Testimonial

¶54 As a matter of New York constitutional law, ⁹⁷ use of incriminatory evidence compelled from a witness is forbidden. ⁹⁸ Moreover, and in contrast to federal law, when a "prospective defendant" or the "target of an investigation" is subpoenaed to testify before a grand jury, his testimony

⁹⁶In re Cioffi, 8 N.Y.2d 220, 226, 168 N.E.2d 663, 665, 203 N.Y.S.2d 841, 844 (1960); see also Anonymous v. Anonymous, 39 App. Div.2d 536, 331 N.Y.S.2d 144 (1st Dept. 1972). In the recent case of People v. McFarlan, 52 App. Div.2d 112 (1st Dept. 1976), a new limitation on the broad scope of transactional immunity was added. The witness had been indicted on drug charges for sales in June 1974. She was later called before a different grand jury investigating a murder occurring in December 1974. While testifying, she blurted out statements about the drug arrest. In denying her motion to dismiss the indictment on the drug sales, the First Department said immunity did not extend to her indictment since the answer was "unresponsive" to the question. The court went on to say, however, that her statement ("I sold drugs in the past") does not confer immunity "since the relationship between that statement and the 'transaction, matter or thing' for which defendant seeks immunity is not a substantial one. . . . The admission of illegal activity by the defendant did not specifically relate to the crimes charged and immunity, therefore, did not obtain."

⁹⁷N.Y. Const. art. I, §6 (1974).

⁹⁸People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

is automatically protected by constitutional immunity.⁹⁹
He need not assert his privilege against self-incrimination affirmatively since the subpoena itself is deemed sufficient "compulsion" to raise the privilege.¹⁰⁰

¶55 This automatic immunity is testimonial, however, and does not have the breadth of the statutory transactional immunity.¹⁰¹ It prohibits the direct and indirect use of the compelled testimony. The burden of proving non-use of the tainted evidence is on the prosecution.¹⁰²

¶56 Questions relating to the scope of testimonial immunity in New York will probably develop along lines similar to

⁹⁹ People v. Avant, 69 Misc.2d 445, 330 N.Y.S.2d 201, rev'd., 39 App. Div.2d 389, 334 N.Y.S.2d 768, rev'd., 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973); People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), appeal dismissed, cert. denied, 374 U.S. 104 (1961); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70, 90 A.L.R.2d 726 (1961). For a case distinguishing "prospective defendant" from mere witness, see People v. Yonkers Contracting Co., 24 App. Div.2d 641, 262 N.Y.S.2d 298 (2d Dept. 1965), modified on other grounds, 17 N.Y.2d 322, 217 N.E.2d 829, 270 N.Y.S.2d 745 (1965).

¹⁰⁰ United States ex rel. Laino v. Warden of Wallkill Prison, 246 F. Supp. 72 (S.D.N.Y. 1965), aff'd., 355 F.2d 208 (2d Cir. 1966). This case interpreted the New York constitutional privilege against self-incrimination.

¹⁰¹ People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973); In People v. Laino, 10 N.Y.2d 161, 173, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 657 (1961), the court said:

Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes.

¹⁰² People v. Yonkers Contracting Co., 24 App. Div.2d 641, 262 N.Y.S.2d 298, modified on other grounds, 17 N.Y.2d 322, 217 N.E.2d 829, 270 N.Y.S.2d 745 (1966).

federal law.¹⁰³

XI. New York Immunity--Effect on Other Jurisdictions

A. Prosecution in Another State

¶57 New York courts long held the view that:

. . . a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under its laws, even though it may not protect against prosecution by the federal government or by another state.¹⁰⁴

The United States Supreme Court, in Murphy v. Waterfront Commission of New York Harbor,¹⁰⁵ held, however, that any testimony given under a grant of immunity by one state will be afforded use immunity status in any subsequent federal (and, by implication, any other state) prosecution.¹⁰⁶

¹⁰³ Federal immunity is based on an act of Congress, while New York testimonial immunity is based on the New York constitution. Nevertheless, since the federal statute was intended to be coextensive with the Fifth Amendment privilege, the analogy will be strong: the Fifth Amendment privilege against self-incrimination and the New York constitutional privilege against self-incrimination are identical.

¹⁰⁴ People v. Riela, 9 App. Div.2d 481, 195 N.Y.S.2d 558 (3d Dept. 1959), rev'd. on other grounds, 7 N.Y.2d 571, 576, 166 N.E.2d 840, 842, 200 N.Y.S.2d 43, 45, reargument denied, 8 N.Y.2d 1008, 169 N.E.2d 439, 205 N.Y.S.2d 352, cert. denied, 364 U.S. 915,

¹⁰⁵ 378 U.S. 52 (1964).

¹⁰⁶ Federal courts have interpreted Murphy, supra at note 9, as providing use immunity, vis-a-vis other states, to testimony compelled under one state's immunity statutes. See, e.g., United States ex rel. Catema v. Elias, 449 F.2d 40 (3d Cir. 1971), rev'd. on other grounds, 406 U.S. 952 (1972).

B. Prosecution by the Federal Government

¶58 As noted above, Murphy held that state witnesses who are compelled to testify and incriminate themselves under a state grant of immunity automatically receive use immunity for their compelled testimony in federal prosecutions.

C. Prosecution by a Foreign Sovereign

¶59 The Supreme Court, in Zicarelli v. New Jersey Investigation Commission,¹⁰⁷ specifically declined to decide if the Fifth Amendment requires that a grant of immunity protect a witness from foreign prosecution to be co-extensive with the privilege against self-incrimination. The New York courts also have not squarely faced this question. A post-Murphy decision by a lower court,¹⁰⁸ however, indicates that New York follows the majority view that a state's immunity statute need not protect against foreign prosecution to be constitutional.

XII. New York Immunity--Effect of Non-Compliance with the Immunity Agreement

A. Perjury

¶60 The definition of immunity in Section 50.10 of N.Y. Crim. Pro. Law (McKinney 1971) provides that a witness who perjures himself while testifying under a grant of immunity

¹⁰⁷ 406 U.S. 472 (1972).

¹⁰⁸ People v. Woodruff, 50 Misc.2d 430, 270 N.Y.S.2d 838 (Sup. Ct. Dutchess County 1966).

may be prosecuted for such perjury.¹⁰⁹

B. Contempt

¶61 If the witness refuses to answer or evasively answers¹¹⁰ while under a grant of immunity, such testimony may be used against him in a future contempt prosecution.¹¹¹

It must first, however, be explained to the witness that he will receive immunity before a contempt prosecution will be possible.¹¹² A witness may be tried for perjury or contempt for statements made while testifying after having been granted constitutional use immunity for testimony illegally coerced.¹¹³ While the witness would be afforded use

¹⁰⁹ Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973). Perjury is also not excused because of some defect in the proceedings in which the false testimony is given. People v. Ward, 37 App. Div.2d 174, 323 N.Y.S.2d 316 (1st Dept. 1971).

¹¹⁰ Consistent answers of "Don't remember" by a witness may constitute contempt. Second Additional Grand Jury of Kings County v. Cirillo, 16 App. Div.2d 605, 230 N.Y.S.2d 303, aff'd., 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1962).

¹¹¹ Matter of Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); this is the rule if answering violates the tenets of the witness's religion, People v. Woodruff, 26 App. Div.2d 236, 272 N.Y.S.2d 786, aff'd., 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1966). See N.Y. Penal Law §215.50(3) (McKinney 1967) for the statutory definition of this contempt.

¹¹² People v. Mulligan, 29 N.Y.2d 20, 272 N.E.2d 62, 323 N.Y.S.2d 681 (1971); People v. Tramunti, 29 N.Y.2d 28, 272 N.E.2d 66, 323 N.Y.S.2d 687 (1971); People v. Franzese, 16 App. Div.2d 804, 228 N.Y.S.2d 644, aff'd., 12 N.Y.2d 1039, 190 N.E.2d 25, 239 N.Y.S.2d 682 (1962).

¹¹³ Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973). In this case two policemen were asked to testify about incriminating matters. The prevailing rule in the police department was one similar to that held unconstitutional in Garrity v. New Jersey, 385 U.S. 493 (1967). In this case, however, the constitutional

immunity for any crimes he revealed while testifying, he would receive no immunity for the crimes of perjury and contempt.

XIII. New York Immunity--Effect of Inconsistent Statements in Other Proceedings

¶62 There are no New York cases dealing with the effect of immunity where a witness testifies inconsistently on two occasions. Obviously, given two inconsistent statements under oath, where neither is immunized, a prosecution for perjury will be possible. Otherwise, the considerations already discussed regarding the federal system would seem to apply (see federal section, ¶¶15-22, supra). It should make no difference in the analogy that federal immunity is testimonial and New York immunity is transactional; perjury vitiates any immunity grant.¹¹⁴

XIV. New York Immunity--Application to Corporations, Associations, and Partnerships

A. Corporations

¶63 New York case law holds that the privilege against

113 (continued)

objection was removed since the policemen would have been granted immunity from use of their incriminatory testimony. The court reasoned that automatic immunity would not protect perjurious or contemptuous testimony.

¹¹⁴The New York case on this point is People v. Goldman, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967). See also People v. Tomasello, 21 N.Y.2d 143, 234 N.E.2d 287 N.Y.S.2d 1 (1967).

self-incrimination does not apply to corporations.¹¹⁵

When corporation books and records are subpoenaed, it may not refuse to produce them on the basis of the privilege. Further, an officer or agent of the corporation may not refuse to produce corporate records on the ground that the disclosures in them might incriminate him.¹¹⁶ A witness who does not have possession of the corporate records, however, cannot be compelled over a claim of privilege to answer questions seeking to elicit either the fact of possession or knowledge of the whereabouts of the records.¹¹⁷ This body of common law was recently supplanted by a consistent statutory provision which applies to grand jury proceedings, in Section 190.40(c) of N.Y. Crim. Pro. Law (McKinney 1975):

1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.

2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

- (a) He has effectively waived such immunity pursuant to section 190.45; or
- (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive;
- (c) The evidence given by the witness consists only of books, papers, records or other physical evidence of an enterprise, as defined in sub-

¹¹⁵Bleakey v. Schlesinger, 294 N.Y.312, 62 N.E.2d 85, 46 N.Y.S.2d 508 (1945).

¹¹⁶Id. Neither the officer nor agent receives immunity by virtue of the production of the records.

¹¹⁷People v. Gold, 7 App. Div.2d 739, 210 N.Y.S.2d 202 (2d Dept. 1959).

division one of section 175.00 of the penal law, the production of which is required by a subpoena duces tecum, and the witness does not possess a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in subdivisions (a) and (b) of this section.

B. Associations

¶64 Associations and unions, under case law, are treated the same as corporations.¹¹⁸ In grand jury proceedings N.Y. Crim. Pro. Law §190.40 is applicable to associations and unions.¹¹⁹

C. Partnerships

¶65 In grand jury proceedings, partnerships will not be granted immunity regarding their subpoenaed books and records under section 190.40 if they fit into the statutory definition of "enterprise."¹²⁰ This definition raises the controversial "entity versus aggregate" issue regarding partnerships. There are no New York cases

¹¹⁸Id. See also Triangle Publications v. Ferrare, 4 App. Div.2d 591, 168 N.Y.S.2d 128; People v. Adams, 183 Misc. 357, 47 N.Y.S.2d 375, rev'd. 268 App. Div. 974, 52 N.Y.S. 2d 575, aff'd. 294 N.Y. 819, 47 N.Y.S.2d 943, 62 N.E.2d 244 (1944).

¹¹⁹N.Y. Crim. Pro. Law §190.40 (McKinney 1975) uses the word "enterprise," which is defined in N.Y. Penal Law §175.00 (1) (McKinney 1967) as:

. . . any entity of one or more person, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

¹²⁰Id.

in point. It is quite conceivable that a court faced with the issue would follow the federal procedure. A federal court looks to the characteristics of the particular partnership before it to determine whether the partnership more closely resembles a corporation, or whether it has no separate existence apart from the partners.¹²¹

XV. New York Immunity--Civil Liabilities

¶66 The constitutional privilege against self-incrimination prevents the use of testimony, obtained from any witness by compulsion, in any proceeding which may result in the imposition of a criminal penalty or forfeiture on that witness. There is no constitutional right to refuse to give testimony which would merely expose the declarant to civil liability or social obloquy.¹²² The issue is not the nature of the proceeding or investigation in which the testimony is given, but rather the type of penalty or forfeiture to which the witness is exposed by the testimony.¹²³

¹²¹See discussion supra in text at ¶¶26-28.

¹²²People ex rel. Lewisohn v. O'Brien, 176 N.Y.253, 68 N.E.353 (1903). In 1917, it was held that disbarment of a lawyer was not a criminal penalty, Matter of Rouss, 221 N.Y.81, 116 N.E. 782, reargument denied, 221 N.Y. 667, 117 N.E. 1083, cert. denied, 246 U.S. 661 (1917).

¹²³The testimony protected is any which "might serve to facilitate the discovery of other circumstances sufficient to lead to conviction" People v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903). See also Chappell v. Chappell, 116 App. Div. 573, 101 N.Y.S. 846 (4th Dept. 1906); New York C.P.L.R. §4501 (1963).

The key inquiry, then, in ascertaining whether a witness's testimony is privileged, is whether it may lead to a criminal or civil sanction.

¶67 The decision of the first relevant case to reach the Court of Appeals was ambiguous.¹²⁴ The lower courts, however, have not given the concept of criminal penalty an expansive reading in this context. Thus, the possibility that adultery would be revealed, subjecting the witness to a potential divorce suit,¹²⁵ or to deportation for moral turpitude,¹²⁶ did not trigger the witness's privilege against self-incrimination. Punitive damages in civil actions are also held non-criminal penalties.¹²⁷ In 1973, the Court of Appeals also held that dismissal from public

¹²⁴In re Nicastro, 305 N.Y. 983, 106 N.E.2d 63 (1952), involved a witness in a grand jury investigation who was granted immunity from prosecution. Nevertheless, he refused to testify on the ground that his testimony might reveal he had filed false returns, the fine for which the immunity did not cover. The County Court convicted him of contempt, noting that the immunity statute "expressly grant[ed] immunity not only against prosecution, but also against the imposition of any penalty or forfeiture." This plainly intimated that the grant immunized the witness from the Tax Law fine. The Appellate Division affirmed in a brief memorandum decision, which did not specify whether the witness was obliged to answer because the fine was a criminal penalty (against which he had received immunity) or because the fine was a non-criminal penalty (susceptibility to which would not trigger his privilege against self-incrimination). The Court of Appeals affirmed without opinion.

¹²⁵People v. Nowacki, 180 Misc. 100, 40 N.Y.S.2d 131 (County Ct., Erie Co. 1943).

¹²⁶Mesticelli v. Mesticelli, 44 Misc.2d 707, 255 N.Y.S.2d 185 (Supreme Ct., Nassau Co. 1964).

¹²⁷People v. Ferro, 66 Misc.2d 752, 322 N.Y.S.2d 354 (Criminal Ct., New York Co. 1971).

employment is not a criminal penalty,¹²⁸ saying:

[T]he State may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions, or furnishes information indicating that he is no longer entitled to public confidence.¹²⁹

XVI. New York Immunity--Effect on Prior Convictions

¶68 The privilege against self-incrimination does not protect a witness from being compelled to give incriminating evidence if the criminal sanction is not applicable. This is true whether the criminal sanction is not applicable because it has already been applied (i.e., the witness was convicted and sentenced) or by the running of the statute of limitations. A witness so situated need not be granted immunity before being compelled to testify.

¶69 Because of the plethora of statutory offenses and since the statutory immunity extends to any crime concerning which the witness testified,¹³⁰ a wise witness will assert his privilege and request immunity. The factual web in which the crime for which he was convicted occurred likely includes various other crimes. Hence, he may make

¹²⁸ People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973).

¹²⁹ 33 N.Y.2d 265 at 271, 307 N.E.2d 230 at 233, 352 N.Y.S.2d 161 at 165.

¹³⁰ In re Cioffi, 21 Misc.2d 808, 192 N.Y.S.2d 754 (County Ct., Kings Co. 1959), aff'd., 10 App. Div.2d 425, 202 N.Y.S.2d 26 (2d Dept.), aff'd., 8 N.Y.2d 220, 168 N.E.2d 663 (1960).

a good argument that his privilege indeed does apply. Under N.Y. Crim. Pro. Law §190.40 (McKinney 1975), if the witness is called before a grand jury, he need not assert his privilege to receive transactional immunity. In any other context, however, unless he is a "prospective defendant," he must assert his privilege to receive constitutional immunity for his subsequent testimony. Constitutional immunity, moreover, is only "use" immunity.¹³¹

XVII. New York Immunity--Non-Testimonial Evidence

¶70 New York case law reflects the rule that "the privilege against self-incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself."¹³²

¶71 The immunity statute, however, read literally, affords far broader protection. Immunity is granted in N.Y. Crim. Pro. Law §50.10 (McKinney 1971) against conviction for any transaction, matter, or thing concerning which the witness "gives evidence" (emphasis added). Moreover, in grand jury proceedings, any "evidence"¹³³ produced by the witness when under subpoena, affords him automatic transactional immunity. Logically, then, if a witness is subpoenaed before the grand jury and asked to furnish handwriting exemplars, or

¹³¹ See People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973).

¹³² People v. Damon, 24 N.Y.2d 256, 261, 247 N.E.2d 651, 653, 299 N.Y.S.2d 830, 834 (1969).

¹³³ Referring to N.Y. Crim. Pro. Law §50.10 (McKinney 1971).

fingerprints, he will automatically receive an "immunity bath," even though such non-testimonial evidence is not protected by the constitutional privilege.

¶72 The very narrow¹³⁴ exception to this immunity for non-testimonial evidence is N.Y. Crim. Pro. Law §190.40(2)(c) (1975). This subsection excepts "books, papers, records, or other physical evidence of an enterprise" produced under subpoena before a grand jury.¹³⁵ Thus, the individual who merely produces and identifies such physical evidence should not receive immunity; any other testimony elicited from the witness, however, means automatic immunity for that witness.¹³⁶

¶73 A possible solution to this dilemma was recently tried by two prosecutors. In Matter of Alphonso C.¹³⁷ and in Matter of the District Attorney of Kings County v. Angelo G.,¹³⁸ two prosecutors avoided granting an "immunity bath" to witnesses who were, nevertheless, forced to produce non-testimonial evidence. In Alphonso, the district attorney moved for and obtained an order directing a witness (for

¹³⁴ See N.Y. Crim. Pro. Law §190.40 (McKinney 1975) (practice commentary). See also People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct., New York Co. 1973).

¹³⁵ Presumably, the legislature could not have thought this addition necessary unless it believed the former immunity statute included such evidence.

¹³⁶ N.Y. Crim. Pro. Law §190.40 (McKinney Supp. 1975) (practice commentary).

¹³⁷ 50 App. Div.2d 97 (1st Dept. 1975), appeal dismissed, 38 N.Y.2d 923 (1976).

¹³⁸ 48 App. Div.2d 576 (2d Dept. 1975), appeal dismissed, 38 N.Y.2d 923 (1976).

whom there was no probable cause for a crime) to appear in a line-up; in Angelo, during an investigation for falsely reporting motor vehicle accidents involving crimes of fraud and forgery, the district attorney obtained an order directing a witness to produce a handwriting sample.¹³⁹

On appeal of the orders, the two departments of the Appellate Division gave opposing holdings. The Court of Appeals dismissed the appeals, stating that the orders sought by the district attorneys and granted by the lower courts were not appealable.

¶74 Until the New York courts hand down more definitive decisions in this area, a firm judgment of what the law is and what the practical procedure ought to be, cannot be made.

XVIII. New York Immunity--How Immunity is Conferred

A. Statutory Immunity

1. Grand Jury Proceedings

¶75 Under N.Y. Crim. Pro. Law §190.40 (McKinney 1975) every witness called before a grand jury automatically receives transactional immunity for any crimes disclosed by any responsive answer to questions put to him.¹⁴⁰ When

¹³⁹ Matter of Alphonso C., supra note 137; Matter of the District Attorney of Kings County v. Angelo C., supra note 138.

¹⁴⁰ The "responsive" limitation is to prevent a sophisticated witness from coming before a grand jury and blurting out irrelevant incriminating statements in the hope of receiving immunity from prosecution for those crimes. The responsiveness limitation was upheld against a void-for-vagueness challenge in People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct. New York Co. 1973).

a witness merely delivers and identifies "books, papers, records, or other physical evidence of an enterprise" that witness receives no immunity.¹⁴¹

¶76 A grand jury witness may waive immunity.

2. Other Proceedings

¶77 In all other "legal proceedings," to receive immunity a witness must refuse to answer on the basis of his privilege against self-incrimination, be advised he will receive immunity, and be ordered to answer by an authority competent to confer immunity. N.Y. Crim. Pro. Law §50.20 (McKinney 1971).

¶78 Section 50.20(2)(a) further provides that only a person expressly declared by statute to be a competent authority in such "legal proceedings" may confer immunity. The statutory authorization to confer immunity in non-grand jury criminal proceedings is contained in section 50.30 which empowers "the court" to confer immunity when requested by the district attorney or assistant district attorney. "The court" refers to the court before which the proceeding occurs, and it includes the supreme court¹⁴² and lower level criminal courts.¹⁴³

¶79 The Attorney General has immunity powers in certain

¹⁴¹N.Y. Crim. Pro. Law §190.40(2)(c) (Supp. 1975).

¹⁴²People v. Kozer, 33 App. Div.2d 617, 304 N.Y.S.2d 793 (3d Dept. 1969).

¹⁴³As defined in N.Y. Crim. Pro. Law §10.10(3) (1971).

situations.¹⁴⁴ Additionally, a number of administrative and investigative agencies have power to grant immunity in the course of their proceedings.¹⁴⁵ Under certain circumstances, a family court may grant immunity.¹⁴⁶

B. Constitutional Immunity

¶80 Constitutional immunity in New York is testimonial. In any proceeding other than a grand jury proceeding, the witness must, to receive immunity, assert his privilege against self-incrimination before he testifies. A "prospective defendant," however, receives automatic constitutional immunity upon testifying.¹⁴⁷

¹⁴⁴See, e.g., N.Y. Bus. Corp. Law §109(7) (1971) (special proceedings pertaining to corporations); N.Y. Bus. Corp. Law §343 (1971) (antitrust investigations).

¹⁴⁵See, e.g., N.Y. Unconsol. Laws §7501 (1958) (the Commission of Investigation); N.Y. Const. art. VI §22(f) (1962) (the Court on the Judiciary); N.Y. Legis. Law §62-b (1971) (joint legislative committees); N.Y. Environmental Conservation Law §71-0503 (1972) (the Environmental Conservation Department); N.Y. Unconsol. Law §9971(n) (1970) (the Waterfront Commission); N.Y. Exec. Law §436 (1971) (the Bingo Control Commission); N.Y. Unconsol. Laws §§8586(7), 8608 (1971) (the division of housing and community renewal and city housing rent agencies).

¹⁴⁶In a family court hearing to decide (1) whether a case should be transferred to a criminal court, or (2) what action is appropriate in a case transferred from a criminal court, the court has power to grant testimonial immunity for any subsequent criminal court proceeding. This is the only statutory provision for testimonial immunity in New York. N.Y. Family Ct. Act §1014(d) (1970).

¹⁴⁷People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

C. Waiver of Immunity

¶81 As noted above, witnesses in grand jury proceedings receive immunity automatically, unless a written waiver is executed in accordance with N.Y. Crim. Pro. Law §190.45 (McKinney 1975). Once such a waiver has been validly executed it may not be withdrawn.¹⁴⁸ The waiver also retains its effectiveness vis-a-vis the grand jury before which it was sworn as long as that grand jury does not embark on a wholly new investigation.¹⁴⁹

¶82 When a person is requested to sign a waiver of immunity he has a right to confer with counsel before deciding, and he must be informed of this right; otherwise the waiver is ineffective under section 190.45(2).

The failure of a purported waiver would simply allow the statutory transactional immunity to become effective.¹⁵⁰

¶83 Subsection 4 of N.Y. Crim. Pro. Law §190.45 makes provision for a waiver of immunity with subject-matter limitations:

If a grand jury witness subscribes and swears to a waiver of immunity upon a written agreement with the district attorney that the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated and testifies concerning another subject, matter or area of conduct not included in such written agreement, he receives immunity with respect to any further testimony which he may give concerning such other subject, matter or area of conduct and the waiver of immunity is to that extent ineffective (emphasis added).

¹⁴⁸ Bohland v. Markewich, 26 App. Div.2d 545, 270 N.Y.S.2d 817 (2d Dept. 1966).

¹⁴⁹ People ex rel. Hofsaes v. Warden of City Prison, 302 N.Y. 403, 98 N.E.2d 579, 100 N.Y.S.2d 478 (1951).

¹⁵⁰ People v. Avant, 33 N.Y.2d 265, 272, 352 N.Y.S.2d 161, 166, 307 N.E.2d 230, 233 (1973).

¶84 The one lower court that considered the problem of the witness's capacity to waive immunity held that a minor does not have the power to waive it.¹⁵¹

¶85 Evidence given under a grant of full transactional immunity may be used against the witness in subsequent perjury or contempt proceedings concerning that testimony under N.Y. Crim. Pro. Law §50.10. A fortiori, evidence given under an invalid waiver of immunity is subject to the same limitation.¹⁵²

XIX. New Jersey Immunity--Generally

¶86 The privilege against self-incrimination, traditionally part of New Jersey's common law,¹⁵³ is now found in N.J. Stat. Ann. §2A:84A-18 (West 1960):

. . . . a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended,

¹⁵¹In re DeGaglia, 54 Misc.2d 423, 282 N.Y.S.2d 627 (Family Ct., Westchester Co. 1967).

¹⁵²People v. Goldman, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967).

¹⁵³State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974); State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955).

other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

N.J. Stat. Ann. §2A:84A-19(1960) fills out the definition by listing exceptions:

Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:

(a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;

(b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;

(c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;

(d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.¹⁵⁴

¹⁵⁴The "Rule 37" referred to is N.J. Stat. Ann. §2A:84A-29 (West 1960) which allows waiver of the privilege.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

Thus, this statutory privilege is much the same as the federal privilege as this provision has been interpreted by the courts. Indeed, a requirement of "compulsion" by the state is held to be implied in the self-incrimination definition.¹⁵⁵

A. Criminal Proceedings Before a Court or Grand Jury--
Statutory Testimonial Immunity

¶87 Of course, where there is no privilege, no immunity is necessary. When the privilege is invoked, immunity may be granted pursuant to N.J. Stat. Ann. §2A:81-17.3 (West 1960):

Order Compelling Person to Testify or Produce Evidence; Immunity from Use of Such Evidence; Contempt

In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind

154 (continued)

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question.

This section was held not to be unconstitutionally vague in In re Bridges 120 N.J. Super. 460, 295 A.2d 3, cert. denied, 410 U.S. 991 (1972).

¹⁵⁵ State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974). A special provision for an accused in a criminal action is found in N. J. Stat. Ann. §2A:84A-17 (West 1960) subsections (1) and (3). These are:

(1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.

(3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

on the ground that he may be incriminated thereby and if the Attorney General or the county prosecutor with the approval of the Attorney General, in writing, requests the court to order that person to answer the question or produce the evidence, the court shall so order and that person shall comply with the order. After complying and if but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury; provided, however, that if the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

This section sets out the procedure for a grant of use immunity¹⁵⁶ in proceedings before a court or grand jury.¹⁵⁷ Generally, the witness must refuse to answer based on his privilege, the court must decide if the privilege is applicable, and the Attorney General (or prosecutor having Attorney

¹⁵⁶The court in State v. Spindel, 24 N.J. 395, 132 A.2d 291 (1957), expanded on what "use" immunity means. It was said that use immunity does not include freedom from arrest and prosecution for a criminal offense acknowledged by a witness in the course of his testimony if provable by evidence independent of the testimony adduced under the privileged circumstances.

¹⁵⁷State v. Sotteriou, 123 N.J. Super. 434, 303 A.2d 585 (1973).

General approval in writing) must request compulsion of the testimony.

¶88 The assertion of the privilege against self-incrimination must be by the witness himself,¹⁵⁸ only after the question is put to him.¹⁵⁹ The general rule, then, is that if the witness does not assert his privilege it is waived;¹⁶⁰ it is not necessary that the witness be advised of his privilege.¹⁶¹ A narrow exception to this rule is made for a witness who is the "target" of the investigation. If a witness is a "target" of the investigation and is called to testify before the grand jury which eventually indicts him, before testifying he must be warned of his privilege against self-incrimination.¹⁶²

¶89 Once the witness asserts his privilege the court decides the validity of the claim, and only then is the prosecutor put to the choice of granting immunity or

¹⁵⁸New Jersey Builders, Owners and Managers Ass'n. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972). See, e.g., State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974) (voir dire examination, attorney made Fifth Amendment objections, held witness was the proper person).

¹⁵⁹State v. Browning, 19 N.J. 424, 117 A.2d 505 (1955).

¹⁶⁰State v. Toscano, 13 N.J. 418, 100 A.2d 170 (1953).

¹⁶¹State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955).

¹⁶²State v. DeCola, 33 N.J. 335, 164 A.2d 729 (1960). In State v. Williams, 59 N.J. 493, 284 A.2d 172 (1971), it also was held that a witness who informs the prosecutor that he will not stay with his sworn statement and who, nonetheless, is subpoenaed by the state to testify, should be advised of his right to remain silent.

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abandoning the inquiry.¹⁶³ If the claim of privilege is held valid, however, and the prosecutor makes written request for immunity, "the court shall so order" and has no discretion in the matter.

B. Other Proceedings--Common Law Testimonial Immunity

¶90 The privilege in New Jersey means that a person shall not be compelled to give evidence against himself.¹⁶⁴ If this privilege is improperly denied or ignored the testimony may not be used against the witness.

The court thereby honors the privilege when its genuineness appears, by shielding the witness from the self-injury against which the privilege was intended to protect.¹⁶⁵

¶91 Both the statutory and common law immunities of New Jersey are "use" or "testimonial" immunities as in the federal system. As a general rule, therefore, when an immunity issue is raised for which there is no New Jersey judicial guidance, it is likely that the New Jersey courts will look to the more fully developed jurisprudence of the federal law as persuasive authority.

¹⁶³In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968); State v. Toscano, 13 N.J. 418, 100 A.2d 170 (1953); In re Pillo, 11 N.J. 8, 93 A.2d 176 (1953); State v. Craig, 107 N.J. Super. 196, 257 A.2d 737 (1969).

¹⁶⁴State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968).

¹⁶⁵State v. DeCola, 33 N.J. 335, 352, 164 A.2d 729, 738 (1960). See also Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975).

XX. New Jersey Immunity--Effect on Other Jurisdictions

A. Prosecution in Another State

¶92 New Jersey courts traditionally hold that the privilege against self-incrimination does not extend to protect a witness as to matters that may tend to incriminate him under the laws of another jurisdiction.¹⁶⁶ The United States Supreme Court, in Murphy v. Waterfront Commission of New York Harbor,¹⁶⁷ held, however, that any testimony given under a grant of immunity by one state will be afforded use immunity status in any subsequent federal (and, by implication, any other state) prosecution.¹⁶⁸

B. Prosecution by the Federal Government

¶93 As stated above, Murphy held that state witnesses who are compelled to testify and incriminate themselves under a state grant of immunity automatically receive use immunity for their compelled testimony in federal prosecutions. If, however, the federal grant is one of transactional immunity, New Jersey prosecutors and courts must honor that grant.¹⁶⁹

¹⁶⁶ In re Pillo, 11 N.J. 8, 93 A.2d 176 (1953).

¹⁶⁷ 378 U.S. 52 (1964).

¹⁶⁸ Federal courts have interpreted Murphy, supra note 167 as providing use immunity, vis-a-vis other states, to testimony compelled under one state's immunity statutes. See, e.g., United States ex rel. Catema v. Elias, 449 F.2d 440 (3d Cir. 1971), rev'd. on other grounds, 406 U.S. 952 (1972).

C. Prosecution by a Foreign Sovereign

¶94 The Supreme Court, in Zicarelli v. New Jersey State Commission of Investigation,¹⁷⁰ specifically declined to answer whether the Fifth Amendment requires that a grant of immunity must protect a witness from foreign prosecution to be co-extensive with the privilege against self-incrimination. It may be assumed, however, that New Jersey would follow the majority view that a state's immunity statute need not protect against foreign prosecution to be constitutional.

XXI. New Jersey Immunity--Effect of Non-Compliance with Immunity Agreement

A. Perjury

¶95 The immunity provision of N. J. Stat. Ann. §2A:81-17.3 (1960) provides that a witness who perjures himself while testifying under a grant of immunity may be prosecuted for such perjury. The case law supports this.¹⁷¹

¹⁶⁹ Thus, the witness may not be prosecuted in New Jersey for any crime concerning which he was federally compelled to testify under the transaction immunity statute, even though the prosecution could be brought, and conviction obtained, on the basis of evidence totally independent of the compelled testimony. State v. Kenny, 68 N.J. 17, 342 A.2d 189 (1975). See also Marcus v. United States, 310 F.2d 143 (3d Cir. 1962), cert. denied, 372 U.S. 944 (1963).

¹⁷⁰ Zicarelli v. New Jersey State Commission of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), aff'd, 406 U.S. 472 (1972).

¹⁷¹ See, e.g., State v. Mullen, 67 N.J. 134, 336 A.2d 481 (1975); State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

B. Contempt

¶96 N.J.Stat. Ann. §2A:81-17.3 (1960) also provides that any contempt committed by a witness, in answering or failing to answer under the immunity grant, may be prosecuted. Failing to answer questions under a grant of immunity may be treated as civil contempt.¹⁷²

¶97 Thus, while a witness is, under N.J. Stat. Ann. §2A:81-17.3 (1960) afforded use immunity for any crimes revealed in the testimony, no immunity is received for perjury or contempt.

XXII. New Jersey Immunity--Effect of Inconsistent Statements In Other Proceedings

¶98 Likewise, no immunity is received under N.J. Stat. Ann. §2A:81-17.3 (1960) for the crime of false swearing. The crime of false swearing is defined in N.J. Stat. Ann. §2A:131-4 (1952)¹⁷³ and N.J. Stat. Ann. §2A:131-5 (West 1952) and states that the indictment need not allege which of the two statements is false.

¶99 Since in both New Jersey and the federal system use immunity prevails, and since both jurisdictions define false swearing as a crime, the effect of immunity on incon-

¹⁷² Application of Waterfront Commission of New York Harbor, 39 N.J. 436, 189 A.2d 36 (1963), affirmed in part, 378 U.S. 52 (1964).

¹⁷³ Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing. . . .

sistent statements is similar between the two jurisdictions. Research could not find any New Jersey decision on this issue.¹⁷⁴ (Reference should be had to the discussion of federal law in ¶¶15-22, supra).

XXIII. New Jersey Immunity--Application to Corporations Associations, and Partnerships

A. Corporations and Associations

¶100 New Jersey cases hold that the privilege against self-incrimination does not apply to corporations.¹⁷⁵ When corporation books and records are subpoenaed, it may not refuse to produce them on the basis of the privilege. Further, according to N.J. Stat. Ann. §2A:84A-19(b) (1960) (listing exceptions to the privilege) an agent of a "corporation or other association" may not refuse to produce corporate or association records on the ground that the disclosures therein might incriminate him.

¶101 Under N.J. Stat. Ann. §2A:84A-19(c) (1960) a broad exception to the privilege against self-incrimination is also made for certain records or reports:

(c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose, except to the

¹⁷⁴The only case in point is State v. Williams, 59 N.J. 493, 284 A.2d 172 (1971). That case, however, says only that non-immunized testimony may be used in proving the falsity of immunized testimony; truthful immunized testimony may never be used against the witness.

¹⁷⁵See, e.g., New Jersey Builders, Owners and Managers Ass'n. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972); Hudson County v. New York Central Railroad Co., 10 N.J. 284, 90 A.2d 736 (1952).

extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential.

B. Partnerships

¶102 Research has found no New Jersey cases on either the application of the privilege to partnerships or the granting of immunity to partnerships. If faced with the issue, it is probable that a New Jersey court would adopt the federal case-by-case approach. (See the discussion of federal law in ¶¶26-28, supra).

XXIV. New Jersey Immunity--Civil Liabilities

¶103 Under the statutory definition of "incrimination" found in N.J. Stat. Ann. §2A:84A-18(1960) upon which the privilege against self-incrimination is based,

. . . a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution.

N.J. Stat. Ann. §2A:84A-19 (1960), however, reads in part:

. . . every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or forfeiture of his estate. . . (emphasis added).

¶104 An issue is thus raised as to what kind of threatened "penalty" is required to support a claim of the privilege. On the one hand, if the testimony sought from the witness would likely expose him to a criminal prosecution, an assertion of the privilege against self-incrimination would obviously be justified, even though the context in which

the testimony is sought is itself civil in nature.¹⁷⁶ On the other hand, a witness has no privilege to refuse to give testimony in a criminal prosecution merely because the giving of the testimony might degrade him.¹⁷⁷ Between the two extremes, and despite the statutory language of N.J. Stat. Ann. §2A:84A-19 (1960), which does not limit application of the privilege to situations where the testimony could lead to a criminal sanction, the line drawn by the courts is that between a criminal sanction and a non-criminal sanction.¹⁷⁸ Indeed, in 1975 a lower court decision¹⁷⁹ construed New Jersey's immunity statute as protecting a testifying witness from the use of his testimony in a subsequent criminal proceeding, but as allowing the use of immunized testimony in a non-criminal disciplinary proceeding. The court said that "proceeding," in the statutory section which provides that immunized testimony or its fruits "may not be used against the person in any proceeding. . . for a crime or offense . . . , " is modified and qualified by the terms

¹⁷⁶In Mahne v. Mahne, 66 N.J. 53, 328 A.2d 225 (1974), it was held that the defendants in a divorce action could properly claim their privileges against self-incrimination when asked by pretrial interrogatories whether they had committed adultery. Such an admission would have exposed them to criminal liability.

¹⁷⁷State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955).

¹⁷⁸See, e.g., Laba v. Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

¹⁷⁹Young v. City of Paterson, 132 N.J. Super. 170, 330 A.2d 32 (1975).

"crime or offense." This interpretation of the permissible uses of testimony that is "use immunized" is consistent with the federal system's interpretation of use immunity (see, ¶¶29-31, supra). It is likely the New Jersey courts will often look to the body of federal use immunity law in this area, too.

XXV. New Jersey Immunity--Effect on Prior Conviction

¶105 From the preceding discussion, it follows that once the criminal penalty of a witness's testimony is removed, no privilege applies to that testimony and no immunity need be granted. Thus, when an element (i.e., pregnancy) of the crime (i.e., abortion), about which the witness was asked to testify was missing, she was not entitled to a claim of privilege.¹⁸⁰ Similarly, when the questions asked by the grand jury concerned transactions which transpired over two years prior to the time at which the witnesses were testifying, and the statute of limitations for the crimes to which the testimony related was two years, no privilege to refuse to testify could be claimed.¹⁸¹

¶106 A witness may not refuse to testify about a crime for which he was previously convicted.¹⁸² This is consistent with the statutory exception from "incrimination"¹⁸³ which

¹⁸⁰In re Vince, 2 N.J. 443, 67 A.2d 141 (1949).

¹⁸¹In re Pillo, 11 N.J. 8, 93 A.2d 176 (1953).

¹⁸²State v. Craig, 107 N.J. Super. 196, 257 A.2d 737 (1969).

¹⁸³N.J. Stat. Ann. §2A:84A-18 (West 1960).

says that if the "witness has no reasonable cause to apprehend a criminal prosecution" concerning a matter, the matter is not "incriminatory." In State v. Tyson,¹⁸⁴ however, it was held that a defense witness, who plead guilty to a criminal charge but was not yet sentenced, retained the privilege to refuse to answer questions about the crime on the ground that his answers could incriminate him.

XXVI. New Jersey Immunity--Non-Testimonial Evidence

¶107 The New Jersey cases also hold that the privilege against self-incrimination does not confer on a witness a right to withhold evidence that is "non-testimonial in character"¹⁸⁵ or evidence that is not a "communication"¹⁸⁶ of the witness. N.J. Stat. Ann. §2A:84A-19(2) (West 1960) says:

. . . no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental conditions. . . .

Consequently, a witness may not refuse, on the basis of his privilege against self-incrimination, to submit to such things as fingerprinting, photographing, examination of body for identifying characteristics, drunkometer tests,

¹⁸⁴43 N.J. 411, 204 A.2d 864, cert. denied, 380 U.S. 987 (1964).

¹⁸⁵State v. King, 44 N.J. 346, 209 A.2d 110, 9 A.L.R.3d 847 (1965).

¹⁸⁶State v. Carr, 124 N.J. Super. 114, 304 A.2d 781 (1973).

blood tests, and voice identification tests.¹⁸⁷ Immunity, then, need not be granted a witness to compel him to submit to these tests.

XXVII. New Jersey Immunity--How Immunity is Conferred

A. Generally

¶108 Under New Jersey statutory law, special provisions allow immunity grants in particular agencies' investigations.¹⁸⁸ The provision governing a grant of immunity in criminal proceedings before a court or grand jury, however, is found in N.J. Stat. Ann. §2A:81-17.3 (West 1960).

¶109 After a witness refuses to answer based on his privilege against self-incrimination and the court rules that the privilege is applicable,¹⁸⁹ the prosecutor must decide

¹⁸⁷ State v. King, 44 N.J. 346, 209 A.2d 110, 9 A.L.R. 3d 847 (1965).

¹⁸⁸ The following sections of N.J. Stat. Ann. govern immunity in particular proceedings: §17:9A-263 (bank examinations); §11:1-15 (civil service commission); §23:10-12 (game laws); §48:2-36 (public utility commission); §17:12A-90 (savings and loan associations); §§49:1-19 to -20 (securities law); §50:5-11 (shell fish proceedings to recover penalties); §32:23-86 (waterfront commission investigation); §58:1-29 (water policy council); §17B:30-22 (health insurance, unfair competition); §40:69A-167 (municipal officers and employees); and the important statutory provision regarding the duty of a public employee to testify, and the immunity to be granted, may be found in N.J. Stat. Ann. §§2A:81-17.2a1 and 2A:81-17.2a2.

¹⁸⁹ In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968). The court there further held that, in determining the validity of the claim of privilege, the court should consider a showing that the witness is the "target" of the grand jury investigation as sufficient to support a claim of the privilege.

whether to compel the testimony under an immunity grant or forego the line of inquiry. If the prosecutor decides to compel the testimony, he must request (with the approval of the Attorney General) in writing that the court order the witness to comply with the order and testify. The witness then receives protection from the use of any of his testimony, or its "fruits," in any subsequent criminal proceeding against him.

B. Waiver

¶110 There is no statutory provision in New Jersey for a waiver of immunity, but in some circumstances a witness may be deemed to have waived his privilege against self-incrimination, nullifying any need for an immunity grant. The most common and important instance of a waiver of the privilege occurs when a witness (other than the "target" of the investigation) when subpoenaed, appears before the court or grand jury and freely testifies about self-incriminatory facts.¹⁹⁰ Thus, in State v. Stavola,¹⁹¹ where the defendant's counsel arranged with the prosecutor for the defendant's voluntary appearance before a grand jury, his appearance constituted an effective waiver of his

¹⁹⁰ A different way to view this, however, is that in such circumstances the witness is not being "compelled" to testify, but rather is testifying voluntarily. In that case, the relevant legal concept would be the absence of the privilege against self-incrimination, not the waiver of the privilege.

¹⁹¹ 118 N.J. Super. 393, 288 A.2d 41 (1972), cert. denied, 415 U.S. 977 (1973).

right (as the "target") of the grand jury's investigation) to be warned of his right to remain silent and to be warned that any statement he gave could be used against him.

¶111 In contrast, in State v. DeCola,¹⁹² the witness previously testified about homicide before a grand jury; the court held that the first testimony did not operate to deprive her of her privilege when summoned before a second grand jury. The second grand jury was pursuing an investigation directed against the witness herself, in regard to a basis for her own indictment for perjury based on her initial testimony.

XXVIII. Massachusetts Immunity--Generally

¶112 The Massachusetts constitutional privilege against self-incrimination is found in Article XII; functionally, it is identical to the federal privilege.¹⁹³

¶113 For criminal proceedings before grand juries and courts, the applicable immunity statute is Mass. Gen. Laws Ann. ch. 233, §§20C-20I (1970).¹⁹⁴ The procedure out-

¹⁹² State v. DeCola, 33 N.J. 335, 164 A.2d 729 (1960).

¹⁹³ The Massachusetts courts, however, seem to interpret the privilege as easily waived by failure to claim it. See In re De Saulnier, 360 Mass. 761, 276 N.E.2d 278 (1971).

¹⁹⁴ Testimonial privileges with special immunity provisions applicable to other proceedings may be found in the following sections of Massachusetts General Laws: Mass. Gen. Laws Ann. ch. 3 §28 (1902) (testimony before general courts); Mass. Gen. Laws Ann. ch. 7 §11 (1962) (testimony before administration finance commission); Mass. Gen. Laws Ann. ch. 93 §7 (1971) (antimonopoly proceedings); Mass. Gen. Laws Ann. ch. 271 §39 (1912) (bribery of employee or agent); Mass. Gen. Laws Ann. ch. 151B §3(7) (1972) (testimony before discrimination commission); Mass. Gen. Laws Ann. ch. 150A §7(3) (1961) (testimony before Labor Relations Commission); Mass. Gen. Laws Ann. ch. 110A §16 (1904) (Security Commission hearings).

lined in these sections provides full transactional immunity to a witness.

¶114 The immunity statute provides that in a proceeding before a grand jury involving specified offenses,¹⁹⁵ after the witness claims his constitutional privilege against self-incrimination,¹⁹⁶ the attorney general or a district attorney may make an application to a justice of the Supreme Judicial Court for an order granting immunity to the witness.¹⁹⁷ If, after a private hearing, the justice finds that the witness validly refused to answer on the ground of his privilege, the justice may order the witness to answer (or produce evidence) by issuing an order granting transactional

¹⁹⁵The offenses, all involving crimes against the public safety and interest, are enumerated in Mass. Gen. Laws Ann., ch. 233, §20D(1970):

. . . abortion, arson, assault and battery to collect a loan, assault and battery by means of a dangerous weapon, assault to murder, breaking and entering a dwelling house or a building, bribery, burning of a building or dwelling house or other property, burglary, counterfeiting, deceptive advertising, electronic eavesdropping, embezzlement, extortion, firearm violations, forgery, fraudulent personal injury and property damage claims, violation of the gaming laws, gun registration violations, intimidation of a witness or of a juror, insurance law violations, kidnapping, larceny, lending of money or thing of value in violation of the general laws, liquor law violations, mayhem, murder, violation of the narcotic or harmful drug laws, perjury, prostitution, violations of environmental control laws (pollution), violations of conflicts-of-interest laws, consumer protection laws, pure food and drug law violations, receiving stolen property, robbery, subornation of perjury, uttering, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

¹⁹⁶See Mass. Gen. Laws Ann. ch. 233, §20C(1970).

¹⁹⁷See Mass. Gen. Laws Ann. ch. 233, §20E(1970).

immunity.¹⁹⁸

¶115 Immunity in court is permitted in Massachusetts only in criminal proceedings in a superior court, provided that the witness was previously granted immunity with respect to his testifying or producing evidence before a grand jury.¹⁹⁹

¶116 A witness who was granted immunity cannot be prosecuted or subjected to "any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is so compelled. . . to testify or produce evidence."²⁰⁰ Nor may the compelled evidence be used against him in any criminal or civil court proceedings in Massachusetts, except for perjury or contempt committed under the immunity order.²⁰¹

¶117 Upon failure of a properly immunized witness to testify, contempt proceedings may be instituted against the witness. After a hearing, if the witness is adjudged in contempt of court, he may be imprisoned for a term not to exceed one year.²⁰²

¹⁹⁸Id. Special requirements are imposed if the application is made by a district attorney.

¹⁹⁹Mass. Gen. Laws Ann. ch. 233, §20F(1970).

²⁰⁰Mass. Gen. Laws Ann. ch. 233, §20G(1970).

²⁰¹Id.

²⁰²Mass. Gen. Laws Ann. ch. 233, §20H(1970) (criminal contempt).

¶118 Finally, the immunity statute provides that no defendant in any criminal proceeding is to be convicted solely on the testimony of (or evidence produced by) a person granted immunity under the act.²⁰³ The Supreme Judicial Court, in Commonwealth v. DeBrodsky, narrowly interpreted this provision to minimize the amount of corroboration required to meet the provisions of the statute; it is said to "merely require support for the credibility of such a witness."²⁰⁴

XXIX. Massachusetts Immunity--Effect on Other Jurisdictions

¶119 Traditionally, the Massachusetts privilege against self-incrimination and hence immunity, was held not to extend to crimes of other jurisdictions.²⁰⁵ Today the United States Supreme Court's decision in Murphy v. Waterfront Commission of New York Harbor²⁰⁶ and its implications²⁰⁷ would prevail; such witnesses would receive use immunity as against other jurisdictions.

²⁰³Mass. Gen. Laws Ann. ch. 233, §20I(1970)..

²⁰⁴____ Mass. ____, 297 N.E.2d 496, 505 (1973). The court observed that the statute simply "changed the law to require that there be some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant."

²⁰⁵See, e.g., Cabot v. Corcoran, 332 Mass. 44, 123 N.E.2d 221 (1955).

²⁰⁶378 U.S. 52 (1963).

²⁰⁷See discussion in text supra at ¶2.

XXX. Massachusetts Immunity--Effect of Non-Compliance with Immunity Agreement

¶120 The use of immunized testimony in a subsequent prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion is provided for in Massachusetts's immunity statute.²⁰⁸

XXXI. Massachusetts Immunity--Application to Corporations

¶121 In Massachusetts, corporations have no privilege against self-incrimination.²⁰⁹

XXXII. Massachusetts Immunity--Civil Liabilities

¶122 In Massachusetts, as in other states, the privilege against self-incrimination protects a witness from being forced, by his testimony, to subject himself to criminal liability or "penalty or forfeiture."²¹⁰ Hence, such sanctions as embarrassment or fear of harm are constitutionally insufficient reasons for declining testimony.²¹¹

²⁰⁸Mass. Gen. Laws Ann. ch. 233, §20G(1970). For further discussion see discussion in text supra at ¶3.

²⁰⁹London v. Everett H. Dunbar Corp., 179 F. 506 (1st Cir. 1910).

²¹⁰See, e.g., Bull v. Loveland, 27 Mass. (10 Pick.) 9 (1838).

²¹¹Commissioner v. Johnson, _____ Mass. _____, 313 N.E. 2d 571 (1974).

XXXIII. Massachusetts Immunity--Effect on Prior Convictions

¶123 When the criminal sanction is removed by the running of the statute of limitations,²¹² a plea of guilty,²¹³ or a conviction,²¹⁴ a witness may not refuse to testify regarding the relevant crime on the basis of the privilege against self-incrimination, nor is immunity required.

XXXIV. Massachusetts Immunity--Non-Testimonial Evidence

¶124 Massachusetts asserts that, once granted immunity, "a witness shall not be excused from testifying or from producing books, papers, or other evidence."²¹⁵

²¹²In re De Saulnier, 360 Mass. 761, 276 N.E.2d 278 (1971). See also Duffy v. Brody, 147 F. Supp. 897, aff'd., 243 F.2d 378 (1st Cir.), cert. denied, 354 U.S. 923 (1957).

²¹³United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973).

²¹⁴Id.

²¹⁵Mass. Gen. Laws Ann. ch. 233 §20C (1970) (grand jury). See also Mass. Gen. Laws Ann. ch. 233 §20F ("answer question or produce evidence in Superior Court") (1970).

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Addenda and Errata

(Double underlining indicates corrected material)

- ¶4, Note 3: Correction: United States v. Kurzer,
534 F.2d 511 (2d Cir. 1976).
- ¶4, Note 5: Correction: United States v. De Diego,
511 F.2d 818 (D.C. Cir. 1975).
- ¶5, Note 8: Correction: In re Minkoff, 349 F.Supp.
154...; United States v. Seiffert, 357
F.Supp. 801 (S.D. Tex. 1972), aff'd, 501
F.2d 974 (5th Cir. 1974).
- ¶8, Note 15: Correction: United States v. Doe, 361
F.Supp. 226 (E.D.Pa.), aff'd, 485 F.2d
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- ¶11, Note 21: Correction: United States v. Mandiyano,
425 U.S. 564 (1976) (Also at: ¶41, Note
76, ¶42, Note 78, ¶44, Note 83).
- ¶24, Note 44: Corrections: Fisher v. United States,
390 U.S. 953 (1976).
- ¶33, Note 62: Correction: United States v. Wilson,
488 F.2d 1231 (2d Cir. 1973), rev'd, 421
U.S. 309 (1975).
- ¶34, Note 64: Correction: United States v. Stephens,
492 F.2d 1367 (6th Cir. 1974); In re
Sadin, 509 F.2d 1252 (2d Cir. 1975).

¶38, Note 70: Correction: Thompson v. Garrison, 516
F.2d 986 (4th Cir.), cert. denied,
423 U.S. 933 (1975).

¶42, Note 78: Corrections: United States ex. rel. Sanney
v. Montayne, 500 F.2d 411 (2d Cir.), cert.
denied, 419 U.S. 1027 (1974); State v.
Hall, 421 F.2d 540, (2d Cir.), cert. denied.
397 U.S. 990 (1969); Garner v. United
States, 451 F.2d 167 (1976); (Also at:
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¶61, Note 112: Correction: People v. Franzese, ...228
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¶62, Note 114: Correction: People v. Tomaselle, 21 N.Y.2d
143, 234 N.E.2d 190 (1967).

¶63, Note 117: Correction: People v. Gold, 7 App. Div.2d
739, 181 N.Y.S.2d 196 (2d Dept. 1959).

¶86, Note 155: N.J. Stat. Ann. §2A: 93-3 (West 1969) (in
reference to the bribery of legislators, §2A:
93-2); N.J. Stat. Ann. §2A:93-9 (West 1969)
(in reference to the bribery or labor representa-
tives and foremen) §2A:93-3 states:

Any party to a violation of section
2A:93-2 of this title who gives evidence
thereof against the other party or
parties in a legal proceeding in which
the evidence is relevant and material,
shall not be liable to prosecution
or punishment for having made or
received a gift, offer or promise
in violation of that section.

§2A: 93-9 states:

On the trial of an indictment for violation of any of the provisions of sections 2A:93-7 or 2A:93-8 of this title, all witnesses sworn shall answer all proper and pertinent questions; and no witness shall be excused from answering on the ground that his answer might or would incriminate or tend to incriminate him, but his answers shall not be used or admitted in evidence in any proceeding against him, except in a prosecution for perjury in respect to his answers.

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LEGISLATIVE IMMUNITY AND PUBLIC CORRUPTION

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SUMMARY

¶1 Article I, section 6 of the United States Constitution provides that Senators and Representatives shall not be questioned in any other place for any speech or debate in either House. Rooted in English parliamentary history, the speech or debate privilege was adopted with little debate by the Constitutional Convention, but in context Article I section 6 substantially reduced contemporary parliamentary privileges. The constitutions of forty states contain substantially the same speech or debate language, while four others grant the same privilege in slightly different language.

¶2 The rationale for this privilege is the preservation of legislative independence and the separation of powers through protection of the legislature from harassment by the executive or the judiciary. To achieve this purpose, the Supreme Court has construed the Clause as protecting not only literal speech and debate, but "legislative acts" (or acts within a privileged legislative sphere) in general, including voting, committee work, and other acts "generally done in Congress in relation to the business before it." The scope of the "legislative act" category has yet to be fully articulated, since the Court has decided relatively few cases involving legislative immunity. The Clause applies in civil as well as criminal cases, and it protects both legislators and their aides insofar as they are performing legislative acts. But

the privilege belongs to the legislator; it may be invoked only on the legislator's behalf, and he may waive it. Legislative privilege can be invoked as a defense on the merits. It can be used to spare the legislator appearing to defend his legislative acts in court. The Clause does not bar judicial review, but it does limit its scope.

¶3 State legislators facing federal criminal charges are privileged, but the basis and scope of the privilege are unclear. The Supreme Court has refused to state whether there is any constitutional basis for the privilege, the circuits are divided. The Seventh Circuit recently held that the Federal Rules of Evidence require a federal common law privilege, which that court defined as official immunity, removing the legislative sphere entirely from criminal cases. State constitutions control the prosecution of state legislators in state courts, and most decisions apply the federal legislative sphere test despite constitutional provisions which define a legislator's liability for acts within the sphere.

¶4 From the point of view of a prosecutor seeking to enforce the laws against public corruption, the Speech or Debate Clause can cause difficulties at any step in the enforcement process. The prosecutor must take precautions to avoid drawing legislative acts and motivations into question when conducting grand jury investigation, drafting indictments, and introducing evidence at trial. For example, in a case involving a bribe taken by a legislator in return

for a speech benefiting the briber, the prosecutor must focus on the corrupt promise without drawing into question the speech or the motivation for making it. Such a procedure may present a major hurdle in the prosecutor's case, especially in view of the fact that "legislative act" has not been fully defined. But to proceed otherwise is to risk reversible error.

I. INTRODUCTION

¶5 Article I, section 6 of the Constitution provides that Senators and Representatives shall not be questioned in any other place for any speech or debate in either House.¹ The

¹U.S. Const. art. I, §6:

The Senators and Representatives shall receive a Compensation for their Service, to be ascertained by Law and paid out of the Treasury of the United States. They shall in all cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

For Law Review treatment of the speech or debate community, see generally Castleman-Zia, "Constitutional Law--Legislative Investigation--The Speech or Debate Clause: Congressional Subpoenas Issued to Third Parties--No Right to Question Their Constitutionality on First Amendment Grounds," 41 Mo. L. Rev. 108 (1976); Cella, "The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality," 8 Suffolk L. Rev. 1019 (1974); Suarez, "Congressional Immunity: A Criticism of Existing Distinctions and a Proposal For a Definitional Approach," 20 Vill. L. Rev. 97 (1974); Note, "Unenforced Congressional Subpoenas: Judicial Actions and Congressional Immunity," 59 Iowa L. Rev. 581 (1974); Cleveland, "Legislative Immunity and the Role of the Representative," 14 N.H.B.J.

legislative immunity provided by this clause has been both praised and condemned. On the one hand, it preserves legislative independence and the separation of powers by shielding the legislature from harassment by the executive or the judiciary; on the other hand, it may be a weapon by which corrupt or malicious legislators seek to escape the legal consequences of their acts.

1 (continued)

139 (1973); Ervin, "The Gravel and Brewster Cases: An Assault on Congress and Independence," 59 Va. L. Rev. 175 (1973); Levine, "Constitutional Law--Separation of Powers--Legislative Investigations--The Speech or Debate Clause Does Not Give Congressmen Absolute Immunity from Suits Arising Out of Their Official Activities," 42 U. Cin. L. Rev. 780 (1973); Lies, "Constitutional Law--Speech or Debate Clause," 22 De Paul L. Rev. 713 (1973); Velvel, "The Supreme Court Trampels Gravel," 61 Ky. L. Rev. 525 (1973); Comment, "Brewster, Gravel and Legislative Immunity," 73 Colum. L. Rev. 125 (1973); Note, "Immunity Under Speech or Debate Clause for Republication and from Questioning about Sources," 71 Mich. L. Rev. 1251 (1973); Note, "Constitutional Law--Legislative Freedom of Speech--Constitutional Privilege Available to Congressman Charged with Bribery," 50 Iowa L. Rev. 893 (1965). Note, "The Bribed Congressman's Immunity from Prosecution," 75 Yale L. J. 335 (1965); Note, "The Supreme Court, 1971 Term," 86 Harv. L. Rev. 189 (1972); Note, "Speech or Debate Clause--Alleged Criminal Conduct of Congressman Not within the Scope of Legislative Immunity," 26 Vand. L. Rev. 327 (1973); Note, "Blacklisting Through the Official Publication of Congressional Reports," 81 Yale L. J. 188 (1971); Cella, "The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts," 2 Suffolk L. Rev. 1 (1968); Note, "The Scope of Immunity for Legislators and Their Employees," 77 Yale L. J. 335 (1965); Comment, "Absolute Privileges as Applied to Investigators for Congressional Committees," 63 Colum. L. Rev. 326 (1963); Oppenheim, "Congressional Free Speech," 8 Loyola L. Rev. 1 (1956); Yankwich, "The Immunity of Congressional Speech--Its Origin, Meaning and Scope," 99 U. Pa. L. Rev. 960 (1951); Note, "'They Shall Not be Questioned...': Congressional Privilege to Inflict Verbal Inquiry," 3 Stan. L. Rev. 486 (1951); Field, "The Constitutional Privileges of Legislators: Exemption from Arrest and Action for Defamation," 9 Minn. L. Rev. 442 (1925); Veeder, "Absolute Immunity in Defamation: Legislative and Executive Proceedings," 10 Colum. L. Rev. 131 (1910).

¶6 The purpose of these materials is to examine the Speech or Debate Clause to determine its effects of the prosecution of public corruption. The historical development of legislative immunity and the rationale for the doctrine will be discussed. The scope and limits of the Clause will be examined in light of past and recent cases. In addition, state provisions for legislative immunity will be briefly considered. Finally, the operation of the doctrine as a factor in criminal prosecution will be analyzed with particular reference to recent cases of public corruption.

II. HISTORICAL DEVELOPMENT OF THE DOCTRINE

A. The Evolution of the Privilege in England

¶7 The doctrine of legislative privilege has its historical roots in the struggle between Parliament and the Crown to establish their respective powers in England.² As first

²See generally, C. Wittke, The History of English Parliamentary Privilege (1970); T. Taswell-Langmead, English Constitutional History from the Teutonic Conquest to the Present Time (11th ed. 1960); M. Clarke, Parliamentary Privilege in the American Colonies (1943).

The history of the speech or debate privilege is complicated. The privilege was stated clearly, and called an ancient right, long before it was generally honored. Some of the legal material dealing with it are legislative acts and cases, with Parliament sitting as a court and as a legislature. The historical record is clouded by political controversies between 1640 and the mid-1700's, in which the several sides tried to use history as legally significant precedent in essentially political, rhetorical debates.

conceived, the privilege afforded little protection to Members of Parliament against the Crown's frequent attacks.

2 (continued)

Thomas Haxey's case, 3 Rot. Parl. 341, 388-9 (1397) (convicted of treason by Parliament); Id. 434, 456 (1399) (third annulment of the conviction), is often cited as the first statement of the speech or debate privilege; but it may be a good illustration of the politics underlying the privilege.

The privilege of not answering for any speech or debate is prayed of the king in the Speaker's Petition in 1377 and in 1406, and is granted in broadly regal language, 3 Rot. Parl. 5, 574. Although by the 1700's speakers could omit the petition, for Parliament was secure, in the early petitions the asking and granting was a ritual without any reliable expectation that the privilege would restrain the king. In the cases that follow the legal issue is whether various acts come under the privilege, but the practical issue is whether Parliament has the power to do its will.

Haxey was a cleric, a parliamentary aide who drafted a bill for the Commons. The bill would have cut Richard II's household allowance substantially, and it contained "whereas" language reflecting upon the king's favorites, who went to Parliament and had Haxey judged a traitor for drafting the bill. Thus, Haxey answered to Parliament, not to some other body.

There followed three annulments. Haxey was spared death even for treason because he was a priest. His estate was forfeit and his blood attainted. The third, ringing annulment removed these disabilities. Richard II made the first annulment by decree, but lost his throne soon thereafter in a dynastic struggle. The second annulment was asked of the king in Parliament, and granted by the new king, Henry IV. The final annulment started in Commons; in strong language it affirmed the privilege and even denied the efficacy of the first action condemning Haxey. The treason conviction was "encountre droit et la course quel este devant en Parliament," and the restoration, "si bien en accomplissement de Droit, come pur salvation des Liberteés de ditz Communes." Id. at 434 and 456.

The king noted his earlier annulment, logically sidestepping the issue of whether Parliament properly convicted Haxey, and gave the Parliament permission to do as it thought proper to reimburse Haxey. Id. at 457; Wittke, supra, at 23 et. seq.

It was not until 1689, with the promulgation of the English Bill of Rights, that the ghost of monarchical interference was

2 (continued)

Rather than a tame judge invading Parliament's jurisdiction, Haxey's case involved a tame Parliament used by the king's favorites. Fear that the legislature might be taken from within is the root of privilege, so Haxey is an example of the power struggle behind the privilege and a nominal, nearly moot acquiescence by the king.

The case of Richard Strode, 4 Henry VIII, ch. 8 (1512), involved a burgess, or unknighthed member of Commons, who had drafted a bill to curb abuses in the Cornish tin industry. He may have had some personal stake in the matter, but his trial in a local Stannary Court was squarely based on the crime of drafting any such bill. The Commons passed Strode's Act, which declared any past or future proceeding against Strode or his associates for "any Bill, speaking or reasoning of any Thing concerning Parliament," to be void. Id. Those using the act as precedent for a general privilege at law passed another act in 1677 declaring Strode's Act to be general law. 1 Hatsell, Proceedings in the Commons 86 (1796). Strode was probably the victim of one or more local gentry with tin interests and commissions as Stannary judges.

Under Elizabeth, the Commons tried to influence royal marriage, succession, and ecclesiastical questions. This provoked a privilege question, because the means the queen chose to effect her theory of royal prerogative in such areas involved intimidating opposition leaders in Parliament. Peter Wentworth was put in the Tower for speeches and questions in Commons, first about the Book of Common Prayer, but later about his privilege to speak on that topic. For a detailed treatment with quotations from Wentworth's speeches, see Wittke, supra, at 27-8.

These confrontations were not confined to the Tudor monarchy. They continued during the reign of the Stuart Kings. In 1621, James I, outraged by the House of Commons discussion of the Spanish marriage and the affairs of the Palatinate, dissolved the Parliament and sent several members of the House to the Tower as dangerous, libelous and seditious. A royally-dominated court found them guilty. In 1631, at their first opportunity, the House adopted a resolution declaring the proceedings against Eliot, Holles, and Valentine to be an unwarranted invasion of their ancient rights, privileges, and liberties. In 1667, following the Restoration, the House sought to remove all doubt concerning the existence of the parliamentary privilege by declaring the Strode's Act to be general law, not limited to a specific case.

finally laid to rest.³

¶8 But although the existence of the privilege was not to be questioned, its proper scope and application were. The two seminal cases were Ex parte Wason⁴ and Stockdale v. Hansard.⁵ In Wason, the English Court held that a conspiracy by a number of people, including Members of the House of Lords, to make false statements in the House was not an actionable offense. The courts were without power to question the motives of the Members of Parliament. In Stockdale, Lord Senman gave the classic description of the scope of the parliamentary privilege:

[T]he privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by the princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher.⁶

³Wittke, supra note 2 at 30.

⁴4 Q.B. 573 (1869).

⁵112 Eng. Rep. 1112 (K.B. 1839).

⁶112 Eng. Rep. 1112, 1156 (K.B. 1839).

B. The Evolution of the Privilege in the United States

1. Constitutional Convention

¶19 The men who drafted the speech or debate clause at the Constitutional Convention were familiar with the history of the parliamentary privilege.⁷ The Clause is a product of a lineage of free speech and debate guarantees from the English Bill of Rights to the first state constitutions and Article V of the Articles of Confederation.⁸ Nevertheless, the Speech or Debate Clause is a substantial departure from the contemporary English parliamentary privileges. The speech or debate tradition survives almost untouched, but the corruption of the parliamentary privileges in England, which had become part of the system, was itself reformed.⁹ Presum-

⁷ See United States v. Johnson, 383 U.S. 169, 177-79 (1969).

⁸ See Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951). See also M. Clarke, Parliamentary Privilege in the American Colonies 69-70, 93-131 (1943).

⁹ For example, the Whigs had developed the lex parliamentaria into a substantial, original jurisdiction, which embraced offenses against members or their servants and gave broad immunity to members, their servants, or those who bought "protections" from members. For several shillings one could buy a paper that ousted sheriffs and ordinary courts from any jurisdiction whatever. Landlords could neither evict nor collect rent from such a protected person without Parliament trying the case. Members could try anyone who challenged them to a duel by attainder, without appeal, or could try a sheriff who arrested an M.P.'s coachman for brawling. See Whittke, supra note 2 at 37 passim.

In this context, the narrow privilege against arrest that excludes serious offenses becomes significant. William Pinckney apparently advocated a lex Congressional, citing Coke, which could have expanded with a corrupt legislature to match the English abuses, while Madison wanted a narrowly delineated set of privileges, see J. Butzner, Constitutional

ably because the principle of speech and debate was so firmly rooted, there was little discussion of it at the Constitutional Convention¹⁰ and virtually none during the ratification debates,¹¹ James Wilson, a member of the Convention's

9 (continued)

Chaff 47 (1941). The present form narrows the privilege against arrest and grants only the freedom of speech or debate; these are much less than Pinkney asked, Coke or Blackstone described, or the Whigs enjoyed in England.

The most radical reform of parliamentary abuse adopted in the Constitution is the ban on Congressmen holding office under the federal executive found in Article I, section 6. Samuel Johnson's Dictionary (abr. 1963) 288 defined "pensioner" and "pension":

pension. An allowance made to any one without an equivalent. In England it is generally understood to mean pay given to a state hireling for treason to his country.

pensioner.(2) A slave of state hired by a stipend to obey his master.

The practice was to give a member a sinecure office or a pension; the king's estates would support enough such bribes to ensure a cohesive group of placemen, a block of votes in a House otherwise without party discipline. They could decide any closely contested vote, especially if they could hold together while the rest of the House stayed as individual gentlemen voting their consciences. If such placemen could inform on their opponents and try them for speeches, or arrest them for trespass in local courts, they could pick off leaders like Wentworth and intimidate the bulk.

Article I, Section 6 is clearly a narrow, integrated attempt to prevent abuses by the executive that also limits the power of Congressmen to take executive bribes and the Whig Parliament's unbridled power. In context, the Convention pruned drastically the power Parliament had won over the centuries, keeping only a carefully balanced fraction of Parliamentary privilege.

¹⁰ See 5 Elliot's Debates on the Federal Constitution 406 (2 ed. 1937). See also United States v. Johnson, 383 U.S. 169, 177 (1966).

¹¹ See 2 Elliot's Debates 52-54 (Massachusetts), 325-329 (New York) (2d ed. 1937); 3 Elliot's Debates 368-75 (Virginia) (2d. ed. 1937).

Committee on Style, expressed the prevailing view that:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty will occasion offense.¹²

Despite this attitude, the freedom of Congress to criticize the executive branch was challenged during the administration of John Adams, resulting in the indictment of one member of Congress¹³ and the imprisonment of another.¹⁴ As a result of public protest,¹⁵ the right to criticize the Executive was firmly established and has remained unchallenged since the Adams administration.

2. Judicial interpretation--the early cases

¶10 Prior to 1972, the Speech or Debate Clause had received little authoritative judicial interpretation. The classic

¹²1 Works of James Wilson 421 (McCloskey ed. 1967).

¹³In 1797 Congressman Samuel Cabell was indicted by a federal grand jury for criticizing the President's foreign policy in an undeclared war with France. See J. Smith, Freedom Fetters: The Alien and Sedition Laws and American Civil Liberty 95 (1956). Apparently public outcry, led by Thomas Jefferson, was so great that Cabell never stood trial.

¹⁴In 1798, Congressman Matthew Lyon was fined \$1000 and sentenced to four months in prison for violation of the Sedition Act. See Smith, supra note 13, at 220-36: Lyon's Case, No. 8646, 15 Fed. Cas. 1183 (Vt. Cir. 1798).

¹⁵8 The Works of Thomas Jefferson 326 (1904).

interpretation was Coffin v. Coffin, decided in 1808.¹⁶ There, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts offered the first American definition of the scope of the privilege:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it

¹⁶ 4 Mass. 1 (Suffolk County 1808). Micajah Coffin was sued by his brother William Coffin for slander. William had been the source of information for a bill authorizing another notary public for Nantucket. When Micajah asked the bill's sponsor where the information came from, arguably because he thought the source an interested candidate for the office, he was told it was his brother. Micajah responded that the source was not credible, because his brother was guilty of bank robbery. William had been acquitted of that charge.

The broad legislative function test is often cited, as is the language about liberal construction, but the court gave Micajah no privilege, despite the fact that the slander was done on the floor during discussion of the substance of a bill, and that the one slandered was the source of the information behind the bill.

The defense presented a resolution by the house holding Micajah privileged, and broadly claiming jurisdiction. The court held that English privilege basically expanded popular power at the king's expense, but that a written constitution that defined the powers of the legislature also limited its power to define its own privilege, id. at 34. As applied in Coffin, the official function test gives the court the power to look into the House, to contradict the House on its own definition and judgments of privilege and perhaps to put the burden of proving official function on the legislator. See also, A. Cella, "The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Prosecutions," 2 Suffolk L. Rev. 1, 18-30 (1968).

may be answered. I will not confine it to delivering an opinion, uttering a speech or haranguing in debate; but will extend it to the giving of a vote, to the making of of a written report, and to every other act resulting from the nature, and in the execution, of the office. And I would define the article, as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.¹⁷

¶11 The Supreme Court first interpreted the Speech or Debate Clause in Kilbourn v. Thompson,¹⁸ decided in 1881.¹⁹ After approving the liberal-constructionist dictum in Coffin, the Court stated that the Clause should be applied

to those things generally done in a session of the House by one of its members in relation to the business before it. It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of

¹⁷4 Mass. at 31.

¹⁸103 U.S. 168 (1881). The court also dealt with Congressional power to punish for contempt. See generally Cella, "The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality" 8 Suffolk L. Rev. 1019, 1050-1052 (1974).

¹⁹Hallett Kilbourn was a business associate of a real estate partnership, a firm which went bankrupt. The government, a creditor of the firm, sought to investigate. He was subpoenaed to appear before a committee of the House of Representatives. He appeared but did not answer all their questions. He was subsequently cited for contempt by a vote of the entire House. He was taken into custody by the Sergeant-at-Arms and imprisoned. Following his release, he brought suit against the Speaker of the House, the committee members and the Sergeant-at-Arms for false imprisonment.

the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.²⁰

Thus, after defining the scope of the privilege, the Court invoked the protection of the Clause for defendant members of Congress on the grounds that the acts complained of were an essential part of the legislative process. But it refused to extend the protection to the Sergeant-at-Arms.²¹

¶12 The Court was not faced again with interpretation of the clause until 1951 when it decided the case of Tenney v. Brandhove.²² Again the Court expressed adherence to a broad liberal-constructionist interpretation. Mr. Justice Frankfurter, speaking for the Court, wrote:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgement against them based upon a jury's speculation as to motives. The holding of the Court in Fletcher v. Peck that it was not consonant with our scheme has remained unquestioned.²³

²⁰103 U.S. 168, 204-205 (1881).

²¹See Cella, supra note 18 at 1053-1067.

²²341 U.S. 367 (1951). At issue was whether the legislative protection afforded a member of the California legislature was a defense to a suit brought under the Civil Rights statutes. Equating the state privilege with the federal, the Court held that a state legislative committee has an absolute privilege to investigate even though the investigations might be unfair or damaging to individuals.

²³367 U.S. at 377, citing 10 U.S. 48, 72-73, 6 Cranch 87, 130 (1810).

¶13 In 1966, the Supreme Court interpreted the scope of the privilege in the context of a criminal case. In United States v. Johnson,²⁴ the Court was asked to review the conviction of a former Representative on seven counts of violating the federal conflict-of-interest statute²⁵ and on one count of conspiring to defraud the United States.²⁶

¶14 This last count alleged that Johnson was paid a bribe to obtain dismissal of a pending mail-fraud indictment against officials of savings and loan associations. At trial, the government questioned Johnson at length about a speech he had given on the House floor. The questioning dealt with the authorship of the speech, the factual basis of parts of the speech, and the speaker's motives. The Court of Appeals found that this questioning violated the Speech or Debate Clause, and set aside the conspiracy-to-defraud conviction. In a limited holding, the Supreme Court agreed:

²⁴383 U.S. 169 (1966). See also Burton v. United States, 202 U.S. 344 (1906), where the Court upheld the conviction of a Senator who had been bribed in order to get a mail order indictment quashed, reasoning that the act was unprotected non-legislative conduct. A. Williamson v. United States, 207 U.S. 425 (1908), where the Court rejected the claims of a Congressman convicted of perjury that any sentence of imprisonment would deprive him of his constitutional right to be privileged from arrest.

²⁵18 U.S.C. §281 (1964).

²⁶18 U.S.C. §371 (1970).

We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.²⁷
(emphasis added)

The conspiracy-to-defraud count was remanded for retrial, so long as legislative acts (the speech on the floor) or motives were not questioned. The Court also indicated that not all acts of a legislator are entitled to the protection of the privilege:

No argument is made, nor do we think it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.²⁸

¶15 The decision also indicates that a general criminal statute that does not call into question the legislative acts or motives of a legislator is constitutional as applied to that legislator if at trial no evidence is admitted that calls the acts or motives into question. In addition, the Court seems to imply that Congress or a state legislature, might pass a "legislator misconduct" statute that specifically defines a legislator's liability within the legislative sphere

²⁷383 U.S. 169, 184-85.

²⁸Id.

that would avoid, override, or waive the individual privilege.²⁹

¶16 Consequently, a prosecutor attempting to deal with graft or bribery under Johnson can avoid the narrow holding by an exception. He could 1) try to prove that the acts or speech charged were not "generally done in a session of the House by one of its members in relation to the business

29

Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members. Johnson, supra note 24, 383 U.S. at 184.

The court footnoted this language with the following: Note, "The Bribed Congressman's Immunity from Prosecution," 75 Yale L.J. 335, 347-8 (1965). The Note discussed the Fourth Circuit proceedings, and at the indicated pages proposes a tight bribery definition, requiring transfer of consideration, delivery of the promised performance, and an agreement binding the bribee to perform. By eliminating latitude in shaping the indictment, and focusing on the whole, completed illicit transaction, it is argued that Congress could regulate its corrupt members through the courts.

Congress's power to narrow or eliminate an individual member's privilege in criminal proceedings without that member's consent is uncertain. Besides the dictum in Johnson citing the article summarized above, in Tenney v. Brandhove, 341 U.S. 367, 376 (1950), the Court considered whether the Civil Rights Act of 1871 was intended to override the immunity. The clear intent of Article I, section 6 is to preserve the legislature from corruption by intimidation under speech or debate, or from bribery under the offices clause; a narrow bribery or graft statute might be necessary and proper to enforce the second constitutional goal of the whole section, without opening the way for corruption by intimidation.

before it;"³⁰ 2) draft an indictment that does not call into question legislative acts or motives; or 3) argue that the legislative body which passed the graft or bribery statute intended to narrowly and intentionally override or waive the privilege.³¹

¶17 The Court, in 1967, re-emphasized its Kilbourn holding in Dombrowski v. Eastland.³² If the alleged violation resulted from congressional action such as giving orders or resolutions, legislators could not be hindered. If the violation goes beyond the protected legislative sphere, a court could review the legitimacy of the act. But it could still only impose liability upon the congressman's agents, not upon the congressman himself. This interpretation was also the basis of the Court's decision in Powell v. McCormack.³³

¶18 Adam Clayton Powell, although elected to the House of Representatives, was excluded from his seat by a majority of the House because of alleged misdeeds. The Supreme Court held that the Clause did not bar all judicial review of legislative acts:

³⁰The legislative function test, applied in Johnson quoting Kilbourne, 103 U.S. at 204, paraphrasing Coffin, 4 Mass. at 31.

³¹This third tactic has not been tested in court.

³²387 U.S. 82 (1967) (per curiam).

³³395 U.S. 486 (1969).

The purpose of the protection afforded the legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.³⁴

Accordingly, the Court dismissed the action against the members of Congress, but allowed it to be maintained against the House employees. As in Kilbourn, the Court did not reach the question of whether the plaintiffs "would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available."³⁵

3. Judicial interpretation--later cases

¶19 In 1972, the Court decided two important cases, United States v. Brewster³⁶ and Gravel v. United States.³⁷ Brewster, like Johnson, involved a criminal prosecution of a congressman accused of taking money in return for performing some legislative act on behalf of a private interest.³⁸ The District Court, on defendant's pre-trial motion, dismissed all five counts on the grounds that the Speech or Debate Clause, as construed in Johnson, shielded him "from any prosecution for alleged bribery to perform a legislative act."³⁹ On direct appeal,

³⁴Id. at 505.

³⁵Id. at 506 note 26.

³⁶408 U.S. 501 (1972).

³⁷408 U.S. 606 (1972).

³⁸408 U.S. at 503.

³⁹Id. at 504.

the Supreme Court reversed, holding that the indictment did not necessitate any inquiry into the defendant's legislative act of voting. The Court stated:

An examination of the indictment brought against appellee and the statutes upon which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case.... The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature, and in the execution, of the office." Nor is it a "thing said or done by him, as a representative, in the exercise of the functions of that office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."⁴⁰

¶20 The majority was able to distinguish the Johnson decision on the grounds of its narrow scope. In Johnson, the critical defect of the conviction was the prosecution's inquiry into the defendant's speech and his motivation for making it. The

⁴⁰Id. at 525, 526.

Brewster case, however, involved no similar inquiry. Indeed, Brewster was seen to represent the type of case which was expressly excluded from the Johnson holding. As previously stated, the Court in Johnson had emphasized that its holding did not affect a prosecution under a general criminal statute if no legislative acts of the defendant or his motives for performing them were called into question.⁴¹ The Court in Brewster concluded:

Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation of legislative acts.⁴²

¶21 In an effort to define the "legislative acts" protected by the Speech or Debate Clause, the Court in Brewster drew a distinction between "purely legislative" activities and "political" activities such as performing "errands" for constituents, making appointments with government agencies, assisting in securing government contracts, preparing newsletters to constituents, news releases, and speeches delivered outside Congress. The Court concluded that the Clause does not protect all conduct relating to the legislative process, but only to those acts which are "clearly a part of the legislative process--the due functioning of the process."⁴³

⁴¹383 U.S. 169, 185 (1966).

⁴²408 U.S. 501, 512 (1972).

⁴³Id. at 516.

¶22 In Gravel v. United States,⁴⁴ the Supreme Court had occasion to define further the scope of legislative immunity. At a midnight meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, Senator Mike Gravel, a subcommittee chairman, read extensively from a copy of the top secret Pentagon Papers. He then placed 47 volumes in the public record. His aide, Dr. Leonard Rodberg, assisted him in these actions. Later, Gravel and Rodberg made arrangements for private republication. A federal grand jury which was convened to investigate possible criminal conduct arising from the release and publication of the Pentagon Papers subpoenaed as witnesses Rodberg and Mr. Howard Webber, Director of M.I.T. Press. Gravel intervened and filed motions to quash the subpoenas on the ground that compelling these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause.

¶23 On review, the Supreme Court held that the Clause applies not only to a member of Congress, but also to his aide insofar as the aide's conduct would be a protected legislative act if performed by the member himself. The privilege belongs to the legislator, and it is invocable only by the legislator or by the aide on the legislator's behalf. Accordingly, an aide's claim of legislative privilege can be repudiated and

⁴⁴408 U.S. 606 (1972).

waived by the legislator.⁴⁵

¶24 More specifically, the majority decided that Senator Gravel and his aide would not be held liable for acts occurring at the subcommittee meeting, but since the private republication had no connection to the legislative process, the Senator and his aide could be questioned before the grand jury on other matters which were relevant to an investigation of possible third-party crime.⁴⁶

¶25 In reaching its decision, the majority sought to clarify the distinction between legislative and non-legislative acts. The Court stated: "That Senators generally perform certain acts in their official capacity as Senators does not necessarily

⁴⁵Id. at 621, 622, note 13. The Court quoted an amicus brief for the Senate to explain the aide's privilege:

that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause--to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 U.S. 169, 181 (1966)--will inevitably be diminished and frustrated. 408 U.S. at 616-17.

⁴⁶Id. at 626, 627.

The First Circuit had closed the grand jury inquiry into broad areas; the Court substantially re-opened these areas, and it appears to have given the trial judge supervising the grand jury substantial authority to allow questioning of aides, or even legislators:

make all such acts legislative in nature."⁴⁷ The Court then defined "legislative act":

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.⁴⁸

The Court concluded that neither the private republication nor the acquisition of the papers by the aide met this test. Moreover, the Court said:

Here private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House; nor does questioning as to private republication threaten the integrity or independence of the House by impermissibly exposing its deliberations to executive influence.⁴⁹

46 (continued)

We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third-party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch. Id. at 629, note 18.

The Court narrowed the scope of what the privilege will shield and allowed for grand jury questioning of privileged people on third-party crime, limited only by the trial judge's finding of harassment or a fishing expedition into the Member's affairs.

⁴⁷Id. at 625.

⁴⁸Id.

⁴⁹Id. at 625.

¶26 The Court also rejected the claim of common law privilege. Emphasizing that there never existed such an immunity with respect to criminal proceedings, the Court concluded that:

The grand jury, therefore, if relevant to its investigation into possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, so long as the questions do not implicate the legislative action of the Senator.⁵⁰

Finally, the majority held that:

Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than other witnesses, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter inquiry in this case, as long as no legislative act is implicated by the questions.⁵¹

¶27 In Eastland v. United States Servicemen's Fund,⁵² decided in 1975, the Senate Subcommittee on Internal Security, in an effort to study the extent and effect of subversive activities in the United States, had subpoenaed the bank records of the United States Servicemen's Fund. The Fund sued to enjoin the implementation of the subpoena on the grounds that it infringed upon freedom of the press and association guaranteed by the First Amendment.

⁵⁰Id. at 628.

⁵¹Id. at 628. See also Doe v. McMillan, 412 U.S. 306 (1973) (civil action for distribution or report outside of Congress sustained).

⁵²421 U.S. 491 (1975).

¶28 The Court found that the issuance of the subpoena fell "within the legitimate legislative sphere,"⁵³ satisfying the Gravel standard of being "an integral part of the deliberative and communicative processes [of Congress]."⁵⁴ Thus, the absolute immunity of the Speech or Debate Clause applied to all of the defendants--the subcommittee chairman, the members, and the chief counsel--and the mere allegation of infringement of First Amendment rights did not warrant judicial interference. The Court's reasoning was summarized in a lengthy footnote:

In some cases we have balanced First Amendment rights against public interests . . . but those cases did not involve attempts by private parties to impede congressional action where the Speech or Debate Clause was raised by Congress by way of defense . . . The cases were criminal prosecutions where defendants sought to justify their refusals to answer congressional inquiries by asserting their First Amendment rights. Different problems were presented than here. Any interference with congressional action had already occurred when the cases reached us, and Congress was seeking the aid of the judiciary to enforce its will. Our task was to perform the judicial function in criminal prosecutions, and we properly scrutinized the predicates of the criminal prosecutions. . . . Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that act is found to be within the legitimate legislative sphere, balancing plays no part. The Speech or Debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to "grind to a halt."⁵⁵

⁵³Id. at 503, quoting Doe v. McMillan, 412 U.S. 306, 314 (1923).

⁵⁴Id. at 504, quoting Gravel v. United States, 408 U.S. 606, 625 (1972).

⁵⁵Id. at 509 n. 16.

¶29 The Court concluded that once it is determined that members of Congress are acting within the legitimate legislative sphere, the Clause is an absolute bar to judicial interference.

C. Waiver of Privilege

¶30 It is clearly established that the Congressman can waive his own privilege, both as to himself and his aides.⁵⁶ That conduct by the legislator may amount to an implied but irrevocable waiver is open to question, but may be tactically just as crucial. If the "shall not be questioned in any other place" language is taken literally, the privilege means that the legislator need not answer questions; he can stand silent before investigators or in court. But once he chooses to answer, he has, in fact, waived the privilege by doing freely that which he cannot be compelled to do. Waiver could bring into evidence material otherwise within the privileged legislative sphere, and might even authorize an indictment which specified legislative acts and motives.

¶31 Practically, a legislator suspected of simple criminal corruption cannot use the legislative privilege to shield anything which his Fifth Amendment privilege would not also cover (except matter which incriminated only an aide or another legislator and was also within the sphere); the same

⁵⁶See Gravel *supra* note 45, and United States v. Sweig, 441 F.2d 114 (2d Cir. 1971) (privilege of aide to Speaker McCormack waived by the Speaker).

practical problems that make the Fifth Amendment uninviting also attach to a plea of privilege. Instead of forthright innocence and outraged probity, the legislator claiming privilege begins to sound guilty, at least in the court of electoral opinion. It thus may be tempting to appear before the grand jury or answer the investigators, in hope of stopping the matter short of trial. Once at trial, such concerns evaporate in the face of prison terms; most would rather be discredited but not convicted, once it becomes impossible to preserve both reputation and freedom.

¶32 Defendant Markert, in United States v. Craig,⁵⁷ apparently tried to explain away his problems by talking to I.R.S. agents, postal inspectors, and a grand jury. At trial, he moved to suppress all such testimony as a violation of his legislative privilege. A panel of the Seventh Circuit held that Markert had effectively waived his privilege, which protected him only from having to answer questions or appear before a grand jury, not from the use of testimony he gave without pleading his privilege. The panel further held that no Miranda style warning was needed, because the privilege protects the system from one branch corrupting another, rather than protecting the fundamental fairness and accuracy of the individual legislator's trial.⁵⁸

⁵⁷528 F.2d 773, 781 (7th Cir.), cert. denied 425 U.S. 973 (1976), modified on other grounds upon rehearing en banc 537 F.2d 957 (1976), cert. denied sub nom. United States v. Markert, 45 U.S. Law Week 3416 (December 6, 1976).

⁵⁸528 F.2d at 781.

¶33 Craig was later modified upon a rehearing en banc,⁵⁹ but several aspects of the en banc holding make the panel opinion more forceful than mere dictum. The en banc opinion adopted the concurring panel opinion of Judge Tone,⁶⁰ which explicitly agreed that if Markert had a privilege, he had waived it by speaking, and could not now undo that waiver. Judge Tone would have held, and the en banc majority did hold, that a state legislator's privilege in federal criminal cases is narrower than the full speech or debate privilege.⁶¹ The en banc majority found it unnecessary to reach waiver, but two concurring judges found that a broader, differently-based privilege had been effectively waived.⁶² At least in the Seventh Circuit, the panel holding on waiver is probably still valid. The only other implied waiver case involves liability for plaintiff's counsel fees in a successful civil rights case, where the official did not plead his immunity to get himself dismissed from the civil rights action that incurred the fees.⁶³

¶34 In a waiver jurisdiction, one could question the target legislator, either informally or before the grand jury. If he stood silent, the resulting loss of reputation might remove the corrupt person from office, even if no indictment could

⁵⁹537 F.2d at 958.

⁶⁰528 F.2d at 781.

⁶¹528 F.2d at 783, 537 F.2d at 958.

⁶²537 F.2d at 958.

⁶³Cohen v. Maloney, No. 4736 (D. Del. March 21, 1977).

be drafted that did not invade the legislative sphere. If the legislator tried to use Markert's strategy, he would open himself to an indictment specifying otherwise privileged matters which he testified about; the indictment could specify those legislative acts and motives as elements of graft, bribery, or conspiracy counts, as well as perjury.

III. THE EFFECT OF THE PRIVILEGE ON THE PROSECUTION OF A CONGRESSMAN

¶35 Under Article I, section 6 speech or debate privilege, the prosecution of a corrupt legislator is complicated by special exclusion rules and by special standards that can quash an indictment or require remand. To illustrate the pitfalls, a recent case will be examined.

¶36 To frame an appropriate prosecutive strategy based upon the cases discussed, it is necessary first to separate legislative from non-legislative matters. A murder on the floor during a debate would not be privileged, but if the murderer was a member, and expressed his premeditation in debate, that evidence might be legislative. Under Brewster, the best approach would be to charge the act of killing, but specify some other basis for intent or malice that is not legislative. As the holding in Coffin indicates, the court might look within the chamber at speech concerning a bill and rule it not privileged; but prudence dictates a prosecution should stay away from the boundaries, or face remand and retrial on any counts that look privileged upon review.

¶37 To charge bribery, the prosecution need only specify agreement to receive a thing of value for delivery of services;

specifying actual delivery, for example, by vote on the floor or in committee, or by taking sides in debate would be fatal. If delivery involves influencing an executive agency, it would fall within the non-legislative errands for constituents or political chores categories. Abuse of the franking or postage free privilege for a newsletter⁶⁴ or opinion survey⁶⁵ is beyond the privilege, even where the court must examine the motive behind the mailing to determine abuse.

¶38 Conspiracy may specify agreement to deliver votes or speeches, but any charged or proven overt act must be non-legislative; taking money or talking to an executive department employee about dropping charges might suffice in many conspiracy-to-influence cases. Misconduct with or against staff members may also escape privilege; notably the legislator could not discriminate against female staffers⁶⁶ and claim privilege, so arguably he could not threaten to fire for exposing the scheme or testifying.

¶39 These general principles were applied in United States v. Dowdy.⁶⁷ The success as well as the pitfalls of the Brewster non-legislative indictment strategy are, therefore, aptly illustrated by this prosecution.

¶40 Congressman John Dowdy, representing the Second Congressional District of Texas, served as chairman of the Subcommittee

⁶⁴Schiaffo v. Helstocki, 492 F.2d 413 (3d Cir. 1973).

⁶⁵Hoelle v. Annunzio, 468 F.2d 522 (7th Cir. 1972).

⁶⁶Davis v. Passman, 544 F.2d 865 (5th Cir. 1977)

⁶⁷479 F.2d 213 (4th Cir. 1973)

on Investigations of the House Committee on the District of Columbia; he was also a member of the Judiciary Committee. During 1963 and 1964, his subcommittee was conducting extensive investigations on urban renewal in the District of Columbia. Nathan H. Cohen was an owner and President of Monarch Construction Corporation, a company engaged in the home improvement business in Maryland and the District of Columbia. Monarch was under investigation by various federal and District of Columbia agencies for sales and financing irregularities.

¶41 At Cohen's suggestion, Monarch Sales Manager Myrvin C. Clark approached Congressman Dowdy in 1965 with a plan whereby Cohen would testify before Dowdy's subcommittee in exchange for immunity from public prosecution. At a later meeting attended by Cohen, Dowdy, and for a time committee counsel Hayden Garber, Dowdy agreed to handle the matter for a "fee" of \$25,000, which Dowdy received from Clark shortly thereafter at the Atlanta airport. As part of the plan Cohen and Clark prepared a complaint asking for an investigation and hearing by the District of Columbia Committee, and sent copies to each committee member.

¶42 Dowdy later advised Clark that the immunity idea would not work. He then met with Cohen and offered to aid him by other means. Acting under Garber's advice, Dowdy subpoenaed documents concerning Monarch from the License and Inspection Division of the District of Columbia. Garber sought similar information at the Department of Justice. Dowdy then made available to Clark certain documents from the License Division

and from the Housing and Home Finance Agency (HHFA) for copying. He also had meetings, arranged by Garber, with an attorney for the Justice Department and with officials of the Federal Housing Administration, the parent agency of the HHFA. Dowdy told Clark that he had explained his personal interest in the Monarch matter to the Justice Department and he felt that the matter was taken care of.

¶43 Dowdy and Cohen had no further contact until 1967, when Cohen informed Dowdy that Monarch was under investigation for possible postal violations. Dowdy assured Cohen that he would not be indicted, since "the last thing the Government did before it dropped the case was to give it to the Post Office Department. ⁶⁸

¶44 In 1969, Cohen and Clark sought Dowdy's help concerning a federal investigation of home improvement frauds. Clark offered to pay Dowdy \$5,000 if no criminal prosecution resulted. Dowdy agreed, and referred Cohen to a Washington attorney to fix the case.

¶45 But then Cohen became involved in an unrelated federal investigation in Maryland. In exchange for immunity, he agreed to disclose his relationship with Congressman Dowdy. Cohen later had a conversation with Dowdy which he recorded without the latter's knowledge. Appearing voluntarily before a federal grand jury in Baltimore in 1970 and questioned about this conversation, Dowdy flatly denied making or being a party to a number of statements.

¶46 Dowdy was indicted and convicted on eight counts--

⁶⁸479 F.2d at 220.

conspiracy⁶⁹ to violate the conflict of interest statute,⁷⁰
conspiracy to violate the obstruction of justice statute,⁷¹
interstate travel⁷² to facilitate federal bribery,⁷³ and five
counts of perjury⁷⁴ before a federal grand jury. Dowdy
appealed.

¶47 In United States v. Dowdy,⁷⁵ the defendant contended
that substantial portions of the allegations of the indictment
and of the proof at trial involved his actions as subcommittee
chairman investigating whether a complaint submitted to each
of the subcommittee members warranted hearings and that
his actions and motivations were immune from judicial
scrutiny under the Speech or Debate Clause.

¶48 The issue before the Fourth Circuit Court of Appeals
was whether any of Dowdy's activities were protected "legis-
lative acts" as defined in Johnson, Brewster, and Gravel.
The Court first considered the indictment. Overt act 19 of
the first two counts of the indictment charged that the defend-
ant caused to be issued a subpoena to the District of Columbia

⁶⁹18 U.S.C. §371 (1970).

⁷⁰18 U.S.C. §203 (1970).

⁷¹18 U.S.C. §1505 (1970).

⁷²18 U.S.C. §1952 (1970).

⁷³18 U.S.C. §201 (1970).

⁷⁴18 U.S.C. §1621 (1970).

⁷⁵479 F.2d 213 (4th Cir. 1973)

Department of Licenses and Inspections commanding the production of certain documents before the defendant's subcommittee. The Court held that this charge violated the Speech or Debate Clause:

The only fair inference that can be drawn from the statement of overt act 19 is that defendant was alleged to have performed a legislative act, because, absent an allegation that procurement of a subpoena was fraudulently obtained, we can infer that the subpoena was issued for some purpose of the subcommittee.⁷⁶

The Court concluded:

However, it does not follow that counts one and two should be dismissed because of the inclusion of this improper matter. Rather, the offending overt acts could have been stricken and the counts would still be legally sufficient since 18 U.S.C.A. §371 requires, in addition to an agreement to commit any offense against the United States, only that "one or more of such person do any act to effect the object of the conspiracy . . . " (emphasis added).⁷⁷

Aside from overt act 19, the counts of the indictment necessitated no inquiries into legislative acts, said the Court, and were therefore valid under Johnson and Brewster.

¶49 The evidence offered at trial presented greater difficulties. The proof fell into three general categories: Dowdy's conversations and dealings with Cohen and Clark; Dowdy's grand jury testimony; and his conversations and dealings with the United States Attorney, the FHA, and the HHFA concerning Monarch. Citing Brewster, the Court found that the evidence falling

⁷⁶ Id. at 223.

⁷⁷ Id. at 224.

into the first category was not barred by the Clause; nor was Dowdy's grand jury testimony, since this voluntary testimony was not "an act generally done in Congress in relation to the business before it."⁷⁸

¶50 With regard to Dowdy's conversations and arrangements with government agencies, however, the Court held that evidence in this category was barred by the clause:

This evidence was an examination of the defendant's actions as a Congressman, who was chairman of a subcommittee investigating a complaint, in gathering information in preparation for a possible subcommittee investigatory hearing It was a complete disclosure of all that transpired including proof of documents that were obtained, and, hence, was a general inquiry into the legislative acts of a Congressman and his motives for performing them.⁷⁹

¶51 Rejecting the Government's assertion that the Clause afforded protection only if a pure legislative motive was present, the Court concluded:

Once it is determined, as here, that the legislative function (here, full investigation of the Monarch complaint to determine if formal subcommittee hearings should be held) was apparently being performed, the propriety and the motivation

⁷⁸Id. at 224, quoting United States v. Brewster, 408 U.S. 501, 512 (1972). It could also be argued that the privilege is intended to keep the legislator out of court entirely, so that once he appeared at the grand jury and answered the questions, he in fact waived the privilege. See Cohen v. Maloney, civil action 4736 (D. Del. March 21, 1977) for a discussion of counsel fee recovery under the Civil Rights laws, where legislative immunity might have been a bar to the defendant's joinder in the first, civil action that incurred the fees, but that immunity was not pleaded. The court held that Congress intended to impose plaintiff's costs on officials or their agencies and that the immunity was effectively waived as to a later fee action by not raising it in the earlier action.

⁷⁹Id. at 224, 225.

for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry.⁸⁰

The Court, therefore, invalidated the convictions under the first five counts of the indictment. A new trial was ordered for these counts.

¶52 The three remaining convictions, on perjury charges, were upheld because they relied solely on the taped conversations and Dowdy's conflicting grand jury testimony. The Court rejected the defendant's arguments that the recordings and transcriptions violated the Fourth Amendment and the constitutional principle of the separation of powers.⁸¹

¶53 Dowdy illustrates the levels a court may examine in determining the application of the privilege. The problem with overt act 19 was not fatal to the first two counts, but those counts do fall when the court finds that apparently this was a committee chairman investigating a complaint, to see if it should be followed up. This throws a legislative mantle over the conversations with agency personnel that would otherwise be non-legislative errands. The "apparently

⁸⁰Id. at 226. See also note 20, beginning Id. at 224. Under the third party misconduct exception to Gravel, the evidence could have come in against a joined conspirator or briber. If bribery was called "criminal" in the sense that murder is criminal, then the act of delivering the vote would also come in against Dowdy. But the Fourth Circuit held that to allow bribery to count as a crime for the exception, would make the exception swallow the rule. It noted that Gravel might have been called a thief of papers, but his immunity did not fall to the exception.

⁸¹479 F.2d at 229.

a legislative function" standard was used in Gravel,⁸² where a midnight meeting of less than a quorum of a public works subcommittee was held a regular function when it sat to publish the Pentagon Papers in the Congressional Record.

IV. PERJURY AND THE PRIVILEGE

¶54 Perjury charges might arguably invade privilege in two ways. Speech to a grand jury may be a legislative function, or the questions may address acts or motives within the legislative sphere. As Dowdy held, citing Gravel, legislators do not testify before grand juries as part of their legislative process of discussion and decision making, so the matter is not privileged because a legislator spoke of it before a grand jury. Dowdy held that perjury requires proof of non-legislative acts and motives: the speech is out of the legislative sphere, the knowledge involves truth or falsehood at the time spoken rather than knowledge at some earlier privileged time on the floor while acting, and materially relates to the investigation. Thus, the prosecutor could charge perjury where a legislator lied about legislative acts, but could not specify those acts in a bribery or graft count. If the Craig dictum on waiver is followed, simply by speaking rather than remaining silent, the legislative acts and motives are open to perjury charges if knowing, material lies and acts can be specified and proven as part of substantive

⁸²408 U.S. at 621.

corruption counts. The Gravel⁸³ holding follows the waiver position in so far as it equates the privilege as to admissibility at trial; if one is privileged to stand silent when questioned, he will waive that privilege when he voluntarily speaks. Perjury seems unprivileged by the non-legislative test, even where it involves otherwise privileged topics. Given the Gravel grand jury standards, this might make calling the target legislator an effective way around the privilege.

¶55 The Gravel⁸⁴ grand jury standard also allows inquiry into third-party crime: third parties may be asked about the legislative acts, and privileged persons may be required to answer questions close to the protected sphere. The standard that the judge supervising the grand jury must follow is designed to avoid harassment and to stop fishing expeditions when there is no proper inquiry into third party crime. The legislator and aide must incriminate a third party, and the third party must incriminate the privileged, even where the third party testifies about matters on which the legislator could himself stand silent. This allows the prosecutor to exploit the legislator's desire to protect his reputation by talking rather than standing silent, and it may reach criminal conduct otherwise shielded by the privilege. Gravel may even authorize admission of testimony about delivery of a vote or a speech in a trial where the legislator and a non-privileged bribe giver are defendants; the jury instruction might cure any

⁸³408 U.S. at 629, n. 18.

⁸⁴408 U.S. at 629, n. 18.

prejudice to the legislator, especially on a Brewster indictment, if delivery of the vote incriminates the bribe giver.⁸⁵ But no federal case has explored this particular aspect of the Gravel opinion as of this date.⁸⁶

V. STATE LEGISLATORS IN FEDERAL COURT

¶56 In most states, a state legislator in state court generally is privileged under the state constitution. But when the legislator is charged in federal court, the scope and basis of his privilege are unclear.

¶57 To date, the Supreme Court has refused to define the basis of a state legislator's federal privilege. In Tenney v. Brandhove,⁸⁷ state legislators allegedly used hearings to brand opponents as communists. The plaintiff claimed violation of his rights under 28 U.S.C. §1983 (1970). The Court held that Congress did not intend to limit the privilege when it passed the Civil Rights Act of 1871, and it specifically refused to decide whether Congress could have constitutionally limited or eliminated the privilege. In Wood v. Strickland,⁸⁸ the Court described the Tenney

⁸⁵ 408 U.S. at 629.

⁸⁶ As of 27 June 1977 no case cited in Shepard's or retrievable on Lexis followed this language.

⁸⁷ 341 U.S. 367, 376 (1950).

⁸⁸ 420 U.S. 308, 316 (1975).

holding as a statutory construction rather than constitutional interpretation. Most recently, in Imbler v. Pachtman, the Court ambiguously referred to common law "as well as" constitutional sources of state and federal privilege, thus perpetuating the uncertainty.⁸⁹

¶58 Theoretically, the privilege could be federal common law, a state constitutional privilege recognized under comity, or an Article I, section 6 privilege conferred upon state legislators by the Fourteenth Amendment due process clause. The federal common law theory would leave the privilege open to interpretation by statute or case law. The Fourteenth Amendment theory would require "bag and baggage" application of a legislative sphere theory.

¶59 The Fourteenth Amendment theory poses several problems. For example, if legislative privilege, intended as a check upon the Executive rather than a matter of fundamental fairness to the legislator, is made applicable to the states by the Fourteenth Amendment, a state judge elected under state law could successfully argue that he has the right to serve on good behavior under Article III.

¶60 Federal-state comity might require application of state constitutional guarantees in federal courts. To extend the Younger v. Harris⁹⁰ line of cases, states are vitally concerned with the independence of their legislatures from state governors

⁸⁹424 U.S. 409, 419 at footnote 15 (1976).

⁹⁰401 U.S. 37, 44, 91 (1970).

and from federal prosecutors. Giving a legislator less than his state law privilege clearly threatens the state legislature. Comity has not been held to provide a broader than federal privilege, but it has been mentioned as an argument for a federal privilege coextensive in scope with state privilege.⁹¹

¶61 Rule 501 of the Federal Rules of Evidence provides for federal common law privileges "as they may be interpreted by the courts of the United States in the light of reason and experience."⁹² Absent a constitutional problem or an act of Congress, federal common law privilege controls in federal criminal trials.⁹³ The Seventh Circuit has found this to be the basis of a state legislator's privilege in federal court,

⁹¹United States v. Craig, 528 F.2d 773, 779 (7th Cir.), cert. denied, 425 U.S. 973 (1976), modified on other grounds upon rehearing en banc 537 F.2d 957 (1976), cert. denied sub nom. United States v. Markert, 45 U.S. Law Week 3416 (December 6, 1976).

⁹²Rule 501, in pertinent part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

⁹³For a discussion of the legislative history of Rule 501 in the legislative privilege area, see 528 F.2d at 775-76.

and it has adopted a privilege in criminal matters that is substantially narrower than Brewster's legislative sphere privilege.⁹⁴

¶62 In United States v. Craig,⁹⁵ the Seventh Circuit reheard en banc the case of an Illinois legislator who was charged in federal court with extortion and mail fraud. The legislator, defendant Markert, moved for suppression of his grand jury testimony, and his interviews with I.R.S. agents, postal inspectors, and an assistant U.S. attorney. The testimony dealt with legislative acts and motives as defined in Johnson or Brewster, including votes, speeches, and committee argument. Markert had claimed neither legislative nor Fifth Amendment privilege when questioned, and the first Seventh Circuit opinion, by a panel, found that Markert had waived his federal common law privilege by testifying or answering the investigators when questioned.⁹⁷ The en banc opinion adopted the panel concurrence of Judge Tone,⁹⁸ agreeing in dicta that although all privilege had been waived,

⁹⁴ See 537 F.2d at 774, explicitly adopting 528 F.2d at 781 as the definition of the scope of a legislator's privilege in federal criminal proceedings. Brewster allows indictments which do not specify acts or motives within the legislative sphere, where Judge Tone simply denies both immunity and evidentiary exclusion in criminal matters.

⁹⁵ See note 91, supra, for complete citation.

⁹⁶ 18 U.S.C. §§1951 and 1341 (1970), respectively.

⁹⁷ 528 F.2d at 780. The court held a Miranda-type warning unnecessary because the privilege protected the purity of an institution but did not effect the fairness of the trial.

⁹⁸ 528 F.2d at 781.

the state legislator's official immunity does not extend to liability under federal criminal statutes, and he therefore has no commensurate official privilege against disclosure.⁹⁹

¶63 Judge Tone's opinion was based upon general Supreme Court discussion of official privilege and immunity, and referred to legislative privilege by analogy.¹⁰⁰ The panel concurrence notes the narrower privilege against injunctive relief given state legislators compared to that given Congressman.¹⁰¹ A legislator has immunity and privilege when there are reasonable grounds to believe, as well as an actual good faith belief, that the acts in question are a legitimate part of his official duties.¹⁰² Thus, a legislator charged with a crime would have to prove that the elements of the offense reasonably came

⁹⁹Id. at 783.

¹⁰⁰See citations in 528 F.2d at 782.

¹⁰¹Id. Compare Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) (Senator immune from injunction for abuse of subpoena to chill freedom of speech) with Bush v. New Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), aff'd sub nom. Louisiana State Legislature v. Denny, 367 U.S. 908 (1961) (legislature enjoined from appointing school board unsympathetic to integration plan); Bond v. Floyd, 385 U.S. 116 (1966) (Julian Bond ordered reseated in legislature despite refusal of that body, voting by its rules, to seat him) with Powell v. McCormick, 395 U.S. 486 (1969) (Speaker and Congressmen absolutely immune from action to force seating of expelled Congressman). Judge Tone notes that the privilege of the Georgia legislature was not even discussed in Bond. Contra, Eslinger v. South Carolina, 476 F.2d 225 (4th Cir. 1972) (female law student plaintiff demanding injunction requiring her hiring as legislative page as remedy to sex discrimination; action dismissed due to legislative immunity).

¹⁰²528 F.2d at 782.

within his official function, and that he actually believed in good faith that he was doing his job properly. He would be shielded from most civil or criminal liability except possibly attorney fees.¹⁰³ Once the defendant loses on the reasonable grounds and good faith test, evidence of votes, speeches, committee proceedings, and motives behind legislative activity become admissible.

¶64 A governor proposing legislation,¹⁰⁴ a county supervisor

¹⁰³Cohen v. Maloney, No. 4736 (D. Del. March 21, 1977) construed 42 U.S.C. §1973(e) (1970) as allowing recovery of a successful civil rights plaintiff's attorney fees from an official, legislator-defendant who did not claim privilege and remove himself from the first civil rights action. The court found Congressional intent to subject officials or their agencies to such liability.

¹⁰⁴United States v. Mandel, 415 F. Supp. 1025 (D. Md. 1976) dealt with Governor Mandel's claim that he had a legislative privilege covering his act and motives for proposing a bill to extend racing days at a track in which he had been given a financial interest. The court analysed the function of the immunity on the state level, and found that a Governor controls the prosecutorial power checked or balanced by the privilege, and hence needed none. *Id.* at 1030. The comity check on federal prosecutors chilling the independent function of state officials was not addressed. CEPA v. Nolan, ___ Pa. ___, 368 A.2d 675 (1977) (attack on public utility commissioner nominee under sunshine law alleged insufficient publicity in confirmation proceeding; Governor has legislative privilege barring the action); Saffioti v. Wilson, 392 F. Supp. 1335 (S.D.N.Y. 1975) gave a privilege to a Lieutenant governor against a plaintiff seeking review of his veto of a bill, which was allegedly capricious or arbitrary. The scope included the act of vetoing and its motive, but the grounds may have been legislative, official, or both privileges.

formulating legislation or ordinances,¹⁰⁵ or an official given legislative-type immunity by state statute,¹⁰⁶ are all performing legislative functions, but none are clearly entitled to the legislative privilege. For the official to be entitled to an absolute legislative privilege, he must prove that fact.¹⁰⁷ Dismissal on the pleadings, or quashing an indictment before trial, are, therefore, very rare.

§65 The cases developing the federal common law privilege have moved away from rigid, formal tests like "the legislative sphere" and toward a narrow definition of the class of situations that require the privilege to preserve the integrity of the system. A libel or sedition action would constitute such an attack on the independence and integrity of the legislature, as would a civil action attacking a subpoena or trying to enjoin a legislative act. Nevertheless, an executive who could trump up a false bribery or extortion charge to intimidate the legislature, could also trump up

¹⁰⁵Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976) (reversing district court dismissal of Section 1983 action against county supervisors, who must prove their legislative function was involved, and whose privilege may be rebutted; Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975) (only qualified privilege given county supervisor, hinging on legislative function being the issue); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

¹⁰⁶See Jacobs v. Underwood, 484 S.W.2d 855 (Ky. Ct. of App. 1972) State court construing Ky. Rev. Stat. 84.050 (1970), which extends legislative immunity to county officials in verbatim speech or debate language.

¹⁰⁷See Thomas, 545 F.2d at 1172.

a charge that would completely evade the privilege. Once bribery or extortion can be charged and proven, the evidentiary privilege in criminal trials will hardly reassure a faint-hearted legislator facing an assertive executive. To be sure, the state legislator's common law privilege falls outside Article I, section 6 case law, and the courts are free to more narrowly redefine the right. The exact contours, however, are as yet unknown.

VI. STATE LAW

¶66 Most states have a speech or debate clause in their constitutions, though only a handful of cases interpret them, mostly cases involving slander or civil rights, rather than corruption. State constitutions borrowed heavily from each other; several clauses, including the speech or debate clauses were adopted widely.¹⁰⁸

¶67 Some variations reflect the history of the privilege. The Massachusetts House of Representatives has authority to punish by imprisonment anyone, not a member, who does or threatens harm to its members in the town where the legislature is sitting and during the session, "for anything said or done in the house."¹⁰⁹ When Chief Judge Parsons spoke

¹⁰⁸ See L. Friedman, A History of American Law. 100-09, 302-09 (1973).

¹⁰⁹ Mass. Const. part II, ch. I, section III, art. 10.

for the Supreme Judicial Court of Massachusetts in Coffin v. Coffin,¹¹⁰ he faced a resolution passed by the House that held the defendant's words privileged; thus a holding in line with his liberal-construction dicta might have been seen as deferential to the legislature's jurisdiction. The heart of that opinion is the discussion of the effect of a written constitution upon privilege, and the conclusion that the courts will both construe the privilege and try the cases.

¶68 The constitutions of several states contain definitions of bribery. A Maryland delegate explained why:

He could not prove before a jury that bribery and corruption had of late prevailed in our legislature, but the charge had been made, not only by the people, but by the press, and with such proofs that he believed it.¹¹¹

It seems likely that the dignity and finality of a constitutional provision was sought as an earnest of good faith, especially where legislators sat to draft the document. Some definitions are broad enough to include extortion or graft,¹¹² while a very narrow populist variant defines only vote-trading or log-rolling as bribery.¹¹³

¹¹⁰4 Mass.1 (Suffolk County 1808); see note 16.

¹¹¹H. Perlman, Debates of the Maryland Constitutional Convention of 1867 285-86 (1923).

¹¹²Alas. Const. art. IV, section 79; Tex. Const. art. XVI, section 41 (extortion but not graft); W. Va. Const. art. VI, section 45.

¹¹³Colo. Const. art. V, sections 40 to 42; N.D. Const. art. II, section 42; Wy. Const. art. III, section 42.

¶69 The states are divided on the effect of such a provision. In Texas the court cited Brewster and let stand a conviction based within the legislative sphere,¹¹⁴ while in Maryland the court cited Gravel and held that the bribery provision in no way narrowed the privilege, which was held interchangeable with Article I section 6.¹¹⁵ That aspect of Johnson that would allow a narrow statute intended to remove the privilege in certain criminal actions seems to apply to detailed bribery provisions that define legislative acts as elements of a crime. The courts have sometimes held the bribery provision overruled by the privilege. Given the movement in Brewster, Craig, and Gravel to narrow the privilege to cover only checks-and-balances cases, or functional intimidation of legislators who are doing their jobs, it seems possible that a court in a state with a bribery provision might hold that it narrows the privilege under Johnson.

¶70 Several states broaden speech or debate to include reports or other written material,¹¹⁶ and Hawaii has broadened the legislator's function to include a duty to inform his constituents,¹¹⁷ going against Doe v. McMillan, and

¹¹⁴Mutscher v. State, 514 S.W.2d 905 (Tex. Sup. Ct. 1974).

¹¹⁵Blondes v. State 16 Md. App. 165, 294 A.2d 661 (1972).

¹¹⁶Ill. Const. art. IV, section 12; W. Va. Const. art. VI, section 17.

¹¹⁷Abercrombie v. McClung, 55 Haw. 595, 525 P.2d 593 (1974) ("duty to keep public informed").

extending the sphere of the privilege beyond the Gravel holding, though without explicitly recognizing the legislator's right to shield sources. Typical provisions explicitly cover committee work,¹¹⁸ "any exercise of their legislative duties,"¹¹⁹ or "any statement made or action taken in the exercise of his legislative function."¹²⁰

¶71 In New York the Appellate Division, Fourth Department extends the privilege to county or municipal legislatures by its construction of its constitution, which mentions only state legislators.¹²¹ Delaware does not extend the privilege in this way.¹²²

¶72 Several New England states include broad "whereas" language, such as, in Vermont, "The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."¹²³ While such clauses have not always been held pari materia or interchangeable with Article I section 6, there seems to be no serious

¹¹⁸ Ill. Const. art. IV, section 12 (committee or commission).

¹¹⁹ Alas. Const. art. II, section 6.

¹²⁰ Haw. Const. art. III, section 8.

¹²¹ Board of Education v. Council, 52 App. Div. 22, 383 N.Y.S. 2d 732 (4th Dep't 1976).

¹²² McClendon v. Coverdale, 203 A.2d 815 (Del. Super. Ct. 1964).

¹²³ Vt. Const. part I, art. 14.

difference.¹²⁴

¶73 State prosecutions generally follow the legislative sphere theory, and the state case law is so thin that federal precedent often serves. State case law may also be found under statutory bribery or the constitutional bribery provision. Given a constitutional bribery definition that will cover corruption and not just log-rolling, it might be possible to draft Brewster counts and non-Brewster counts (which specify legislative acts or motives) to establish that the bribery provision narrows the privilege; if the argument should fail, the non-Brewster counts would be remanded for retrial.

¶74 In the Seventh Circuit, where Craig is followed, a local prosecutor might well consider referring the case to the federal prosecutor. The official-function test would virtually remove the speech or debate privilege. Ohio and Pennsylvania recognize this Seventh Circuit privilege, but the cases are neither recent nor definitive. The federal courts, therefore, are the best place to prosecute state legislators, at least where Craig prevails.

¹²⁴Coffin, for example, is based on the broad "whereas" form, and is cited interchangeably with Article I, section 6.

¹²⁵Commonwealth v. Magaro, 175 Pa. Super. Ct. 79, 103 A. 2d 449 (1954); Akron v. Mingo, 169 Ohio St. 521, 163 N.E.2d 229 (1959). Each case holds no immunity in criminal cases; both are intermediate court opinions and twenty years old.

APPENDIX: LEGISLATIVE PRIVILEGES IN STATE CONSTITUTIONS

State	Speech or Debate Clause	Freedom from Arrest Clause	Immunity from Civil Process Clause	Language of Speech or Debate Clauses, Bribery Provisions, Cases, etc.
ALABAMA	art. IV, §56	art. IV, §56	none	"and for any speech or debate in either house shall not be questioned in any other place." Ala. Const. art. IV, §79 defines broad bribery liability of legislators (including extortion and graft).
ALASKA	art. II, §6	art. II, §6	art. II, §6	"Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session."
ARIZONA	art. IV, part II, §7	art. IV, part II, §6	art. IV, part II, §6	"No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate."
ARKANSAS	art. IV, §15	art. IV, §15	none	"and for any speech or debate in either house they shall not be questioned in any other place." Ark. Const. art. V, §35 defines liability of legislators for receipt or consent to receive anything of value to influence official act.
CALIFORNIA	none	none	art. IV, §14	<u>Harmer v. Superior Court</u> , 275 Cal. App. 2d 345, 79 Cal. Rptr. 855 (3d Dep't 1969) (sphere of immunity extends to committee activities, all civil actions).
COLORADO	art. V, §16	art. V, §16	none	"and for any speech or debate in either house they shall not be questioned in any other place." Colo. Const. art. V, §§40-42 defines bribery of legislators (including vote trading) and provides for expulsion as well as other legal penalty.
CONNECTICUT	art. III, §15	art. III, §15	none	"And for any speech or debate in either house, they shall not be questioned in any other place."

DELAWARE	art. II, §13	art. II, §13	none	<p>"and for any speech or debate in either House they shall not be questioned in any other place."</p> <p><u>McClendon v. Coverdale</u>, 203 A.2d 815 (Del. Super. Ct. 1964) (immunity applies only to state legislators, not to city councilmen).</p>
FLORIDA	none	none	none	<p>Fla. Const. art. III, §18 provides for a code of ethics for state employees.</p>
GEORGIA	art. III, §VII 3	art. III, §VII 3	none	<p>"and no member shall be liable to answer in any other place for anything spoken in debate in either House."</p>
HAWAII	art. III, §8	art. III, §8	none	<p>"No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative functions."</p> <p><u>Abercrombie v. McClung</u>, 55 Haw. 595, 525 P.2d 593 (1974) (remarks to newspaper "clarifying" speech on floor within sphere of privilege, duty "to keep the public informed").</p>
IDAHO	art. III, §7	art. III, §7	art. III, §7	<p>"nor shall a member, for words uttered in debate in either house, be questioned in any other place."</p>
ILLINOIS	art. IV, §12	art. IV, §12	none	<p>"A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings."</p>
INDIANA	art. IV, §8	art. IV, §8	art. IV, §8	<p>"For any speech or debate in either House, a member shall not be questioned in any other place."</p>
IOWA	none	art. III, §11	none	
KANSAS	art. II, §22	art. II, §22	art. II, §22	<p>"For any speech or debate in either house, the members shall not be questioned elsewhere."</p>
KENTUCKY	§43	§43	none	<p>"and for any speech or debate in either House they shall not be questioned in any other place."</p> <p>Ky. Rev. Stat. §§84.050(5) and 89.400 extend the speech or debate privilege to subordinate county and municipal legislators</p> <p><u>Jacobs v. Underwood</u>, 484 S.W.2d 855 (Ky. Ct. of App. 1972) (privilege absolute, construing §84.050(5)).</p>

State	Speech or Debate Clause	Freedom from Arrest Clause	Immunity from Civil Process Clause	Language of Speech or Debate Clause, Bribery Provisions, Cases, etc.
LOUISIANA	art. III, §8	art. III, §8	none	"No member shall be questioned elsewhere for any speech in either house." <u>In re Baer</u> , 310 So.2d 537 (La. Sup. Ct. 1975) (question whether privilege extends to legislative aide not reached).
MAINE	art. IV, part III, §8	art. IV, part III, §8	none	"and no member shall be liable to answer for anything spoken in debate in either House, in any court or place elsewhere."
MARYLAND	art. III, §18	none	none	"No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate." Md. Const. art. III, §50 provides for liability of legislators for bribery and provides for disenfranchisement in addition to other legal penalty. <u>Blondes v. State</u> , 16 Md. App. 165, 294 A.2d 661 (1972) (<u>Gravel</u> applied; art. III, §50 not an exception to art. III, §18; substantive evidence of legislative acts inadmissible).
MASSACHUSETTS	part I, art. XXI	part II, ch. I, §3, art. X	none	"The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."
MICHIGAN	art. IV, §11	none	art. IV, §11	"They shall not be questioned in any other place for any speech in either house."
MINNESOTA	art. IV, §8	art. IV, §8	none	"For any speech or debate in either house they shall not be questioned in any other place."
MISSISSIPPI	none	art. IV, §48	none	
MISSOURI	art. III, §19	art. III, §19	none	"and they shall not be questioned for any speech or debate in either house in any other place."
MONTANA	art. V, §8	art. V, §8	none	"He shall not be questioned in any other place for any speech or debate in the legislature."
NEBRASKA	art. III, §26	art. III, §15	none	"No member of the Legislature shall be liable in any civil or criminal action whatever for words spoken in debate."

NEVADA	none	none	art. IV, §11	
NEW HAMPSHIRE	part I, art. 30	part II, art. 21	part II, art. 21	"The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever."
NEW JERSEY	art. IV, §IV 9	art. IV, §IV 9	none	"and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place."
NEW MEXICO	art. IV, §13	art. IV, §13	none	"And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house." N.M. Const. art. IV, §§39-41 define liability of legislators for taking or consenting to take bribes (includes extortion) and provides for compulsion of testimony in bribery investigations.
NEW YORK	art. III, §11	none	none	"For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." <u>Board of Educations v. Council</u> , 52 App. Div. 220, 383 N.Y.S.2d 732 (4th Dep't 1976)(policy behind privilege applies also to secondary legislatures).
NORTH CAROLINA	none	none	none	
NORTH DAKOTA	art. II, §42	art. II, §42	none	"For words used in any speech or debate in either house, they shall not be questioned in any other place." N.D. Const. art. II, §40 defines narrowly liability of legislators for trading votes and provides for expulsion and bar as well as other legal penalty.
OHIO	art. II, §12	art. II, §12	none	"and for any speech, or debate, in either House, they shall not be questioned elsewhere." <u>Akron v. Mingo</u> , 169 Ohio St. 521, 163 N.E.2d 229 (1959)(all crimes excepted from privilege).
OKLAHOMA	art. V, §22	art. V, §22	none	"and for any speech or debate in either House, shall not be questioned in any other place."
OREGON	art. IV, §9	art. IV, §9	art. IV, §9	"Nor shall a member for words uttered in debate in either house, be questioned in any other place."

State	Speech or Debate Clause	Freedom from Arrest Clause	Immunity from Civil Process Clause	Language of Speech or Debate Clause, Bribery Provisions, Cases, etc.
PENNSYLVANIA	art. II, §15	art. II, §15	none	"and for any speech or debate in either House they shall not be questioned in any other place." <u>Commonwealth v. Magaro</u> , 175 Pa. Super. Ct. 79, 103 A.2d 449 (1954)(quoting <u>Commonwealth ex. rel. Bullard v. The Keeper of the Jail</u> , all crimes excepted from privilege).
RHODE ISLAND	art. IV, §5	art. IV, §5	art. IV, §5	"For any speech or debate in either house, no member shall be questioned in any other place."
SOUTH CAROLINA	none	art. III, §14	art. III, §14	
SOUTH DAKOTA	art. III, §11	art. III, §11	none	"and for words used in any speech or debate in either house, they shall not be questioned in any other place."
TENNESSEE	art. II, §21	art. II, §21	none	"and for any speech or debate in either House, they shall not be questioned in any other place."
TEXAS	art. III, §21	art. III, §14	none	"No member shall be questioned in any other place for words spoken in debate in either house." Tex. Const. art. XVI, §41 defines liability of legislators for bribery (including extortion) and provides for forfeiture of office as well as other legal penalty. <u>Cox v. State</u> , 166 Tex. Crim. 587, 316 S.W.2d 891 (1958)(upheld conviction of legislator for accepting bribe).
UTAH	art. VI, §8	art. VI, §8	none	"and for words used in any speech or debate in either house, they shall not be questioned in any other place."
VERMONT	part I, art. 14	none	none	"The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."
VIRGINIA	art. IV, §9	art. IV, §9	art. IV, §9	"and for any speech or debate in either house shall not be questioned in any other place."

WASHINGTON art. II, §17 art. II, §16 art. II, §16

"No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate."

Seamans v. Walgren, 82 Wash. 2d 771, 514 P.2d 166 (1973)(\$16 disallows all civil process, but the statute of limitations is tolled).

WEST VIRGINIA art. VI, §17 art. VI, §17 art. VI, §17

"and for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place."

W. Va. Const. art. VI, §45 obliges the Legislature to provide by law for the imprisonment of legislators who demand or receive bribes and for compulsion of testimony, and provides for disqualification from office as well as other legal penalty.

WISCONSIN art. IV, §16 art. IV, §15 art. IV, §15

"No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."

WYOMING art. III, §16 art. III, §16 none

"and for any speech or debate in either house they shall not be questioned in any other place."

Wy. Const. art. III, §42 defines liability of legislators for bribery (including trading of votes) and provides for expulsion and disqualification as well as other legal penalty.

Contempt and Perjury

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Summary

¶1 In the law of contempt, important procedural consequences turn on two distinctions. First is the distinction between civil and criminal contempt. The purpose of the punishment determines this nature of the contempt; commitment for civil contempt is indefinite and conditional on the witness's compliance with the court's order, whereas commitment for criminal contempt is punitive, of fixed duration, and unconditional. As a rule, any criminal contempt sentence in excess of six months requires that the contemnor receive a jury trial.

¶2 The second distinction is between direct and indirect contempts. The category of direct contempts includes only those contempts committed in the actual physical presence of the court. Usually direct contempts may be punished summarily. All other contempts are considered indirect and due process requires that the contemnor receive notice and a hearing.

¶3 Perjury statutes generally follow the common law and, for a conviction, require proof of an oath, a statement, intent, falsity, and materiality. Falsity is traditionally the most problematic for the prosecutor. The "two witness" rule and its corollary "direct evidence" rule require that the falsity of the statement be proved by the testimony of at least two witnesses, or the testimony of a single witness corroborated by independent evidence, or strong direct evidence.

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¶4 As a result, federal law, New York, and New Jersey now define the crime of false swearing which allows punishment for two irreconcilably inconsistent statements without requiring proof of the falsity of either statement. Massachusetts has not yet followed this trend.

1. Federal Contempt: Generally

¶5 The contempt power has roots which run deep in Anglo-American legal history.¹ Under modern law, there is no question that courts have power to enforce compliance with their lawful orders.² At common law, contempt proceedings were sui generis and punishable summarily.³

A. Statute

¶6 Title 18 of the United States Code §401 (1948) now provides for the federal courts' contempt power.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

¹See generally, Goldfarb, The Contempt Power (1963). The Judiciary Act of 1789, 1 Stat. 83 (1789) first recognized the contempt power. A limitation to conduct that obstructs justice was enacted in 1831 and sustained as constitutional in Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1874).

²United States v. United Mine Workers, 330 U.S. 258, 330-32 (1947). Both persons directly involved in a judicial proceeding and mere spectators are subject to all reasonable orders of the court, United States v. Abascal, 509 F.2d 752 (9th Cir. 1975).

³Myers v. United States, 264 U.S. 95 (1924).

¶7 The following section, 18 U.S.C. §402(1948), in paragraph three, defines crimes constituting contempt and provides for their punishment "in conformity to the prevailing usages at law."⁴ These sections, though authorizing both civil and criminal contempt sanctions,⁵ were intended to limit the contempt power traditionally possessed by federal judges to the least possible power adequate to the end proposed.⁶

B. Distinguishing Civil from Criminal Contempt

¶8 Case law draws two functional distinctions in the law of contempt.⁷ Under civil contempt, the refusal is brought

⁴18 U.S.C. §402 (1949) provides in paragraph 3 that the section shall not be construed to relate to contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, or to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of the United States. Such contempts, and all other cases of contempt not specifically embraced in this section, may be punished "in conformity to the prevailing usages at law."

⁵United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970); Taylor v. Finch, 423 F.2d 1277 (8th Cir. 1970), cert. denied, 400 U.S. 881 (1970).

⁶Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821); Cammer v. United States, 350 U.S. 399 (1956); In re McConnell, 370 U.S. 230 (1962).

⁷Procedurally, the issue arises as follows. When subpoenaed before a grand jury the witness must attend; see, e.g., United States v. Neff, 212 F.2d 297 (3d Cir. 1954). The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions, Wong Gin Ying v. United States, 231 F.2d 776 (D.C. Cir. 1956). Then two courses are open when a witness thus refuses to testify after a proper court order: civil or criminal contempt. The courses, however, are not exclusive; the same conduct may be proceeded against both civilly and criminally. United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

to the attention of the court,⁸ and the witness may be confined until he testifies.⁹ The witness is said, in an oft-quoted phrase, to carry "the keys of the [prison] in [his] own pocket."¹⁰ The confinement cannot extend beyond the life of the grand jury although the sentence can be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.¹¹

⁸The usual procedure is set out in In re Hitson, 177 F. Supp. 834, 837 (N.D. Cal. 1959), rev'd on other grounds, 283 F.2d 355 (9th Cir. 1960):

A legally constituted grand jury must call the witness and place him under oath. The witness must refuse to answer a pertinent question on the grounds that the answer would tend to incriminate him under some federal law. The grand jury, prosecuting official, and witness must then come before the court in open session where the foreman must inform the court of the matter and ask its advice. The court then hears the question and makes certain that the witness understands it. If the question does not on its face disclose that the answer would tend to incriminate the witness, he must be given opportunity to be heard and introduce any relevant evidence; if the court is satisfied that an answer would not tend to incriminate it must direct the witness to return to the grand jury room and answer the question. Should the witness continue to refuse, such fact is reported to the court in open session, with the grand jury and court again listening to the question. The question is again put to the witness and if he still refuses to answer he has committed a contempt.

⁹McCrone v. United States, 307 U.S. 61 (1939).

¹⁰In re Nevitt, 117 F. 449, 461 (8th Cir. 1902).

¹¹Shillitani v. United States, 384 U.S. 364 (1966).

¶9 Under criminal contempt, the witness, after a hearing,¹² may be fined or imprisoned, not to compel compliance but rather to vindicate the court's authority.¹³ In general, a jury trial is required if the sentence to be imposed exceeds six months.¹⁴ The precise procedure is governed by the Federal Rules of Criminal Procedure, Rule 42.¹⁵ Thus, the nature of the sanction to be imposed, as opposed to the nature of the act itself, determines whether the act constitutes a civil or a criminal contempt.

¶10 While criminal contempt is punitive in nature and cannot be purged by any act of the contemnor, civil contempt is conditional in nature and terminable if the contemnor purges himself by compliance with the court's order.¹⁶ Logically, criminal contempt is essentially reserved for willful contumacy and not good faith disagreement.¹⁷ Even

¹²Harris v. United States, 382 U.S. 162 (1966); Taylor v. Hayes, 418 U.S. 488 (1974).

¹³Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 441 (1911); Lamb v. Cramer, 285 U.S. 217 (1932).

¹⁴See Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

¹⁵Sentencing for contempt lies within the sound discretion of the trial judge, United States v. Seavers, 472 F.2d 607 (6th Cir. 1973).

¹⁶Skinner v. White, 505 F.2d 685 (5th Cir. 1974); United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill. 1973), aff'd, 508 F.2d 529 (7th Cir. 1974). In addition, criminal contempt, but not civil contempt, is subject to the pardoning power. E. parte Grossman, 267 U.S. 87, 119-20 (1925).

¹⁷Floersheim v. Engman, 494 F.2d 949 (D.C. Cir. 1973).

when the contempt is characterized by the court as criminal, however, if the court conditions release from custody on the contemnor's willingness to testify, the contempt is civil¹⁸ and confinement must end when the grand jury dissolves,¹⁹ or possibly when the confinement loses its coercive impact.²⁰ The Supreme Court has said that the trial judge should first consider the feasibility of coercing testimony through the imposition of civil contempt before resorting to criminal contempt.²¹ Additionally, three circuits have held that a valid civil contempt sentence operates to interrupt a criminal sentence then being served by the contemnor,²² reasoning that such is the only method of bringing civil contempt's coercive power to bear on an incarcerated witness.

¶11 As a rule, the order of a court must be obeyed on pain of contempt, even if the order is ultimately ruled incorrect.²³ If the contempt is clear, no bail is allowed

¹⁸ Shillitani v. United States, 384 U.S. 364 (1966).

¹⁹ Id.

²⁰ See discussion in text at ¶19 infra.

²¹ Shillitani v. United States, 384 U.S. 364, 371 note 9 (1966). The First Circuit has interpreted this suggestion to be mainly a discretionary matter, so that if the judge does impose a criminal sanction for the contempt, the appellate court will be loathe to recharacterize it as civil, Baker v. Eisenstadt, 456 F.2d 382 (1st Cir. 1972).

²² Martin v. United States, 517 F.2d 906 (8th Cir. 1975); United States v. Liddy, 506 F.2d 1293 (D.C. Cir. 1974); Anglin v. Johnson, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 95 S. Ct. 1353 (1975).

²³ Maness v. Meyers, 419 U.S. 449, 458-59 (1975).

when an appeal is taken.²⁴

C. Distinguishing Direct from Indirect Contempt

¶12 Direct contempts are those committed in the actual physical presence of the court²⁵ or so near to the court as to interfere with or interrupt its orderly course of procedure. Traditionally, such contempts are punished in a summary manner.²⁶ Indirect contempts are those committed outside the presence of the court which tend by their operation to interfere with the orderly administration of justice. Since the behavior constituting "direct contempt" occurs beyond the sight and hearing of the court, a hearing of some type²⁷ is required to inform the court of the facts constituting the alleged contempt. Consequently, with

²⁴ 28 U.S.C. §1826(b) (1970) (no bail if frivolous or for delay); see United States v. Coplon, 339 F.2d 192 (6th Cir. 1964). When an appeal of a civil contempt is taken, the Federal Rules of Civil Procedure control, McCrone v. United States, 307 U.S. 61, 64 (1939).

²⁵ Nye v. United States, 313 U.S. 230 (1962). Even when it occurs in the presence of the court, the contempt must be open. Compare Ex parte Terry, 128 U.S. 289 (1888) (assault of court officer in court upheld) with Cooke v. United States, 267 U.S. 517, 534-35 (1925) (letter submitted in court remanded).

²⁶ In re Michael, 326 U.S. 224 (1945); In re Murchison, 349 U.S. 133 (1955).

²⁷ The constitutional "non-crimes" of civil and criminal contempt are tested by standards of due process, rather than under specific strictures of particular amendments, United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971).

criminal contempt there must be a formal hearing.²⁸

¶13 A contempt before a grand jury is considered an indirect contempt; it cannot be summarily punished without some sort of a hearing.²⁹

D. Summary of Procedural Settings of Contempt

¶14 The four situations in which contempt is committed, relevant to this discussion, may be generally described as follows:

¶15 a. Direct civil contempt: A refusal to testify before a judge (direct contempt), which he punishes conditionally (civil contempt), does not entitle the contemnor to a formal hearing before punishment or to a jury trial, but punishment extends only for the life of the proceeding, or eighteen months, whichever is less.

¶16 b. Indirect civil contempt: A refusal to testify before a grand jury (indirect contempt), which the judge punishes conditionally (civil contempt), does not entitle the contemnor to a formal hearing before punishment or to a jury trial, but punishment extends only for the life of the grand jury, or eighteen months, whichever is less.

¶17 c. Direct criminal contempt: A refusal to testify before a judge (direct contempt), which he immediately punishes unconditionally (criminal contempt) does not

²⁸ Groppi v. Leslie, 404 U.S. 496 (1972); In re Oliver, 333 U.S. 257 (1948); United States v. Peterson, 456 F.2d 1135 (10th Cir. 1972); United States v. Marshall, 451 F.2d 372 (9th Cir. 1971); United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

²⁹ Harris v. United States, 382 U.S. 162 (1965), overruling, Brown v. United States, 359 U.S. 41 (1959).

entitle the contemnor to a formal hearing before punishment, but does entitle him to a jury trial if the sentence imposed by the judge is more than six months.

¶18 d. Indirect criminal contempt: A refusal to testify before a grand jury (indirect contempt), which the judge punishes unconditionally (criminal contempt) entitles the contemnor to a formal hearing before punishment, and to a jury trial if the sentence imposed is for more than six months. The trial may be required to be held before a different judge.

2. Federal Civil Contempt

¶19 Where contempt consists of a witness's refusal to obey a court order to testify³⁰ at any stage in the proceedings, the witness may be confined until he complies.³¹ This is true of both direct (in the presence of the court) and indirect (outside the presence of the court, e.g. before a grand jury) contempts. Title 28 U.S.C. §1826 (1970) provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other

³⁰ See Federal Rules of Civil Procedure, Rule 37(b) (failure to comply with a discovery order as contempt) and Rule 45(f) (failure to obey a subpoena as contempt). The grand jury is essentially an agency of the court; it is the court's process which summons witnesses to attend, and it is the court which must compel the witness to testify, United States v. Stevens, 510 F.2d 1101 (5th Cir.), rehearing denied, 512 F.2d 1406 (1975).

³¹ 18 U.S.C. §401 (1948) and see McCrone v. United States, 307 U.S. 61 (1939).

information, including any book, paper, document, record, recording or other material, the court upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of---

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

The conditional nature of the imprisonment justifies holding civil contempt proceedings absent the safeguards of indictment and jury trial, provided that basic due process requirements are met.³² A violation of the court's order need not be found intentional for the party to be guilty of civil contempt.³³ The

³²In re Long Visitor, 523 F.2d 443, 448 (8th Cir. 1975), the court there citing Shillitani v. United States, 384 U.S. 364, 368 (1965). See also Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), aff'd, 406 U.S. 441, rehearing denied 408 U.S. 931 (1972).

³³N.L.R.B. v. Local 282 Teamsters, 428 F.2d 994 (2d Cir. 1970); United States v. Greyhound Corp., 363 F. Supp. 525, aff'd, 508 F.2d 529 (7th Cir. 1973). Fear of gangland reprisal does not make a failure to comply any less voluntary. See Piemonte v. United States, 367 U.S. 556, 559, 561 (1961); Reina v. United States, 364 U.S. 507 (1960).

contemnor remains imprisoned only until he complies with the court's order, or until the proceeding (by grand jury) before which he refused to testify is over, or eighteen months, whichever occurs sooner.³⁴

¶20 The Supreme Court has said, however, that sentences of imprisonment for civil contempt may be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.³⁵ The possibility that a witness may be imprisoned indefinitely again and again for eighteen month periods for civil contempt poses problems. Obviously, due process considerations arise. Since the purpose of the civil contempt sanctions is to coerce testimony, it can be argued that incarceration for too great a period of time, for a continuing, stubborn refusal to testify, eventually loses any coercive impact for the witness and so should be terminated to avoid becoming punitive.

¶21 In affirming the validity of a judgment for civil contempt, Judge Friendly, speaking for the Second Circuit, addressed the appellant's argument that his non-compliance with the court's order left him vulnerable

³⁴Shillitani v. United States, 384 U.S. 364 (1966). But if a grand jury witness shows that the interrogation which he refused to answer was based on illegal interception of the witness's communications, he need not testify and may not be found in contempt for his refusal, Gelbard v. United States, 408 U.S. 41 (1972).

³⁵Shillitani v. United States, 384 U.S. 364, 371 note 8 (1966). Justice Fortas, in dissents to Gilbert v. California, 388 U.S. 263, 291 (1967) and United States v. Wade, 388 U.S. 218, 260 (1967), suggested that the majority meant that a non-complying accused could be held "indefinitely."

to indefinite incarceration.³⁶ The court stated that:

[e]ven though evidence is not within a testimonial privilege, the due process clause protects against the use of excessive means to obtain it. While exemplars of Devlin's handwriting may be important to the Government, they can hardly be essential. . . . (citations omitted and emphasis added).³⁷

¶22 A due process defense to indefinite imprisonment for civil contempt, therefore, may arise where the evidence sought by the relevant court order is not "essential." Judge Friendly went on to say that it would be sufficient in such cases for the government to rely, at trial, on the strong inference to be drawn from the witness's continued refusal to comply with the order. In any event, in that case, the sentence actually imposed for the contempt was "relatively mild,"³⁸ since the grand jury expired about thirty days later. The defense of due process can be asserted by a contemnor, based on this dictum, probably only when the evidence he is asked to produce is not "essential" and his sentence was not "relatively mild."

¶23 In a recent state case³⁹ where the evidence which the contemnor was asked to produce was "essential," five years imprisonment of the seventy-three year

³⁶United States v. Doe, 405 F.2d 436, 438 (2d Cir. 1968).

³⁷Id. at 438.

³⁸Id. at 439.

³⁹Catena v. Seidl, 17 Crim. L. Rptr. 2497 (N.J. Sup. Ct., August 19, 1975).

old witness was held to have lost its "coercive impact" and to have no legal justification for its continuance. The court considered as relevant the factors of the age of the witness, his failing health, and his continued "obstinacy." While each case must be decided on its own merit, said the court, sufficient evidence was presented in that case to meet the standard that there existed "no substantial likelihood" that continued confinement would cause the witness to change his mind and testify. The court cited one of its prior decisions⁴⁰ for the proposition that "[o]nce it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." There the court based its reasoning on a statement in the United States Supreme Court case of Shillitani v. United States⁴¹ that "[t]he justification for coercive imprisonment, as applied to civil contempt, depends upon the ability of the contemnor to comply with the court's order" (emphasis added by Supreme Court of New Jersey). The New Jersey court then interpreted this to mean that when the contemnor is adamant, "continued imprisonment may reach a point where it becomes more punitive than coercive and thereby defeats the purpose of the commitment."⁴² Although it is unclear whether

⁴⁰ Catena v. Seidl, 65 N.J. 257, 262, 321 A.2d 225, 228 (1974).

⁴¹ 384 U.S. 364, 371 (1966).

⁴² 65 N.J. 257, 262, 321 A.2d 225, 228 (1974).

the United States Supreme Court intended such an interpretation of its words, the argument has been forcefully made and has been accepted by one court. Thus, a new limitation on a court's civil contempt power may be on the horizon.

3. Federal Criminal Contempt

A. Generally

¶24 Criminal contempt is punitive in nature and is punishable by fine or imprisonment or both.⁴³ It is intended to serve the interests of the court and society by punishing a witness for deliberate violation of the court's order, and by deterring future violations in much the same way that other criminal penalties are intended to deter violations of the criminal law. The courts have recognized the similarities between criminal contempt and other forms of criminal sanctions in their effect on the witness. Subject to a very limited exception, therefore, most constitutional safeguards that protect a criminal defendant also apply to criminal contempt proceedings.

¶25 One charged with criminal contempt is presumed innocent until proven guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself.⁴⁴ He must be found to have possessed wrongful intent,⁴⁵

⁴³Bloom v. Illinois, 391 U.S. 194 (1968).

⁴⁴Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911).

⁴⁵United States v. Seale, 461 F.2d 345 (7th Cir. 1972);
In re Brown, 454 F.2d 999 (D.C. Cir. 1971).

and is entitled to a hearing on the issue⁴⁶ where he has a right to assistance of counsel and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or to extenuation of the offense and in mitigation of the penalty to be imposed.⁴⁷ If the penalty to be imposed exceeds six months, the witness must be afforded a jury trial.⁴⁸ Evidence seized in violation of the Fourth or Fourteenth Amendments is subject to the exclusionary rule of Mapp v. Ohio⁴⁹ in criminal contempt proceedings.⁵⁰ A criminal contempt proceeding, however, need not be initiated by an indictment, no matter what the sentence is to be.⁵¹

⁴⁶ Harris v. United States, 382 U.S. 162 (1966).

⁴⁷ Cooke v. United States, 267 U.S. 517 (1925).

⁴⁸ Codispoti v. Pennsylvania, 418 U.S. 506 (1974). For purposes of the "six month" rule, the Court said that in the case of post-verdict adjudications of various acts of contempt committed during a proceeding, a jury trial is required if the sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt. Further, in the companion case of Taylor v. Hayes, 418 U.S. 488 (1974), the Supreme Court held that a sentence of longer than six months could be reduced to satisfy this rule and thereby no retrial with jury was necessary. As to other penalties the Court, in Frank v. United States, 395 U.S. 147 (1969) held that a penalty of probation for up to five years would not entitle the contemnor to a jury trial.

⁴⁹ 367 U.S. 643 (1961).

⁵⁰ Dyke v. Taylor Implement Co., 391 U.S. 216 (1968).

⁵¹ In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Mitchell v. Fiore, 470 F.2d 1149 (3d Cir. 1972), cert. denied, 411 U.S. 938 (1973); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970); and see Green v. United States, 356 U.S. 165, 183-85 (1958).

¶26 A good faith reliance on one's Fifth Amendment privilege, even when granted immunity, is not a defense to criminal contempt when one has been unequivocally ordered by the judge to answer.⁵² In addition, the invalidity of a court order is not a defense in a criminal contempt proceeding alleging disobedience of that order.⁵³

¶27 The procedure for criminal contempt is governed by Rule 42 of the Federal Rules of Criminal Procedure, which reads as follows:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an Act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt involves disrespect to or criticism of a judge, that judge is disqualified from

⁵²United States v. Leyva, 513 F.2d 774 (5th Cir. 1975).

⁵³United States v. Seale, 461 F.2d 345 (7th Cir. 1972); and see Maness v. Meyers, 419 U.S. 449 (1975).

presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment. 54

B. Conduct Constituting Contempt

¶28 Under Rule 17(g) of the Federal Rules of Criminal Procedure⁵⁵ failure to obey a subpoena "without adequate excuse" is behavior constituting contempt of court. Proceedings may be conducted under Rule 17(g) as well as under Rule 42.⁵⁶

¶29 In general, the "misbehavior" necessary to support a contempt conviction is conduct "inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator."⁵⁷ There must be an "intent to obstruct," which entails an intentional act done by one "who knows or should reasonably be aware that his conduct is wrongful."⁵⁸

⁵⁴"Summary" as used in Rule 42(a), refers to dispensing with formality, Sacher v. United States, 343 U.S. 1, rehearing denied, 343 U.S. 931 (1952).

⁵⁵ (g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

⁵⁶Nilva v. United States, 352 U.S. 385, 395, rehearing denied, 353 U.S. 931 (1957). Refusing to testify before a grand jury after a grant of immunity is criminal contempt. United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971).

⁵⁷United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972).

⁵⁸Id. at 368.

¶30 In contrast to the standards of Rule 42(b), contemptuous conduct which may be summarily punished under Rule 42(a) must not only be committed directly under the eye of the court, but must also threaten the orderly procedure of the court.⁵⁹ Thus, whether for disorderly behavior⁶⁰ or for refusal to obey an order of the court, for purposes of Rule 42 a distinction is drawn between contempt at trial and contempt before a grand jury. To be punishable summarily under Rule 42(a), the contempt must be an intentional obstruction of trial court proceedings that disrupts the progress of a trial and hence the orderly administration of justice.⁶¹ Any other conduct constituting contempt must be punished upon notice and hearing as provided in Rule 42(b).

C. Double Jeopardy Considerations

¶31 Since civil and criminal sanctions for contempt

⁵⁹In re Little, 404 U.S. 553 (1971); Jessup v. Clark, 490 F.2d 1128 (9th Cir. 1973); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973); United States v. Pace, 371 F.2d 810 (2d Cir. 1967).

⁶⁰Many types of conduct can constitute criminal contempt: (insulting the judge so as to disrupt the proceedings) United States v. Seale, 461 F.2d 345 (7th Cir. 1972); (failure to produce records under subpoena) James v. United States, 275 F.2d 332 (8th Cir. 1960), cert. denied, 362 U.S. 989 (1960); (bribing of jurors) Hawkins v. United States, 190 F.2d 782 (2d Cir. 1951); (bribing of witness) Ex parte Savin, 131 U.S. 267 (1889); (perjury, if shown that the purpose of the perjury is to obstruct justice) United States v. Brown, 116 F.2d 455 (7th Cir. 1940).

⁶¹United States v. Wilson, 421 U.S. 309, 314-16 (1975).

serve distinct purposes, the one coercive, the other punitive, that the same act may give rise to those distinct sanctions presents no double jeopardy problem.⁶² But the rule against double jeopardy does apply to criminal contempt proceedings,⁶³ so that a contemnor could not be found in criminal contempt twice for the same act.⁶⁴

¶32 A witness who is punished for criminal contempt for an act which is a crime under other statutes, however, may also be prosecuted for that criminal act.⁶⁵ For example, when a defendant, during his trial for robbery, threw a water pitcher at the prosecutor, the defendant could be summarily punished for criminal contempt, as well as prosecuted for assault with a dangerous weapon and assault on a federal officer in the performance of his official duties, as a result of the same act.⁶⁶

⁶²Yates v. United States, 355 U.S. 66 (1957); and see United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 419 U.S. 1079 (1974).

⁶³United States v. United Mine Workers, 330 U.S. 258 (1947).

⁶⁴Baker v. Eisenstadt, 456 F.2d 382 (1st Cir. 1972). A witness who responded that she would not, no matter how many times asked, identify any person as a Communist was guilty of only one contempt, despite her refusals to answer numerous subsequent questions also relating to whether persons were Communist party members, Yates v. United States, 355 U.S. 66 (1957).

⁶⁵United States v. Mirra, 220 F. Supp. 361 (S.D. N.Y. 1963).

⁶⁶United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971).

D. Federal Criminal Contempt: Disposition on Notice and Hearing

¶33 In all situations where there is a criminal contempt, except in the limited class of cases to which Rule 42(a) applies, the contemnor is entitled to notice and an opportunity to be heard on the charge of criminal contempt. In In re Oliver⁶⁷ (1947) the Supreme Court said:

If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing⁶⁸

In any case where it is not clear that the judge was personally aware of the contemptuous action when it occurred, the accused must be provided the procedural safeguards set out in Rule 42(b).⁶⁹ A refusal to testify before a grand jury, therefore, even where the questions are restated by the judge and the witness still refuses to answer, must be punished pursuant to Rule 42(b).⁷⁰ Further, even when the contempt was committed

⁶⁷333 U.S. 257 (1947).

⁶⁸Id. at 275-76. Recently, the Ninth Circuit has interpreted Rule 42(b) as applicable to a grand jury witness cited for civil contempt for refusal to testify. The court said a proceeding in contempt to compel a grand jury witness to testify is "civil enough" that the witness is not entitled to a jury trial, but "criminal enough" that notice and hearing are mandated, United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 1973). This holding has not yet been followed; if followed it will drastically change the law of civil contempt.

⁶⁹Johnson v. Mississippi, 403 U.S. 212 (1971).

⁷⁰United States v. Wilson, 421 U.S. 309, 318 (1975).

at a trial in the presence of the judge, if the judge waits until after trial to adjudge the contemnor guilty of contempt and sentence him, reasonable notice of the specific charges and an opportunity to be heard must be provided.⁷¹ What constitutes sufficient notice and time to prepare to be heard is in the discretion of the judge.⁷²

⁷¹Taylor v. Hayes, 418 U.S. 488 (1974). The Court said:

We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). The usual justification of necessity, see Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L.Ed.11 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial. Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L.Ed.717 (1952); cf. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S. Ct. 499, 504, 27 L.Ed.2d 532 (1971). But Sacher noted that "[s]ummary punishment always, and rightly, is regarded with disfavor. . . ." 343 U.S. at 8, 72 S. Ct. at 454. . . .

On the other hand, where convictions and punishment are delayed, "it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business." Id. at 498-99 [footnotes omitted].

⁷²United States v. Hawkins, 501 F.2d 1029 (9th Cir. 1974), cert. denied, 419 U.S. 1079 (1974). There the defendant was one day ordered to provide exemplars of his signature, he refused, was given one day to reconsider, and was then found in contempt. This was found to be a reasonable time to prepare a defense.

E. Federal Criminal Contempt: Summary Disposition

¶34 Where a contempt is committed in the actual presence of the court at trial, and where immediate corrective steps are needed to restore order or halt an obstruction of the administration of justice, the contempt may be punished summarily under Rule 42(a).⁷³ With summary procedure no formal hearing is necessary: "[a]ll that is necessary is that the judge certify that he 'saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court'."⁷⁴ A fair reading of the most recent relevant Supreme Court case suggests that, in general, proper summary disposition for criminal contempt requires that there be:

1. a face to face
2. unjustified refusal to comply with the court's order,
3. which constitutes an affront to the court,
4. disrupting and frustrating an ongoing trial,
5. which is immediately⁷⁵ cited by the judge as contempt and immediately punished.

⁷³United States v. Wilson, 421 U.S. 309 (1975); Harris v. United States, 382 U.S. 162 (1965).

⁷⁴United States v. Wilson, 421 U.S. 309, 315 (1975).

⁷⁵Even if the procedure of Rule 42(a) were otherwise applicable, if the judge waits until the end of the trial to find the contemnor guilty of contempt and impose sentence for acts of contempt committed during the trial, that delay necessitates following the procedure of Rule 42(b), i.e. allowing notice and a hearing, Taylor v. Hayes, 418 U.S. 488 (1974).

F. Disqualification of the Judge

¶35 Although, generally, a judge before whom a contempt is committed will preside at the hearing on contempt, and may preside at the contempt trial,⁷⁶ due process may require otherwise under some circumstances.⁷⁷ The most recent decision in which the Supreme Court addressed this issue was the 1974 case of Taylor v. Hayes.⁷⁸ In repudiating the former test of whether the contemptuous conduct is a "personal attack" on the trial judge, the Court said:

. . . [b]ut contemptuous conduct though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear, and true between the state and the accused . . .'
. . . In making this ultimate judgement, the inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused' From our own reading of the record, we have concluded that 'marked personal feelings were present on both sides' and that the marks of 'unseemingly conduct [had] left personal stings' A fellow judge should have been substituted for the purpose of finally disposing of the charges of contempt made by [the judge] against petitioner. 79

In that case, the contempt proceeding had been a Rule 42(a) summary proceeding. The Court distinguished the requirements for a different judge in a Rule 42(b) context.

⁷⁶Sacher v. United States, 343 U.S. 1 (1952).

⁷⁷Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

⁷⁸418 U.S. 488.

⁷⁹Id. at 502, 504.

[The judge] relies on Ungar v. Sarafite, [376 U.S. 575 (1964)] but we were impressed there with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' 80

On an appeal from a summary contempt conviction under Rule 42(a), therefore, the reviewing court will more easily find that a different judge should have intervened than will be the case when the original judge followed the non-summary procedure of Rule 42(b).

G. Jury Trial

¶36 When the punishment imposed for criminal contempt exceeds six months, the contemnor is entitled to a jury trial.⁸¹ Moreover, in the absence of legislative authorizations of serious penalties for contempt, a court may reduce a contempt sentence solely to meet this requirement and thus avoid giving the accused a jury trial.⁸² When a person during the course of a proceeding is cited for many acts of contempt the "six month rule" is applied differently, depending on whether the judge employed a summary [Rule 42(a)] or non-summary [Rule 42(b)] procedure.

⁸⁰Id. at 504.

⁸¹Bloom v. Illinois, 391 U.S. 194 (1968); Baldwin v. New York, 399 U.S. 66 (1970).

⁸²Taylor v. Hayes, 418 U.S. 488, 497 (1974).

¶37 In the 1974 case of Codispoti v. Pennsylvania,⁸³ the petitioners, who were convicted of criminal contempt, contended that under the Sixth Amendment they were entitled to a jury trial. At their trial, they had been sentenced to serve six months or less for each of several individual acts of contempt, but the total sentences aggregated to three years and three months in one case, and two years and eight months in the other case. The Supreme Court said that, though there were separate criminal contempts, since the trial judge waited until the end of the trial to impose sentence for all of the contempts [i.e., proceeded under Rule 42(b) type procedure], due process requires a jury trial for the contempt charges if the aggregate sentence exceeds six months.⁸⁴ In contrast, if a contemnor is summarily tried for an act of contempt during the proceeding [a Rule 42(a) type procedure] and punished by a term of no more than six months, the judge does not exhaust his power and no jury trial is required, even when the total sentence for the contempts, each separately and summarily dealt with, exceeds six months.⁸⁵

¶38 The anomalous result of a judge having the power to impose sentences for criminal contempt but to deny the contemnor a jury trial merely by proceeding summarily rather than on notice and hearing was

⁸³418 U.S. 506.

⁸⁴Id. at 516.

⁸⁵Id. at 515.

justified to the Court:

Neither are we impressed with the contention that today's decision will provoke trial judges to punish summarily during trial rather than awaiting a calmer, more studied proceeding after trial and deliberating 'in the cool reflection of subsequent events' . . . Summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review. 86

In any event, the sentences imposed must bear some reasonable relation to the nature and gravity of the contumacious conduct.⁸⁷

4. Federal Perjury: Generally

a. Title 18 U.S.C. Section 1621 Compared to Title 18 U.S.C. Section 1623

¶39 The general federal perjury statute is title 18 U.S.C. §1621 (1964):

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years or both. This section is applicable whether the statement or subscription is made within or without the United States.

Perjury or false swearing in particular proceedings

⁸⁶Id. at 518.

⁸⁷United States v. Conole, 365 F.2d 306 (3d Cir. 1966), cert. denied, 385 U.S. 1025 (1967).

may also be prosecuted under other statutes.⁸⁸

¶40 Alternatively, false declarations before a grand jury or court may be prosecuted under title 18 U.S.C.

§1623 (1970):

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

⁸⁸ See, e.g., 15 U.S.C. §§80b-7, 80b-9 (1940) (perjury in matters concerning the Securities and Exchange Commission); 18 U.S.C. §2424 (1970) (perjury in Mann Act proceedings); 26 U.S.C. §7206 (1954) (tax matters); 18 U.S.C. §1015 (1948) (perjury in naturalization proceedings).

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

¶41 These are the two false statement statutes of greatest use to the prosecutor dealing with organized crime. The differences between the statutes make them complimentary tools, and enhance the law's effectiveness against false testimony.⁸⁹ For example, while recantation of the false testimony bars prosecution under section 1623 (if made before the testimony significantly affects the tribunal and before the falsity of the testimony becomes obvious), recantation does not affect the offense of perjury under section 1621 (except as the fact of recantation may bear on the issue of "willfulness"). On the other hand, while the falsity of the testimony must always be proved in a prosecution under section 1621, the government need not, under section 1623, show which of the inconsistent statements was false. Additionally, the so-called "two witness rule," and its corollary, the "direct evidence rule," impede prosecutions

⁸⁹ The courts have held that the passage of section 1623 as part of the Organized Crime Control Act of 1970 was meant to supplement, rather than supplant section 1621, see, e.g., United States v. Kahn, 472 F.2d 272 (2d Cir. 1973).

for perjury under section 1621. These evidentiary rules, in contrast, are inapplicable to prosecutions for false testimony under section 1623. The element of "materiality," of the false statement to the proceeding in which the statement is made, is common to both statutes. The courts have consistently applied, to section 1623, the tests of materiality developed under section 1621. The requirement that the statements be made under oath is, of course, also common to both statutes.⁹⁰

¶42 The two statutes will be treated separately in the remaining discussion.

5. Federal Perjury: Title 18 U.S.C. Section 1621

A. Elements

¶43 There are five elements of perjury: lawful oath, proper proceedings, false swearing, willfulness, and materiality.⁹¹ In the contexts in which perjury occurs relevant to this discussion, i.e., grand jury and trial proceedings, a witness need not be given Miranda-type warnings before his false testimony may be used against him to prove perjury, even when the proceedings have become accusatory, focusing on him.⁹²

⁹⁰Any oath having a legislative basis is sufficient, Caha v. United States, 152 U.S. 211 (1894). See also United States v. Edwards, 443 F.2d 1286 (8th Cir.), cert. denied, 404 U.S. 944 (1971) (regarding oath in section 1621 prosecution); United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975) (regarding oath in section 1623 prosecution).

⁹¹United States v. Stone, 429 F.2d 138 (2d Cir. 1970).

⁹²United States v. Mandujano, 44 U.S.L.W. 4629 (U.S. May 19, 1976).

B. Intent and Falsity

¶44 Crucial to the crime of perjury is the witness's belief concerning the truth of his sworn testimony; generally, the statements must be proved false, and it must be shown that the witness did not believe his statements to be true.⁹³ "Willfulness" is a question for the jury,⁹⁴ but it may be inferred from proof of falsity itself.⁹⁵ Intent may also be proved by prior similar acts.⁹⁶

¶45 Since falsity of the statements is an essential element of perjury, as a rule perjury cannot be based on a reply to a question which although incomplete, misleading, or unresponsive, is literally true or technically accurate,⁹⁷ even if for devious reasons the statement was intentionally misleading,⁹⁸ or was

⁹³United States v. Bronston, 453 F.2d 555 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 352 (1973); United States v. Dowdy, 479 F.2d 213 (4th Cir. 1973); United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971); United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968); United States v. Wall, 371 F.2d 398 (6th Cir. 1967).

⁹⁴United States v. Letchos, 316 F.2d 481 (7th Cir.), cert. denied, 375 U.S. 824 (1963).

⁹⁵United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); La Placa v. United States, 354 F.2d 56 (3d Cir. 1965), cert. denied, 383 U.S. 927 (1966).

⁹⁶United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971).

⁹⁷Bronston v. United States, 409 U.S. 352 (1973); United States v. Franklin, 478 F.2d 703 (5th Cir. 1973); United States v. Cook, 489 F.2d 286 (9th Cir. 1973); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, rehearing denied, 418 U.S. 955 (1974).

⁹⁸See United States v. Slutzky, 79 F.2d 504 (3d Cir. 1935).

shrewdly evasive, and it intentionally conveyed false information by implication.⁹⁹ Lower courts have held that perjury cannot be based on a nonresponsive and therefore ambiguous statement the literal truthfulness of which cannot be ascertained.¹⁰⁰ In reversing a perjury conviction for an unresponsive, literally true, but misleading answer by the witness, the Supreme Court in Bronston v. United States, observed:

. . . the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true. . . . If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe [his answer] to be true.' ¹⁰¹

If the witness does not understand the question and gives a nonresponsive answer, the answer cannot be perjurious.¹⁰² Even when nonresponsive, however,

⁹⁹Bronston v. United States, 409 U.S. 352 (1973).

¹⁰⁰United States v. Esposito, 358 F. Supp. 1032 (N.D. Ill. 1973); United States v. Cobert, 227 F. Supp. 915 (S.D. Cal. 1964). In Esposito, supra, the court said the government must prove beyond a reasonable doubt that a defendant charged with perjury both literally and as a matter of substance lied under oath.

¹⁰¹409 U.S. 352, 357-60 (1973).

¹⁰²United States v. Paolicelli, 505 F.2d 971 (4th Cir. 1974).

if the statement is not literally true, it is perjurious.¹⁰³

C. Materiality

¶46 For a false statement to be perjurious, it must be material to the investigative proceeding in which it is made.¹⁰⁴ The rule applied by the courts to test whether the false testimony is "material" is whether it has the capacity or tendency to influence the decision of the tribunal or inquiring or investigative body, or to impede the proceeding, with respect to matters which the tribunal or body is competent to consider.¹⁰⁵ The testimony need not be directed to the primary subject of the investigation to be material, and the government

¹⁰³United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974); United States v. Andrews, 370 F. Supp. 365 (D. Conn. 1974); United States v. Crandall, 363 F. Supp. 648 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir. 1974), cert. denied, 419 U.S. 852, aff'd, 495 F.2d 1368 (3d Cir. 1974).

¹⁰⁴United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971); United States v. Stone, 429 F.2d 138 (2d Cir. 1970). Lord Coke seems to have been the originator of this requirement. He said that, for perjury, a false statement must be "in a matter material to the issue, or cause in question. For if it be not material, then though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudicial," as quoted in McKinney's commentary to N.Y. Penal Law §210.15 (1965).

¹⁰⁵United States v. Saenz, 511 F.2d 766 (5th Cir. 1975); United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973); United States v. Lardieri, 497 F.2d 317 (3d Cir.), rehearing, 506 F.2d 319 (1974). Or, stated another way, for the false statement to be "material" it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry that a minimum of additional, fruitful investigation would have occurred. United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971).

need not prove that the false testimony actually impeded the investigation.¹⁰⁶ "Materiality" is a question of law for the court,¹⁰⁷ and it must be established only in reference to the time the statement was given; subsequent events (e.g., abandonment of the proceedings at which the testimony was given) will not render testimony "immaterial," which was "material" when given.¹⁰⁸

D. Two-Witness Rule

¶47 Since the time of Blackstone a conviction for perjury could not be sustained when it was based solely on the uncorroborated testimony of only one witness.¹⁰⁹ Generally,

¹⁰⁶United States v. Makris, 483 F.2d 1082 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974); United States v. Masters, 484 F.2d 1251 (10th Cir. 1973); United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972); United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). And see United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 95 S. Ct. 1653 (1975).

¹⁰⁷Tasby v. United States, 504 F.2d 332 (8th Cir. 1974), cert. denied, 95 S. Ct. 811 (1975); United States v. Demopoulos, 506 F.2d 1171 (7th Cir. 1974), cert. denied, 95 S. Ct. 1427 (1975); United States v. Gugliaro, 501 F.2d 68 (2d Cir. 1974); United States v. Wesson, 478 F.2d 1180 (7th Cir. 1973); United States v. Rivera, 448 F.2d 757 (7th Cir. 1971); Vitello v. United States, 425 F.2d 416 (9th Cir.), cert. denied, 400 U.S. 822 (1970). Since the issue of "materiality" of false testimony is one to be resolved by the court, clearly evidence bearing only on the issue of "materiality" should be heard outside the presence of the jury, see, e.g., United States v. Alu, 246 F.2d 29 (2d Cir. 1957); Harrell v. United States, 220 F.2d 516 (5th Cir. 1955).

¹⁰⁸United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), cert. denied, 387 U.S. 906 (1967).

¹⁰⁹United States v. Wood, 39 U.S. 430 (1840). This is because, otherwise, there would be nothing more than an oath against an oath.

in prosecutions under section 1621, this rule still prevails.¹¹⁰ The rule, as interpreted by the courts, requires that the element of falsity in a perjury charge be proven by the testimony of two witnesses, or by one witness corroborated by independent evidence.¹¹¹ This evidentiary rule applies only to the element of falsity.¹¹²

¶48 There are two ways to satisfy the rule. First, if two witnesses each give testimony, as to distinct incidents or transactions, which if believed, would prove that what the accused said under oath was false, the rule is satisfied.¹¹³ Second, the two-witness rule is satisfied by corroborative evidence of sufficient content and quality to persuade the trier of fact that

¹¹⁰Hammer v. United States, 271 U.S. 620 (1926); Weiler v. United States, 323 U.S. 606 (1945). The rule, however, has been held not to be constitutionally mandated, United States v. Koonce, 485 F.2d 374 (8th Cir. 1973); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

¹¹¹United States v. DeLeon, 474 F.2d 790 (5th Cir.), cert. denied, 414 U.S. 853 (1973); United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971); United States v. Brandyberry, 438 F.2d 226 (9th Cir.), cert. denied, 404 U.S. 842 (1971); Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

¹¹²Hammer v. United States, 271 U.S. 620 (1926). Once the falsity of the testimony is established under this strict requirement the witness's belief as to the falsity of the testimony may be established by circumstantial evidence, or by inference drawn from proven facts, United States v. Rivera, 448 F.2d 757 (7th Cir. 1971); United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

¹¹³United States v. Weiner, 479 F.2d 923, 928 (2d Cir. 1973). It is of no consequence whether the testimony of the second witness is corroborative of the first witness's story in whole, in part, or not at all.

what the principal prosecution witness testified to about the falsity of the accused's statement under oath was correct.¹¹⁴

E. Direct Evidence Rule

¶49 When the government's evidence of falsity rests primarily upon documentary evidence, the document in itself constitutes sufficient "direct" evidence to support conviction, and the two-witness rule is inapplicable.¹¹⁵

¶50 The trend of decisions, moreover, seems to be toward abrogation of even the direct evidence rule. Circumstantial evidence of falsity, if it meets standards such as "sufficiently probative,"¹¹⁶ or "of substantial weight,"¹¹⁷ among others,¹¹⁸ has been found sufficient. The Ninth Circuit recently said:

The responses to the questions involved in these counts were invariably "I don't recall" or "I

¹¹⁴ Id. at 928. The split among the circuits as to exactly what standard must be met by the corroborative evidence is discussed in this case. The court there notes, however, that in the rules' applications, the divergences are "very few and very narrow."

¹¹⁵ Barker v. United States, 198 F.2d 932 (9th Cir. 1952); Stassi v. United States, 401 F.2d 259 (5th Cir. 1968); Vuckson v. United States, 354 F.2d 918 (9th Cir.), cert. denied, 384 U.S. 991, rehearing denied, 385 U.S. 893 (1966).

¹¹⁶ United States v. Goldberg, 290 F.2d 729 (2d Cir.), cert. denied, 368 U.S. 899 (1961).

¹¹⁷ United States v. Bergman, 345 F.2d 931 (2d Cir. 1966).

¹¹⁸ See United States v. Collins, 272 F.2d 650 (2d Cir. 1959), cert. denied, 362 U.S. 911 (1960); Weinheimer v. United States, 283 F.2d 510 (D.C. Cir. 1960), cert. denied, 364 U.S. 930 (1961); United States v. Manfredonia, 414 F.2d 760 (2d Cir. 1969).

don't know" or "I don't remember." Given answers of this nature, it would be difficult to find two witnesses to testify that the defendant did know or believe or recall a matter which he said he did not. Absent a contrary admission by the defendant, there would be no way to get direct evidence that the defendant did know or recall the fact that he denied knowing or recalling under oath. Therefore, only circumstantial evidence can be used to establish the knowing lies of the defendant.¹¹⁹

Depending upon the form of the perjurious statements at issue, therefore, the court will demand the most trustworthy kind of evidence possible to be obtained, but nothing more.

F. Recantation

¶51 In contrast to section 1623, in a prosecution under section 1621 a witness's recantation or retraction of his perjurious statement is no defense.¹²⁰ Such willingness to correct a false statement, however, is relevant in showing absence of intent.¹²¹

G. Separate Perjuries and Double Punishment

¶52 If a witness before a grand jury tells two "separate and distinct" lies, he may be prosecuted on a separate count for each.¹²² Where a witness is asked to give answers to

¹¹⁹Gebhard v. United States, 422 F.2d 281, 287-88 (9th Cir. 1970).

¹²⁰United States v. Norris, 300 U.S. 564 (1937); United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973); United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972).

¹²¹United States v. Kahn, supra, note 120.

¹²²United States v. Tyrone, 451 F.2d 16 (9th Cir. 1971), cert. denied, 405 U.S. 1075 (1972); Richards v. United States, 408 F.2d 884 (5th Cir. 1969).

questions which are "substantially the same," however, only one perjury count is proper.¹²³

¶53 A charge of perjury is not barred merely by acquittal in the case in which the false testimony is given, but the doctrine of collateral estoppel may be applicable.¹²⁴ The test is whether a rational jury could have discredited the defendant's allegedly false testimony and still conclude that the government failed to prove its case.¹²⁵

H. Subornation

¶54 Title 18 U.S.C. §1622(1948) defines the offense of subornation of perjury:

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

This section includes both procuring another to commit perjury, as defined in section 1621, but also procuring another to make false statements before a court or grand jury, as defined in section 1623.¹²⁶ To make out a charge

¹²³ Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970); Masinia v. United States, 296 F.2d 871 (8th Cir. 1961).

¹²⁴ Wheatley v. United States, 286 F.2d 519 (5th Cir. 1961); In re Bonk, 527 F.2d 120 (7th Cir. 1975).

¹²⁵ United States v. Haines, 485 F.2d 564 (7th Cir. 1973), cert. denied, 417 U.S. 977 (1974). And see United States v. Barnes, 386 F. Supp. 162 (E.D. Tenn. 1973), aff'd, 506 F.2d 1400 (6th Cir.), cert. denied, 95 S. Ct. 1449 (1975); United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. Nash, 447 F.2d 1382 (4th Cir. 1971).

¹²⁶ United States v. Gross, 511 F.2d 910 (3d Cir. 1975). Since the two-witness rule was abrogated in prosecutions for false declarations before a grand jury or court by section 1623, the rule does not apply in prosecutions for subornation of false declarations.

of subornation, the false statement crime of section 1623 or the perjury of section 1621 must in fact have been committed.¹²⁷

6. Federal False Swearing: Title 18 U.S.C. Section 1623

A. Elements

¶55 Title 18 U.S.C. §1623(1970), set out earlier in ¶40, makes it a crime to utter under oath, before a court or grand jury, any false material declaration, or to use other material knowing that it contains a false material declaration. It is sufficient proof to show that the two statements are irreconcilably contradictory; the government need not prove one of the statements false. Subsection (d) provides a recantation defense. Subsection (e) abrogates both the two-witness rule and the direct

¹²⁷United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972). An interesting sort of "subornation" of perjury was at issue in the recent Second Circuit case of Washington v. Vincent, 18 Crim. L. Rptr. 2221-2222 (November 5, 1975). There a prosecutor had made a promise to a witness about getting charges against him dropped. At trial, as the prosecutor stood silently by, the witness falsely swore that no deal had been made. The court held this to be grounds for federal habeas corpus relief, despite the failure of the defendant and his counsel to challenge what they had reason to know was false testimony. The court said:

The knowing use by a State prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial [citations omitted]. Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle; nor does the rule lose force because the perjury reflects only upon the credibility of the witness.

evidence rule; proof beyond a reasonable doubt by any type of admissible evidence is sufficient for conviction. This statute provides an alternative type of "perjury" crime¹²⁸ and does not repeal the general perjury statute, section 1621.¹²⁹

¶56 A witness, even a potential defendant, need not be given Miranda warnings before being asked to testify; failure to give such warnings does not bar a prosecution for false declarations.¹³⁰

B. Intent and Falsity

¶57 The statement's falsity need not be directly proven in section 1623 prosecutions; it is sufficient that the prosecution show two statements made by the witness which are "inconsistent to the degree that one of them is necessarily false."

¶58 Regarding intent, the jury must infer defendant's state of mind from the things he said or did, and such an

¹²⁸United States v. Gross, supra, note 126.

¹²⁹United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973). The abrogation of section 1623 of the two-witness rule is not unconstitutional, and a defendant is not denied equal protection of the laws by being prosecuted under section 1623 rather than under section 1621. United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974). Nor is section 1623 unenforceably vague. United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 95 S. Ct. 1653, cert. denied, 95 S. Ct. 2645 (1975).

¹³⁰United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088, rehearing denied, 420 U.S. 939 (1974); United States v. Mandujano, 19 Crim. L. Rptr. 3087 (U.S. May 19, 1976).

inference may come from proof of the objective falsity itself, from proof of a motive to lie, or from other facts tending to show that the defendant was lying.¹³¹ Vagueness or ambiguity in the questions asked the witness is not a defense; the possibility that the question has many interpretations is immaterial as long as the jury is charged to determine that the question as the witness understood it was falsely answered.¹³²

C. Materiality

¶59 The courts have applied the same test of "materiality" in section 1623 prosecutions as is used in section 1621 perjury prosecutions.¹³³ It is sufficient if the untrue testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation.

D. Two-Witness Rule

¶60 Section 1623(e) allows conviction upon the evidence of a single witness.¹³⁴

¹³¹United States v. Chapin, 515 F.2d 1274 (D.C. Cir. 1975).

¹³²Id.

¹³³See United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973).

¹³⁴United States v. Isaacs, 493 F.2d 1124 (7th Cir.) cert. denied, Kerner v. United States, 417 U.S. 976 (1974). This is not unconstitutional. United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975).

E. Direct Evidence Rule

¶61 Section 1623(e) allows proof by any type of admissible evidence, including circumstantial evidence.¹³⁵

F. Recantation

¶62 Section 1623(d) provides a right to a witness to recant, and bars any perjury prosecution, if the declaration is admitted to be false in the same continuous proceeding and if, at the time the admission is made, the false declaration

a. has not substantially affected the proceeding, and

b. it has not become manifest that such falsity has been or will be exposed.

This right to recant applies both to trials and grand jury proceedings, but in no case is the witness entitled to be warned of his right to recant.¹³⁶

7. New York Contempt: Generally

A. Distinguishing Civil and Criminal Contempts

¶63 As in the federal system, the New York courts have

¹³⁵ United States v. Chapin, 515 F.2d 1274 (D.C. Cir. 1975). For examples of the amount of evidence sufficient to support a section 1623 conviction, see United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 95 S. Ct. 1653 (1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 95 S. Ct. 1561 (1975); United States v. Clizer, 464 F.2d 121 (9th Cir.), cert. denied, 409 U.S. 1086, rehearing denied, 410 U.S. 948 (1973).

¹³⁶ United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975); United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975); United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974); United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

discretion in determining the nature of a contempt adjudication;¹³⁷ the purpose of civil contempt is to compel compliance with the court's order, and the purpose of criminal contempt is to punish disobedience.¹³⁸

¶64 New York's statutory provisions for civil contempt are found in New York Judiciary Law section 753(1962), and New York Civil Practice Law and Rules section 2308(1965). The statutory provisions for criminal contempt are: New York Penal Law sections 215.50 through 215.55(1972), and New York Judiciary Law sections 750 and 752.

B. Distinguishing Direct and Indirect Contempts

¶65 Direct contempts are those committed in the "immediate view and presence of the court"; indirect contempts are those committed "out of court."¹³⁹ Traditionally, summary procedure is permissible when the contempt is direct.¹⁴⁰

¹³⁷ Lane v. Lombardozzi, 7 App. Div.2d 48, 180 N.Y.S.2d 496 (1st Dept. 1958), aff'd, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550, cert. denied, 360 U.S. 930, appeal dismissed, 361 U.S. 7, cert. denied and appeal dismissed, 361 U.S. 10 (1959).

¹³⁸ King v. Barnes, 113 N.Y. 476, 21 N.E. 182 (1889). Regardless of whether the contempt is civil or criminal, however, if there is a factual issue as to whether the defendant did or did not disobey the order, he is entitled to a hearing. Ingraham v. Maurer, 39 App. Div.2d 258, 334 N.Y.S.2d 19 (3d Dept. 1972).

¹³⁹ People v. Albany County, 147 N.Y. 290, 41 N.E. 700 (1895).

¹⁴⁰ Id. See also Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935).

The procedural distinction between direct and indirect contempts is now statutory, and found in New York Judiciary Law section 755(1962):

Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor. Such order is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.

8. New York Civil Contempt

¶66 The New York courts have long recognized their inherent power to commit a recalcitrant witness to jail until he testifies as ordered. As the court in People ex rel. Phelps v. Fancher observed:

Independent then of any statute authorizing the court. . . to commit a witness for refusing to answer a proper question until answered, that court has ample power at common law to order such a commitment. Such a proceeding is not one to punish a party as for contempt, but the exercise of a power necessarily conferred to elicit truth and to administer justice. It was not necessary to bring [the witness] before the court, and formally adjudge him to be guilty of a contempt, but upon his refusal to answer the question which the court adjudged to be proper, it might, by simple rule, have ordered him to be confined until he should answer.¹⁴¹

Great discretion is vested in the courts when punishing for a civil contempt.¹⁴² And, even if the court's order is

¹⁴¹4 Thomp. & C. 467, 471-72 (1st Dept. 1874).

¹⁴²Stamen Bldg. Materials Corp. v. Gould, 79 Misc. 2d 97, 359 N.Y.S.2d 394 (Dist. Ct. Suffolk County 1974).

erroneous, a witness is obligated to obey it (until it is vacated or reversed) or be held in contempt.¹⁴³

¶67 The courts' civil contempt power is now set out in New York Judiciary Law section 753(1962). The relevant parts are:

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

1. An attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience of a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge. . . .

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

In civil proceedings, the relevant civil contempt statute is New York Civil Practice Law and Rules section 2308(1965), which reads, in pertinent part, as follows:

(a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. . . . A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he was directed to produce by the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him to jail, there to remain until he submits to do the act which he was so required to

¹⁴³Marquiles v. Marquiles, 42 App. Div.2d 517, 344 N.Y.S. 2d 482 (1st Dept.), appeal dismissed, 33 N.Y.2d 894, 307 N.E.2d 562, 352 N.Y.S.2d 447 (1973).

do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant. . . .

(c) Review of proceedings. Within ninety days after the offender shall have been committed to jail he shall, if not then discharged by law, be brought, by the sheriff, or other officer, as a matter of course personally before the court issuing the warrant of commitment and a review of the proceedings shall then be held to determine whether the offender shall be discharged from commitment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from such commitment, shall be brought, by the sheriff, or other officer, personally before the court issuing the warrant of commitment and further reviews of the proceedings shall then be held to determine whether he shall be discharged from commitment. The clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in the proceeding resulting in the issuance of the warrant of commitment, at their last known address.

All of the governing detail and procedure for the contempt punishment comes from the Judiciary Law; whether the witness's imprisonment is governed by New York Civil Practice Law and Rules section 2308 or by New York Judiciary Law section 753, periodic review of the commitment is assured.¹⁴⁴

¶68 Whether the witness must be afforded notice and a hearing on his alleged contempt is governed by New York Judiciary Law section 755(1962), set out in ¶65 above.

¹⁴⁴The 90-day period for review commences from the date that all matters relating to the prior review were finally submitted by counsel to the court for its determination. People v. Rosoff, 82 Misc.2d 199, 368 N.Y.S.2d 969 (Sup. Ct. N.Y. County 1975).

9. New York Criminal Contempt

A. Generally

¶69 New York's statutory scheme regarding criminal contempt is unique. New York Judiciary Law, sections 750 through 752, delineates the power of the courts to punish for criminal contempts. The offenses that constitute it are listed in section 750(1966).

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. . . .

3. Wilful disobedience to its lawful mandate. . . .

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn to answer any legal and proper interrogatory. . . .

C. A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other.

Section 751 sets out the punishment.

1. Except as provided in subdivisions (2), (3) and (4), punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. . . .¹⁴⁵

Section 752 provides for a review of the mandate.

Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.¹⁴⁶

¹⁴⁵ New York Judiciary Law §751 (McKinney 1975).

¹⁴⁶ New York Judiciary Law §752 (McKinney 1975).

¶70 Obviously, in the context of an organized crime investigation, the light penalty provided for criminal contempt renders the criminal contempt sanction relatively ineffective. Beside criminal contempt, and the more potent sanction of civil contempt, New York has defined the crime of criminal contempt in the New York Penal Law. Section 215.50 provides:

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or. . . .

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory; or. . . .¹⁴⁷

* * * *

A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, when after having been sworn as a witness, before a grand jury, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree in a class E felony.¹⁴⁸

Section 215.51 was enacted in 1970 with the intent of increasing the penalty for a witness's contumacious refusal to testify before grand juries investigating organized

¹⁴⁷ New York Penal Law §215.51 (McKinney 1975).

¹⁴⁸ New York Penal Law §215.50 (McKinney 1975).

crime.¹⁴⁹ The maximum jail sentence is now four years. Additionally, the interrelation between the two degrees of the crime affords latitude in plea bargaining situations.

¶71 The question arises whether a witness may be adjudged in criminal contempt, under the Judiciary Law, and also be prosecuted for the crime of criminal contempt, under the Penal Law, for a single instance of contumacious conduct. New York Penal Law section 215.55(1965) provides:

Adjudication for criminal contempt under subdivision A of section seven hundred fifty of the judiciary law shall not bar a prosecution for the crime of criminal contempt under section 215.50 based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant shall take the previous punishment into consideration.

This section, however, does not settle the question. In 1972, the New York Court of Appeals held that, where the same evidence proved both judiciary law criminal contempt (for which the defendant had been punished) and the crime of criminal contempt (with which the defendant was charged in a later indictment), double jeopardy barred indictment for the crime of criminal contempt.¹⁵⁰ Recent decisions follow this holding.¹⁵¹ When a strong sanction is sought, therefore,

¹⁴⁹ See Practice Commentary to New York Penal Law §215.51 (McKinney 1975). In organized crime investigations immunity grants are useful. N.Y. Crim. Pro. Law §50.10 (1971) provides, therefore, that a witness possessing immunity may nevertheless be adjudged in contempt for having contumaciously refused to give evidence. See also Ruskin v. Detkin, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973).

¹⁵⁰ People v. Columbo, 31 N.Y.2d 947, 293 N.E.2d 247, 341 N.Y.S.2d 97 (1972).

¹⁵¹ People v. Menna, 36 N.Y.2d 930, 335 N.E.2d 848, 373 N.Y.S.2d 542 (1975); People v. Failla, 74 Misc.2d 979, 347 N.Y.S.2d 502 (Nassau County Ct. 1973).

proceedings under the penal law crime of criminal contempt should be begun in lieu of proceedings for judiciary law criminal contempt.

¶72 In general, proof of a criminal contempt must be established beyond a reasonable doubt.¹⁵² The statute's listing of causes for which a person may be punished for criminal contempt is exclusive;¹⁵³ disobeying the court's mandate must be intentional.¹⁵⁴ Before a person may be punished for criminal contempt for refusing to testify before a grand jury, the prosecutor must show that the evidence demanded was relevant and proper;¹⁵⁵ the relevancy, however, need not be conclusively established.¹⁵⁶

¶73 In establishing the existence of intent in a prosecution for penal law criminal contempt, where the only evidence consists of the contemnor's grand jury testimony, it is sufficient merely to find that the contemnor's refusal to

¹⁵²Yorktown Central School Dist. No. 2 v. Yorktown Congress of Teachers, 42 App. Div.2d 422, 348 N.Y.S.2d 367 (2d Dept. 1973); Gold v. Valentine, 35 App. Div.2d 958, 318 N.Y.S.2d 360 (2d Dept. 1970).

¹⁵³Briddon v. Briddon, 229 N.Y.452, 128 N.E. 675 (1920).

¹⁵⁴Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939). See People v. Renaghan, 40 App. Div.2d 150, 338 N.Y.S.2d 125 (1st Dept. 1972), aff'd, 33 N.Y.2d 991, 309 N.E.2d 425 (1974), it was held that an essential ingredient of criminal contempt, arising out of a refusal to answer questions before a grand jury, is an intent to obstruct justice. Further, the defendant is entitled to introduce evidence relative to his intent and state of mind, when he is prosecuted for criminal contempt.

¹⁵⁵In re Koota, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S.2d 409, cert. denied, 384 U.S. 1001 (1966).

¹⁵⁶Id. It is enough if the evidence's bearing on the subject of investigation is susceptible to intelligent estimate or there is a justifiable suspicion of relation.

answer was the product of rational choice.¹⁵⁷ It constitutes no defense to a criminal contempt prosecution that the refusal to testify was based on advice of counsel, on a good-faith belief that the questions were improper, or on the failure of the prosecutor to answer defendant's inquiries concerning electronic surveillance.¹⁵⁸

B. Misbehavior

¶74 A refusal to produce documentary evidence, when under subpoena to produce it, is a contempt if it is shown that the evidence is in the possession of the subpoenaed witness.¹⁵⁹ A witness who refuses to testify, when clearly so ordered by the court,¹⁶⁰ and informed of any immunity he may have

¹⁵⁷People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct. New York County 1973), aff'd, 45 App. Div.2d 691, 356 N.Y.S.2d 626 (1st Dept.), aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

¹⁵⁸Id. See also People v. Einhorn, 74 Misc.2d 958, rev'd, 45 App. Div.2d 75, 356 N.Y.S.2d 620 (1st Dept.), rev'd and remitted for consideration of the facts, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974), aff'd mem., 47 App. Div.2d 813, 368 N.Y.S.2d 804 (1st Dept. 1975).

¹⁵⁹People v. Gold, 210 N.Y.S.2d 202 (N.Y. County Ct. Gen. Sess. 1959).

¹⁶⁰The mandate of the court, or district attorney's subpoena, must be "clear," Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939); People v. Balt, 34 App. Div.2d 932, 312 N.Y.S.2d 587 (1st Dept. 1970). There need not be formal direction by the grand jury foreman to answer. People v. Breindel, 45 App. Div.2d 691, 356 N.Y.S.2d 626 (1st Dept. 1973), aff'd mem., 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

received,¹⁶¹ commits a contempt.

¶75 In some circumstances, even if a witness does respond to the question the response may constitute contempt. False testimony is not punishable as civil contempt¹⁶² or as criminal contempt.¹⁶³ With respect to both civil and criminal contempt, however, when the testimony is so plainly inconsistent, manifestly contradictory, and conspicuously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth and has given answers which are as useless as a complete refusal to answer, there is contempt.¹⁶⁴ If the witness's answers must be proven false by extrinsic evidence there is no contempt.¹⁶⁵ When the testimony, however, is so

¹⁶¹ People v. Sparaco, 39 App. Div.2d 753, 332 N.Y.S.2d 351 (2d Dept. 1972), aff'd, 32 N.Y.2d 652, 295 N.E.2d 653, 342 N.Y.S.2d 854 (1973); People v. Mulligan, 29 N.Y.2d 20, 272 N.E.2d 62, 323 N.Y.S.2d 681 (1971); Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); People v. Saperstein, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160, cert. denied, 353 U.S. 946 (1957).

¹⁶² Fromme v. Gray, 148 N.Y. 695, 43 N.E. 215 (1896).

¹⁶³ Finkel v. McCook, 247 App. Div. 57, 286 N.Y.S. 755 (1st Dept.), aff'd, 271 N.Y. 636, 3 N.E.2d 460 (1936).

¹⁶⁴ People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959).

¹⁶⁵ People v. Renaghan, supra note 154. As stated by the Appellate Division in that case at 40 App. Div. 2d 150, 152, 338 N.Y.S.2d 125, 128 (1st Dept. 1972):

Unless the record, without resort of external proof of falsity (emphasis supplied), indisputably shows the response is false and the clearly false testimony was given to obstruct the investigation of the grand jury, there is no basis for criminal contempt.

The witness may, however, be convicted of perjury.

patently false on its face, as to be considered no testimony at all, it is a basis for civil or criminal contempt.¹⁶⁶

C. Double Jeopardy Considerations

¶76 As discussed above in ¶71, a witness cannot be both punished for criminal contempt and then prosecuted for the crime of criminal contempt.¹⁶⁷

¶77 Where it is clear at the outset that the witness will not answer any question, and where all the questions relate to a "single area of inquiry," only one contempt is committed, no matter how many questions are asked.¹⁶⁸ No immunity from later charges of contempt is conferred, however, merely

¹⁶⁶People ex rel. Valenti v. McCloskey, supra note 164. For examples of responses which were held to be "no testimony at all" and, therefore, contemptuous see: People v. Ianniello, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821, cert. denied, ___ U.S. ___, 96 S. Ct. 52 (1975); Ruskin v. Detkin, supra note 149; People v. Martin, 47 App. Div. 2d 883, 367 N.Y.S.2d 8 (1st Dept. 1975); People v. Tilotta, 84 Misc.2d 170, 375 N.Y.S.2d 965 (Sup. Ct. Kings County 1975); Holtzman v. Tobin, 78 Misc.2d 8, 358 N.Y.S.2d 94 (Sup. Ct., App. T. 1st Dept. 1974).

¹⁶⁷ See cases in notes 150 and 151. See also Capio v. Justices of Supreme Court, Kings County, 41 App. Div. 2d 235, 342 N.Y.S.2d 100 (2d Dept. 1973), aff'd, 34 N.Y.2d 603, 310 N.E.2d 547, 354 N.Y.S.2d 953 (1974).

¹⁶⁸People v. Chestnut, 26 N.Y.2d 481, 260 N.E.2d 501, 311 N.Y.S.2d 853 (1970); People v. Cavalieri, 36 App. Div. 2d 284, 320, 320 N.Y.S.2d 390 (1st Dept.), aff'd, 29 N.Y.2d 762, 276 N.E.2d 624, 326 N.Y.S.2d 562 (1971), cert. denied, 406 U.S. 962 (1972); Second Additional Grand Jury of Kings County v. Cirillo, 16 App. Div. 2d 605, 230 N.Y.S.2d 303 (2d Dept. 1962), aff'd, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963); People v. Epps, 32 App. Div. 2d 625, 299 N.Y.S.2d 878 (1st Dept. 1969); People ex rel. Vario v. Kreuger, 58 Misc.2d 1023, 297 N.Y.S.2d 488 (Sup. Ct. Nassau County 1969).

because the witness has served his term of imprisonment for contempt; he may be recalled to testify and again be found in contempt.¹⁶⁹ If the witness refuses to testify to separate questions on separate days,¹⁷⁰ or to questions involving separate and distinct transactions,¹⁷¹ separate contempts occur.

D. Disposition on Notice and Hearing

¶78 A prosecution for penal law criminal contempt, being for a crime, requires a trial, or guilty plea. Criminal contempt under the judiciary law, however, may be punished summarily if committed in the immediate view and presence of the court.¹⁷² A witness's refusal to testify before a grand jury is not a contempt committed in the presence of the court and, therefore, mandates notice and a hearing.¹⁷³ Further, where a court delays imposing sanctions for contempt

¹⁶⁹ Second Additional Grand Jury of Kings County v. Cirillo, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963).

¹⁷⁰ People v. Matra, 42 App. Div. 2d 865, 346 N.Y.S.2d 872 (2d Dept. 1973).

¹⁷¹ People v. Saperstein, 1 App. Div. 2d 402, 150 N.Y.S.2d 842 (1st Dept. 1956), aff'd, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160, cert. denied, 353 U.S. 946 (1957); Lombardozzi, supra note 137.

¹⁷² New York Judiciary Law §755 (1962), see section (7)(B), supra. And see Interfaith Hospital v. People, 71 Misc.2d 910, 337 N.Y.S.2d 358 (Sup. Ct. Queens County, Crim. T. 1972); People v. Zweig, 32 App. Div. 2d 569, 300 N.Y.S.2d 651 (2d Dept. 1969).

¹⁷³ People v. Martin, supra note 166; People v. Woodruff, 50 Misc.2d 430, 270 N.Y.S.2d 838 (Sup. Ct. Dutchess County, 1966).

until after the proceeding in which the contempt occurred, it may be inferred that there is no immediacy for dealing with the contempt; notice and hearing, therefore, will be required.¹⁷⁴ What constitutes sufficient notice and reasonable opportunity to defend depends on the particular circumstances of each case.¹⁷⁵

E. Summary Disposition

¶179 Where a witness refuses to obey a court's order (e.g. refuses to testify before grand jury while under subpoena) and is taken before the court and repeats his refusal (e.g. again refuses to answer when asked questions by the judge) the contempt is committed in the "immediate view and presence of the court" and may be summarily punished.¹⁷⁶ But immediate disposition is required.¹⁷⁷ Review of the contempt is provided for in New York Civil Practice Law and Rules

¹⁷⁴ Katz v. Murtagh, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 104 (1971).

¹⁷⁵ Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939). And see People v. Zweig, supra note 172; People v. Martin, supra note 166.

¹⁷⁶ Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935); Hackley v. Kelly, 24 N.Y. 74 (1861), overruled on other grounds, People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903); Waterhouse v. Celli, 71 Misc.2d 600, 336 N.Y.S.2d 960 (Sup. Ct. Monroe County 1972); People v. Knapp, 4 Misc.2d 449, 157 N.Y.S.2d 820 (N.Y. County Ct. Gen. Sess. 1956).

¹⁷⁷ If the judge awaits completion of the proceeding before punishing contempts, he must afford contemnor notice and hearing. Zols v. Lakritz, 74 Misc.2d 322, 344 N.Y.S.2d 626 (Sup. Ct. Queens County 1973).

section 7801(1962).¹⁷⁸

F. Disqualification of the Judge

¶80 When the contempt, although disruptive, is not an insulting attack upon the integrity of the judge, there is no need for disqualification of the judge.¹⁷⁹ Disqualification occurs when the contempt is "of such personal character as to indicate virtual impossibility of detached evaluation."¹⁸⁰

G. Jury Trial

¶81 Since the maximum punishment for the crime of criminal contempt (New York Penal Law sections 215.50 and 215.51) is thirty days in jail and/or \$500, no jury trial is required.¹⁸¹ In all other circumstances, the constitutional requirements, spelled out by the Supreme Court, would be followed (see ¶¶36-38 above).

¹⁷⁸Waterhouse v. Celli, supra note 176; Cahn v. Vario, 32 App. Div. 2d 564, 300 N.Y.S.2d 657 (2d Dept. 1969); People v. Epps, 21 App. Div. 2d 650, 249 N.Y.S.2d 639 (1st Dept. 1964), cert. denied, 379 U.S. 940 (1964), rehearing denied, 380 U.S. 928 (1965).

¹⁷⁹Katz v. Murtagh, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 104 (1971).

¹⁸⁰Id. at 239, 269 N.E.2d 816, 819, 321 N.Y.S.2d 104, 108.

¹⁸¹Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

10. New York Perjury

A. Generally

¶82 New York's statutory scheme for perjury is organized into degrees of the crime. Perjury in the third degree, found in New York Penal Law section 210.05(1965), covers all forms of perjury, whether the statement is oral or written, whether it is material or immaterial; it provides:

A person is guilty of perjury in the third degree when he swears falsely.

Perjury in the third degree is a class A misdemeanor.

Perjury in the second degree, New York Penal Law section 210.10(1965), applies only to written instruments; it provides:

A person is guilty of perjury in the second degree when he swears falsely and when his false statement is (a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved.

Perjury in the second degree is a class E felony.

The most serious crime is perjury in the first degree, New York Penal Law section 210.15(1965), which requires materiality and that the statement be in the form of testimony; it provides:

A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.

Perjury in the first degree is a class D felony.

Definitions of terms relating to perjury are set out in

New York Penal Law section 210.00(1965); they provide:

The following definitions are applicable to this article:

1. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.
2. "Swear" means to state under oath.
3. "Testimony" means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered. . . .
5. "Swear falsely." A person "swears falsely" when he intentionally makes a false statement which he does not believe to be true (a) while giving testimony, or (b) under oath in a subscribed written instrument shall not be deemed complete until the instrument is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true. . . .

The key term defined here is "swears falsely," which amounts to an overall definition of perjury. It contains the five basic elements which are common to the three degrees of perjury:

- a. a statement,
- b. intentionally made, which is,
- c. false, made,
- d. under oath,¹⁸² and
- e. not believed by the maker to be true.

The degrees of the crime of perjury are not mutually exclusive; the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior

¹⁸²Regarding the oath requirement, see People v. Grier, 42 App. Div. 2d 803, 346 N.Y.S.2d 422 (3d Dept. 1973).

thereto.¹⁸³

¶83 Perjury is not excused because of some defect in the proceedings in which the false testimony is given.¹⁸⁴

Additionally, New York Penal Law section 210.30(1965) provides:

It is no defense to a prosecution for perjury that:

1. The defendant was not competent to make the false statement alleged; or
2. The defendant mistakenly believed the false statement to be immaterial; or
3. The oath was administered or taken in an irregular manner or that the authority or jurisdiction of the attesting officer who administered the oath was defective, if such defect was excusable under any statute or rule of law.

B. Intent and Falsity

¶84 Generally, the falsity of testimony does not alone establish willfulness;¹⁸⁵ a perjury conviction cannot be based on evidence that is as consonant with fallibility of memory as with willful lying.¹⁸⁶ Testimony to a fact that a person has no reason to believe to be true may be perjury even though in fact it is true.¹⁸⁷

¹⁸³ People v. Samuels, 284 N.Y. 410, 31 N.E.2d 753 (1940). Other sections of New York Penal Law relating only to perjury in written instruments are §§210.35, 210.40, and 210.45 (McKinney 1975).

¹⁸⁴ People v. Ward, 37 App. Div. 2d 174, 323 N.Y.S.2d 316 (1st Dept. 1971).

¹⁸⁵ Samuels, supra note 183.

¹⁸⁶ Id. See also People v. Lombardozzi, 35 App. Div. 2d 508, 313 N.Y.S.2d 305 (2d Dept. 1970), aff'd, 30 N.Y.2d 677, 283 N.E.2d 609, 332 N.Y.S.2d 630 (1972).

¹⁸⁷ People v. Doody, 72 App. Div. 372, 76 N.Y.S. 606 (3d Dept.), aff'd, 172 N.Y. 165, 64 N.E. 807 (1902).

¶85 When two statements are made under oath and one is false, however, their inconsistency alone may prove perjury. New York Penal Law section 210.20(1965) defines perjury involving inconsistent statements:

Where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjurally so, and where each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged, the inability of the people to establish specifically which of the two statements is the false one does not preclude a prosecution for perjury, and such prosecution may be conducted as follows:

1. The indictment or information may set forth the two statements and, without designating either, charge that one of them is false and perjurally made.

2. The falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.

3. The highest degree of perjury of which the defendant may be convicted is determined by hypothetically assuming each statement to be false and perjurious. If under such circumstances perjury of the same degree would be established by the making of each statement, the defendant may be convicted of that degree at most. If perjury of different degrees would be established by the making of the two statements, the defendant may be convicted of the lesser degree at most.¹⁸⁸

Under this section, contradictory statements presumptively establish the falsity of the false statement.¹⁸⁹ The

¹⁸⁸ A similar statute was recently upheld against Fifth Amendment challenges. The Florida Supreme Court construed "inconsistent statements" to mean statements which are mutually exclusive, and "willfully" to mean that the statement was knowingly false when made. With this construction the statute's presumption of falsity, said the court, is constitutional. Brown v. State, 19 Crim. L. Rptr. (Fla. Sup. Ct. May 5, 1976).

¹⁸⁹ People v. Ashby, 8 N.Y.2d 238, 168 N.E.2d 672, 203 N.Y.S.2d 854 (1960).

people, however, must establish a willful contradiction and show that the oaths were required by law.¹⁹⁰

C. Materiality

¶86 The materiality of the allegedly false testimony is an essential ingredient of perjury.¹⁹¹ Since the crime of perjury is divided into several degrees, the gravity of the offense (of which materiality is partly determinative) is an issue of fact for the jury.¹⁹² A preliminary determination is made by the judge, and the test is whether the statement made can influence the tribunal on the issue before it.¹⁹³ As the court in People v. Perna observed:

Thus a statement is usually held sufficient to support a charge of perjury if it is material to any proper matter of inquiry, and if, furthermore, it is calculated and intended to bolster the testimony of a witness on some material point, or to support or attack the credibility of the witness, or if it is a link in a chain of circumstantial evidence, or supports a conclusion or

¹⁹⁰ People v. Lillis, 3 App. Div. 2d 44, 158 N.Y.2d 191 (4th Dept. 1956). Additionally, the jurisdictional element is a limitation. An irreconcilable inconsistency between a statement sworn in a state proceeding and another sworn in a federal proceeding may not be the basis for a charge of perjury under this section. People v. Iadarola, 85 Misc.2d 271, 377 N.Y.S.2d 431 (Sup. Ct. N.Y. County, 1975).

¹⁹¹ People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909).

¹⁹² People v. Clemente, 285 App. Div. 2d 258, 136 N.Y.S.2d 202 (1st Dept. 1954), aff'd, 309 N.Y. 890, 131 N.E.2d 294 (1955); People v. Dunleavy, 41 App. Div. 2d 717, 341 N.Y.S.2d 500 (1st Dept. 1973).

¹⁹³ People v. Perna, 20 App. Div. 2d 323, 246 N.Y.S.2d 920 (4th Dept. 1964).

opinion of the witness. A person swearing falsely to a material fact cannot defend himself on the ground that the case did not ultimately rest on the fact to which he swore.¹⁹⁴

D. The Two-Witness Rule and the Direct Evidence Rule

¶87 The two-witness rule is a well-established rule of law in New York.¹⁹⁵ New York Penal Law section 210.50(1965) codifies this principle by stating that, with respect to the crimes defined in New York Penal Law article 210, the "falsity of a statement may not be established by the uncorroborated testimony of a single witness." This rule does not, however, apply to prosecutions based upon inconsistent statements pursuant to section 210.20, supra ¶85.

¶88 In establishing a prima facie case of perjury, the government in proving falsity must at least corroborate the testimony of a single witness by independent corroborative circumstances, or make a prima facie case by circumstantial proof.¹⁹⁶

¹⁹⁴ Id. at 327, 246 N.Y.S.2d at 924.

¹⁹⁵ People v. Doody, 172 N.Y. 165, 64 N.E. 807 (1902); People v. Sabella, 35 N.Y.2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100 (1974).

¹⁹⁶ People v. Sabella, supra note 195; People v. Fitzpatrick, 47 App. Div. 2d 70, 364 N.Y.S.2d 910 (1st Dept. 1975); People v. Ginsberg, 80 Misc.2d 921, 364 N.Y.S.2d 260 (Nassau County Ct. 1974). Even the testimony and behavior of the defendant need not be discounted as a possible corroborative factor. People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923). But circumstantial evidence that points equally to defendant's innocence as to his guilt may leave the testimony of the one witness uncorroborated and insufficient to convict. People v. Fellman, 42 App. Div. 2d 764, 346 N.Y.S.2d 334 (2d Dept. 1973). And a conviction cannot be based on evidence that is as consonant with fallibility of memory as with willful falsification. People v. Lombardozzi, supra note 186.

E. Recantation

¶89 New York Penal Law section 210.25(1965) provides a defense to perjury:

In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.

This section codifies previous case law.¹⁹⁷ The defense is designed primarily to encourage witnesses to correct knowingly false testimony, but to disallow blame from being purged when the testimony has influenced the investigation, or when the witness sees that his falsehood is soon to be discovered anyway.

F. Double Punishment

¶90 Exoneration of a witness in the proceeding in which the false testimony is given does not bar a perjury prosecution;¹⁹⁸ collateral estoppel, however, may apply.¹⁹⁹

¹⁹⁷ People v. Gillette, 126 App. Div. 655, 111 N.Y.S. 133 (1st Dept. 1908) (recantation defense); People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957) (limitation on the defense).

¹⁹⁸ Wood v. People, 59 N.Y. 117 (1874).

¹⁹⁹ People v. Berger, 199 Misc. 543, 106 N.Y.S.2d 761 (Monroe County Ct. 1950).

11. New Jersey Contempt: Generally

A. Statutes

¶91 The primary²⁰⁰ sections governing contempt are found in the New Jersey Statutes and in the Rules of Court. N.J. Stat. Ann. sections 2A:10-1, 10-3, 10-5, 10-7, and 10-8 (West 1965) provide respectively:

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, of command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

* * * *

Every summary conviction and judgment, by the Superior Court in the law division or chancery division or by a County Court or any inferior court except the municipal court, for a contempt, shall be reviewable by the appellate division of the Superior Court and all convictions and judgments for contempt by the municipal courts shall be reviewable by the County Court. Such review shall be both upon the law and the facts and the court shall give such judgment as it shall deem to be lawful and just under all the circumstances of the case and shall enforce the same as it shall order.

* * * *

Any person who shall be adjudged in contempt of the superior court of county court by reason

²⁰⁰ New Jersey's immunity statute makes a provision for contempt. If a person refuses to testify after being granted immunity he may be adjudged in contempt and committed to jail until he testifies. N.J. Stat. Ann. §2A:81-17.3 (1973).

of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for the use of the state or the county, as the case may be, for every such contempt, a sum not exceeding \$50 as a fine, to be imposed by the court, together with the costs incurred.

* * * *

The county courts, juvenile and domestic relations courts, county district courts, county traffic courts, criminal judicial district courts, municipal courts and park police courts in this state shall have full power to punish for contempt in any case provided by section 2A:10-1 of this title.

* * * *

Any court may issue a warrant for the arrest of any person subject to punishment for a contempt pursuant to the provisions of chapter 10 of Title 2A of the New Jersey Statutes, directed to any officer or person authorized by law to serve process, who shall be empowered to serve such warrant in any county of this State and to produce the person subject to punishment for contempt as herein provided before the judge of such court issuing said warrant.

Rules 1:10-1 to 1:10-4 of the New Jersey Rules of Court (1969) provide respectively:

Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

* * * *

Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of _____ Charged with Contempt of Court."

* * * *

A person charged with contempt under R. 1:10-2 shall be admitted to bail pending the hearing. The amount and sufficiency of bail shall be reviewable by a single judge of the Appellate Division.

* * * *

A proceeding under R. 1:10-2 may be prosecuted on behalf of the court only by the Attorney General, the County Prosecutor of the county, or where the court for good cause designates an attorney, then by the attorney so designated. Except with the consent of the person charged, the matter may not be heard by the judge allegedly offended or whose order was allegedly contemned. Unless there is a right to a trial by jury, the court in its discretion may try the matter without a jury.

All New Jersey courts of record, civil and criminal, inherently possess the power to punish contempts;²⁰¹ section 2A:10-1 delimits this power. Section 2A:10-3 provides a safeguard to a contemnor summarily punished in allowing review of the contempt judgment "both upon the law and the facts." The "fine" provided in section 2A:10-5 for civil contempt, despite its penal connotation, is merely an imposition of costs in favor of the state to reimburse it for the proceeding.²⁰²

¶92 The rules of court regarding contempt were amended in 1965 in response to the New Jersey Supreme Court's reconsideration of the contempt offense in New Jersey Department of Health v. Roselle;²⁰³ the rules now reflect the court's reasoning. There is no distinction between civil and criminal contempt; any contempt is the same offense in every case. The real distinction is between cases which may be dealt with summarily pursuant to Rule 1:10-1, and cases which must be prosecuted as crimes

²⁰¹In re Merrill, 88 N.J. Eq. 261, 102 A. 400 (1918). The court's power to punish for contempt is over court officers, parties, or strangers. In re Megill, 114 N.J. Eq. 604, 169 A. 501 (1934).

²⁰²New Jersey Department of Health v. Roselle, 34 N.J. 331, 169 A.2d 153 (1961).

²⁰³Id.

pursuant to Rule 1:10-2 [then N.J. Stat. Ann. section 2A:85-1(1965)²⁰⁴] or disposed of on notice and hearing preceding a conditional commitment.

¶93 The offense may be responded to by either punitive or coercive measures, or both. If there has been a direct contempt (in the judge's "actual presence"), the judge may punish the contemnor summarily; no notice or order to show cause is necessary. Any other contempt (indirect contempts) may only be punished pursuant to the procedures specified in Rules 1:10-2 through 1:10-4. Although the term "summary proceeding" is used, the proceedings clearly are not "summary" as that term has been used in this discussion and in other jurisdictions.

B. Distinguishing Civil and Criminal Contempts

¶94 For purposes of this discussion, the distinction between civil and criminal contempt is important in three contexts.²⁰⁵

²⁰⁴N.J. Stat. Ann. §2A:85-1. Offenses indictable at common law and not otherwise covered, punishable as misdemeanors

Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors.

Under this section contempt may be prosecuted as a crime. In re Buehrer, 50 N.J. 501, 236 A.2d 592 (1967); State v. Byrnes, 109 N.J. Super. 105, 262 A.2d 420, aff'd, 55 N.J. 408, 262 A.2d 408, cert. denied, 398 U.S. 941 (1970).

²⁰⁵Of course, the purpose of the punishment, punitive or coercive, determines whether the contempt will be deemed "criminal" or "civil." Roselle, supra note 202.

First, the pardoning power applies to criminal contempt, but not to civil contempt.²⁰⁶ Second, the contemnor must be informed as to whether his contempt is civil or criminal.²⁰⁷ Third, based upon the actual sentence imposed,²⁰⁸ the maximum criminal penalty which may be imposed without a jury trial is six months.²⁰⁹

C. Distinguishing Direct and Indirect Contempts

¶95 "Direct" contempts under Rule of Court 1:10-1 are those committed "in the actual presence of a judge"; they may be adjudged summarily without notice or order to show cause. This procedure may be employed where the judge witnessed the contempt, but not where proof of the contempt depends on proof from persons other than the judge himself.²¹⁰ All other contempts, including obstructive misbehavior outside the presence of the court, misbehavior of an officer of the court, and violation of an order of the court, must be prosecuted after notice and hearing

²⁰⁶ In re Caruba, 142 N.J. Eq. 358, 61 A.2d 290 (1948); In re Borough of West Wildwood, 42 N.J. Super. 282, 126 A.2d 333 (1956).

²⁰⁷ New Jersey Department of Health v. Roselle, supra note 202.

²⁰⁸ State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969), cert. denied, 396 U.S. 1021 (1970).

²⁰⁹ In re Bruehrer, 50 N.J. 501, 236 A.2d 592 (1967).

²¹⁰ Swanson v. Swanson, 8 N.J. 169, 84 A.2d 450 (1951).

under Rules of Court 1:10-2 through 1:10-4.²¹¹ Whether direct or indirect, if the criminal penalty actually imposed is greater than six months, a jury trial will also be required.²¹²

12. Civil and Criminal Contempt in New Jersey

A. Misbehavior

¶96 In general, any conduct which is disrespectful or scornful of the court is contemptuous,²¹³ if it tends to obstruct the administration of justice.²¹⁴ Disorderly behavior that interrupts the proceedings of a judicial body,²¹⁵ or refusal to give unprivileged answers to a grand

²¹¹In re Fairlawn Education Assn., 63 N.J. 112, 305 A.2d 72, cert. denied, 414 U.S. 855 (1973); In re Finklestein, 112 N.J. Super. 534, 271 A.2d 916 (1970); In re Boyd, 36 N.J. 285, 176 A.2d 793 (1962); In re Szczepanik, 37 N.J. 503, 181 A.2d 772 (1962). The court's directive, however, disobedience of which constitutes contempt, must be written. In re Callan, 66 N.J. 401, 331 A.2d 612 (1975).

²¹²In re Buehrer, supra note 209.

²¹³In re Callan, 122 N.J. Super. 479, 300 A.2d 868, aff'd, 126 N.J. Super. 103, 312 A.2d 881, rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975).

²¹⁴In re Caruba, 139 N.J. Eq. 404, 51 A.2d 446 (1947), aff'd, 140 N.J. Eq. 563, 55 A.2d 289, application denied, 142 N.J. Eq. 358, 61 A.2d 290 (sentence imposed by trial court and affirmed on appeal, is not then to be modified by trial court), cert. denied, 335 U.S. 846 (1948); State v. Gonzalez, 134 N.J. Super. 472, 341 A.2d 694 (1975).

²¹⁵State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (1969).

jury when so ordered,²¹⁶ are contemptuous acts. That the court's order was unlawful²¹⁷ or that disobedience to the order was in good faith,²¹⁸ are not defenses to the resulting contempt charge.

¶197 In New Jersey, perjury or false swearing is a contempt of court and may be punished as such;²¹⁹ the falsity, however, must be shown incontrovertibly.²²⁰

B. Double Jeopardy Considerations

¶198 Repetition of direct contempts during the course of a trial was recently held to support separate contempt offenses with separate sentences.²²¹

¶199 A contempt which is also an assault may be punished

²¹⁶State v. Kenny, 68 N.J. 17, 342 A.2d 189 (1975); In re Boyd, 36 N.J. 285, 176 A.2d 793 (1962); In re Schwarz, 134 N.J.L. 267, 46 A.2d 804 (1946).

²¹⁷State v. Corey, 117 N.J. Super. 296, 284 A.2d 395 (1971), opinion adopted, 119 N.J. Super. 579, 293 A.2d 196, cert. denied, 409 U.S. 1125 (1973); Oddo v. Saibin, 106 N.J. Eq. 453, 151 A. 289 (1930); Forrest v. Price, 52 N.J. Eq. 16, 29 A. 215 (1894).

²¹⁸In re Brown, 50 N.J. 435, 236 A.2d 142 (1967).

²¹⁹In re Caruba, supra note 214; Swanson v. Swanson, 8 N.J. 169, 84 A.2d 450 (1951); State v. Illario, 10 N.J. 475, 77 A.2d 483 (1951). Recantation of the false testimony does not purge the contempt.

²²⁰Harbor Tank Storage Co. v. LoMuscio, 45 N.J. 539, 214 A.2d 1 (1965); In re Malisse, 66 N.J. Super. 195, 168 A.2d 838 (1961).

²²¹Further, as long as the direct contempts are adjudged as such immediately, a jury trial will not be required, even though the sentences aggregate more than six months. State v. Gonzalez, 134 N.J. Super. 472, 341 A.2d 694 (1975).

as both without violating double jeopardy principles.²²²

C. Disposition on Notice and Hearing

¶100 Referring to the procedures set out in Rules of Court 10:1-2 through 10:1-4, the New Jersey Supreme Court in In re Buehrer said:²²³

But since the summary power lends itself to arbitrariness, it should be hemmed in by measures consistent with its mission. To that end, our rules embody sundry restraints. The judge whose order was allegedly breached may not hear the charge unless the defendant consents; the contempt process may be instituted only by the court, lest a litigant turn it to private gain; the defendant shall be informed plainly that the proceeding is penal as distinguished from one for the further relief of a litigant; the penal charge may not be tried with a litigant's application for further relief unless the defendant consents; a conviction is reviewable upon appeal both upon the law and the facts, and the appellate court shall give such judgment as it shall deem just. The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt. Thus the defendant is afforded all the rights of one charged with crime except the right to indictment and to trial by jury.²²⁴

Such a "summary" conviction for contempt is not a "conviction" within statutes imposing a disability or disqualification on an individual because of a conviction for a crime.²²⁵

²²² In re Burroughs, 125 N.J. Super. 221, 310 A.2d 117 (1973).

²²³ 50 N.J. 501, 515-16, 236 A.2d 592, 600 (1967).

²²⁴ See also New Jersey Department of Health v. Roselle, 34 N.J. 331, 169 A.2d 153 (1961); Essex County Welfare Board v. Perkins, 133 N.J. Super. 189, 336 A.2d 16 (1975); In re Fair Lawn Education Ass'n., 63 N.J. 112, 305 A.2d 72 (1973).

²²⁵ State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (1969).

D. Summary Disposition

¶101 In In re Bridge²²⁶ the court observed that for proceedings under Rule of Court 1:10-1, where the contempt is in the "actual presence of the judge" and no notice or hearing is necessary for disposition of the contempt, the confinement must be terminable upon the contemnor's compliance with the order disobeyed.²²⁷ In State v. Gonzalez,²²⁸ however, the immediate summary procedure of Rule 10:1-1 was not limited only to coercive, as opposed to punitive, punishment. The court observed:

. . .[A] court may summarily convict and impose punishment for contempt, without any provision for notice and opportunity to be heard, provided that the contemptuous conduct occurred in the immediate presence of the judge and was personally witnessed by him, and that the conduct created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that if 'not instantly suppressed and punished, demoralization of the court's authority would follow.'²²⁹

Obviously, this procedure is of very limited application; whether it is limited to coercive punishment, however, is unclear.

¶102 Summary convictions are reviewable by appeal under N.J. Stat. Ann. section 2A:10-3(West 1965).

²²⁶ 120 N.J. Super. 460, 295 A.2d 3 (1972), certif. denied, 62 N.J. 80, 299 A.2d 77 (1972); cert. denied, 410 U.S. 991 (1973).

²²⁷ See also Essex County Welfare Board v. Perkins, 133 N.J. Super. 189, 336 A.2d 16 (1975).

²²⁸ 134 N.J. Super. 472, 341 A.2d 694 (1975).

²²⁹ Id. at 475, 341 A.2d at 696 (1975).

E. Limitation on Coercive Commitment

¶103 The New Jersey Supreme Court recently became the first court to hold that civil confinement may become unjustified and will be discontinued when it loses its "coercive impact." Noting that each case must be decided on its own merit, the court in Catena v. Seidl²³⁰ said the relevant question is "whether there is a substantial likelihood that continued confinement will cause [the witness] to change his mind and testify." Factors to be weighed in deciding each case are age, state of health, and length of confinement. Catena was seventy-three years old, continued confinement posed a great danger to his heart condition, and he had been imprisoned for five years, steadfastly refusing to testify. Catena's confinement was held no longer coercive, and it was ended.

13. New Jersey Perjury

A. Generally

¶104 New Jersey, like the federal system, punishes both perjury and false-swearing.²³¹ The perjury statute, in N. J. Stat. Ann. section 2A:131-1 (West 1969) provides that:

²³⁰17 Crim. L. Rptr. 2497 (N.J. Sup. Ct. August 19, 1975).

²³¹There are other statutes more specifically tailored to particular situations. See, e.g., N.J. Stat. Ann. §2A:131-2 (West 1953) (perjury before commissioner of another state or of the United States); N.J. Stat. Ann. §2A:131-3 (West 1953) (using false oaths or depositions); N.J. Stat. Ann. §41:3-1 (West 1937) (partnerships--perjury in taking oaths or making affidavits).

Any person who willfully and corruptly commits perjury or by any means procures or suborns any person to commit corrupt and willful perjury, on his oath, in any action, pleading, indictment, controversy, matter or cause depending or which may depend in a court of this state, or before a referee or arbitrator, or in a deposition or examination taken or to be taken pursuant to the laws of this state or the rules of the supreme court of this state, before any public officer legally authorized to take the same, is guilty of a high misdemeanor.

The false-swearing statute follows at New Jersey Stat.

Ann., section 2A:131-4(West 1969); it provides:

Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable as for a misdemeanor.

Further definition is provided by the next section, which provides:

If a person has made contrary statements under oath, it shall not be necessary to allege in an indictment or allegation which statement is false but it shall be sufficient to set forth the contradictory statements and allege in the alternative that one or the other is false.

Proof that both statements were made under oath duly administered is prima facie evidence that one or the other is false; and if the jury are satisfied from all the evidence beyond a reasonable doubt that one or the other is false and that such false statement was willful, whether made in a judicial proceeding or before a person authorized to administer an oath and acting within his authority, it shall be sufficient for a conviction.

¶105 The purpose of the false-swearing statute was to relieve the prosecution of many of the technical difficulties of a perjury prosecution.²³² False swearing is a lesser

²³²State v. Kowalczyk, 3 N.J. 51, 68 A.2d 835 (1949); State v. Angelo's Motor Sales, 125 N.J. Super. 200, 310 A.2d 97 (1973), aff'd, 65 N.J. 154, 320 A.2d 161 (1974).

included offense of perjury²³³ includes certain classifications of falsehoods not reached by perjury,²³⁴ and allows a conviction without proof of falsity. . Perjury requires that a formal oath was administered²³⁵ while false swearing does not.

B. Intent and Falsity

¶106 Perjury is a willful assertion as to a fact, knowing such to be false, with the intent of misleading a court or jury.²³⁶ Willfulness in the use of false swearing was defined by the Supreme Court of New Jersey to be intentionally testifying to something known to be false.²³⁷ A statutory

²³³ Perjury is a high misdemeanor, punishable by a fine of not more than two thousand dollars or imprisonment for not more than seven years or both. False swearing is classified as a misdemeanor. A misdemeanor is punishable by a fine of not more than one thousand dollars or imprisonment for not more than three years or both. New Jersey Stat. Ann. §2A:85-6 (West 1952) and §2A:85-7 (West 1952).

²³⁴ State v. Siegler, 12 N.J. 520, 97 A.2d 469 (1953). Under the false swearing statute, for example, one may prosecute false statements formally sworn to by means of an oath as well as solemn verification of false statements during various stages of judicial proceedings. State v. Angelo's Motor Sales, 125 N.J. Super. 200, 310 A.2d 97 (1973); aff'd, 65 N.J. 154, 320 A.2d 161 (1974).

²³⁵ State v. Randazzo, 92 N.J. Super. 579, 224 A.2d 341 (1966).

²³⁶ Cermak v. Hertz Corp., 53 N.J. Super. 455, 147 A.2d 800, aff'd, 28 N.J. 568, 147 A.2d 795 (1959). See also State v. Sullivan, 24 N.J. 18, 130 A.2d 610, cert. denied, 355 U.S. 840 (1957).

²³⁷ State v. Fuchs, 60 N.J. 564, 292 A.2d 10 (1972). See also State v. Browne, 43 N.J. 321, 204 A.2d 346 (1964); State v. Doto, 16 N.J. 397, 109 A.2d 9 (1954), cert. denied, 349 U.S. 912 (1955).

definition of willfulness is now found in N. J. Stat. Ann. section 2A:131-7 (West 1969) and applies to both crimes; it provides:

"Willful" shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false.

¶107 Falsity must be established for perjury, but not for false swearing.

C. Materiality

¶108 Even though never a requirement for a false swearing conviction, traditionally the allegedly false statement had to be material to be perjury.²³⁸ Under N. J. Stat. Ann. section 2A:131-6 (West 1969) materiality is no longer required; it provides:

Corroboration or proof by more than 1 witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this article. It shall not be necessary to prove, to sustain a charge under this article, that the oath or matter sworn to was material, or, if before a judicial tribunal, that the tribunal had jurisdiction.

D. Two-Witness and Direct Evidence Rules

¶109 Although once required by the case law,²³⁹ these rules were often ignored or evaded.²⁴⁰ N.J. Stat. Ann. section

²³⁸ State v. Ellenstein, 121 N.J.L. 304, 2 A.2d 454 (1938). Materiality was a question of law. State v. Lupton, 102 N.J.L. 530, 133 A. 861 (1926).

²³⁹ State v. Camporale, 16 N.J. 373, 108 A.2d 841 (1954).

²⁴⁰ See State v. Siegler, 12 N.J. 520, 97 A.2d 469 (1953); State v. Haines, 18 N.J. 550, 115 A.2d 24 (1955); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973).

2A:131-6, above, abrogates these rules as to perjury and false swearing prosecutions.

E. Recantation

¶110 Recantation of perjury or false swearing neither neutralizes the false testimony nor exculpates the witness of the crime.²⁴¹

F. Separate Perjuries

¶111 Acquittal of the substantive crime does not necessarily preclude subsequent prosecution for perjury.²⁴²

G. Subornation

¶112 To establish this crime the government must show that the defendant requested the individual to swear falsely and that the individual in fact did so.²⁴³

²⁴¹ State v. Kowalczyk, 3 N.J. 51, 68 A.2d 835 (1949); In re Foster, 60 N.J. 134, 286 A.2d 508 (1972). When the prosecutor is told, however, that the witness intends to recant, he may have a duty to advise the witness of his privilege against self-incrimination. State v. Williams, 112 N.J. Super. 563, 272 A.2d 294 (1970), aff'd, 59 N.J. 493, 284 A.2d 172 (1971).

²⁴² See State v. Redinger, 64 N.J. 41, 312 A.2d 129 (1973).

²⁴³ State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962).

14. Massachusetts Contempt

A. Generally

¶113 Massachusetts does not have a general contempt statute,²⁴⁴ but the superior courts,²⁴⁵ district courts,²⁴⁶ and courts of chancery²⁴⁷ possess inherent power to punish for contempt.

B. Distinguishing Civil and Criminal Contempts

¶114 Under Massachusetts case law the purpose of the punishment for contempt fixes its nature as either civil or criminal; civil contempt is remedial and its punish-

²⁴⁴ There are, however, contempt statutes for particular proceedings. See, e.g., Mass. Gen. Laws Ann. ch. 220, §13A (1974) (regarding labor disputes); Mass. Constitution pt. 2, ch. 1, §3, arts. 10, 11 (1967) (power of House of Representatives, Senate and Governor to punish for contempt); Mass. Gen. Laws Ann. ch. 30A, §12(5) (1954) (contempt before certain state agencies); Mass. Gen. Laws Ann. ch. 233, §8-11 (1974) (contempt before specified town officials); Mass. Gen. Laws Ann. ch. 233, §5 (1974) (contempt of court-appointed master or auditor); Mass. Rules of Civil Procedure §37 (1974) (refusal to honor a court-ordered deposition or to answer a question in such a deposition).

²⁴⁵ Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N.E. 429 (1920); Home Investment Co. v. Iovieno, 246 Mass. 346, 141 N.E. 78 (1923); Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943); New England Novelty Co. Inc. v. Sandberg, 315 Mass. 739, 54 N.E.2d 915, cert. denied, 323 U.S. 740, rehearing denied, 323 U.S. 815 (1944).

²⁴⁶ Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943). And see Mass. Gen. Laws Ann. ch. 218, §4 (1916).

²⁴⁷ Root v. Mac Donald, 260 Mass. 344, 157 N.E. 684 (1927).

ment is contingent, while criminal contempt is punitive and its punishment is unconditional and fixed.²⁴⁸ Good faith is not a defense to a contempt charge, civil or criminal.²⁴⁹

¶115 The only important procedural consequence turning on the distinction between civil and criminal contempt is the method of review of the contempt. Judgments of criminal contempt are reviewed by writ of error²⁵⁰ while appeal is the proper remedy for review of adjudication of civil contempt.²⁵¹

²⁴⁸Sodones v. Sodones, 74 Adv. Sheets 1303, 314 N.E.2d 906 (1974). And see In re De Saulnier, 360 Mass. 769, 279 N.E.2d 287 (1971); Blackenburg v. Commonwealth, 260 Mass. 369, 157 N.E. 693 (1927), cert. denied, 283 U.S. 819 (1930); Root v. Mac Donald, 260 Mass. 344, 157 N.E. 684 (1927); Hurley v. Commonwealth, 188 Mass. 443, 74 N.E. 677 (1905).

²⁴⁹United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 278 N.E.2d 716 (1972). Inability to comply with the court's order, however, though a defense to civil contempt, Milano v. Hingham Sportswear Co., Inc., 74 Adv. Sheets 2121, 318 N.E.2d 827 (1974); is no defense to criminal contempt, In re Cartwright, 114 Mass. 230 (1873). Furthermore, criminal contempts will survive reversal of the decree which was disobeyed. Town of Stow v. Marinelli, 352 Mass. 738, 227 N.E.2d 708 (1967).

²⁵⁰Hansen v. Commonwealth, 344 Mass. 214, 181 N.E.2d 843 (1962); New England Novelty Co. v. Sandberg, *supra* note 245; In re Opinion of the Justices, 301 Mass. 615, 17 N.E.2d 906 (1939).

²⁵¹Nickerson v. Dowd, 342 Mass. 452, 174 N.E.2d 346 (1961); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 65 N.E.2d 555 (1946). Under Mass. Gen. Laws Ann. ch. 233, §20H (1970) the government can appeal the failure of the court to find contempt in cases dealing with immunized witnesses.

C. Distinguishing Direct and Indirect Contempts

¶116 For purposes of determining whether summary procedure is allowed or whether notice and hearing are required, the distinction between direct and indirect contempts is decisive. Direct contempts, those committed in the "court's presence," are punishable summarily.²⁵² In a 1971 case where the witness was summarily convicted of criminal contempt for refusals to testify before a grand jury, after the refusals were repeated to the judge, the Supreme Judicial Court, not following the federal rule, characterized the contempt as direct and upheld the summary conviction.²⁵³ In the case of a direct contempt, the trial judge may rest on his judicial knowledge of the facts constituting the contempt,²⁵⁴ but it is advisable for the judge to set forth the acts constituting contempt in the contempt order.²⁵⁵

¶117 In a prosecution for contempt not committed in the court's presence, the witness must be given notice of the charges against him and an opportunity to be heard.²⁵⁶

²⁵² Joyce v. Hickey, 337 Mass. 118, 147 N.E.2d 187 (1958); Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209, cert. denied, 283 U.S. 819 (1930); Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943).

²⁵³ In re De Saulnier, 360 Mass. 769, 279 N.E.2d 287 (1971).

²⁵⁴ Blankenburg v. Commonwealth, supra note 252.

²⁵⁵ Albano v. Commonwealth, 315 Mass. 531, 53 N.E.2d 690 (1944); Silverton v. Commonwealth, supra note 252.

²⁵⁶ Meranto v. Meranto, 75 Adv. Sheets 227, 323 N.E.2d 723 (1975); Garabedian v. Commonwealth, 336 Mass. 119, 142 N.E.2d 777 (1957); Woodbury v. Commonwealth, 295 Mass. 316, 3 N.E.2d 779 (1936).

¶118 For criminal contempts where the actual sentence imposed is over six months the federal constitutional rule requires a jury trial.²⁵⁷

D. Double Jeopardy Considerations

¶119 Only one penalty may be imposed for contempt when separate questions are designed to establish a single fact, or relate to only a single subject of inquiry.²⁵⁸

But if the witness makes no effort to define his area of refusal and each question seeks to elicit new facts, repeated refusals to answer constitute separate contempts of court.²⁵⁹ If the same act constitutes a contempt and a criminal offense double jeopardy does not automatically bar bringing both proceedings.²⁶⁰

E. Misbehavior

¶120 Noncompliance with an order of the court constitutes contempt.²⁶¹ In Massachusetts, perjury, if sufficient to be an "obstruction of justice," can constitute contempt.²⁶²

²⁵⁷Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

²⁵⁸In re De Saulnier, supra note 253.

²⁵⁹Id.

²⁶⁰New England Novelty Co. v. Sandberg, 315 Mass. 739, 54 N.E.2d 915, cert. denied, 323 U.S. 740, rehearing denied, 323 U.S. 815 (1944).

²⁶¹Commissioner of Banks v. Tremont Trust Co., 267 Mass. 331, 166 N.E.2d 848 (1929).

²⁶²Blankenburg v. Commonwealth, 260 Mass. 369, 157 N.E. 693 (1927), aff'd 272 Mass. 25, 172 N.E. 209, cert. denied, 283 U.S. 819 (1930).

F. Disqualification of Judge

¶121 A witness accused of an indirect contempt may under Mass. Gen. Laws Ann. ch. 220, §13b(1935) file for withdrawal of the presiding judge whose person or conduct was the object of the contempt, thus resulting in possible prejudice. This statute provides:

The defendant in any proceeding for contempt of court in such a case may file with the court a demand for the retirement of the justice sitting in such case, if the contempt arises from an attack upon the character or conduct of such justice and the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand, prior to the hearing in the contempt proceeding, the justice shall thereupon proceed no further, but another justice shall be assigned by the chief justice of the court.

15. Massachusetts Perjury

A. Generally

¶122 Perjury is defined in Mass. Gen. Laws Ann. ch.268, section 1(1920) as follows:

Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, wilfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury. Whoever commits perjury on the trial of an indictment for a capital crime shall be punished by imprisonment in the state prison for life or for any term of years, and whoever commits perjury in any other case shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars or by imprisonment in jail for not more than two and one half years, or by both such fine and imprisonment in jail.

The first sentence defines two classes of perjury. The first part of the first sentence defines perjury committed in a judicial or ancillary proceeding, or committed in a proceeding in the course of justice, e.g. an adjudicatory proceeding before some administrative officer or agency other than a court. The second part of the first sentence, which requires neither a judicial nor adjudicatory proceeding, defines perjury as the making of false statements under oath where there was statutory or other legal justification for the requiring of an oath in the particular circumstances.²⁶³

¶123 Under the first part, perjury in a judicial proceeding occurs whenever one willfully swears or affirms falsely in a matter material to the issue or point in question.²⁶⁴

¶124 Under the second part, all willfully false and relevant statements under oath, where the oath reasonably should be regarded as required by law, are defined as perjury.²⁶⁵ In this regard, perjury has been found to exist before the State Crime Commission,²⁶⁶ which had the statutory authority to require testimony under oath; before the Commissioner of the Department of Public Works,²⁶⁷

²⁶³Commonwealth v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966).

²⁶⁴Commonwealth v. Geromini, 357 Mass. 61, 255 N.E.2d 737 (1970).

²⁶⁵Commonwealth v. Giles, supra note 263.

²⁶⁶Id.

²⁶⁷Commonwealth v. Bessette, 345 Mass. 358, 187 N.E.2d 810 (1963).

who had the power to administer oaths in removal hearings; and before a bail commissioner.²⁶⁸

B. Intent and Falsity

¶125 In Massachusetts, knowledge that the testimony is false may be inferred from the falsity of the statement itself if considered in relation to the facts relating to the witness's opportunity to have knowledge.²⁶⁹ If the jury concludes that the witness believed his statement to be true, however, perjury is not shown.²⁷⁰ A party is not to be convicted of perjury because, in the opinion of the jury, he has no reasonable cause for the opinion he expressed.²⁷¹ Thus, where a witness relates untrue facts in his testimony, but they are derived from a source that he has no reason to doubt, his testimony is not intentionally untrue.²⁷² Where the answer is susceptible of a reasonably ascertainable meaning, a conviction for perjury requires proof beyond a reasonable doubt as to the intentional falsity of the answer.²⁷³

²⁶⁸ Commonwealth v. Sargent, 129 Mass. 115 (1880). The definition is also broad enough to include perjury in hearings before legislative and investigative bodies. Commonwealth v. Giles, 350 Mass. 102, 108, 213 N.E.2d 476, 481 (1966).

²⁶⁹ Commonwealth v. Giles, supra note 268.

²⁷⁰ Id.

²⁷¹ Commonwealth v. Brady, 71 Mass. 78, 79 (1855).

²⁷² Commonwealth v. Geromini, 357 Mass. 61, 255 N.E. 2d 737 (1970).

²⁷³ Commonwealth v. Giles, supra note 268.

C. Materiality

¶126 A false answer, to be perjurious, must be material to a matter under investigation.²⁷⁴ The test is whether the testimony could have influenced the final outcome.²⁷⁵ Materiality is a question of law.²⁷⁶

D. Two-Witness and Direct Evidence Rules

¶127 In 1848 in Commonwealth v. Parker,²⁷⁷ Massachusetts adopted the traditional two-witness rule. Dicta in that case, however, suggest the possibility that documentary evidence be of such a character as to overcome the oath of the defendant and his presumption of innocence.²⁷⁸

E. Recantation

¶128 Recantation is not a defense to a charge of perjury. But any testimony given by the defendant, subsequent to the perjurious testimony and which tends to qualify it, must be taken into consideration. If the subsequent

²⁷⁴Commonwealth v. Louis Construction Co., 313 Mass. 600, 180 N.E.2d 83 (1962).

²⁷⁵Commonwealth v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966). In Commonwealth v. Grant, 116 Mass. 17 (1874), it was held perjury to swear falsely to any "material circumstances" which tend to prove or disprove a fact. See also Commonwealth v. Baron, 356 Mass. 362, 252 N.E.2d 220 (1969).

²⁷⁶Commonwealth v. Giles, *supra* note 275; Commonwealth v. Hollander, 200 Mass. 73, 85 N.E. 844 (1908).

²⁷⁷56 Mass. (2 Cush.) 212.

²⁷⁸Id. at 223.

testimony indicates that no falsity was intended, the original testimony is not an intentionally false statement.²⁷⁹

F. Subornation and Related Matters

¶129 The following sections, related to the general perjury statute, may be useful.

No written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made under the penalties of perjury. Whoever signs and issues such a written statement containing or verified by such a written declaration shall be guilty of perjury and subject to the penalties thereof if such statement is wilfully false in a material matter.²⁸⁰

* * * *

Whoever is guilty of subornation of perjury, by procuring another person to commit perjury, shall be punished as for perjury.²⁸¹

* * * *

Whoever attempts to incite or procure another person to commit perjury, although no perjury is committed, shall be punished by imprisonment in the state prison for not more than five years or in jail for not more than one year.²⁸²

²⁷⁹Commonwealth v. Geromini, 357 Mass. 61, 255 N.E. 2d 737 (1970). In that case the subsequent testimony indicated that the defendant, in giving the original testimony as to a fact, had no personal recollection as to the fact but was relying on a written record. He had no reason to think the record was inaccurate at the time, but it turned out to be inaccurate. No intentional falsity was shown.

²⁸⁰Mass. Gen. Laws Ann. ch. 268, §1A (1947) (verifying certain written statements by written declaration instead of by oath).

²⁸¹Mass. Gen. Laws Ann. ch. 268, §2 (1812) (subornation of perjury).

²⁸²Mass. Gen. Laws Ann. ch. 268, §3 (1812) (inciting to perjury).

* * * *

If it appears to a court of record that a party or a witness who has been legally sworn and examined, or has made an affidavit, in any proceeding in a court or course of justice has so testified as to create a reasonable presumption that he has committed perjury therein, the court may forthwith commit him or may require him to recognize with sureties for his appearance to answer to an indictment for perjury; and thereupon the witnesses to establish such perjury may, if present, be bound over to the superior court, and notice of the proceedings shall forthwith be given to the district attorney.²⁸³

²⁸³Mass. Gen. Laws Ann. ch. 268, §4 (1812) (commitment on presumption of perjury).

Contempt and Perjury: Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

- ¶5, Note 2: Correction: United States v. Abascal, 509 F.2d 752 (9th Cir. 1975), cert. denied, 422 U.S. 1027 (1975).
- ¶7, Note 5: Correction: Taylor v. Finch, 423 F.2d 1277 (8th Cir. 1970), cert. denied sub nom. Taylor v. Richardson, 408 U.S. 881 (1970).
- ¶8, Note 7: Correction: Wong Gim Yong v. United States, 321 F.2d 776 (D.C. Cir. 1956).
- ¶8, Note 9: Add: Under civil contempt, the court may also order the payment of damages caused by a violation of a court order or decree. McComb v. Jacksonville Paper Co., 336 U.S. 176, 193 (1949).
- ¶8, Note 10: Correction: In re Nevitt, 117 F. 448, 461 (8th Cir. 1902).
- ¶9, Note 12: Correction: Harris v. United States, 382 U.S. 162 (1965). (Also at: ¶25, Note 46).
- ¶10, Note 22: Correction: In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974); Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975).
- ¶12, Note 25: Correction: Nye v. United States, 313 U.S. 33 (1941).

¶12, Correction: Since the behavior constituting
 "indirect contempt"....

¶9, Note 31: Add: United States v. First National State
Bank, 18 Crim. L. Rptr. 2454 (3d Cir. 1976)
(witness in administrative summons enforcement
proceeding not subject to contempt for refusing
to answer questions beyond the scope of the
proceeding).

¶19, Note 32: Correction: Stewart v. United States, 440
F.2d 954 (9th Cir. 1971), aff'd sub nom. Kastigar
v. United States, 406 U.S. 441, rehearing
denied, 408 U.S. 931 (1972).

¶23, Note 39: Correction: Catena v. Seidl, 68 N.J. 224, 343
A.2d 744 (1975). (Also at ¶103, Note 230).

¶23, Note 42: But see Gruner v. Superior Court, 19 Crim.
L. Rptr. 4170 (1976) (Applicants sought a
stay of a civil contempt sentence, asserting
that they were entitled to a hearing to
determine whether or not the commitment for
contempt had a reasonable prospect of accom-
plishing its purpose. Justice Rehnquist,
issuing the opinion in his capacity as Circuit
Justice for the 9th Circuit, denied the stay,
stating, "None of our cases supports the exist-
ence of any such requirement, and applicants'
position seems to boil down to a contention
that if they but assure the court of their
complete recalcitrance the court is powerless

to commit them for contempt." None of the special circumstances in Catena v. Seidl were present in this case).

¶25, Note 50: Correction: Dyke v. Taylor Implement Manu-
facturing Co.

¶25, Note 51: Correction: United States v. Bukowski, 435
F.2d 1094 (7th Cir. 1970), cert. denied,
401 U.S. 911 (1971).

¶30, Note 59: Correction: In re Little, 404 U.S. 553
(1972); Jessup v. Clark, 490 F.2d 1068
(3d Cir. 1973).

¶31, Note 60: Correction: Hawkins v. United States, 190
F.2d 782 (4th Cir. 1951).

¶33, Note 64: Correction: Baker v. Eisenstadt, 456 F.2d
382 (1st Cir.), cert. denied, 409 U.S. 846
(1972). (Also at: ¶10, Note 21).

¶33, Note 67: Correction: In re Oliver, 333 U.S. 257
(1948).

¶33, Note 71: Correction: Taylor v. Hayes, 418 U.S. 488,
497-498 (1974)....Id. at 497-498.

¶33, Note 71: See also Paul v. Pleasants, 21 Crim. L. Rptr.
2012 (4th Cir. 1977) (postponing the hearings
held on appellant's contempt citation until
the conclusion of the trial coupled with
notification of the charges against him and
the dual opportunity given appellant to speak

in his own behalf satisfied due process).

¶35, Note 79:Correction: Id. at 501, 503.

¶35, Note 80:Correction: Id. at 503.

¶38, Note 86:Correction: Id. at 517.

¶41, Note 89:Correction: United States v. Kahn, 472 F.2d
272 (2d Cir.), cert. denied, 411 U.S. 982
(1973).

¶41, Note 90:Correction: United States v. Devitt, 499
F.2d 135 (7th Cir. 1974), cert. denied,
421 U.S. 975 (1975).
(Also at: ¶44, Note 95; ¶55, Note 129; ¶59,
Note 133).

¶43, Note 92:Correction: United States v. Mandujano,
425 U.S. 564 (1976).

¶44, Note 93:Correction: United States v. Dowdy, 479
F.2d 213 (4th Cir. 1973), cert. denied, 414
U.S. 323, 414 U.S. 866, rehearing denied,
414 U.S. 1117 (1974).

¶44, Note 95:Correction: La Placa v. United States, 354
F.2d 56 (1st Cir. 1965).

¶45, Note 103:Correction: United States v. Nickels, 502
F.2d 1173 (7th Cir. 1974), cert. denied,
426 U.S. 911 (1976); United States v. Crandall,
363 F.Supp. 648 (W.D. Pa. 1973), aff'd, 493
F.2d 1401 (3d Cir. 1974), cert. denied,
419 U.S. 852, aff'd, 495 F.2d 1369 (3d Cir.
1974).

¶46, Note 105:Correction: United States v. Saenz, 511
F.2d 766 (5th Cir.), cert. denied, 423 U.S.
946 (1975).

¶46, Note 106:Correction: United States v. Lee, 509
F.2d 645 (2d Cir.), stay denied, 421 U.S.
927 (1975), cert. denied, 422 U.S. 1044
(1975). (Also at: ¶55, Note 129; ¶61, Note
135).

¶46, Note 107:Correction: Tasby v. United States, 504
F.2d 332 (8th Cir. 1974), cert. denied,
419 U.S. 1125 (1975).

¶48, Note 114:Correction: Id. at 927.

¶49, Note 115:Correction: Strassi v. United States, 401
F.2d 259 (5th Cir. 1968), vacated and remanded
on other grounds, 394 u.S. 311 (1969).

¶50, Note 117:Correction: United States v. Bergman,
354 F.2d 931 (2d Cir. 1966).

¶52, Note 122:Correction: Richards v. United States,
408 F.2d 884 (5th Cir.), cert. denied, 395
U.S. 986 (1969).

¶53, Note 125:Correction: United States v. Barnes, 386
F.Supp. 162 (E.D.Tenn. 1973), aff'd, 506
F.2d 1400 (6th Cir.), cert. denied, 420
U.S. 1005 (1975).

¶54, Note 126:Correction: United States v. Gross, 511 F.2d
910, cert. denied, 423 U.S. 924 (1975).

¶54, Note 127:Correction: U.S. ex. rel. Washington v.
Vincent, 525 F.2d 262 (2d Cir.), cert. denied,
424 U.S. 934 (1975).

¶58, Note 131:Correction: United States v. Chapin, 515
F.2d 1274 (D.C. Cir.), cert. denied, 423
U.S. 1015 (1975). (Also at: ¶61, Note 135).

¶61, Note 135:Correction: United States v. Braasch, 505
F.2d 139 (7th Cir. 1974), cert. denied,
421 U.S. 910 (1975).

¶62, Note 136:Correction: United States v. Del Toro,
513 F.2d 656 (2d Cir.), cert. denied,
423 U.S. 826 (1975).

¶62, Note 147:Correction: New York Penal Law §215.50
(McKinney 1975).

¶70, Note 148:Correction: New York Penal Law §215.51
(McKinney 1975).

¶70, Note 149:Correction: Ruskin v. Detken (Also at:
¶75, Note 166).

¶71, Note 151:Correction: People v. Menne, 373 N.Y.S.
2d 541 (1975).

¶72, Note 155:Correction: In re Koota, 269 N.Y.S.2d
393.

¶75, Note 166:Correction: People v. Ianniello, 36 N.Y.2d
137, 325 N.E.2d 146, 365 N.Y.S.2d 821,
cert. denied, 423 U.S. 831 (1975).

¶85, Note 188: Correction: Brown v. State, 334 So.2d
597 (1976).

¶87, Note 195: Correction: People v. Sabella, 35 N.Y.
2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100
(1974), overruled on other grounds, People
v. Brown, 40 N.Y.2d 381, 353 N.E.2d 811,
386 N.Y.S.2d 848 (1976).

¶88, Note 196: Correction: People v. Fitzpatrick, 47 App.
1 Div. 2d 70, 364 N.Y.S.2d 190 (1st Dept.
1975), rev'd on other grounds, 40 N.Y.2d
44, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976);
People v. Ginsberg, 80 Misc. 2d 921, 364
N.Y.S.2d 260 (Nassau County Ct. 1974),
aff'd, 375 N.Y.S.2d 855 (1975).

¶91, Note 201: Correction: In re Borough of West Wildwood,
42 N.J. Super. 282, 126 A.2d 233 (1956).

¶96, Note 214: Correction: State v. Gonzalez, 69 N.J.
397, 354 A.2d 325 (1975) (Second conviction
of contempt vacated; first conviction and
sentence affirmed--no opinion). (Also at:
¶98, Note 221).

¶97, Note 219: Correction: State v. Illario, 10 N.J.
Super. 475.

¶100, Note 224: Correction: In re Fair Lawn Education
Ass'n., 63 N.J. 112, 305 A.2d 72, cert.
denied, 414 U.S. 855 (1973).

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¶101, Note 226:Correction: certif. denied, 62 N.J. 80,
299 A.2d 78 (1972).

¶115, Note 250:Correction: In re Opinion of the Justice,
301 Mass. 615, 17 N.E.2d 906 (1938).

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V.2

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ACQUISITIONS

Techniques in the Investigation and
Prosecution of Organized Crime:

Manuals of Law and Procedure

G. Robert Blakey
Ronald Goldstock

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PREFACE

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LEGAL LIMITATIONS ON LAW ENFORCEMENT ACCESS

TO

BOOKS AND RECORDS

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SUMMARY

¶1 Access by law enforcement officials to books and records held by third parties is an important prosecutorial tool. Records held by banks, businesses, phone companies, and professionals can yield a wealth of information and evidence useful in combatting public corruption.

¶2 Acquiring the records or permission to examine them may be limited by constitutional, statutory, and common law strictures, the application of which often vary from one jurisdiction to the next. Generally, the government's access is eased by the fact that a customer or individual whom the records concern is held not to have a reasonable expectation of privacy in records held by third parties. Nevertheless, most federal and state courts and legislatures are sensitive to encroachments on personal privacy and do not allow completely unrestricted access to third party records.

I. ACCESS TO THIRD PARTY RECORDS: CONSTITUTIONAL LIMITS

¶3 The urgent need of public prosecutors to gain access to books and records continually collides with the equally compelling interest of society in preserving constitutional freedoms. The successful investigation and prosecution of public corruption and white collar crime are often dependent on the ability of law enforcement officials to use written documentation to trace the flow of illicit cash or corroborate crucial oral testimony.¹ The Fourth, the Fifth, and to some extent the First Amendments to the Constitution, however, limit government access to written records.

¹Jonathan L. Goldstein, the current United States Attorney for New Jersey, whose office has been responsible for a number of major political corruption prosecutions, makes the point:

But as surely as corruption follows money, money leaves a trail behind it, and this is what we have focused on in the investigations conducted by our office. Every prosecution involving political corporate and labor corruption in New Jersey during the past 6 years has been conducted with the assistance of I.R.S. special and revenue agents, who have worked together with assistant United States Attorneys during grand jury investigations analyzing literally millions of documents in a joint effort to trace illicit cash gains arising out of varied illegal activities. Without this sort of painstaking and skilled auditing, bribery, extortion, fraud against the government and significant tax fraud schemes are, quite simply, impossible to successfully uncover.

Remarks of J.L. Goldstein, Federal Bar Convention, Mayflower Hotel, September 16, 1976.

A. The Fourth Amendment

¶4 Since its ratification in 1791, the Fourth Amendment has restricted government intrusion into protected zones of personal privacy. The first clause of the Amendment limits all searches and seizures by a general requirement of reasonableness; the second limits warranted searches by requirements of probable cause, oaths, and particularity.²

1. Search warrants

¶5 To fall within the limitations imposed by the Fourth Amendment, the governmental action³ must constitute a "search and seizure." At first, "search and seizure" were concep-

Footnote 1 (continued)

Herbert Stern, former U.S. Attorney to New Jersey, developed the successful technique of the corruption audit: going into a community cold and subpoenaing books and records and combing through this for traces of graft and corruption. See P. Hoffman, Tiger in the Court 7(1974). As Stern put it, "The weakness in every ...[corruption] scheme is that, in the end, it must come out in cash. Find that cash coming out and you're half way home." Id. at 39.

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The 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 warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

See Constitution of the United States of America Revised and Annotated, pp. 1041-45, 1065-67 (1973).

³Private action does not fall within the Amendment. Burdeau v. McDowell, 256 U.S. 465 (1921).

tualized in property terms⁴ by the Supreme Court,⁵ sharply limiting the class of things that could be seized under a warrant. At common law, a search warrant could be issued for only three classes of property: 1) stolen goods, 2) contraband, or 3) the instrumentalities of crime. In each case, the government had an arguably superior property right to the citizen. All other classes of property were termed "evidence per se," and no warrant could be issued for them.⁶

¶6 Modern Fourth Amendment search and seizure theory, however, has replaced the old evidence per se rule⁷ with a new emphasis on the concept of "reasonable expectation of privacy."⁸ In Andresen v. Maryland, the Supreme Court

⁴ Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029, 1066, had, after all, observed: "The great end for which men entered into society was to secure their property. . . . No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing."

⁵ Boyd v. United States 116 U.S. 616, 627 (1886); Adams v. New York, 192 U.S. 585, 598 (1904); Weeks v. United States, 232 U.S. 383, 390 (1914).

⁶ Boyd v. United States, supra note 5; Gouled v. United States, 255 U.S. 298, 309 (1921).

⁷ Warden v. Hayden, 387 U.S. 294, 304 (1967) ("property interests [no longer] control the right of the Government to search and seize").

⁸ Katz v. United States, 389 U.S. 347, 352 (1967). See particularly the concurring opinion of Mr. Justice Harlan, 389 U.S. at 361. The most dramatic catalyst for the development of Fourth Amendment theory away from an analysis rooted in property law concepts, of course, was electronic surveillance--clearly a product of modern science and technology. Katz overruled Olmstead v. United States, 277 U.S. 438 (1928), in which the Supreme Court had held that because wiretapping involved neither a physical trespass nor a tangible seizure, it was not within Fourth Amendment protection.

recently upheld the issuance of a search warrant for the books and records of a lawyer believed to relate to the crime of obtaining property by false pretenses.⁹ A search warrant to obtain access to books and records constituting "mere evidence" need only meet the usual requirements of probable cause and particularity to be consistent with the Fourth Amendment.¹⁰

2. Subpoena¹¹

¶7 Neither the history behind, nor the language of the Fourth Amendment supports its application to a subpoena for books and records. Nevertheless, the Supreme Court in Boyd v. United States, in dictum, extended the reach of the Amendment to any "compulsory extortion of . . . private

⁹96 S. Ct. 2737 (1976). How far the Andresen rule would extend is not clear. Andresen involved business records. Nevertheless, it is difficult to see a distinction between Andresen and the seizure of a personal diary, assuming all other aspects of the Fourth Amendment are met: probable cause, particularly, etc. See United States v. Bennett, 409 F.2d 888, 896-97 (2nd Cir. 1969) (Friendly J.), cert. denied, 396 U.S. 852 (1969) and 402 U.S. 984 (1970). The Court, however, has apparently left the diary issue open. Fisher v. United States, 425 U.S. 391, 401 (1976).

¹⁰The requirement of a warrant and probable cause, however, has been given a broad construction in the context of administrative inspections. See See v. Seattle, 387 U.S. 541 (1967) (only generalized probable cause required in fire department inspection); Camara v. Municipal Court, 387 U.S. 523 (1967) (same for building inspector); United States v. Biswell, 406 U.S. 311 (1972) (search without warrant or probable cause of commercial gun licensee upheld).

¹¹See generally, K. Davis, Administrative Law, §§3.01-14 (1958).

papers to be used as evidence"12 The Boyd decision was followed in 1906 by Hale v. Henkel, in which the Court held that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment."¹³

¶8 Although the Court in Hale held that a grand jury subpoena may be subject to Fourth Amendment scrutiny, the requirement of probable cause was ignored. Instead, the Court analyzed the facts in terms of "particularity" and held that the subpoena duces tecum was "far too sweeping in its terms."¹⁴

¶9 Recognizing the need to bring large organizations within the effective control of the law, the Supreme Court in subsequent years retreated from the traditional narrow approach. In Brown v. United States, the Court found that a demand for all communications between January 1, 1922 and June 15, 1925 relating to the manufacture and sale of goods in eighteen categories was a "reasonable period" under Fourth Amendment requirements.¹⁵ The modern trend begun

¹² 116 U.S. 616, 630 (1886).

¹³ 201 U.S. 43, 76 (1906).

¹⁴ Id. at 76. The high water mark of the Court's narrow reading of the proper scope of the subpoena came in 1924. In F.T.C. v. American Tobacco Co., Mr. Justice Holmes spoke out for the Court against the practice of conducting "fishing expeditions into private papers on the possibility that they may disclose evidence of a crime," and held that it was "contrary to the first principles of justice to allow a search through all...[records] in the hope that something will turn up." 264 U.S. 298, 306 (1924).

¹⁵ 276 U.S. 134, 143 (1928).

in Brown was summarized in Oklahoma Press Pub. Co. v. Walling, where the Court observed that the requirement of "particularity"

comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry.¹⁶

¶10 In 1950, the new rule was firmly fixed in United States v. Morton Salt Co.¹⁷ Noting the argument that the F.T.C. was accused of engaging in a "fishing expedition," the Court compared the administrative investigation to that of the traditional grand jury:

[The F.T.C. has] a power of inquisition . . . not derived from the judicial function [but] more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.¹⁸

¹⁶327 U.S. 186, 209 (1946). The Court also refers to "confusion obscuring the basic distinction between actual and so called 'constructive' search." Id. at 204. Even as early as 1911, the Court had held that a suitably specific requirement that reports be furnished did not involve "the faintest semblance of an unreasonable search and seizure." Baltimore and Ohio R.R. v. I.C.C., 221 U.S. 612 (1911).

¹⁷338 U.S. 632 (1950).

¹⁸Id. at 642-43. Professor Davis aptly comments on these developments:

Some may see in the abrupt changes brought about during the 1940's an alarming breakdown of constitutional protection against oppressive exercise of the bureaucratic inquisitorial power. Petty officials may now, when authorized by statute, enter a business establishment, demand

Today, a subpoena for books and records is free from the demand of probable cause and subject only to the general Fourth Amendment requirement of particularity.¹⁹

Footnote 18 (continued)

that records and documents be made available for their inspection and enforce the demand by securing a court order requiring disclosure, even in absence of probable cause to believe that the law has been violated. Furthermore, the enforcing court may not even make its own determination as to whether the officer is acting in excess of his jurisdiction . . .

But a better understanding of the significance of what has happened emphasizes the inevitability. Each step follows inexorably: Industrialization brings regulation. Regulation necessitates administrative processes. Agencies cannot operate without access to facts. Ideas about privacy, standing in the way of agencies which seek information indispensable to intelligent regulation, have to give way. In the same way that the gasoline engine made inevitable the development of the airplane, mass production methods and all they symbolize produce complex business arrangements which bring forth equally intricate governmental mechanisms requiring effective exercise of the administrative power of investigation. And the courts as a result feel called upon to write out of the Constitution the protections that the courts at an earlier time felt called upon to write into the Constitution.

K. Davis, Administrative Law §3.14, pp. 231-32 (1958). On recent lower court holdings dealing with enforceability of subpoena, compare In Re Grand Jury Proceeding (Schofield I) 486 F.2d 85 (3rd Cir. 1973) (subpoena for identifying physical characteristics; no contempt under 28 U.S.C. §1826 without showing of relevance) and In Re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1975) (affidavit of relevance upheld; not necessary to hold hearing in all cases), with Universal Manufacturing Co. v. United States, 508 F.2d 684 (8th Cir. 1975) (Schofield not followed) and In Re Horowitz 482 F.2d (2d Cir.), cert. denied, 414 U.S. 867 (1973) (subpoena not quashed unless no conceivable relevance).

¹⁹ See, e.g., United States v. Powell, 379 U.S. 48 (1964) (I.R.S. summons need not show probable cause);

Footnote 19 (continued)

United States v. Dionisio, 410 U.S. 1 (1973). (Same for subpoena for voice sample). The classic statement of the scope of grand jury investigations came in Blair v. United States, 250 U.S. 273, 282 (1919):

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

The power of grand juries, with the assistance of trained prosecutors, to investigate (aptly termed, "an instrument of discovery against organized crime... [without] counterpart," Younger, "The Grand Jury under Attacks," 46 J. Crim. L.C. & P.S. 214, 224 (1955) is today under renewed challenge. The alleged abuses may be summarized as misuse of subpoena power, gathering evidence on indicted defendants, freezing testimony, interrogating subpoenaed persons outside the presence of the grand jury and improper examination of witnesses. See Abuse of Power, A Staff Report of the Codes Committee of the New York State Assembly, pp. 26-30 (1976). The American Bar Association, too, is considering grand jury "reform" proposals. See 4 Criminal Justice, 5 (1977). Reforms would include elimination of use immunity and giving witness before the grand jury, legal representation. For possible conflicts of interest in this practice see Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975), cert. denied, 44 U.S. LW. 3424 (1976); In Re April Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). It is to be emphasized, too, that the development of the general power to investigate using subpoena reflected in the text was also paralleled by the development of the special Congressional power to investigate. In 1881, the Supreme Court in Kilbourn v. Thompson, 103 U.S. 168 (1881) held that neither house of Congress possessed "the general power of making inquiry into the private affairs of the citizen." Kilbourn was abandoned as a controlling precedent in 1927 in McGrain v. Daugherty, 273 U.S. 135, 174, when the Court announced an opposite rule: "We are of opinion that the power of inquiry--with process to enforce it--is essential and appropriate auxiliary to the legislative function." Kilbourn had dealt with an investigation into a "real-estate pool" of Jay Cooke & Co., in which books and papers were subpoenaed. McGrain dealt with an investigation into the corrupt administration of the U.S. Department of Justice under Attorney General Harry M. Daugherty, in which bank deposits and other records were called for by the Senate.

3. Consent

¶11 The Fourth Amendment protects only against "unreasonable" searches and seizures.²⁰ The warrant requirement, if met, makes a search and seizure "reasonable," and overcomes the objections of the person against whom the search is directed of an invasion of privacy.²¹ Where the search is consented to, however, under the prevailing view, no warrant is required.²² Consent searches have not been construed by the Supreme Court as a waiver of the right against warrantless searches; the consent need only be voluntary in the sense of not coerced.²³

²⁰The essence of the Amendment was early capsulized in Mr. Justice Miller's concurring opinion in Boyd v. United States, 116 U.S. 616, 641 (1886):

The things here forbidden are two--search and seizure. And not all searches or all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.

While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable search and seizures that are forbidden. . . .

²¹

Fisher v. United States, 425 U.S. 391, 400 (1976); Andresen v. Maryland, 96 S. Ct. 2737, 2747 (1976).

²²

See, e.g., Zap v. United States, 328 U.S. 624, 628-30 (1946) (consent to examination of books and records in contract audit).

²³

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). (Miranda type warnings a factor, but not controlling). Consent obtained by claim of warrant, where the claim is not true,

¶12 Where a person shares his privacy with another, he assumes the risk that the other person may consent to a search.²⁴ The sharing, however, must be substantial. Spouses,²⁵ relatives,²⁶ joint users,²⁷ and mistresses²⁸ have been held to share privacy. Hotel clerks²⁹ and landlords³⁰ have not.

Footnote 23 (continued)

however, is not voluntary. Bumper v. North Carolina, 391 U.S. 543 (1968). The Schneekloth analysis has not found universal acceptance among the states. New Jersey, for example, has explicitly refused to follow it under the New Jersey Constitution. State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975).

²⁴See, e.g., Frazier v. Cupp, 394 U.S. 731 (1969) (Joint user of bag); cf. White v. United States, 401 U.S. 745 (1971) (transmitter) (plurality opinion). The White analysis has not received universal acceptance among the states. Michigan, for example, has explicitly refused to follow it under the Michigan Constitution. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511, cert. denied, 423 U.S. 878 (1975). Beavers dealt with participant monitorings; its rationale was extended to recordings in People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (1975). Note that the validity of a vicarious consent may be vicariously challenged. Bumper v. North Carolina, supra, note 24.

²⁵Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion).

²⁶Cf. Bumper v. North Carolina, supra, note 24 (grandmother).

²⁷Fraizer v. Cupp, supra, note 25.

²⁸United States v. Matlock, 415 U.S. 164 (1974). Cf. Silva v. State, 327 So.2d 107 (1976) (woman's consent to search of paramour's closet held invalid).

²⁹Stoner v. California, 376 U.S. 483 (1964).

³⁰Chapman v. United States, 365 U.S. 610 (1961).

4. Standing

¶13 The concept of shared privacy not only defines the right of vicarious consent, it also defines the limits of the right to object to a search and seizure. The Fourth Amendment creates a personal right; it may not be vicariously asserted,³¹ although it may be vicariously waived where privacy is shared. There can be no valid complaint of search or seizure where there is no reasonable expectation of privacy in goods or premises.³² A search and seizure invalid as to the person whose personal rights are infringed may be valid as to another.

¶14 Under this rule, the Supreme Court recently held in United States v. Miller³³ that a depositor has no legitimate expectation of privacy in bank records subpoenaed by a defective subpoena. The Court observed:

All of the documents obtained including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.³⁴

³¹See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963) (no standing if privacy not invaded).

³²See, e.g., Brown v. United States, 411 U.S. 223 (1973) (no standing re store where stolen goods were stored). A union official, however, may have standing to object to search of union office. Mancusi v. DeForte, 392 U.S. 364 (1968). Even though the seized material may concern him, a person has no standing to object unless his own conversations are seized, cf., Goldstein v. United States, 316 U.S. 114 (1942), or the material is seized from his house. Alderman v. United States, 394 U.S. 165 (1969).

³³425 U.S. 435 (1976).

³⁴Id. at 442-43.

Consequently, only the bank may object to the faulty subpoena.³⁵

B. The Fifth Amendment³⁶

¶15 A subpoena can compel the attendance of a witness and the production of books and records, but a witness's testimony cannot be compelled under the Fifth Amendment privilege against self-incrimination.

1. The scope of the privilege

¶16 The development of the privilege against self-incrimination has been burdened with the failure of the Supreme Court to articulate clearly the policy objectives behind the privilege. Instead the Court has justified the gradually

³⁵Not all states follow this analysis. California, for example, has rejected the standing rule in searches and seizures. People v. Martin, 45 Cal.2d 755, 759, 290 P.2d 855, 857 (1955). See also People v. Worburton, 7 Cal. App.3d 815, 86 Cal. Rptr. 894 (1970) (compliance with subpoena). Likewise, it has found an expectation of privacy in bank records. Burrows v. Superior Court, 13 Cal.3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974) and telephone company records. People v. McKunes, 51 Cal. App.3d 487, 124 Cal. Rptr. 126 (1975). See also Shapiro v. Chase Manhattan Bank, 84 Misc.2d 938, 376 N.Y.S.2d 365 (N.Y. Ct. 1975) (Pre-Miller case following Burrows). Burrows was rejected in United States v. Sahley, 526 F.2d 913 (5th Cir. 1976) (subpoena without probable cause to obtain financial disclosure statement to bank) prior to the Supreme Court's decision in United States v. Miller, supra, note 34.

³⁶"No person. . . shall be compelled in any criminal case to be a witness against himself. . . ." See generally, Constitution of the United States of America Revised and Annotated, pp. 1106-22 (1973); G. Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," Task Force Report: Organized Crime, The President's Commission on Law Enforcement and Administration of Justice, pp. 85-87 (1967).

expanding limits of the Fifth Amendment with the rationale that it "reflects many of our fundamental values and noble aspirations."³⁷ The "privilege," according to the modern Court, "like the guarantees of the Fourth Amendment, stands as a protection of . . . values reflecting the concern of our society for the right of each individual to be let alone."³⁸

¶17 Like the Fourth Amendment, the privilege against self-incrimination is personal; it may not be asserted to protect another.³⁹ It has also been limited by the Supreme Court to natural persons.⁴⁰ Despite a promise of liberal construction in Boyd v. United States,⁴¹ the Supreme Court held in Hale v. Henkel,⁴² a decision involving an antitrust grand jury

³⁷Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964).

³⁸Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966).

³⁹McAlister v. Henkel, 201 U.S. 90 (1906). Although the California Courts have rejected the notion of standing under the Fourth Amendment, supra, note 36, they have retained it under the Fifth Amendment, People v. Varnum, 66 Cal.2d 808, 427 P.2d 772 (1967) (no standing to complain that another's Miranda warning had not been given).

⁴⁰The other clauses of the Fifth Amendment are not so limited. Corporations, for example, may complain of double jeopardy, Rex Trailer Co. v. United States, 350 U.S. 148 (1956). (liquidated damage held civil and not violative of double jeopardy), due process, Boyce Motor Lines v. United States, 342 U.S. 337 (1952), and improper eminent domain, Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896).

⁴¹116 U.S. 616, 635 (1886).

⁴²201 U.S. 43 (1906).

investigation, that the privilege did not extend to corporations. The Court rested its opinion on the ground that a corporation was a creature of the state, and thus it could not resist an inquiry into the exercise of its corporate powers.⁴³ The Hale rationale, if not the Hale rule, however, has not withstood the test of time. In United States v. White the Court, in facing the question of whether or not to extend Hale's modification of Boyd to labor unions, held that unions were not "creature[s] of the state's" law of incorporation, but that the facts of modern economic life made it necessary to deny to unions what had already been denied to corporations.⁴⁴ White, too, has been extended to

⁴³ The court observed:

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.

It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. 201 U.S. at 74-75.

As noted above, however, the Court did hold that a corporation could complain of a violation of the Fourth Amendment. Id. at 75-76.

⁴⁴ 332 U.S. 694, 700-701. Writing for the majority, Mr. Justice Murphy observed:

partnership papers held by a partner in a representative capacity.⁴⁵

¶18 The interests protected by the privilege are circumscribed by the language of the Amendment; a witness must be faced with compulsion to be a witness against himself before the privilege is applicable.⁴⁶ Only testimonial evidence falls

Footnote 44 (continued)

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. . . .

But the absence of that fact (incorporation by the state) as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective. . . .

Basically, the power to compell. . . arises out of the inherent and necessary power of the governments to enforce their laws. . . .

⁴⁵Bellis v. United States, 417 U.S. 85 (1974) (three-man firm). In United States v. Kuta, 518 F.2d 947 (2d Cir.), cert. denied, 423 U.S. 1014 (1975), a two-man firm was held to be a separate entity.

⁴⁶The privilege may now be claimed in more than "criminal cases." It has been extended to juvenile proceedings, In Re Gault, 387 U.S. 1, 42-57 (1967), civil litigation, McCarthy v. Arndstein, 266 U.S. 34 (1924), grand jury Hoffman v. United States, 341 U.S. 479, 486-87 (1951), legislative hearings, Quinn v. United States, 349 U.S. 155 (1955), administrative bodies, I.C.C. v. Brimson, 154 U.S. 447, 478-80 (1894), and the police station, Miranda v. Arizona, 384 U.S. 436 (1966).

Since a search warrant operates without compulsion on the person, even though it secures incriminating evidence, it does not violate the Fifth Amendment. Andresen v. Maryland, 96 S. Ct. 2737, 2743-47 (1976).

within the phrase "be a witness."⁴⁷ The privilege does not attach unless the evidence called for is incriminating; it does not protect against injury to reputation, infamy, or disgrace.⁴⁸

¶19 The application of the privilege to the compulsory production of books and records is best illustrated by

Fisher v. United States.⁴⁹ In Fisher, taxpayers transferred their accountants' papers to their lawyers. Summons issued for the papers were resisted on Fifth Amendment grounds.⁵⁰

⁴⁷The taking of physical identifying characteristics is not a violation of the privilege against self-incrimination. Blood tests, Schmerber v. California, 384 U.S. 757 (1966); voice samples, United States v. Wade, 388 U.S. 218 (1967); and handwriting exemplars, United States v. Dionisio, 410 U.S. 1 (1973), for example, do not fall within the protection of the privilege.

⁴⁸Brown v. Walker, 161 U.S. 591, 605-06 (1896). While a public employee cannot be required to waive his privilege against self-incrimination to retain his job, Garrity v. New Jersey, 385 U.S. 493 (1967), where the employee is given immunity, a failure to cooperate in a corruption investigation may be grounds for dismissal, Gardner v. Broderick, 392 U.S. 273, 278 (1968). Unlike public employees, lawyers, although licensed by the state, may claim their privileges and retain their license, Spevack v. Klein, 385 U.S. 511 (1967); and contractors, absent immunity, cannot be barred from work with the state, Lefkowitz v. Turley, 414 U.S. 70 (1973), for asserting their privilege. A New York law which automatically stripped political party officers of their party jobs for refusal to waive immunity has been held unconstitutional. Lefkowitz v. Cunningham, N.Y. Times, June 14, 1977, at 1, col. 5 (U.S. Sup. Ct., June 13, 1977).

⁴⁹425 U.S. 391 (1976).

⁵⁰The taxpayers also raised attorney client and Fourth Amendment issues.

Following a parallel holding in Couch v. United States,⁵¹ the Court found that the taxpayers' Fifth Amendment privilege against personal compulsion was not involved in the enforcement of a summons issued to a third party. The court said:

[W]e are confident that however incriminating the contents of the accountant's work papers might be, the act of producing them--the only thing which the taxpayer is compelled to do--would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth telling" of the taxpayer to prove the existence of or his access to the documents.⁵²

¶20 Nevertheless, because the third party was a lawyer,⁵³ the Court found the attorney-client privilege applied; but only to the degree that the taxpayers themselves would have been privileged under the Fifth Amendment not to produce the documents. To fall within the scope of the privilege, the actual production of the records must be testimonial in itself.⁵⁴ The content of the books and records

⁵¹409 U.S. 322 (1973) (Fifth Amendment rights of taxpayer not violated by enforcement of summons against accountant for production of taxpayer's papers).

⁵²425 U.S. 410-11.

⁵³In Couch v. United States, supra, note 52, the Court rejected an accountant-client privilege in the federal courts.

⁵⁴The Court rejected the broad dicta of Boyd v. United States, 116 U.S. 616 (1886), observing:

as such was immaterial. Because the papers belonged to the accountants, the act of production would not require the taxpayers to "testify" against themselves, and therefore the privilege against self-incrimination was not applicable.

2. Immunity

¶21 The concept of immunity was developed to mitigate the impact of the privilege against self-incrimination on the administration of justice. Statutory removal of the criminality of a witness results in the simultaneous extinguishment of the privilege against self-incrimination.⁵⁵ There can be no incrimination if there is no crime.

¶22 Beginning in 1857 statutory immunity schemes were repeatedly enacted, and their constitutionality tested with varying results.⁵⁶ The Supreme Court insisted that the

Footnote 54 (continued)

It would appear that the precise claim sustained in Boyd would now be rejected for reasons not there considered.

It also noted that Boyd's application of the Fourth Amendment to subpoena had been limited by Hale, that Boyd's evidence per se rule was no longer valid, and that incrimination was now thought limited to testimonial incrimination. 425 U.S. at 407-408.

⁵⁵Cf. Hale v. Henkel, 201 U.S. 43, 67 (1906).

⁵⁶See, Act of Jan. 24, 1857, ch. 19, 11 Stat. 155. This Act was later replaced by the Immunity Statute of 1862 (Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, now found in 18 U.S.C. §3486 (1964), as amended, 18 U.S.C. §3486(c) (Supp. I, 1965).), which protected the witness only from having his testimony used against him, not from prosecution. The statute was later struck down by the Supreme Court in Counselman v. Hitchcock, 142 U.S. 547 (1892) because it did not adequately eliminate the criminality of the witness. A new Immunity Act of 1893 (Act of Feb. 11, 1893, ch. 83, 27 Stat. 443) granting immunity from prosecution was upheld by the Court in Brown v. Walker, 161 U.S. 591 (1896).

immunity granted by law be co-extensive with the Fifth Amendment privilege and completely eliminate criminality, not simply provide a shield from use of the compelled testimony.⁵⁷

¶23 The theory of a valid immunity law gradually expanded to include use as well as transactional immunity. Protection against direct or derivative use⁵⁸ of compelled testimony is now a constitutionally sufficient replacement for the Fifth Amendment privilege against self-incrimination.⁵⁹ The privilege extends to the states through the Fourteenth Amendment,⁶⁰ and Congress has been held to have the power to immunize against state incrimination.⁶¹ Immunization

⁵⁷Some leading scholars attacked the Counselman holding (see note 55) and called for use rather than transactional immunity statutes. J. Wigmore, 8 Evidence §2283-84, pp. 522-30 (3d ed. 1940) and C. McCormick, Evidence §135, pp. 285-86 (1st ed. 1954). Such statutes were commonly upheld in early opinions, "written at a period nearer to the era of constitution-making, when the cobwebs of artificial fantasy had not begun to obscure its plain meanings." Wigmore, supra at 523. McCormick called transaction statutes "unjust and unnecessary obstruction[s] to law enforcement." Supra at 286. Wigmore and McCormick also called for codification of the various separate immunity statutes. Id. at 530; id. at 287.

⁵⁸See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963).

⁵⁹See Murphy v. Waterfront Commission, 378 U.S., 52 (1964).

⁶⁰See Malloy v. Hogan, 378 U.S. 1 (1964). Malloy did not, however, spell the end of valid state immunity statutes. The Supreme Court indicated in Murphy v. Waterfront Commission, note 57, supra, that state immunity statutes were still valid. See generally Wendel, "Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Development and New Confusion," 10 St. Louis U.L.J. 327 (1966).

⁶¹See, e.g., Adams v. Maryland, 347 U.S. 179 (1954).

against state incrimination was extended in 1970 to the federal government itself with the enactment of a general federal use immunity statute in the Organized Crime Control Act,⁶² and was sustained in 1972 against constitutional objection.⁶³

C. The First Amendment⁶⁴

¶24 Most litigation in the area of access to books and records has focused on the Fourth and Fifth Amendments. The First Amendment plays a less central role. The Supreme Court has consistently recognized that the First Amendment plays a role in limiting government access to books and records, but provides no serious impediment to their production.

⁶²84 Stat.922, 18 U.S.C. §§6002-03 (1970). The adoption of use immunity was recommended by scholars (see note 56, *supra*) and the National Commission on the Reform of Federal Criminal Laws. Measures Related to Organized Crime, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 91st Cong. 1st Sess. 287-90 (1969).

⁶³Kastigar v. United States, 406 U.S. 441 (1972). A similar statute was sustained in Zicarelli v. New Jersey State Comm. of Investigations, 406 U.S. 472 (1972). Use immunity was also sustained in theory on the state level in People v. La Bello, 24 N.Y.2d 598, 249 N.E.2d 412 (1969) and Byers v. People, 80 Cal. Rptr. 553, 458 P.2d 465 (1969). See also People v. Superior Court, 115 Cal. Rptr. 812, 525 P.2d 716 (1974). The notion that "most constitutional scholars" were "amazed" at the Supreme Court's decision in Kastigar is unfounded. Compare R. Harris, New Yorker, April 12, 1976, p. 98, col. 1 with Electronic Surveillance, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, p. 189 n. 7 (1976) (concurrence of Commissioner Blakey).

⁶⁴"Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." See generally, Constitution of the United States of America Revised and Annotated, pp. 936-1034 (1973).

¶25 The production of books and records may be compelled incident to a valid legislative investigation if the investigating committee shows "a substantial relation between the information sought and a subject of . . . compelling state interest."⁶⁵ Membership questions must also be answered.⁶⁶ Nor may journalists hide from grand jury inquiries behind the safeguards of the First Amendment.⁶⁷

¶26 Fearing the suppression of political dissent, the Supreme Court has insisted on judicial supervision of electronic surveillance of domestic "national security" groups,⁶⁸ and on

⁶⁵Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1963). See also, Barenblatt v. United States, 360 U.S. 109 (1959); McPhaul v. United States, 364 U.S. 372 (1960) (books held in representative capacity not protected by Fifth); Uphaus v. Wyman, 360 U.S. 72 (1959) (corporation must produce names of those who attended summer camp).

⁶⁶Wilkinson v. United States, 365 U.S. 399 (1961). Only the N.A.A.C.P. in the late 1950's and early 1960's was consistently successful in blocking inquiries on freedom of association grounds. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (compulsory disclosure of membership records set aside). Bates v. City of Little Rock, 361 U.S. 516 (1960) (same). Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (same).

⁶⁷See, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972). One other constitutional privilege should be mentioned. Art. I §6 cl. 1 guarantees that speech and debate of the Congress "shall not be questioned in any other place." Representatives and their aids may assert the privilege in response to a grand jury subpoena. Gravel v. United States, 408 U.S. 606 (1972). The constitutional privilege has been extended on a common law basis to state legislative officials. United States v. Craig, 528 F.2d 773 (7th Cir.), cert. denied, 425 U.S. 973 (1976). The privilege, however, is not general. United States v. Cooper, 4 U.S. (4 Dall) 341 (1800). It restricts only an area of inquiry touching the "due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 172 (1966) quoted in Gravel v. United States, supra at 625.

⁶⁸United States v. United States District Court, 407 U.S. 297, 314 (1972).

a high degree of particularity in the execution of search warrants for books and papers embracing First Amendment interests.⁶⁹ The lower courts, however, have had to face the question of whether special rules should govern the issuance of subpoenas and search warrants for third party records in investigations touching on First Amendment interests. Generally, third party records are accessible and the usual rules governing subpoena enforcement apply.⁷⁰

⁶⁹Stanford v. Texas, 379 U.S. 476 (1965) (seizure of "communist" books and records).

⁷⁰One need not even be a subject of the investigation to become involved. See, e.g., F.T.C. v. Tuttle, 244 F.2d 605, (2d Cir.), cert. denied, 354 U.S. 925 (1957) (subpoena of third party record upheld). Even when subpoenas are directly issued to the subjects of an investigation in cases touching freedom of the press, the usual rules governing subpoena enforcement are held to apply, at least in the first instance. S.E.C. v. Wall Street Transcript Corp., 422 F.2d 1371, 1380 (2d Cir.), cert. denied, 398 U.S. 958 (1970) (Oklahoma Press applicable to S.E.C. subpoena of press data); S.E.C. v. Sanage, 513 F.2d 188, 189 (7th Cir. 1975) (same).

Generally, similar rules have been applied in the subpoenaing of third parties. In Re Lewis, 501 F.2d 418, 422-23 (9th Cir.), cert. denied, 420 U.S. 913 (1974) (subpoena to radio station for document and tap in investigation of S.L.A. bombing). At least one district court, however, has developed the novel rule that in third party investigations touching on First Amendment issues, a subpoena must be sought before resorting to a search warrant. Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), appeal docketed, No. 74-3212 (9th Cir. Nov. 20, 1974). The rule is subjected to cogent analysis in Note, "Search and Seizure of the Media: a Statutory, Fourth Amendment and First Amendment Analysis," 28 Stanford L. Rev. 957, 995-1000 (1976).

II. NEW APPLICATIONS OF OLD PRINCIPLES: THIRD PARTY RECORDS

¶27 Traditionally, the Constitution limits law enforcement access to the books and records of the subject of the investigation. In recent years, however, a new body of law concerning access to books and records held by third parties has developed. Litigation has centered on access to the records of banks and phone companies, and to a lesser extent on the records of businesses and professionals.

A. Third Party Records: Banks

¶28 Tracing and analyzing the flow of cash through financial and business records is one of the most important techniques for investigating white collar crime.⁷¹ Banks maintain a variety of records that are helpful to investigators. They hold a signature card for each checking and savings account which provides a sample of the subject's writing, and frequently useful background information as well.⁷² In addition, federal regulations require banks to maintain copies of periodic account statements that furnish running records of all deposits and withdrawals.

¶29 Safe deposit rental contracts containing the subject's signature and physical descriptions, and entry slips

⁷¹See generally R. Nossen, The Seventh Basic Investigative Technique, pp.5-7 (L.E.A.A. 1976).

⁷²Id. at 15.

recording the date and time of each entry into the box are also valuable sources of information. The daily proof sheets kept by tellers recording all purchases of cashier checks are particularly helpful because many individuals involved in criminal transactions mistakenly believe that cashier's checks cannot be traced.

¶30 Increasing awareness of financial records as sources of information has raised questions as to the lawful limits of access to them. The controversy has been highlighted recently by the Watergate scandal and Congressional investigations of FBI and CIA intrusions into the private lives of citizens.⁷³

1. Constitutional limits

- a. Fourth Amendment

¶31 Fourth Amendment challenges to governmental access to bank records have been substantial. The Supreme Court recently resolved the issue of a bank's duty to disclose its records in Miller v. United States.⁷⁴ Bank records obtained by a faulty subpoena served on Miller's bank, and used against him at his trial for tax fraud, were held admissible by the Court.⁷⁵ There "was no intrusion," the

⁷³See, "Ford Sees Peril of 'Big Brother,'" New York Times, Sept. 22, 1976, p.13 col.1; "FBI's Persistence," New York Times, July 1, 1975, p.28 col.1.

⁷⁴425 U.S. 435 (1976).

⁷⁵The bank records had been suppressed by the Fifth Circuit because

Court said, "into any area in which respondent had a protected Fourth Amendment interest."⁷⁶

¶32 The Court based its opinion on two reasons. First, the subpoenaed bank records were not Miller's "private papers," but rather the business records of the bank. Second, Miller had no legitimate "expectation of privacy," in the bank records concerning him.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.⁷⁷

Footnote 75 (continued)

Surely a purported grand jury subpoena, issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient 'legal process'. . .

United States v. Miller, 500 F.2d 751, 757-58 (5th Cir. 1974), rev'd, 425 U.S. 435 (1976).

⁷⁶425 U.S. at 443. A depositor does have standing to challenge governmental access to bank records, however, where the access is in response to a letter rogatory from a foreign government. In Re Letter Rogatory From the Justice Court, District of Montreal Canada, 523 F.2d 526 (6th Cir. 1975).

⁷⁷425 U.S. at 442.

The standards to be applied to a subpoena for bank records are not equivalent to the probable cause standards required for a search warrant. The Court followed the test of Oklahoma Press Publishing Co. v. Walling:⁷⁸

[T]he Fourth [Amendment], if applicable [to subpoenas for the production of business records], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.

Furthermore, the bank, not the depositor, must challenge the subpoena.⁷⁹ And because they are sensitive to an obligation to protect the customer's privacy, banks frequently exercise this right.⁸⁰

⁷⁸ 327 U.S. 186, 208 (1946). Quoted at 425 U.S. 445-46. There was no reason to believe "that the traditional distinction between a search warrant and a subpoena would not be recognized." See also United States v. Sahley, 526 F.2d 913 (5th Cir. 1976).

⁷⁹ The Court observed that the "banks upon which [the subpoenas] ...were served did not contest their validity." The banks' failure to notify Miller was "...a neglect without legal consequence here, however unattractive it may be." 425 U.S. at 446 n.9, 443 n.5.

⁸⁰ See, La Valley and Lancy, "The I.R.S. Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers," 89 Banking L.J. 979, 980 (1972). But see American Banker, May 19, 1972, p.1, col.3-4: "Many banks voluntarily allow agents of the government--police, F.B.I. agents, investigators for Congressional committees--to examine at will the records of individuals and organizational accounts, without the permission or indeed the knowledge of any of the people involved." The real ground for banks' resistance to subpoenas--cost--is

¶33 Although most state courts will probably follow Miller, the California Supreme Court has adopted a different rule. Bank records need not be surrendered upon the informal request of the government.⁸¹ A depositor can reasonably expect that his personal bank records will not be turned over to the government except under "compulsion by legal process."⁸²

¶34 Regardless of whether the records are obtained by consent, subpoena, or warrant, the holding in Miller eliminates a depositor's standing to assert Fourth Amendment rights against disclosure of his bank records in federal court. Simple access to the records can be acquired by

Footnote 80 (continued)

seldom sufficient. Compare United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 130 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968), with United States v. Northwest Pennsylvania Bank and Trust Co., 355 F. Supp. 609 (W.D. Pa. 1973). See also United States v. Farmers and Merchants Bank, 397 F.Supp. 418 (C.D. Cal. 1975), listing recent cases and setting out a procedure for banks to follow in securing cost reimbursement in I.R.S. summons cases. In United States v. Continental Bank and Trust Co., 503 F.2d 45 (10th Cir. 1974), \$1500 was held not to be an unreasonable financial burden to be borne by the bank.

In United States v. Grand Jury Investigation, a savings and loan association was compelled to comply with a subpoena for records even though no notice was given to the depositors and the bank might be subject to a civil suit by the depositors. 417 F.Supp. (E.D.Pa. 1976).

⁸¹In Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), detectives obtained the bank records of an attorney under investigation for grand theft, upon request and without a subpoena. The court suppressed the records under the search and seizure provision of the California Constitution. (See Art. 1, §13).

⁸²13 Cal. 3d at 243; 529 P.2d at 593; 118 Cal. Rptr. at 169 (1974). Notice to the customer is also required by the California Constitution, Valley Bank v. Superior Court, 13 Cal. 3d 652, 658, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 556 (1975).

subpoena; seizure would require a search warrant supported by probable cause and specifying the documents sought,⁸³ but nothing prohibits the right of banks to consent to an examination of their records.⁸⁴

b. Fifth Amendment

¶35 Because most banks are corporations, they have no Fifth Amendment privilege against self-incrimination and cannot refuse to produce books and records on that ground.⁸⁵ Nor does the Fifth Amendment privilege of the depositor prohibit production of the records. The "testimony" possibly involved in the production of the records is the act of a third party (the bank), and involves no compulsion on the part of the depositor.⁸⁶

c. First Amendment

¶36 The Supreme Court has yet to face directly the First Amendment issues raised by delivery of bank records to law

⁸³ See, e.g., Vonder A.H.E. v. Howard, 508 F.2d 364 (9th Cir. 1974) (search warrant for doctor's records). The court even suggested that warrants should issue only "upon the strongest showing of necessity" if the records were not requested or subpoenaed first. Id. at 369.

⁸⁴ See, e.g., United States v. Prevatt, 526 F.2d, 400 (3rd Cir. 1976) (consent obviates the need for legal process).

⁸⁵ See California Bankers Ass'n. v. Shultz, 416 U.S. 21 (1974).

⁸⁶ See Fisher v. United States, 425 U.S. 391 (1976). See generally J. Wigmore, 8 Evidence §2264 (McNaughton rev. 1961).

enforcement agencies.⁸⁷ In California Banker's Assn. v. Shultz,⁸⁸ the Court rejected a challenge by the American Civil Liberties Union (ACLU) against the reporting requirements if the Bank Secrecy Act of 1970⁸⁹ because the ACLU failed to allege that it engaged in reportable transactions. Dicta in the opinion, however, emphasized that previous cases

. . .do not elicit a per se rule that would forbid such disclosure in a situation where the governmental interest would override the associational interest in maintaining such confidentiality.⁹⁰

⁸⁷The issue was raised, but not squarely decided in Buckley v. Valeo, 424 U.S. 1 (1976); Eastland v. United States, Servicemen's Fund, 421 U.S. 491 (1975); and California Bankers Ass'n. v. Shultz, 416 U.S. 21 (1974). The impact of financial disclosure on First Amendment rights has usually involved political organizations and the freedom to associate. See, e.g., Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973), cert. denied, 415 U.S. 948 (1974); City of Carmel v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970). In United States v. Privitera the Ninth Circuit held that a subpoena for bank records that would reveal political contributions and membership in political groups did not violate First Amendment freedoms. 549 F.2d 1317 (9th Cir. 1977), petition for cert. filed, 21 Crim. L. Rep. 4057 (U.S. Apr. 23, 1977) (No. 76-1472).

⁸⁸416 U.S. 21, 55-57 (1974).

⁸⁹31 U.S.C. §§1101-1105, 1121-1122 (1970) (foreign transactions); 31 U.S.C. §§1081-1082 (1970) (domestic transactions). Under 31 U.S.C. §1061 (1970), the Secretary of the Treasury is authorized to promulgate regulations making the information contained in the domestic and foreign transaction reports available to other departments and agencies of the Federal government.

⁹⁰416 U.S. at 55-56.

In other words, when resolving a First Amendment issue, courts must balance the importance of the governmental interest at stake against the possible threat to the personal rights involved.⁹¹

2. Common law limits

¶37 Limitations on the obligation of banks to disclose records may be imposed on the basis of an infringement of property rights or breach of an implied contract. In Brey v. Smith, a New Jersey prosecutor's application to a bank to examine "all the accounts of all the members of the Newark police department . . ." ⁹² was enjoined because

⁹¹The Second Circuit has taken a narrow view of the possible chilling effects of financial disclosure in Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (1973), cert. denied, 415 U.S. 948 (1974). The Parade Committee, an organization of 200 antiwar groups in New York City, hired 600 buses and several trains to provide transportation to a moratorium demonstration in Washington, D.C., and deposited receipts from the ticket sales in a bank account. The F.B.I. obtained the bank records prior to the demonstration and disseminated the information to various government agencies. When the Committee challenged the investigation as a violation of their constitutional rights, the court found for the defendants because the Committee failed to demonstrate that it had suffered any harm.

In contrast, the Supreme Court of California struck down a financial disclosure law requiring public officials, candidates for state and local office, and their families to submit a statement of their investments over \$10,000. City of Carmel v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970). At no point did the opinion suggest that actual harm had to be shown before the disclosure law could be rendered invalid.

⁹²104 N.J. Eq. 386, 387, 146 A.34, 35 (Ch. 1929).

it was overbroad and

[T]here is an implied obligation, . . . on the bank, to keep [records of accounts] from scrutiny unless compelled by a court of competent jurisdiction to do otherwise. The information contained in the records is certainly a property right.⁹³

The equitable obligation of a bank under Brey was interpreted as an obligation implied by contract in In Re Addonizio.⁹⁴

[W]e may assume a bank or a brokerage firm would violate a contractual obligation if it disclosed details of the account to someone who had no legitimate interest⁹⁵

Both bank and depositor, however, remain obliged to respond to a subpoena. A bank must comply, even over the customer's objections,⁹⁶ or when made aware that failure to disclose would further a fraud.

¶38 An implied contractual right limiting bank disclosures has been accepted in Idaho, Florida, and Minnesota.⁹⁷ Although the contractual duty does not block all access to

⁹³Id. at 390, 146 A. at 36.

⁹⁴53 N.J. 107, 248 A.2d 531 (1968). Addonizio involved the corrupt mayor of Newark, who was later convicted of extortion in a federal prosecution. The story is told in P. Hoffman, Tiger in the Court, pp.93-125 (1973). See United States v. Addonizio, 313 F.Supp. 486 (D.C. N.J. 1970), aff'd 449 F.2d 100 (3d Cir.) and 451 F.2d 49 (3rd Cir. 1971), cert. denied, 405 U.S. 936 (1972).

⁹⁵53 N.J. at 133, 248 A.2d at 546.

⁹⁶Id.

⁹⁷See, e.g. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 588, 367 P.2d 284, 290, 92 A.L.R.2d 891 (1961); Milohnich v. First Nat'l Bank of Miami Springs, 224 So.2d 759, 760 (Dist. Ct. of App., 3d Dist. Fla. 1969); Richfield Bank & Trust Co. v. Sjogren, ____ Minn. ____, 244 N.W.2d 648, 652n.2 (1976) (dicta).

bank records, it may make institutions less willing to disclose information voluntarily.

3. Statutory limits

a. Federal legislation: Bank Secrecy Act of 1970

¶39 The Bank Secrecy Act of 1970 requires banks to compile files on customer accounts and to report designated financial transactions to the Secretary of the Treasury.⁹⁸ These provisions were designed to create and preserve records and reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."⁹⁹ The Secretary is authorized to promulgate regulations to implement the Act.¹⁰⁰

i. Recordkeeping requirements

¶40 Title 12 U.S.C. §1829b (1970) applies only to federally insured banks.¹⁰¹ The law requires banks to record the identities of persons having accounts and having signatory authority over accounts. To the extent that the Secretary

⁹⁸The Act is codified at 12 U.S.C. §§1730(d), 1829(b), 1951-59 (1970); and, 31 U.S.C. §§1051-62, 1081-83, 1101-05, 1121-22 (1970).

⁹⁹12 U.S.C. §§1829(a)(2), 1951 (1970); 31 U.S.C. §1051 (1970).

¹⁰⁰The regulations are found at 31 C.F.R. §103 (1975).

¹⁰¹12 U.S.C. §1730(d) (1970) amended the National Housing Act to authorize the Secretary to apply similar recordkeeping requirements to institutions insured under that Act. 12 U.S.C. §§1952-53 (1970) authorized the Secretary to apply recordkeeping requirements to additional domestic financial institutions.

determines certain records have a "high degree of usefulness. . ." the banks must make and maintain microfilm or other reproductions of each check, draft, or other instrument drawn on or payable by the bank. In addition, record must be made of each deposit or collection, including an identification of the party holding the account involved in the transaction. The Secretary is authorized to require insured banks to keep a record of the identity of all individuals who engage in reportable transactions.

¶41 The regulations require copying checks in excess of \$100.¹⁰² Only "on us" checks must be copied.¹⁰³ Dividend, payroll, and employee benefits are exempt from the requirement¹⁰⁴. Additionally, all financial institutions must maintain a microfilm copy of each extension of credit over \$5,000 (except those secured by an interest in real property), and of all communications relating to transfers of funds exceeding \$10,000 to a person, account, or place outside the United States.¹⁰⁵ The regulations state that inspection or access to the records is governed by "existing legal

¹⁰² 31 C.F.R. §103.34(b)(3) (1975). The regulations also require the recording of the identity of depositors and microfilming of certain documents.

¹⁰³ "On us" checks and those drawn on the banks, or issued and payable by it. Id.

¹⁰⁴ Checks "drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued" are exempt. Id.

¹⁰⁵ 31 C.F.R. §103.33 (1975).

process."¹⁰⁶ Civil and criminal penalties exist for willful violations of the recordkeeping requirements.¹⁰⁷

ii. Reporting requirements

¶42 Title 31 U.S.C. §§1101-1105 (1970) and the corresponding regulations in 31 C.F.R. §103.23 (1976) require individuals to report the receipt or transfer of monetary instruments exceeding \$5,000 in value passing into or out of the United States. Sections 1121-1122 of Title 31 U.S.C. (1970) require United States citizens, residents, and business people to file reports of their relationships with foreign financial institutions.

¶43 The domestic reporting provisions of the Act, as implemented by the regulations, apply only to banks and financial institutions. Under 31 U.S.C. §§1081 and 1082 (1970), the Secretary may specify the types of currency transactions that must be reported, and require reports from the domestic financial institutions involved, from the parties to the transactions, or from both. The Secretary, however, has promulgated regulations that require only financial institutions to report to the Internal Revenue Service by filing "a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to

¹⁰⁶31 C.F.R. §103.51 (1975). See also, 31 U.S.C. § 1121(b) (1970). In California Bankers Ass'n. v. Shultz, 416 U.S. 21, 52 (1974), the court found that this clause prevented the authorization of unreasonable searches and seizures.

¹⁰⁷12 U.S.C. §§1955-57 (1970).

such financial institutions which involves a transaction in currency of more than \$10,000."¹⁰⁸

¶44 Under 31 U.S.C. §1061 (1970), the Secretary may make the information in the reports required by the Act available to other departments and agencies of the federal government. Pursuant to this authority, the Secretary may make the information available

[U]pon the request of the head of [any] department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.¹⁰⁹

b. State legislation

i. California right to Financial Privacy Act¹¹⁰

¶45 In 1976, the California legislature enacted the Right to Financial Privacy Act "to balance a citizen's right of privacy with the governmental interest in obtaining information. . . ."¹¹¹ To receive copies of financial records,

¹⁰⁸ 31 C.F.R. §103.22 (1975). The regulation also exempts transactions "...with an established customer maintaining a deposit relationship with the bank in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business industry or profession of the customer concerned."

¹⁰⁹ 31 C.F.R. §103.43 (1975).

¹¹⁰ Cal. Gov't. Code §§7460-7490 (West 1976), added by Stats. 1976, c.1320, p.____, §5.

¹¹¹ Id. at §7461.

state and local officers must first procure customer authorization, an administrative subpoena, a search warrant, a judicial subpoena, or a subpoena duces tecum.¹¹² The financial institution¹¹³ must release the requested material if presented with a document showing facial compliance with the law.¹¹⁴ The document must state the name of the agency making the request, the reason for disclosure, and, if based on customer authorization, the period for which it is valid. Finally, the records to be examined must be identified, and the requesting agency must notify the customer in writing of the disclosure within thirty days.¹¹⁵

¶46 If information is divulged pursuant to an administrative subpoena or summons, a copy of the process must be served upon the customer beforehand, and show the name of the issuing agency and the statutory purpose for which the information will be used. The customer may move to quash the subpoena within ten days unless designated state officers show "a reasonable inference" that "a law . . . has been or is about to be violated."¹¹⁶ In such case, service upon the customer

¹¹²Id. at §7470(a).

¹¹³Section 7465(a) of the Act defines "financial institution" to include state and national banks, state and federal savings and loan associations, trust companies, and state and federal credit unions.

¹¹⁴Id. at §7470(b).

¹¹⁵Id. at §7473.

¹¹⁶Id. at §7474(b).

may also be waived. When a waiver is granted, the court must order the agency to notify the customer within sixty days of the disclosure. The financial institution may notify the customer of receipt of process unless waiver of notice is granted, and the court finds that notice would impede the investigation.¹¹⁷

¶47 The Act does not require customer notification if the examination is conducted pursuant to a search warrant, although the institution may still, of course, elect to notify the subject unless prohibited from doing so by court order.¹¹⁸ When a judicial subpoena or a subpoena duces tecum issues (to both the bank and the customer), the institution may divulge customer records after ten days, unless the subject moves to quash the subpoena, or notice to the customer is delayed until after the disclosure.¹¹⁹

¶48 Knowing and intentional violations of the Act are misdemeanors punishable by up to one year's imprisonment and a \$5,000 fine.¹²⁰

¹¹⁷Id.

¹¹⁸Id. at §7475.

¹¹⁹Id. at §7476. A grand jury may issue a subpoena with delayed notice upon the vote of a majority of its members. The subpoena must be based upon probable cause, a significant departure from the general rule for such subpoena in the federal system. See supra, note 20.

¹²⁰Id. at §7485.

ii. Confidentiality of customer records:
Maryland and Illinois¹²¹

¶49 A recent Maryland statute restricts record disclosures by "fiduciary institutions,"¹²² unless the customer authorizes release of the information or the investigator¹²³ presents a lawful subpoena, summons, warrant, or court order.¹²⁴ Process must be served on both customer and institution at least twenty-one days before disclosure, although a court may waive service of process on the customer for good cause.¹²⁵

¶50 The statute does not prohibit the handling or examination of the records without customer authorization or legal process by the fiduciary institution having custody, or by designated supervisory agencies.¹²⁶ Finally,

¹²¹Md. Ann. Code. Art. 11, §224-27 (1976), and Pub. Acts 79-1493, 1494, 1976 IU Legis. Serv. (West).

¹²²"[F]iduciary institutions" includes commercial banks and trust companies, private banks, state and federal loan associations, institutions insured under the National Housing Act, thrift institutions, credit unions, and any other organizations chartered under Maryland banking laws and subject to the supervision of the Bank Commissioner. Id. at §224(a)(1).

¹²³The Maryland statute applies to all persons, not just governmental agencies, as in the California Act. Compare id. at §225 with Cal. gov't. Code §7470(a).

¹²⁴Md. Ann. Code, Art. 11 §§225, 226. The court order, as in California, and a departure from the federal rule, must be based on probable cause. See supra, note 17.

¹²⁵Id.

¹²⁶The designated federal and state agencies having this privilege are at id., §224(a)(3).

information may be published so long as the data is not identified in connection with a particular individual.¹²⁷

¶51 The Illinois Legislature followed the lead of California and Maryland in 1976 by enacting two statutes¹²⁸ to protect the privacy of the financial records of bank customers and savings and loan association members. Like the California and Maryland laws,¹²⁹ the Illinois statute requires disclosure of records in response to a "lawful subpoena, summons, warrant, or court order, only if. . . served upon the customer and. . . the state bank,¹³⁰ or if authorized by the customer."¹³¹ A court may, for good cause, waive service upon the customer.¹³²

iii. Depositor and customer records confidential:
Alaska¹³³

¶52 In 1976, the Alaska Legislature also acted to protect the confidentiality of customers' bank records except where a "bank, customer, or depositor is compelled to disclose. . . by a court" or when disclosure is required by a state or federal law authorized by the depositor, or made to

¹²⁷Id. at §224(b).

¹²⁸Pub. Acts 79-1493, 79-1494, 1976 Ill. Legis. Serv. (West).

¹²⁹See supra notes 108,119.

¹³⁰Pub. Act 79-1493 at §(d)(1) and 79-1494 at §(d)(2), supra note 125a.

¹³¹Pub. Act 79-1493 at §(c)(1) and 79-1494 at §(d)(1).

¹³²Pub. Act 79-1493 at §(d)(1) and 79-1494 at §(e)(1).

¹³³Depositor and customer Records Confidential, 1976 Alaska Sess. Laws §06.05.175.

the holder of a negotiable instrument drawn on the bank as to sufficiency of funds.¹³⁴ In a departure from similar statutes in other states, no notification to the customer "shall be made if disclosure is made under a search warrant or under a subpoena. . . ." ¹³⁵

iv. Electronic funds transfer systems¹³⁶

¶53 New state laws governing electronic funds transfer systems reflect a developing trend toward a presumption of greater confidentiality of bank records. Several statutes recently enacted deal with the threat to privacy of computerized banking. They provide for liability of banks to customers for disclosure of information, or criminal penalties for "tapping in" to the computer to obtain financial information or obtaining information from the system without authorization.¹³⁷

¹³⁴ Id. at §(a).

¹³⁵ Id. at §(b).

¹³⁶ See generally Scaletta, "Privacy Rights and Electronic Funds Transfer Systems--an Overview," 25 Cath. L. Rev. 767 (1976). See also National Commission on Electronic Funds Transfers, EFT And Public Interest at 24-30 (February, 1977) recommending that Congress enact legislation granting the individual standing to contest government access to his financial records, and providing for prior notification to the individual of any subpoena or summons.

¹³⁷ See, e.g., Fla. Stat. Ann. §659.062 (West, 1976); 1975 Iowa Acts, ch. 240, §536; Kan. Stat. §§17-5568, 17-5569, 9-1111 (d) (1975); 1975 Or. Laws, ch. 193, §§9, 10.

B. Third Party Records: The Phone Company

¶54 The telephone company keeps a number of records potentially useful in law enforcement. Billing records, for example, show the date, time, duration, and destination of all long distance telephone calls, and the name and address of the person owning the calling telephone. In certain situations, conversations may be recorded by the telephone company and obtained by law enforcement officials.¹³⁸ Information in the hands of the phone company can be used for investigative leads,¹³⁹ to provide probable cause for issuing a search warrant,¹⁴⁰ to authorize electronic surveillance,¹⁴¹ or as evidence before a grand jury¹⁴² or at trial.¹⁴³

¹³⁸ See, e.g., United States v. Hanna, 260 F. Supp. 430 (S.D. Fla. 1966), rev'd, 393 F.2d 700 (5th Cir.), aff'd on rehearing, 404 F.2d 405 (5th Cir. 1968) (telephone company investigations of "blue box" leading to a bookmaking operation).

¹³⁹ See, e.g., United States v. Barnard, 490 F.2d 907, 913 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974); United States v. Michigan Bell Telephone Co., 415 F.2d 1284 (6th Cir. 1969).

¹⁴⁰ See, e.g., United States v. Russo, 250 F. Supp. 55 (E.D. Pa. 1966); Cashen v. Spann, 125 N.J. Super. 386, 311 A.2d 192 (App. Div. 1973), modified on other grounds, 66 N.J. 541, 334 A.2d 8, cert. denied, 423 U.S. 829 (1975).

¹⁴¹ See, e.g., United States v. Kohne, 347 F. Supp. 1178 (W.D. Pa. 1972).

¹⁴² See, e.g., Nolan v. United States, 423 F.2d 1031, 1044 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970).

¹⁴³ See, e.g., United States v. Gallo, 123 F.2d 229 (2d Cir. 1941).

1. Constitutional limits

a. Fourth Amendment

¶55 As with bank records, the strongest challenges to governmental access to phone company records have been based on the Fourth Amendment. In most jurisdictions, if the telephone company consents to an examination of its records, the subscriber cannot object. The records are normally considered the property of the telephone company, not the subscriber.¹⁴⁴ Even if the records are viewed as jointly owned, the telephone company's consent would generally be sufficient, unless the subscriber was present and objecting to the search.¹⁴⁵

¶56 In People v. McKunes, a California Court of Appeals adopted a different analysis and held that a telephone subscriber had a reasonable expectation that his telephone billing records would remain private, absent a "subpoena or other court order."¹⁴⁶

¹⁴⁴See, e.g., United States v. Kohne, *supra* note 129, at 1183 ("The defendants have no proprietary interest in records kept by the telephone company . . .").

¹⁴⁵Cf. United States v. Hughes, 441 F.2d 12, 17 (5th Cir.), cert. denied, 404 U.S. 849 (1971).

¹⁴⁶51 Cal. App.3d 487, 490-91, 124 Cal. Rptr. 126, 128 (1975). The McKinnes court closely followed the holding of the California Supreme Court in Burrows v. Superior Court (*supra*, note 79) that a bank customer can reasonably expect, absent "compulsion by legal process," that his records will remain confidential. 13 Cal.3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974). The Court rejected the argument that the bank owned the records, stating, "It is not the right of privacy of the bank but of the petitioner which is at issue" *Id.* at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170.

[A] subscriber has a reasonable expectation that records of his calls will be utilized only for the accounting functions of the telephone company in determining his bills. He has no reason to expect that his personal life, as disclosed by the calls he makes and receives, and the day and time of those calls, will be disclosed to outsiders without some prior judicial inquiry into the need for such invasion and its extent.¹⁴⁷

¶57 Other courts do not accept the California argument. The Ninth Circuit stated the general rule in United States v.

Fithian:

The expectation of privacy attaching to telephone conversations relates to the content of the conversations themselves and not to the fact that a conversation took place. No one justifiably could expect that the fact that a particular call was placed will remain his private affair when business records necessarily must contain this information.¹⁴⁸

Conversations may even be recorded in special circumstances, such as fraud on the telephone company:

[O]nce it has been determined that the use of the communication facility is illegal, no complaint will be heard as to the disclosure of the conversation.¹⁴⁹

Even in California, if the customer attempts to defraud the recordholder, his rights are not violated by voluntary disclosure.¹⁵⁰ Thus, if the telephone company consents,

¹⁴⁷Id. at 492, 124 Cal. Rptr. at 129.

¹⁴⁸452 F.2d 505, 506 (9th Cir. 1971).

¹⁴⁹United States v. Hanna, 260 F. Supp. 430, 433 (S.D. Fla. 1966), rev'd, 393 F.2d 700 (5th Cir.), aff'd on rehearing, 404 F.2d 405 (1968). The 1968 Act (18 U.S.C. §2511 (2)(a)) reflects this holding. S. Rep. No. 1097, 90th Cong., 2d Sess. at 93 (1968).

¹⁵⁰"[I]f the bank is not neutral, as for instance where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail." Burrows v. Superior Court (supra, note 134), 13 Cal.3d at 245, 529 P.2d at 590, 118 Cal. Rptr. at 170.

or the customer commits a fraud on the company, the records may be examined without subpoena or warrant.¹⁵¹ If the phone company does not consent, a subpoena or summons must be used, but only the company may move to quash it.¹⁵²

b. Fifth Amendment

¶58 The production of toll records or recorded conversations does not violate an individual's privilege against self-incrimination. Records belonging to, prepared, or produced by the phone company are not "compelled" testimony of the caller.¹⁵³ Even recorded conversations, which could be viewed as testimonial, would not be compelled.

¶59 Cases raising Fifth Amendment claims have involved telegraph rather than telephone company records. In United States v. Gross, however, the court held that Western Union records "are not the property of the customer [who] has no standing to object on . . . Fifth Amendment grounds."¹⁵⁴

¹⁵¹ Generally, however, the telephone company will not consent, and some sort of process will be required. See N.Y. Times, Feb. 13, 1976, p. 45, col. 3; City of New York v. Public Service Comm., 84 Misc.2d 1058, 1060, 379 N.Y.S.2d 987, 990 (Sup. Ct. Albany Cty 1976), aff'd 53 App. Div.2d 164, 385 N.Y.S.2d 634 (3d Dept. 1976).

¹⁵² United States v. Michigan Bell Telephone Co., 415 F.2d 1284, 1286 (6th Cir. 1969). See also, United States v. Finn, 502 F.2d 938 (7th Cir. 1974) (search warrant on phone company to install pen register).

¹⁵³ See Fisher v. United States, 425 U.S. 391 (1976).

¹⁵⁴ 416 F.2d 1205, 1213 (8th Cir. 1969).

A subpoena duces tecum for telegrams sent or received over a ten-week period has also been upheld.¹⁵⁵

c. First Amendment

¶60 To sustain a First Amendment objection to government access to phone company records, the aggrieved party must show real injury or the threat of future harm.¹⁵⁶ Even where harm or a significant encroachment upon personal liberty is shown, the state may prevail upon showing an interest that is compelling.¹⁵⁷

2. Statutory limits: Section 605¹⁵⁸

¶61 Section 605 was enacted by Congress in 1934 to protect the integrity of communication systems and the privacy of

155 [Against] such a demand, made not upon plaintiffs, but upon the telegraph companies, plaintiffs have no standing whatever to invoke the . . . Fifth Amendment for plaintiffs are being called neither to produce evidence, nor to testify against themselves, they are not being called at all.

Newfield v. Ryan, 91 F.2d 700, 705 (5th Cir.), cert. denied, 302 U.S. 729 (1937).

156 [T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action

Ex Parte Levitt, 302 U.S. 633, 634 (1937). See also Laird v. Tatum, 408 U.S. 1 (1972).

157 See Bates v. Little Rock, 361 U.S. 516 (1960).

158 Federal Communication Act of 1934, 47 U.S.C. §605 (1970).

communications themselves.¹⁵⁹ It was extensively amended in 1968 as part of Title III of the Omnibus Crime Control and Safe Streets Act.¹⁶⁰

¶62 The section addressed two distinct classes of persons.¹⁶¹ The first sentence deals with persons "receiving or assisting in receiving, or transmitting,. . . any interstate or foreign communication by wire or radio," and prohibits interception of any communication or divulging or publishing the existence or contents of the communication except under certain circumstances or where authorized by the sender.¹⁶² Disclosure made "in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority," is an exception.¹⁶³ Sentence two

¹⁵⁹ See, e.g., Bubis v. United States, 384 F.2d 643, 646-47 (9th Cir. 1969).

¹⁶⁰ 18 U.S.C. §§2510-20 (1970). See S. Rep. No. 1097, 90th Cong. 2nd Sess. at 107-08 (1968) ("This section is not intended merely to be a re-enactment of section 605. The new provision is intended as a substitute."). See also Note, 60 Cornell L. Rev. 1028 (1975). The re-written section 605 left exclusive control of wiretaps to Title III.

¹⁶¹ See United States v. Covello, 410 F.2d 536, 541 (2nd Cir.), cert. denied, 396 U.S. 879 (1969).

¹⁶² 47 U.S.C. §605.

¹⁶³ Id.

addresses "all other persons not within the first class."¹⁶⁴

¶63 Defendants have argued for suppression of telephone company records under both sentences. Under the first sentence, they argue that a person with the described duties divulged the existence of a communication in a situation not falling under one of the exceptions, or that "demand of other lawful authority" should be narrowly construed. A challenge under the second sentence of the post-1968 section is no longer possible, as the sentence deals with radio communications, not telephone toll records.¹⁶⁵

¶64 One response to the arguments is that telephone toll records are not within the scope of section 605. The Second Circuit in United States v. Covello noted that the keeping of toll records is "a necessary part of the ordinary course

¹⁶⁴ See United States v. Covello, supra, note 148.

¹⁶⁵ United States v. Baxter, 492 F.2d 150, 166-67 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973), cert. denied, 416 U.S. 940 (1974). Indeed, law enforcement personnel are no longer "persons" within the meaning of new Section 605. S. Rep. No. 1097, 90th Cong. 2nd Sess. at 108 (1969); United States v. Hall, 488 F.2d 193, 195-96 (9th Cir. 1973).

An argument under sentence two prior to 1968--that records were obtained by the phone company by intercepting a communication, the existence of which was illegally divulged--was first rejected in United States v. Gallo, 123 F.2d 229 (2d Cir. 1941). The court held that there was implied consent to make records required for "business convenience." If such records were an interception of the communication, they were authorized by the sender and therefore outside the proscription of Section 605. Id. at 231. The other circuits followed Gallo. See, e.g., Nolan v. United States, 423 F.2d 1031, 1044 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970); Di Piazza v. United States, 415 F.2d 99, 101-02 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

of the telephone company's business . . . in order that the company may substantiate its charges to its customers."¹⁶⁶

The records are kept with the knowledge of and for all subscribers, not only those under criminal investigation.

[T]he records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. . . . Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business.¹⁶⁷

¶65 The Seventh Circuit and Ninth Circuit have both followed Covello.¹⁶⁸ By construing section 605 in this fashion, the courts avoid the necessity of considering such issues as the standing of the subscriber, or what constitutes a "demand of other lawful authority."

¶66 Other courts have handled these issues by limiting the class of persons covered by sentence one to exclude individuals who actually turned over the toll records to the police. The district court in United States v. Russo, for example, held that telephone company accounting employees were

¹⁶⁶ 410 F.2d at 542.

¹⁶⁷ Id.

¹⁶⁸ See United States v. Crone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); and United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974) ("garden variety telephone toll records . . . do not fall within . . . §605").

excluded from the class.¹⁶⁹ The sentence includes, the court held, only those ". . . who must either learn the content of the message or handle a written record of communications in the course of their employment."¹⁷⁰ A special agent of the telephone company in charge of an investigation has also been held to fall outside its scope.¹⁷¹

¶67 An argument that a violation of section 605 has occurred may, of course, be defeated if the telephone toll records were obtained in compliance with the statute: by a "subpoena issued by a court of competent jurisdiction,"¹⁷² or upon the "demand of other lawful authority."¹⁷³ Most courts

¹⁶⁹250 F. Supp. 55 (E.D. Pa. 1966).

¹⁷⁰Id. at 59.

¹⁷¹Bubis v. United States, 384 F.2d 643 (9th Cir. 1967) (interception and recording part of toll fraud investigation). See United States v. Baxter, 492 F.2d 150, 166 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973), cert. denied, 416 U.S. 940 (1974). Contra, Hana v. United States, 404 F.2d 405, 408 (5th Cir. 1968), cert. denied, 394 U.S. 1015 (1969) (security officer within sentence one). See also United States v. Covello, 410 F.2d 536, 541 (2d Cir.), cert. denied, 396 U.S. 879 (1969) (entire phone company considered as one person, but §605 irrelevant for toll records).

¹⁷²See, e.g., Nolan v. United States, 423 F.2d 1031, 1045 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970).

¹⁷³See, e.g., Di Piazza v. United States, 415 F.2d 99, 103 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971) (I.R.S. summons). United States v. King, 335 F. Supp. 523, 534 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974) (request by federal law enforcement agent).

accept a court or grand jury subpoena as "a subpoena issued by a court of competent jurisdiction."¹⁷⁴ In addition, many courts will construe non-judicial or administrative subpoenas as a "demand of other lawful authority." Thus, under section 605 a valid and enforceable subpoena can be issued by the Securities and Exchange Commission,¹⁷⁵ the Internal Revenue Service,¹⁷⁶ or a county prosecutor.¹⁷⁷

¶68 A federal district court has, however, indicated a willingness to include within the phrase "demand of other lawful authority" a request by a law enforcement officer in the regular course of his duties. In United States v. King, the court held that a request by a special agent of the United States Customs Service "as part of an on going criminal investigation was a 'demand of . . . lawful authority' within the meaning of Section 605."¹⁷⁸ King may be of little significance today, however, because in 1974 the American

¹⁷⁴ See, e.g., Nolan v. United States, supra, note 159.

¹⁷⁵ Newfield v. Ryan, 91 F.2d 700, 703 (5th Cir.), cert. denied, 302 U.S. 729 (1937) (subpoena for telegrams).

¹⁷⁶ Di Piazza v. United States, supra, note 160.

¹⁷⁷ Cf. People v. Meticheccia, 83 Misc.2d 241, 245, 371 N.Y.S.2d 805, 809 (Mt. Vernon City Ct. 1975).

¹⁷⁸ 335 F. Supp. 523, 534 (S.D. Cal. 1971), aff'd. in part, rev'd. in part on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974).

Telephone and Telegraph Company initiated a policy to release telephone records only under a subpoena, either administrative or judicial.¹⁷⁹

¶69 Nevertheless, the defendant always retains the burden both of producing evidence and of persuading the court that his telephone toll records were obtained in an illegal manner.¹⁸⁰ The defendant who successfully meets these burdens may have the toll records and their derivative evidence suppressed. He also has ". . . an implied right of action for damages arising out of violation of §605" ¹⁸¹ Suits for damages, however, are not usually successful.¹⁸²

¹⁷⁹ See N.Y. Times, Feb. 13, 1976, p. 47, col. 5.

¹⁸⁰ See, e.g., United States v. Baxter, 492 F.2d 150, 168 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973), cert. denied, 416 U.S. 940 (1974).

¹⁸¹ Guido v. City of Schenectady, 404 F.2d 728, 731 (1968), cert. denied, 395 U.S. 962 (1969). Criminal penalties are provided in 47 U.S.C. §501 (1970). Prosecutions are unusual, probably because law enforcement officials can usually argue good faith.

¹⁸² See Cashen v. Spann, 125 N.J. Super. 386, 311 A.2d 192 (App. Div. 1973), modified on other grounds, 66 N.J. 541, 334 A.2d 8, cert. denied, 423 U.S. 829 (1975).

C. Third Party Records: Commercial Enterprises

¶70 Law enforcement officials are discovering a wealth of useful information in ordinary records kept by businesses that can be particularly valuable in tax fraud and political corruption cases. Records from credit card companies reveal how and where a suspect spends money. Because card-issuing companies keep monthly account statements for several years, investigators can reconstruct the pattern of a suspect's expenditures over a period of time.¹⁸³ Car rental agencies, airlines, hotels, and credit reporting bureaus provide similar material.

1. Constitutional limits

a. Fourth Amendment

¶71 Law enforcement officials, can routinely obtain commercial records from businessmen upon request without showing legal process of any kind.¹⁸⁴ Under current law, privacy interests are defined to exclude ". . . information

¹⁸³See R. Nossen, The Seventh Basic Investigative Techniques, pp. 60-63 (L.E.A.A. 1976).

¹⁸⁴The general attitude of the courts is reflected in United States v. Donaldson, 400 U.S. 517, 531 (1971), where the I.R.S. sought to obtain employment data from the subject's employer and the subject intervened in a summons enforcement suit:

The nature of the 'interest' urged by the taxpayer is apparent from the fact that the material in question . . . would not be subject to suppression if the Government

revealed to a third party . . . even if the information is revealed on the assumption that it will be used only for a limited purpose" ¹⁸⁵ As a result, a customer has no standing to object to the surrender of a third party's records or to a consent search of those records. ¹⁸⁶ The only limitation on law enforcement access is private commercial policy.

¶72 At present, some businesses refer requests to their legal and security departments for consideration. ¹⁸⁷ They may require a showing that the request involves an on-going criminal investigation before documents are released. ¹⁸⁸ Others demand a written request with identifiable author-

Footnote 185 (continued)

obtained it by other routine means, such as by the . . . [employer's] independent and voluntary disclosure prior to summons, or by way of identifiable deductions in . . . [the employer's] own income tax returns.

¹⁸⁵ Miller v. United States, 425 U.S. 435, 443 (1976).

¹⁸⁶ See, e.g., Ebbel v. United States, 364 F.2d 127 (10th Cir.), cert. denied, 385 U.S. 1014 (1966) (receiver permitted F.B.I. to examine books of savings and loan association); United States v. Prevatt, 526 F.2d 400 (5th Cir. 1976) (bank consented to I.R.S. examination).

¹⁸⁷ See, e.g., statement of Rudolph J. Mezaro of Atlantic Richfield before Privacy Protection Study Commission, Public Hearing, Feb. 12, 1976, pp. 150-51 (hereinafter Privacy Commission).

¹⁸⁸ See, e.g., statement of Max Hopper of American Airlines before Privacy Commission, Feb. 13, 1976, p. 12.

ization before surrendering materials.¹⁸⁹

¶73 Absent consent, general commercial records are usually obtained by subpoena. Only the recipient of the subpoena has the right to object to the production of the records.¹⁹⁰ There is not even a general requirement that the subject be notified that the records have been subpoenaed.¹⁹¹

¶74 Search warrants may also be obtained for commercial books and records, but, unlike subpoenas, must be supported by probable cause.¹⁹² In addition, the warrant should specifically designate the papers sought. Courts are particularly sensitive to blanket warrants designed to permit

¹⁸⁹ See, e.g., statement of T. Trintler of Pan American Airlines before Privacy Commission, Feb. 13, 1976, p. 60; statement of B. Curry of Hertz Corp., id. at 81.

¹⁹⁰ See, e.g., United States v. Sahley, 526 F.2d 913 (5th Cir. 1976); In Re Grand Jury Proceedings, 520 F.2d 904 (8th Cir.), cert. denied, 423 U.S. 1050 (1975).

¹⁹¹ See Miller v. United States, 425 U.S. 435, 443 n.5 (1976). But see Valley Bank of Nevada v. Superior Court, 15 Cal. App.3rd 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) (notice must be given before compliance with court order). Many private businesses have special policies to deal with the notification issue. Bankers in the Mastercharge system notify customers if credit records are subpoenaed. Statement of J. Reynolds of Interbank Association before Privacy Commission, Feb. 11, 1976, p. 63. The American Telephone and Telegraph Company follows a similar policy unless the investigating agency certifies that notice would obstruct a felony investigation. Id., Feb. 12, 1976, pp. 48-50. American Express, Hertz Corporation, and Sheraton Hotels make no effort to notify. Id., Feb. 13, 1976, pp. 81-82, 107.

¹⁹² See, e.g., VonderAHE v. Howard, 508 F.2d 364, 369 (9th Cir. 1974).

investigators to comb all available records.¹⁹³ A warrant, however, will not be held invalid if no attempt was first made to get the documents by other means.¹⁹⁴

b. First Amendment

¶75 In the past, political organizations have attacked the release of third party records as a violation of First Amendment rights because it "chilled" the membership's freedom to associate.¹⁹⁵ Unfortunately, the Supreme Court has not yet squarely faced the question of the constitutionality of the disclosure of general commercial records.

¶76 The Court skirted this issue recently when provisions of the Election Campaign Act,¹⁹⁶ requiring political committees and candidates to report election contributions made to and received by the Election Commission, were challenged. The language in the decision, however, suggests that the Court is

¹⁹³Id.

¹⁹⁴But some courts clearly show a preference for subpoena or request. Id.

¹⁹⁵See, e.g., Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (bus company data obtained by F.B.I.). Cf. Buckley v. Valeo, 424 U.S. 1 (1976) (disclosure of contributor to political campaign).

¹⁹⁶2 U.S.C. §431 (1970 ed., Supp. IV).

aware of the danger to First Amendment guarantees posed by compelled financial disclosure:

[W]e repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment . . . significant encroachments . . . cannot be justified by a mere showing of some legitimate governmental interest . . . we have required that the subordinating interests of the State must survive exacting scrutiny.¹⁹⁷

2. Statutory limits

a. Fair credit reporting legislation

¶77 The Fair Credit Reporting Act¹⁹⁸ governs the dissemination of information collected by credit reporting bureaus. The Act distinguishes between two types of information gathered about consumers. A "consumer report" contains financial and credit data on the individual; an "investigative consumer report" includes personal information.

¶78 A bureau may provide consumer reports under the order of a court with proper jurisdiction.¹⁹⁹ If a bureau discloses an investigative consumer report, it must inform the consumer within three days of the request for the report.²⁰⁰ The required notification may "chill" on-going criminal investi-

¹⁹⁷Buckley v. Valeo, 424 U.S. 1, 64 (1976).

¹⁹⁸15 U.S.C. §1681 et. seq. (Supp. 1975).

¹⁹⁹Id. at §1681 (b) (1).

²⁰⁰Id. at §1681 (d).

gations when information is requested by law enforcement officials. Moreover, the consumer may ask the agency that received the report to disclose the nature of the investigation within five days of his request or within five days of receipt of the report, whichever is sooner.²⁰¹

¶79 Some states have similar credit reporting statutes.²⁰²

The Massachusetts, New Hampshire, New Mexico, and Oklahoma statutes are based on the federal model. All but the Oklahoma law permit disclosure of identifying information to government agencies upon request.²⁰³

New York, on the other hand, recognizes the special needs of law enforcement by permitting investigative consumer reports to be obtained by agencies submitting a signed statement that the information is requested solely for law enforcement purposes.²⁰⁴

Connecticut also permits broad disclosure to a law enforcement officer, but a signed statement is not required.²⁰⁵

²⁰¹Id.

²⁰²See, e.g., Conn. Gen. Stat. §§36-431-35 (Supp. 1976); Mass. Gen. Laws Ann. ch. 93, §§50-70 (West, 1975); N.H. Rev. Stat. Ann. §359-B (Supp. 1975); N.M. Stat. Ann. §50-18-1 (Supp. 1975); N.Y. Gen. Bus. Law §§370-76 (McKinney Supp. 1976); Okla. Stat. Ann. tit. 24 §81 (West, 1955).

²⁰³Mass. Gen. Laws Ann. ch. 93 §55 (West, 1975); N.H. Rev. Stat. Ann. §359 B:8 (1975); N.M. Stat. Ann. §50-18-3 (Supp. 1975).

²⁰⁴N.Y. Gen. Bus. Law §373 (McKinney Supp. 1976).

²⁰⁵Conn. Gen. Stat. §36-433 (Supp. 1976).

b. Privacy legislation

¶80 The Privacy Act of 1974,²⁰⁶ amending title 5 of the U.S. Code deals with the maintenance and dissemination of information about individuals collected by government agencies. The law forbids disclosure of information without the written consent of the individual involved. An exception is made for law enforcement agencies that submit a written request to the agency possessing the record. The request must specify the records as well as the law enforcement activity for which they are sought.²⁰⁷ No accounting of these requests need be made to the individual.²⁰⁸

¶81 The ultimate effect of the Privacy Act on access to private commercial records is undetermined. Section five created the Privacy Protection Study Commission with a mandate to study private information systems and to recommend, if necessary, measures to regulate them.²⁰⁹ Over the past year, the Commission has held hearings to explore practices in the insurance industry, the credit industry, and the hotel and travel industries.

²⁰⁶ 5 U.S.C. §552(a) (Supp. 1976).

²⁰⁷ 5 U.S.C. §552(a) (b) (7).

²⁰⁸ Id. at §552(a) (c).

²⁰⁹ Privacy Act of 1974, Pub. L. No. 93-579, §5, 88 Stat. 1896 (1974).

¶82 Minnesota and Virginia have enacted their own privacy statutes.²¹⁰ Although both are modeled on the federal legislation, the Virginia law goes beyond it to regulate private organizations entering into contracts with government agencies to operate systems of personal information.²¹¹ The organizations having regular access to personal information. Furthermore, the subject may request the names of recipients of information who do not have regular access to the records.²¹²

D. Third Party Records: Professional and Spousal Privileges

¶83 Books and records in the hands of professionals can be valuable to law enforcement officials. Records held by an attorney or accountant may, for example, provide information on a subject's business activities, contractual

Footnote 209 (continued)

In July, 1977, the Privacy Protection Study Commission will publish recommendations pertaining to the privacy of customer records at depository institutions. The Commission, which has been quoted as saying, "Americans have long believed that the details of their personal finances are nobody's business but their own and that the information they disclosed to depository and lending institutions will not travel further" is expected to advise more stringent safeguards for limiting access to customer records. See Am. Banker, May 4, 1977, at 1, col. 1. See also Privacy Journal, Compilation of State and Federal Privacy Laws (1977).

²¹⁰Minn. Stat. Ann. §15.162-69 (Supp. 1977); Va. Code §2.1-377 (Supp. 1976).

²¹¹See Va. Code at §2.1-379 (6) (Supp. 1976).

²¹²Id. at §2.1-382 (a) (c).

obligations, legal status under a separation agreement, or tax returns. A doctor may provide a medical history. In some situations, even a clergyman's records may be of assistance.

¶84 Unlike custodians of other third-party records, professionals seldom consent²¹³ to an examination of their records for fear of breaching a duty of confidentiality to the client,²¹⁴ or exposing themselves to liability for damage disclosure may cause the client.²¹⁵ Consequently, a subpoena or search warrant is usually necessary.

²¹³Consent, of course, obviates Fourth Amendment issues. Zap v. United States, 328 U.S. 624 (1946).

²¹⁴See, e.g., A.B.A. Canons of Professional Ethics, E.C. 4.1 (1973) (fiduciary relationship requires preservation of confidences); C.P.A., Professional Standards, Concepts of Professional Ethics, Rules of Conduct, Rule 301 (1973) (no disclosure without consent of client); A.M.A., Principles of Medical Ethics, Section 9 (confidences not revealed in course of medical attendance). See also Doe v. A. Corp., 330 F. Supp. 1352 (S.D. N.Y. 1971) (attorney cannot use confidence in derivative suit); Lord v. Kelley, 223 F. Supp. 684, 690 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965) (accountant may not allow examination of records without consent).

²¹⁵See, e.g., Simonsen v. Swenson, 104 Neb. 224, 228-29, 177 N.W. 831, 832 (1920). Many courts hold that the duty of confidentiality ends, however, when the client expresses an intention to commit a crime. Tarasoff v. Regents of University of California, 13 Cal.3d, 177, 182-83, 529 P.2d 553, 558-59, 118 Cal. Rptr., 129, 134-35 (1974), vacated on other grounds, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (causes of action for damages found where psychiatrist failed to warn victim).

¶85 A subject of an investigation has no standing, usually, to complain how the government obtains access to a professional's records.²¹⁶ The privilege against self-incrimination does not apply because production of records by the professional involves no compulsion on the client.²¹⁷ Nor are First Amendment challenges to government access to professional's records, except in the case of clergymen,²¹⁸ usually successful.

1. Attorney-client

¶86 The oldest common law privilege is that existing between attorney and client.²¹⁹ An attorney, served with process for the production of books and records, may claim the attorney-client privilege protects the materials sought. The privilege belongs to the client,

²¹⁶See, e.g., Fisher v. United States, 425 U.S. 391 (1976) (accountant's records in lawyer's hands); Couch v. United States, 409 U.S. 322 (1973) (accountant's records).

²¹⁷Fisher v. United States, supra, note 203.

²¹⁸See la Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

²¹⁹The first reported case was decided in 1577. Bred v. Lovelace, Cary 88, 21 Eng. Rep. 33 (ch. 1577). The privilege developed to provide "subjectively for the client's freedom of apprehension in consulting his legal advisor." 8 J. Wigmore, Evidence §2390 (McNaughton rev. 1961) (emphasis in original). The privilege exists in some form in all jurisdictions today.

and unless he waives it, the attorney must assert it.²²⁰
¶87 The privilege applies to confidential communications made in connection with a request to an attorney for legal advice.²²¹ Lack of confidentiality will defeat the privilege,²²² and communications pertaining to collusion to commit a crime, continuing illegality, or contemplated future crimes are also unprotected.²²³ If a client seeks only business advice, the privilege does not apply.²²⁴ The person asserting the privilege carries the burden of showing the privileged nature of the docu-

²²⁰ See, e.g., Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833 (1956). Often the client will seek to intervene in enforcement proceeding. Intervention is permissive, not mandatory. See Donaldson v. United States, 400 U.S. 517, 529 (1971); O'Donnell v. Sullivan, 364 F.2d 43, 44 (1st Cir.), cert. denied, 385 U.S. 969 (1966); In Re Cole, 342 F.2d 5, 7-8 (2d Cir.), cert. denied, 381 U.S. 950 (1965).

²²¹ 8 J. Wigmore, Evidence §2292 (McNaughton rev. 1961).

²²² See, e.g., United States v. Silverman, 430 F.2d 106, 120-22 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971) (union records in hands of attorney must be produced).

²²³ See Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused") (Cardozo, J.); United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir. 1971), cert. denied, 404 U.S. 958 (1971) (attorney's co-conspirators).

²²⁴ Lowy v. C.I.R., 262 F.2d 809, 812 (2d Cir. 1959) (business dealings); United States v. Chin Lim Mow, 12 F.R.D. 433, 434 (N.D. Cal. 1952) (attorney who maintained bank account must answer subpoena).

ments,²²⁵ which is determined by in camera inspection.²²⁶

¶88 Generally, the fact of employment, the names of clients, and the amount of fees paid²²⁷ can be discovered. Only under exceptional circumstances will the identity of a client be confidential.²²⁸ When a prima facie showing can be made that the communications relate to criminal activity, disclosures can be required.²²⁹

²²⁵In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965).

²²⁶United States v. Johnson, 465 F.2d 793, 794 (5th Cir. 1972) (documents best evidence of privileged character).

²²⁷United States v. Carter, 489 F.2d 413 (5th Cir. 1973) (names of client compelled by "John Doe" summons). See, e.g., United States v. Schmidt, 360 F. Supp. 339, 349 (M.D. Pa. 1973). Nor are bank records pertaining to an attorney's trust account (client's funds) with a bank, which he may be required by law to keep, clothed with the attorney-client privilege. Gannett v. First National State Bank of N.J., 546 F.2d 1072 (3d Cir. 1976), petition for cert. filed, 20 Crim. L. Rep. 2364 (Dec. 27, 1976) (No. 76-1262). See also United States v. Bank of Calif., 424 F. Supp. 220 (N.D. Calif. 1976).

²²⁸Tillotson v. Boughner, 350 F.2d 663, 666 (7th Cir. 1965) (attorney who made conscience payment to I.R.S. not compelled to reveal name of client).

²²⁹See, e.g., In re Selser, 15 N.J. 393, 105 A.2d 395 (1954) (ongoing criminal activity coupled with continuous conferences).

¶89 Some courts argue that the preparation of a tax return by an attorney is outside the scope of the attorney-client privilege, because it involves business rather than legal advice.²³⁰ The majority of the cases, however, extend the privilege to all communications related to the tax return, as long as no crime or fraud is involved.²³¹ The materials incorporated in the return, however, are not confidential and must be produced.

¶90 The privilege does not prevent the production of documents existing before the initiation of the attorney-client relationship that are delivered to an attorney, because the element of confidentiality is lacking.²³² Only if the documents were protected in the hands of the client, (e.g., by the Fifth Amendment) will they be protected by the attorney-client privilege in the hands of the attorney.²³³

¶91 In appropriate circumstances, the attorney-client privilege may bar disclosures made to non-lawyers acting

²³⁰ See In re Shapiro, 381 F. Supp. 21, 22-23 (N.D. Ill. 1974).

²³¹ See, e.g., United States v. Schlegel, 313 F. Supp. 177, 178-80 (D. Neb. 1970).

²³² See, e.g., United States v. Judson, 322 F.2d 460, 463 (9th Cir. 1963).

²³³ Fisher v. United States, 425 U.S. 391 (1976). See also Grant v. United States, 227 U.S. 74 (1913).

as agents of an attorney.²³⁴ The privilege will occasionally bar production of an accountants' workpapers if the accounting advice is:

1. essential to the attorney-client relationship;²³⁵
2. given in confidence;²³⁶
3. prepared by an accountant employed by an attorney;²³⁷
4. under the attorney's direct control; and
5. assisting the attorney in giving legal assistance.²³⁸

Courts often reflect a strong prejudice against an attorney acting as accountant.²³⁹ Papers and communications relating to the attorney's accounting as opposed to legal advice are not within the scope of the attorney-client privilege.²⁴⁰

²³⁴United States v. Pipkins, 528 F.2d 559, 562 (5th Cir. 1976); United States v. Schmidt, 360 F. Supp. 339, 346 (M.D. Pa. 1973) (rules stated).

²³⁵United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972); United States v. Kovel, 296 F.2d 918, 919-20 (2d Cir. 1961) (procedure to determine described) (Friendly, J.).

²³⁶United States v. Brown, 349 F. Supp. 420, 426 (N.D. Ill. 1972).

²³⁷Id.

²³⁸United States v. Cote, supra, note 222.

²³⁹See, e.g., United States v. Schmidt, supra, note 221.

²⁴⁰United States v. Gurtner, 474 F.2d 297, 298 (9th Cir. 1973).

¶92 There is a qualified privilege for the work product materials, of an attorney prepared in anticipation of litigation.²⁴¹ Although frequently asserted as a bar to discovery in civil litigation, the doctrine also applies to criminal proceedings.²⁴² The requirement that the materials be prepared in anticipation of litigation is strictly construed.²⁴³

2. Accountant-client

¶93 There is no federal accountant-client privilege.²⁴⁴ Several states have statutory privilege.²⁴⁵ Whether federal courts will apply state privilege law is an Erie question:²⁴⁶ Rule 501 of the Federal Rules of Evidence mandates the application of state privilege law in civil actions where state law supplies the rule of decision.

²⁴¹Hickman v. Taylor, 329 U.S. 495 (1947). The requirement that the materials be prepared by the attorney makes it unlikely that the doctrine would apply to pre-existing documents transferred to the attorney.

²⁴²United States v. Nobles, 422 U.S. 225 (1975).

²⁴³See, e.g., United States v. McKay, 372 F.2d 174 (5th Cir. 1967) (appraisal report).

²⁴⁴Couch v. United States, 409 U.S. 322 (1973).

²⁴⁵See, e.g., Ariz. Rev. Stat. Ann. §32-749 (1976).

²⁴⁶Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

¶94 In federal civil actions and criminal proceedings, the privilege is governed by common law as interpreted by the federal courts. As a rule, no state law pertaining to accountant-client privilege is applied.²⁴⁷ An accountant's work papers in the hands of a client are not privileged, even if the client assumes ownership of the papers.²⁴⁸

3. Physician-patient

¶95 The physician-patient privilege²⁴⁹ is entirely a statutory creation. Where recognized, the privilege usually protects only communications

1. made in confidence to the physician;²⁵⁰
2. necessary to treat the patient;²⁵¹ and

²⁴⁷ See, e.g., Cotton v. United States, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (federal tax investigation is federal matter).

²⁴⁸ Matter of Fred R. Witte Center Glass No. 3, 544 F.2d 1026, 1028 (9th Cir. 1976).

[M]ere ownership of an accountant's work papers does not convert the production of such papers into an affirmation of their contents.

Cf. United States v. Beattie, 541 F.2d 329 (2d Cir. 1976) (compulsory production of letters which taxpayer had sent to and then retrieved from his accountant in anticipation of criminal investigation would violate Fifth Amendment privilege).

²⁴⁹ 8 J. Wigmore, Evidence §2380 (McNaughton rev. 1961)

²⁵⁰ State v. Broussard, 12 Wash. App. 355, 529 P.2d 1128 (1974) (gunshot wound not in confidence).

²⁵¹ Mass. Mutual Life Insurance Co. v. Brei, 311 F.2d 463, 468 (2d Cir. 1962).

3. related to the patient.²⁵²

The privilege is waivable.²⁵³ It does not protect the identity of the patient,²⁵⁴ nor has it been held to protect communications relating to proposed criminality.²⁵⁵ Hospital records are generally admissible as business records.²⁵⁶ The use of hospital records in court, if they contain privileged material, will be restricted to the accessible or non-privileged parts.²⁵⁷

4. Priest-penitent

¶96 Although seldom asserted, in two recent cases the priest-penitent privilege was claimed by ministers acting in the capacity of counselors. The court held

²⁵²Ranger, Inc. v. Equitable Life, 196 F.2d 968, 972 (6th Cir. 1952).

²⁵³Id.

²⁵⁴In re Albert Findley Lee Memorial Hospital, 115 F. Supp., 643 (N.D. N.Y. 1953).

²⁵⁵See, e.g., Seifert v. State, 160 Ind. 464, 67 N.E. 100 (1903).

²⁵⁶United States v. Bohle, 445 F.2d 54, 61 (2d Cir. 1971).

²⁵⁷See, e.g., Franklin Life Ins. Co. v. William G. Champion and Co., 350 F.2d 115, 130 (6th Cir. 1965), cert. denied, 384 U.S. 928 (1966); and, Ranger, Inc. v. Equitable Life, supra, note 238.

in In re Verplanck, that draft counseling performed by a clergyman and his staff constituted services in the course of the clerical profession, and therefore the records held by the priest were privileged.²⁵⁸ On the other hand, in United States v. Wells,²⁵⁹ a priest was required to produce a letter he received because the letter did not expressly request religious consultation, comfort, or confidentiality.

5. Spousal privilege

¶97 Confidential communications made from one spouse to the other are privileged.²⁶⁰ Societal interest in protecting the marriage relationship outweighs any resulting handicap to the administration of justice.²⁶¹

¶98 There are two important exceptions to the privilege: testimony or production of documents may be compelled where both spouses are granted immunity,²⁶² or where

²⁵⁸329 F. Supp. 433, 437 (C.D. Cal. 1971). The issue was raised again in United States v. Boe, 491 F.2d 970 (8th Cir. 1974), but the case was decided on other grounds.

²⁵⁹446 F.2d 2 (2d Cir. 1971).

²⁶⁰8 J. Wigmore, Evidence §§2332-41 (McNaughton rev. 1961).

²⁶¹Blau v. United States, 340 U.S. 332 (1957).

²⁶²In re Alpern, 478 F.2d 194 (1st Cir. 1973).

the spouses are partners in a crime.²⁶³ Where the spouse has merely seen or heard evidence of a past crime, the privilege applies.²⁶⁴ As neither spouse can be prosecuted for what the others says, the underlying precept of preservation of the family is maintained.

¶99 Communications that are not confidential are not privileged. When a third party is involved,²⁶⁵ or when the spouse knows that the communications will be revealed to another,²⁶⁶ the confidential element is lacking. Documents that originate from a third party are also non-confidential and not protected. The modern trend is towards strict construction of the privilege.²⁶⁷

¶100 It was originally thought that a bilateral waiver of the privilege was required. The South Carolina

²⁶³United States v. van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), rev'd. on other grounds, 415 U.S. 143 (1974).

²⁶⁴Iveg v. United States, 344 F.2d 770, 772 (5th Cir. 1965).

²⁶⁵Wolfe v. United States, 291 U.S. 7, 14 (1934) (stenographer).

²⁶⁶State v. Grove, 65 Wash.2d 525, 398 P.2d 170 (1965) (letter subject to prison censorship not confidential).

²⁶⁷United States v. George, 444 F.2d 310, 314 (6th Cir. 1971) (only means of protecting relationship).

Supreme Court in State v. Motes²⁶⁸ held otherwise. The privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought.²⁶⁹

²⁶⁸264 S.C. 317, 215 S.E.2d 190 (1975).

²⁶⁹Id.

NOTIFICATION

Customer Notification

OUTLINE

Summary¶ 1

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SUMMARY

¶1 In the course of a criminal investigation, law enforcement offices often seek access to bank, telephone, or other third-party records. If the custodian of the records alerts the subject that the records have been subpoenaed, the subject may try to thwart the investigation, threaten witnesses, destroy evidence, or flee. Nevertheless, banks and phone companies, afraid of breaching an implicit contractual obligation of confidentiality to their customers or being held civilly liable for damages, frequently notify customers of pending investigations.

¶2 Because a customer or depositor has no reasonable expectation of privacy in third-party records, he has no federal constitutional right to know that the records are under investigation. Although statutorily required notice, mandated in some jurisdictions, is generally subject to waiver upon a showing of good cause, the issue of whether a private institution may be compelled to assist an investigation by withholding notice to its customers, independent of statutory authorization, has not yet been resolved.

I. DUTY TO NOTIFY

A. Grand Jury Investigations

¶3 To fulfill its task of inquiring into possible criminal conduct and returning well-founded indictments, the grand jury exercises the broadest possible powers of investigation. "[T]he scope of [its] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."¹ The subject of a grand jury investigation has no right to be informed of the investigation, nor is notification the duty or right of the subpoenaed party.² Even if an individual is notified that he is the target of an investigation, he may not be allowed to intervene in the proceedings to challenge access to his records.³

¹Blair v. United States, 250 U.S. 273, 282 (1919) quoted in Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

²City of New York v. Public Service Comm'n, 84 Misc.2d 1058, 1063, 379 N.Y.S. 2d 987, 992 (Sup. Ct. Albany Co.), aff'd, 53 App. Div. 2d 164, 385 N.Y.S. 2d 634 (3d Dep't 1976).

³See, e.g., Donaldson v. United States, 400 U.S. 517 (1971) (intervention in civil proceedings not permitted under Fed. R. Civ. P. 24); United States v. Continental Bank and Trust Co., 503 F.2d 45 (10th Cir. 1974). But see United States v. Friedman, 388 F. Supp. 963, 966 (W.D.Pa. 1975), modified on other grounds, 532 F.2d 928 (3d Cir. 1976), where taxpayers, notified by their banks of the investigation, were allowed to intervene because when "faced with the prospect" of imprisonment, it was "only fair" that defendants "be a party to the proceedings against [them]."

B. Constitutional Considerations

¶4 In most jurisdictions, the constitutional rights of customers or subscribers is neither the responsibility nor the legitimate concern of banks, phone companies, or other businesses. Toll billing records or bank records are the property of the custodian institutions; the customer has no standing to challenge a subpoena or summons.⁴ If a challenge is made, it must come from the institution owning and possessing the documents.

¶5 A customer has no reasonable expectation of privacy in unprivileged records held by third parties.⁵

To seize or examine the records, the government need not obtain a customer's or depositor's permission.⁶

Consequently, remaining ignorant of law enforcement access to such records does not violate any rights of the individual.

¶6 Because no Fourth Amendment rights of a depositor or customer are involved, no notice is necessary to warn him that his interests are being invaded by the subpoena or search warrant.⁷ Indeed, prior notice is not always required before searching an individual's home where

⁴United States v. Miller, 425 U.S. 435 (1976).

⁵Id.

⁶United States v. Prevatt, 526 F.2d 400 (5th Cir. 1976) (federal courts do not recognize a banker-depositor privilege).

⁷United States v. Grand Jury Investigation, 417 F. Supp. 389 (E.D. Pa. 1976).

there is a strong and carefully protected right to privacy.⁸ If prior notice is not a constitutional guarantee where privacy rights are invaded, it cannot be a constitutional right where an individual enjoys no expectation of privacy. California is in the minority in holding that a depositor has a constitutionally protected right to privacy in his bank records,⁹ and the right to know of a government subpoena or summons for those records.¹⁰

¶7 Self-interest, not the constitutional rights of their customers, is the strongest argument that banks or businesses can make in support of notifying their customers of a pending investigation. Even when faced with a court order to withhold notice, third-party record

⁸ See United States v. Chun, 503 F.2d 533, 536 n.5 (9th Cir. 1974): "First, it is clear that all searches need not be conducted on prior notice. . . . Second, the constitution does permit an entry into a home for a lawful governmental purpose without prior notice . . . where giving such notice . . . would reasonably result in the destruction of evidence" quoting the President's Commission in Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (1967) (remarks of Commissioner Blakey).

⁹ Burrows v. Superior Court, 13 Cal.3d 238, 529 P.2d 59, 118 Cal. Rptr. 166 (1974).

¹⁰ In Valley Bank of Nevada v. Superior Court of San Joaquin Co., 15 Cal.3d 652, 654, 542 P.2d 977, 977, 125 Cal. Rptr. 553, 553 (1975) the California Supreme Court stated that bank records are discoverable, but the bank "must first take reasonable steps to locate the customer, inform him of the discovery proceedings, and provide him a reasonable opportunity to interpose objections and seek appropriate protection orders."

CONTINUED

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holders may still insist on notifying their customers for fear of subjecting themselves to civil liability. The threat of liability for disclosing customer information is rarely, however, an adequate reason to support notification. The possibility of depositors suffering compensable damages from a bank's disclosure has been held "too slight and speculative."¹¹ More important, the disclosing institution would have the defense that the disclosure was involuntary and compelled by the court.¹²

II. THIRD-PARTY ASSISTANCE IN LAW ENFORCEMENT

A. Common Law Notion: The Posse Comitatus

¶8 A call from the sheriff to the civilian population for help in keeping the peace or apprehending criminals is an ancient custom.¹³ For hundreds of years, the posse comitatus, or power of the country, was a valuable law enforcement tool. The sheriff not only had the right

¹¹United States v. Grand Jury Investigation, *supra* note 7.

¹²Id. See also United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976) and United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968) (bank's failure to comply with subpoena for records because it would subject bank to civil liability under German law is no justification).

¹³According to Blackstone, a sheriff was "to defend his county against any of the king's enemies when they came onto the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called

to request assistance; the citizenry had the legal duty to respond.¹⁴

¶9 Marshalling the entire force of the community to fight crime may not be as important today as it once was, but cooperation from private citizens and enterprises remains essential. For example, the technical expertise of the phone company may be necessary to intercept wire communications; access to a bank's computer storehouse of information may have to be secured with the assistance of bank personnel; or a business's records unraveled for law enforcement officers by the company's experts. The theory behind the posse comitatus is, therefore, still very much alive.

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the posse comitatus, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon waiving, under pain of fine and imprisonment." 1 W. Blackstone, Commentaries on the Laws of England *343.

¹⁴See, e.g., statute of Hen. 5, c.8, par.2:

the king's liege people not being clergymen, women, persons decrepit, or infants under the age of 15, being sufficient to travel, shall be assistance to such justices, upon reasonable warning, to ride with them in aid to resist riots, routs and assemblies on pain of imprisonment and to make fine and ransom to the king;

and Coyles v. Hurtin, 10 Johns 85, 88 (N.Y. 1813):

Every man is bound to be aiding and assisting upon order or summons, in preserving the peace and apprehending offenders, and is punishable, if he refuses."

B. Modern Analogy: Pen Register Installation

¶10 The question of whether a bank, phone company, or commercial enterprise may be compelled to aid an investigation by refraining from notifying customers has not been squarely faced by the courts. The federal courts have, however, split on the issue of compelling the phone company to assist in the installation of pen registers (dialed number recorders). Authorization for the device is usually held to fall outside federal and state wiretap laws;¹⁵ as for an application for a search warrant for third-party records, only a showing of probable cause is required. Once probable cause has been shown, according to the Seventh Circuit, the court acquires the concomitant authority to compel assistance in implementing the court's order.¹⁶ The Second Circuit, on the other hand, has held that absent specific statutory authority, a court has no power to order a phone company to furnish technical assistance.¹⁷

¶11 Drawing an analogy between third-party compliance with

¹⁵ Contra, Application of the United States, 407 F. Supp. 398 (W.D. Mo. 1976).

¹⁶ United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976); accord, United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976), U.S. appeal pending.

¹⁷ Application of the United States in Matter of Order etc., 538 F.2d 956 (2d Cir. 1976), cert. granted sub nom. United States v. New York Telephone, 45 U.S.L.W. 3508 (No. 76-835, 1977).

orders for pen registers and compliance with waiver of customer notice may be risky. In the case of pen registers, technical assistance is necessary to implement the device. Prohibiting the custodians of records from notifying their customers, however, will not impede the actual implementation of the subpoena or warrant, although it may seriously obstruct the investigation.

C. Statutory Mandate

¶12 The courts have approached the right of law enforcement officers to prohibit third-party record holders from alerting customers of an investigation more as a negative safeguard than as a positive prerogative. If a prosecutor can show good cause for prohibiting or delaying notice, such as the possibility of an obstruction of justice, the court may grant his request and silence the custodian of the records. Service of notice and inventory following the issuance of a wiretap order, for example, may be postponed if shown to be necessary to the continued effectiveness of the government's investigation.¹⁸ Under new bank confidentiality statutes in California, Maryland, and Illinois, notice to a customer that his records have been subpoenaed may be waived by the court if good cause for the waiver is shown.¹⁹

¹⁸ See, e.g., United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975).

¹⁹ See Cal. Gov't Code §§7460-80 (West Supp. 1977);

1. Section 2518(4)

¶13 In the area of electronic surveillance, a court held in 1970 that in the absence of specific statutory authorization, the telephone company could not be compelled to cooperate in intercepting wire communications.²⁰

Before the court's decision was published, Congress amended Title III of the Omnibus Crime Control and Safe

19(continued)

Md. Ann. Code, art. 11, §224-27 (1976); and 1976 Ill. Legis. Serv., Pub. Law 79-1493-94.

The Tax Reform Act of 1976 (26 U.S.C. §§6103(i)) severely limits the disclosure of tax return information to law enforcement personnel for reasons other than the administration of the tax laws. Disclosure can only be made pursuant to a court order based on a showing that there is "reasonable cause" to believe that a crime has been committed, the return is probative of the crime, and the information cannot be otherwise obtained. Under the original Senate bill, a showing of "probable cause" would have been required; the Senate wanted to accord tax returns "essentially the same degree of privacy as those private papers maintained in [a person's] ... home." S. Rep. No. 94-938, 94th Cong. 2nd Sess., 328 (1976). The House insisted on the lesser standard. See H.R. Rep. No. 94-1515, 94th Cong. 2nd Sess. 482 (1976). But even where disclosure is authorized, it can only be used to show guilt; the "credibility of a witness" can not be challenged with return information. Id. The new law emphasizes procedural safeguards for protecting the confidentiality of the returns, but does not provide for notice to the subject of the investigation that his return has been requested. Protection of the tax payers interests are in the hands of the Secretary. Notice is required only before a "written determination" (ruling, determination letter, or technical advice memorandum) is opened to public inspection. Id. at §6110(f) (1976). If the I.R.S., however, serves a summons on a third-party record holder, the individual involved must be notified and given an opportunity to challenge the summons and intervene in the proceeding. See 26 U.S.C. §7609 (1976).

²⁰ Application of the United States for Relief, 427 F.2d 639, 643-44 (9th Cir. 1970).

Streets Act of 1968 to compel telephone assistance.²¹

"[I]t was our intention," according to Senator McClellan when introducing the amendment, "that good faith cooperation with law enforcement officers would be an absolute defense to civil or criminal liability...."²² The amendment would specifically empower the court "to authorize and direct telephone companies to cooperate with law enforcement officers."²³ No similar statute, however, exists to compel assistance from the holders of third-party records.

2. Federal All Writs Act

¶14 A prosecutor, acting alone, has no power to force compliance with an order to stop a recordholder from notifying the target of an investigation. Only a court has the "inherent authority" or an authority granted by the Federal All Writs Act²⁴ to order cooperation. If a court has the power, based on a grand jury subpoena or a search warrant supported by probable cause, to issue an order, it also has the power to see that the order is carried out.²⁵

²¹18 U.S.C. §2518(4), and §2511(2)(ii) (1960). See generally J.G. Carr, The Law of Electronic Surveillance (1977).

²²115 Cong. Rec. 37192 (1969).

²³Id.

²⁴28 U.S.C. §1651 (1970).

²⁵See United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976); Application of the United

¶15 The Federal All Writs Act gives the federal courts the authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."²⁶ Once jurisdiction is properly vested in a federal court, the All Writs Act allows the court to fully exercise its acquired jurisdiction. It does not provide an independent basis for jurisdiction.²⁷ The All Writs Act is entirely permissive and discretionary. The scope of the Act would not have to be stretched very far, if at all, to permit a court of proper jurisdiction to issue an order compelling a bank or phone company to refrain from notifying its customers of an investigation.

¶16 The power of courts, when not authorized by specific statute, "to impress unwilling aid on private third parties," may be, in the words of the Second Circuit, a "dangerous and unwise precedent."²⁸ Yet it has, in

25 (continued)

States in Matter of Order, etc., supra note 17 at 961-62. See also In re In-Progress Trace, 138 N.J. Super. 404, 351 A.2d 356 (App. Div. 1975) (a prosecutor may be able to use a grand jury subpoena to require a phone company to install and maintain a pen register).

²⁶ 28 U.S.C. §1651(a) (1970).

²⁷ See, e.g., United States v. First Fed. Savings & Loan Ass'n, 248 F.2d 804 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958).

²⁸ Application of the United States in Matter of Order, etc., supra note 17 at 962.

the traditional notion of the posse comitatus, clear historical analogue. The purpose of the All Writs Act would appear to be nullified if such orders are held to be beyond the proper discretion of the court. A court should be able, pursuant to "inherent" or statutory authority, to enter such orders, injunctions, or temporary restraining orders as may be necessary to prevent interference with the administration of justice.²⁹ Waiving notice to the target of an investigation when third-party books and records are subpoenaed may not be essential to the implementation of a subpoena or search warrant, but it may be absolutely essential to the successful completion of an investigation.

²⁹ Another source of judicial authority may perhaps be found in Fed. R. Crim. P. 57(b) which provides "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute."



INFORMANTS

CONSTITUTIONAL LIMITATIONS ON THE USE OF INFORMANTS

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SUMMARY

¶1 The Fourth Amendment does not protect a speaker against disclosure of his incriminating statements made to, or in the presence of, an informant. The informant may consent to have his conversations transmitted and recorded. In most jurisdictions one-party consent eavesdropping is not considered a search and seizure and no warrant is required. The constitutionality of a "listening post informant" was recently challenged in a state court, but under the federal jurisprudence there is no Fourth Amendment violation.

¶2 The Fifth Amendment privilege against self-incrimination is not violated by admission at trial of statements made to, or in the presence of an informant. Such statements are not made under any compulsion, an essential element of a Fifth Amendment violation.

¶3 Due Process does not prohibit the use of an informant to gather evidence. An informant's conduct may be sufficiently outrageous, however, to deprive a defendant of his procedural rights.

¶4 First Amendment freedoms of speech and association may be threatened by covert surveillance of political groups. The government must have a legitimate purpose in its investigation, use legal surveillance techniques that do not cause specific harm to protected rights, and divulge the information obtained only to law enforcement agencies.

¶5 The Sixth Amendment guarantee of effective assistance of counsel presents two problems for covert investigation.

First, an informant may not surreptitiously interrogate an accused to obtain evidence to use against him at trial once the accused has been charged or indicted. Recent cases suggest that interrogation may include any conduct aimed at eliciting incriminating statements.

¶6 Second, informant or electronic intrusions into the attorney-client relationship may violate the Sixth Amendment. Such an intrusion is unconstitutional if it is a deliberate attempt to learn defense secrets or if it causes prejudice in fact to the defendant at trial.

I. THE FOURTH AMENDMENT

A. Physical Presence of Informant

¶7 Conversations with, or in the hearing of, an undercover agent or government informant are not a search and seizure within the meaning of the Fourth Amendment. The Supreme Court held in Hoffa v. United States¹ that a person speaking within the hearing of a government agent is not relying on the security of any constitutionally protected area, but rather on his misplaced confidence that the listener will not reveal what is said.² The use of an informant to gather evidence of incriminating statements for use against the speaker does not pose a Fourth Amendment problem.³

¶8 Informants invited into a home or place of business may testify regarding what they saw and heard.⁴ Entrance

¹385 U.S. 293, 302 (1966).

²Id.

³See also United States v. Santillo, 507 F.2d 629, 632 (3d Cir.), cert. denied, 421 U.S. 968 (1975) (undercover agent's testimony from notes admissible at trial); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 153 (D.D.C. 1976) (covert penetration of organization does not violate Fourth Amendment); State v. Hamm, 234 N.W. 2d 60, 63 (S.D. 1975) (use of informant to "pump" suspects does not violate Fourth Amendment); Brown v. State, 10 Md. App. 462, 472, 271 A.2d 182, 187 (1970), cert. denied, 261 Md. 722 (1971) (statements overheard by intentionally placed informant in jail cells admissible at trial). But cf. Note, "Judicial Control of Secret Agents," 76 Yale L. Rev. 994 (1967).

⁴An agent invited into a person's home for the purpose of hiding and overhearing that person's conversation with another may testify to the conversation without violating the speaker's Fourth Amendment rights. United States v. Missler, 414 F.2d 1293, 1299 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970).

with consent is not a Fourth Amendment violation.⁵ An agent invited to enter for a particular purpose, however, is not authorized to make a general search for incriminating evidence.⁶

B. Electronic Eavesdropping with Consent of Informant

¶9 Electronic eavesdropping on conversations to which a consenting informant is a party or is physically present is not a search and seizure and no warrant is required.⁷ This is so whether the conversation is transmitted by a device worn by the informant,⁸ taped by the informant,⁹ or

⁵ Lewis v. United States, 385 U.S. 206, 211 (1966) (agent invited into home to purchase narcotics); United States v. Tarrant, 460 F.2d 701, 703 (5th Cir. 1972) (agent invited into home testified regarding observed illegal possession of firearms). See also Lopez v. United States, 373 U.S. 427, 438 (1963) (agent invited into business office did not violate privacy of office).

⁶ Lewis v. United States, 385 U.S. 206, 211 (1966); State v. Monahan, 21 Crim. L. Rptr. 2008 (Wis. Sup. Ct. 3/15/77).

⁷ United States v. White, 401 U.S. 745, 752 (1971) (conversations electronically transmitted and taped by others). The Court reasoned that, for purposes of the Fourth Amendment there is no difference between an electronically equipped and an unequipped agent. 401 U.S. 753. See also United States v. Quintana, 508 F.2d, 867 (7th Cir. 1975).

⁸ Id.; People v. Gibson, 23 N.Y.2d 618, 246 N.E.2d 349, 298 N.Y.S.2d 469 (1969), cert. denied, 402 U.S. 951 (1971).

⁹ Lopez v. United States, 373 U.S. 427, 439 (1963); United States v. Koska, 443 F.2d 1167 (2d Cir.), cert. denied, 404 U.S. 852 (1971); United States v. Santillo, 507 F.2d 629, 634 (3d Cir. 1975), cert. denied, 421 U.S.

taped by other agents monitoring a transmission¹⁰ or telephone call.¹¹ At least one state court has held that if a telephone conversation is intercepted with an informant's consent, the identity of the informant must be revealed so as to permit the defendant the opportunity to explore the possibility that there was actually no consent.¹²

9(continued)

968 (1976); United States v. Lippman, 492 F.2d 314, 318 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); People v. Murphy, 8 Cal. 3d 349, 359, 503 P.2d 594, 600, 105 Cal. Rptr. 138, 144 (1972), cert. denied, 414 U.S. 833 (1973); State v. Jordan, 220 Kan. 110, 551 P.2d 773 (1976); In re Haggerty, 257 La.1, 241 So.2d 469 (1970); State v. Myers, 190 Neb. 146, 206 N.W.2d 851 (1973).

¹⁰Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973); Pennington v. State 19 Md. App. 253, 310 A.2d 817, (1973), cert. denied, 419 U.S. 1019 (1975); State v. Maes, 81 N.M. 550, 469 P.2d 529 (1970).

¹¹United States v. Bonano, 487 F.2d 654, 658 (2d Cir. 1973); United States v. Dowdy, 479 F.2d 213, 229 (4th Cir.), cert. denied, 414 U.S. 823 (1973); Holmes v. Burr, 486 F.2d 55, 60 (9th Cir.), cert. denied, 414 U.S. 116 (1973); United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877 (1972). In addition, the Fourth Amendment does not prohibit the use of electronic surveillance of incarcerated individuals. The rationale is that there is not a reasonable expectation of privacy. See Lanza v. New York, 370 U.S. 139 (1962); Williams v. Nelson, 457 F.2d 376 (9th Cir. 1972); Commonwealth v. Dougherty, 343 Mass. 299, 178 N.E.2d 584 (1961); Thompson v. State, 298 P.2d 464 (Okla. Crim. 1965); Annot., 57 A.L.R. 3rd 176 (1974).

¹²Connally v. Georgia, 237 Ga. 203, 227 S.E.2d 352 (1976), rev'd per curiam on other grounds, 20 Crim. L. Rptr. 4122 (U.S. Sup. Ct. Jan. 10, 1977).

C. The "Listening Post" Informant

¶10 In People v. Collier,¹³ a judge of the New York Supreme Court held that the conduct of an undercover agent placed in a community where no suspected crime was under investigation violated the Fourth Amendment rights of an individual who was convicted by evidence gathered by the agent.¹⁴

The agent's assignment was to infiltrate an entire community and, specifically, a politically active organization within the community. His activities included both attendance at public gatherings and numerous secret warrantless searches of the defendant's home. Acknowledging the appropriate function of an undercover agent in infiltrating groups where there is evidence of criminal activity,¹⁵ the court found that the police had no probable cause to believe that a criminal investigation in the community was required, or that the individual defendant was engaged in criminal activity.¹⁶ The Fourth Amendment was violated in the first instance by planting an agent in the community, and second by allowing him to focus his evidence gathering efforts on one individual.¹⁷

¹³ 85 Misc. 2d 529, 376 N.Y.S. 2d 954 (Sup. Ct. N.Y. County 1975).

¹⁴ Id. at 565.

¹⁵ Id. at 567.

¹⁶ Id. at 568.

¹⁷ Id.

¶11 This broad ruling is inconsistent with a series of federal and state court decisions. These decisions recognize a legitimate police function in attending public gatherings to collect information about people active in political organizations.¹⁸ Mere presence in the community and attendance of public meetings do not invade any constitutionally protected area of privacy.¹⁹ Nor is there any precedent for requiring that probable cause exist before an informant is placed in a public meeting or engages in conversation with any individual. Although the conduct of the police in this case was reprehensible and the constitutional rights of the defendant were violated in several instances,²⁰ there is little support for the decision's implication that the use of a "listening post" informant is unconstitutional.

II. THE FIFTH AMENDMENT

¶12 The Supreme Court held in Hoffa v. United States that the use at trial of incriminating statements made to, or overheard by, an informant does not violate the defendant's privilege against compulsory self-incrimination.²¹ Such

¹⁸ See discussion infra, ¶19.

¹⁹ Cf. Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 153 (D.D.C. 1976).

²⁰ People v. Collier, 85 Misc. 2d 529, 541, 554 (illegal search and seizure), 560 (violation of First Amendment rights of community members), and 569 (possible deprivation of due process), 376 N.Y.S.2d 954 (Sup. Ct. N.Y. County 1975).

²¹ Supra note 1, at 304.

statements are made voluntarily and lack any element of compulsion.²² Lower federal courts²³ and state courts²⁴ have consistently held that informant-obtained statements are admissible and do not violate the defendant's Fifth Amendment privilege.

III. DUE PROCESS

A. Secrecy Per Se

¶13 Courts have seldom treated the argument that the use of an undercover agent is per se a violation of due process. The argument was flatly rejected by the Supreme Court in Hoffa v. United States,²⁵ where an informant testified regarding the defendant's jury-tampering efforts during an

²²Id. at 303.

²³See, e.g., United States v. DiLorenzo, 429 F.2d 216, 219 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971); Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973); United States v. Quintana, 508 F.2d 867, 872 (7th Cir. 1975).

²⁴See, e.g., Easley v. State, 56 Ala. App. 102, 319 So.2d 721, 724 (1975); People v. Murphy, 8 Cal. 3d 349, 362, 503 P.2d 594, 602, 105 Cal. Rptr. 138, 146 (1972), cert. denied, 414 U.S. 833 (1973); State v. Jordan, 220 Kan. 110, 551 P.2d 773 (1973); Montgomery v. State, 15 Md. App. 7, 288 A.2d 628, cert. denied, 266 Md. 740 (1972); State v. Myers, 190 Neb. 146, 206 N.W.2d 851 (1973); State v. Hamm, 234 N.W.2d 60, 64 (S.D. 1975); State v. Killary, 133 Vt. 604, 349 A.2d 216 (1975). Contra, State v. Travis, 360 A.2d 548, 551 (R.I. 1976) (statements made to undercover agent in jail cell after request was made for counsel were obtained in violation of Fifth Amendment of United States Constitution and Article I of Rhode Island Constitution).

²⁵Supra note 1, at 311.

earlier trial. It failed again before the Eighth Circuit in a case in which the informant infiltrated a political organization when several of its members were under indictment.²⁶ The informant did not testify at the defendant's trial, and there was no evidence that he had intruded into confidential trial strategy sessions. The court reasoned that there could be no due process violation when the informant's conduct was not prejudicial to the defendant.²⁷

B. Secrecy With Prejudice

¶14 Even where there is prejudice to the defendant, the due process theory has seldom proven successful. In Hoffa, the informant's testimony related to ongoing criminal activity separate from the charges already at trial.²⁸ In two state court cases²⁹ the informants were put in jail with the defendant in order to get more evidence on the charges already pending.³⁰ In all of these cases, the courts spe-

²⁶United States v. Crow Dog, 532 F.2d 1182, 1197 (8th Cir. 1976).

²⁷Id.

²⁸Supra note 1, at 308.

²⁹People v. Lopez, 60 Cal.2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Brown v. State, 10 Md. App. 462, 271 A.2d 182 (1970), cert. denied, 261 Md. 722 (1971).

³⁰But see discussion, infra, ¶45-48, of Sixth Amendment problems after charges have been brought against an accused.

cifically held that the defendants had not been deprived of due process.³¹

¶15 The Ninth Circuit suggested in dicta, however, that informants may violate due process when they are used to invade the trial strategy counsels of a pro se defendant to gain advantage for the prosecution.³² In addition, the opinion in People v. Collier³³ suggested that indiscriminate, pervasive infiltration of a community and its organizations may be so outrageous as to deprive the accused of due process.³⁴

¶16 The Fourth Circuit recently held that maintaining an informant's cover after an accused has been indicted and allowing the informant to continue his undercover relationship with the accused deprives the defendant of due process.³⁵ The court reasoned that the rule of Brady v.

³¹Hoffa v. United States, supra note 1, at 311; People v. Lopez, supra note 29, 32 Cal. Rptr. at 438; Brown v. State, supra note 29, 271 A.2d at 188.

³²United States v. Scott, 521 F.2d 1188, 1189 (9th Cir. 1975), cert. denied, 424 U.S. 925 (1976). The court held that Sixth Amendment protections are not applicable to pro se defendants, 521 F.2d at 1192. Cf. discussion of intrusions into the attorney-client relationship, infra, ¶60-61.

³³Supra note 13, and discussion, supra, ¶10-11, infra, ¶25.

³⁴Supra note 13, 85 Misc. 2d at 569.

³⁵Burse v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975), rev'd, 20 Crim. L. Rptr. 3059 (Feb. 22, 1977).

Maryland³⁶ requiring disclosure by the prosecution of exculpatory evidence, created a duty to disclose an informant's identity when the accused is indicted.³⁷ The Supreme Court, however, reversed³⁸ holding that Brady did not create a constitutional right to discovery in a criminal case,³⁹ and that disclosure of an informant's identity is not required by the Due Process Clause.⁴⁰

¶17 The Fifth Circuit has recently suggested in dicta that there may be a due process argument where the informant worked on a contingent fee basis and the defendant was a "target."⁴¹ The argument relies on Williamson v. United States:⁴²

Williamson occupies the niche recognized by at least five members of the U.S. Supreme Court in United States v. Russell, 411 U.S. 423,...and Hampton v. United States, 425 U.S. 484, that there may be cases in which the conduct of law enforcement agencies is so outrageous that due process principles absolutely bar use of the judicial process to obtain any conviction.⁴³

³⁶ 373 U.S. 83 (1963).

³⁷ Supra note 35, at 487.

³⁸ Weatherford v. Bursey, 20 Crim. L. Rptr. 3059 (Feb. 22, 1977).

³⁹ Id., at 363.

⁴⁰ Id.

⁴¹ United States v. McClure, 20 Crim. L. Rptr. 2485 (8th Cir. Feb. 7, 1977).

⁴² 311 F.2d 441 (5th Cir. 1962) (informer used on a contingent fee basis to "get" three individuals targeted by treasury agents).

⁴³ 20 Crim. L. Rptr. at 2486.

But, the court noted, Williamson is narrowly construed. Consequently, the argument would be effective only in a few circumstances.⁴⁴

IV. THE FIRST AMENDMENT

A. In General

¶18 The known or suspected presence of informants in a group organized to pursue a lawful purpose may inhibit protected speech and association activities. As Mr. Justice Marshall stated:

Dangers inherent in undercover investigation are even more pronounced when the investigated activity threatens to dampen the exercise of First Amendment rights.⁴⁵

¶19 Groups and individuals have challenged government use of informants to attend meetings and infiltrate organizations on the grounds that protected freedoms of association and expression are thereby chilled. Federal courts recognize legitimate data collection and compilation that is relevant to law enforcement functions of investigating and deterring crime. Certain activities in pursuance of those functions are sanctioned as legitimate and immune from challenge in a court. Courts have been careful, however, to distinguish

⁴⁴ Id.

⁴⁵ Socialist Workers Party v. Attorney General of the United States, 419 U.S. 1314, (Marshall, Circuit Justice, 1974).

legitimate purposes, surveillance techniques, and uses of data from illegitimate ones. Covert activities that do not have a legitimate law enforcement purpose, that are illegal or specifically harmful to protected rights in and of themselves, or that make inappropriate use of the information may be challenged and enjoined in court.

B. Justiciability

¶19 In Laird v. Tatum⁴⁶ the Supreme Court held that in order for a challenge to covert government activities on First Amendment grounds to be justiciable the plaintiff must allege "specific present objective harm or a threat of specific future harm."⁴⁷ Plaintiffs had complained that the existence and operation of an Army intelligence gathering system had a chilling effect on protected First Amendment rights. The Court noted that the Army activities had a legitimate law enforcement purpose⁴⁸ and that the techniques employed were public and lawful.⁴⁹ Absent a showing that the plaintiffs were specifically harmed in their enjoyment of their constitutional rights, such law enforcement activities are immune from attack in court.

⁴⁶408 U.S. 1 (1972).

⁴⁷Id. at 13-14.

⁴⁸Id. at 3-8.

⁴⁹Id. at 9.

¶21 Lower courts have consistently applied this rule. In doing so, however, they have focussed on three distinct issues: the legitimacy of government purposes (ends), techniques (means), and uses of the data.

C. Purposes

¶22 In Laird v. Tatum, the Court held that the Army had a legitimate purpose in helping local authorities deal with domestic violence.⁵⁰ The appropriateness of surveillance of such "dissident" political organizations as the Socialist Workers Party,⁵¹ the Fifth Avenue Peace Parade,⁵² and the Religious Society of Friends⁵³ has been assumed.

¶23 Several courts found, however, that First Amendment issues are raised where surveillance does not have an acknowledged law enforcement function or where the defendant can show specific injury.⁵⁴

⁵⁰Id. at 3-8.

⁵¹Supra note 45, 95 S.Ct. at 428.

⁵²Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 332 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974).

⁵³Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335, 1337-38 (3d Cir. 1975) (hereinafter referred to as Friends v. Tate).

⁵⁴People v. Collier, supra note 13. See Socialist Workers Party v. Attorney General of the United States, 387 F.Supp. 747 (S.D.N.Y.), vacated in part, 510 F.2d 253 (2d Cir.), stay denied, 419 U.S. 1314 (Marshall, Circuit Justice, 1974).

¶24 The motive for conducting covert surveillance may be illegitimate. Where the government seeks to coerce or intimidate,⁵⁵ or to hinder a political candidate during an election,⁵⁶ it has acted outside of its legitimate law enforcement function and threatened First Amendment rights.

¶25 On the other hand, the conduct under surveillance may not be a legitimate area for investigation.⁵⁷ In White v. Davis⁵⁸ the California Supreme Court held that ongoing police undercover surveillance of university classrooms and organizations where no specific criminal activity was involved, created too great a threat to First Amendment freedoms.⁵⁹ The state was required to show a compelling state interest in continuing surveillance of the university community when no specific crime was under investigation.⁶⁰ In People v. Collier,⁶¹ a New York court found that the police could not

⁵⁵Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 151 (D.D.C. 1976).

⁵⁶Lowenstein v. Rooney, 401 F.Supp. 952, 954 (E.D.N.Y. 1975).

⁵⁷Socialist Workers Party v. Attorney General of the United States, 510 F.2d 253, 256 (2d Cir.), stay denied, 419 U.S. 1314 (1974).

⁵⁸13 Cal. 3d 757, 533 P.2d 211, 120 Cal. Rptr. 94 (1975).

⁵⁹Id., 13 Cal. 3d at 769, 533 P.2d at 218, 120 Cal. Rptr. at 101.

⁶⁰Id., 13 Cal.3d at 773, 533 P.2d at 221, 120 Cal. Rptr. at 104.

⁶¹85 Misc. 2d 529, 376 N.Y.S.2d 954 (Sup. Ct. N.Y. County 1975). Compare discussion of Fourth Amendment issue in this case, supra, ¶10-11.

legitimately place an informant in a Manhattan community when no specific crime was under investigation. The existence of covert surveillance was found to have substantial deterrent effect on First Amendment rights of speech, association, and assembly.⁶² It is difficult to see how a constitutional violation can occur by the mere presence of an undercover agent. It is possible that the courts in these cases found an inference of specific harm to the individual by the techniques employed or probable use of the information.

D. Techniques

¶26 Attendance at public meetings and gatherings,⁶³ taking photographs of those who are present⁶⁴ and compiling files on individuals and groups⁶⁵ for use by law enforcement agencies are legitimate surveillance techniques that do not in and of themselves threaten specific harm to individual rights.⁶⁶

⁶²Id. 85 Misc. 2d at 560-561.

⁶³Laird v. Tatum, 408 U.S. 1, 9 (1972); Socialist Workers Party v. Attorney General of the United States, 419 U.S. 1314, 95 S.Ct. 425, 428 (Marshall, Circuit Justice, 1974); Friends v. Tate, 519 F.2d 1335, 1337-38 (3d Cir. 1975); Donohue v. Duling, 465 F.2d 196, 201 (4th Cir. 1972).

⁶⁴Friends v. Tate, supra note 53 at 1337-38; Donohue v. Duling, supra note 63, at 201.

⁶⁵Berlin Democratic Club v. Rumsfeld, supra note 50, at 151.

⁶⁶See Laird v. Tatum, supra note 43.

If they are undertaken with an illegitimate intent,⁶⁷ however, or if their effect is to specifically harm or threaten harm to protected rights of speech and association, the First Amendment may be violated. For example, allegations that the presence of informants at meetings of political organizations causes potential participants to stay home or refrain from active participation are specific enough to be justiciable. If a substantial chill on speech and association is shown the surveillance will be enjoined.⁶⁸

¶27 In several cases members of "dissident" political groups complained that they were the targets of intensive and disruptive police campaigns.⁶⁹ Police conduct included unlawful tactics,⁷⁰ unlawful use of the information obtained,⁷¹ and

⁶⁷ See discussion supra ¶24. See also Berlin Democratic Club v. Rumsfeld, supra note 55; Handschu v. Special Services Division, 349 F.Supp. 766, 770 (S.D.N.Y. 1972) (where undercover agents induced members of a legitimate organization to engage in unlawful activities).

⁶⁸ See Socialist Workers Party v. Attorney General of the United States, supra note 45, at 428.

⁶⁹ Berlin Democratic Club v. Rumsfeld, supra, note 55, at 147; Alliance to End Repression v. Rochford, 407 F. Supp. 115, 116 (N.D. Ill. 1975); Handschu v. Special Services Division, supra note 67, at 770.

⁷⁰ Infiltration of the group was often accompanied by warrantless electronic surveillance of group members, entries and seizures. Berlin Democratic Club v. Rumsfeld, supra note 55, at 147 (warrantless eavesdropping, opening mail); Alliance to End Repression v. Rochford, supra note 69, at 116 (illegal electronic surveillance, entry and seizure).

⁷¹ Berlin Democratic Club v. Rumsfeld, supra, note 55 at 147 (dissemination of files resulting in members losing jobs); Alliance to End Repression v. Rochford, supra note 69, at 116 (dissemination of derogatory information). See discussion of legitimate uses of intelligence data infra, ¶28.

provocation to engage in unlawful activities.⁷² Finding these allegations specific enough under the Laird v. Tatum standard⁷³ to be justiciable, courts have, however, usually failed to differentiate among legitimate and illegitimate purposes; lawful, harmful, and illegal techniques; and legitimate and illegitimate uses. One court suggested that the combination of legitimate and illegitimate techniques and uses raises an inference of an illegitimate purpose of intimidation or coercion.⁷⁴ It is important that these distinctions be made in the interest of both preserving individual freedoms and protecting legitimate law enforcement functions.

E. Uses

¶28 Information gathered through investigations with a legitimate purpose, conducted by legal and non-harmful means, may be shared with federal, state, and municipal law enforcement agencies.⁷⁵ This use of intelligence data is seen as

⁷²Handschu v. Special Services Division, supra note 67, at 770.

⁷³ [S]pecific present objective harm or a threat of specific future harm.

408 U.S. at 13-14. See discussion of justiciability, supra, ¶20.

⁷⁴Berlin Democratic Club v. Rumsfeld, supra note 55, at 151.

⁷⁵Fifth Avenue Peace Parade Comm. v. Gray, supra note 52, at 332; Friends v. Tate, supra note 59, at 1337; Donohue v. Duling, supra note 63, at 197-198. See also Laird v. Tatum, supra note 47. But see Socialist Workers Party v. Attorney General of the United States, supra note 57, at 257 (FBI will not disclose names of people attending convention outside of federal government).

non-harmful and non-justiciable.⁷⁶ Transmission of the information to non-law enforcement agencies or individuals may raise an inference of illegitimate purpose⁷⁷ or be seen as specifically harmful to First Amendment rights in and of itself.⁷⁸ Courts usually, though, identify a causal relation-protected rights as work,⁷⁹ travel,⁸⁰ due process,⁸¹ and association.⁸² For example, the Third Circuit found that transmission of information on the Religious Society of Friends to non-law enforcement groups threatened injury to freedoms of speech and association, interfered with job opportunities, and burdened individual travel rights.⁸³

⁷⁶Id.

⁷⁷See Friends v. Tate, supra note 53, at 1338; Berlin Democratic Club v. Rumsfeld, supra note 55, at 151, 161.

⁷⁸Socialist Workers Party v. Attorney General of the United States, supra note 57, at 257 (transmission of names of people attending convention to Civil Service Commission enjoined).

⁷⁹Socialist Workers Party v. Attorney General of the United States, supra note 57, at 428; Friends v. Tate, supra note 53, at 1338; Berlin Democratic Club v. Rumsfeld, supra note 55, at 147.

⁸⁰Friends v. Tate, supra note 53, at 1338.

⁸¹Berlin Democratic Club v. Rumsfeld, supra note 55, at 149 (dissemination of information allegedly prejudiced defendant in military trial).

⁸²Friends v. Tate, supra note 53, at 1338.

⁸³Id. at 1338.

F. Electronic Surveillance

¶29 When targets of electronic surveillance are members of dissident political groups, Fourth and First Amendment values of privacy and free expression converge. In United States v. U.S. District Court, the Supreme Court held that prior judicial approval is required for searches or electronic surveillance made in the interest of national domestic security.⁸⁴

Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.⁸⁵

This rule is, in effect, a judicial examination of purpose, ensuring that there is a legitimate law enforcement end to be served.⁸⁶

⁸⁴ 407 U.S. 297 (1972).

⁸⁵ Id. at 315. For development of rule where activities under surveillance affect foreign relations, see Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 96 S.Ct. 1684 (1976); and Berlin Democratic Club v. Rumsfeld, supra note 55. See also comment, "Title III and National Security Surveillance," 56 B.U.L. Rev. 776 (1976).

⁸⁶ The historical judgement, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

United States v. United States District Court, supra note 84, at 317.

V. THE SIXTH AMENDMENT-DEPRIVATION OF
COUNSEL AND COVERT INVESTIGATION

A. In General: Basic Supreme Court Rulings

1. Massiah v. United States

¶30 In Massiah v. United States⁸⁷ the Supreme Court first gave close attention to the Sixth Amendment implications of informant testimony. The defendant had been indicted and was free on bail. A government informant, equipped with a transmitter, engaged the defendant in a conversation designed to elicit incriminating statements. A second government agent was hidden in the trunk of the car where the conversation took place. This agent overheard and taped the incriminating statements.

¶31 Admission of these incriminating statements, the Supreme Court held, violated the defendant's right to assistance of counsel.⁸⁸ Powell v. Alabama⁸⁹ had established that during the critical period of time from arraignment to trial a criminal defendant is entitled to counsel.⁹⁰ Spano v. New York⁹¹ ensured that the due process procedural safeguards

⁸⁷377 U.S. 201 (1964).

⁸⁸Id. at 206.

⁸⁹287 U.S. 45 (1932).

⁹⁰Massiah v. United States, supra note 87, at 205.

⁹¹360 U.S. 315 (1959).

of a trial following indictment may not be denied at a pre-trial extra-judicial police interrogation.⁹² Consequently, the Court held in Massiah that incriminating statements deliberately elicited by surreptitious interrogation of an indicted defendant by a government agent in the absence of counsel are obtained in violation of the defendant's Sixth Amendment rights and may not be used against him at trial on the pending charge.⁹³

¶32 The Court emphasized that it may be entirely proper, however, to continue a covert investigation of suspected criminal activities after a defendant has been indicted.

All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.⁹⁴

2. Hoffa v. United States

¶33 Two years later, in Hoffa v. United States,⁹⁵ the Court again considered the Sixth Amendment problem. While Hoffa was on trial for a Taft-Hartley offense a government informant was often in the company of the defendant, his attorneys, and associates. He reported regularly to federal agents; his reports and testimony were used to convict Hoffa at a subsequent trial for attempting to influence the jury at the

⁹²Massiah v. United States, supra note 81, at 204.

⁹³Id. at 206.

⁹⁴Id. at 207.

⁹⁵385 U.S. 293 (1966).

first trial. Three important Sixth Amendment principles were set out by the Supreme Court when Hoffa appealed on the jury-tampering conviction.

¶34 Assuming that the informant had access to privileged attorney-client conversations and trial strategy relating to the first trial, such an intrusion may have violated Hoffa's Sixth Amendment right to counsel regarding the first trial. If the informant's reports or testimony had resulted in conviction in that trial, a new trial may have been required.⁹⁶

¶35 The informant's activities did not, however, violate the defendant's rights with relation to the second charge, the jury-tampering offense. The incriminating statements admitted at the second trial related to new, ongoing criminal activity, and they were not tainted by any intrusion into legitimate attorney-client conversations about the first trial.⁹⁷ The statements relating to jury tampering could, therefore, be admitted at the second trial.⁹⁸

¶36 When an investigation has not yet produced a charge or indictment the Massiah rule is not applicable.⁹⁹ The police have no constitutional duty to stop an investigation and arrest or charge a suspect as soon as they have the

⁹⁶Id. at 307.

⁹⁷Id. at 308.

⁹⁸Id. at 309.

⁹⁹Id. at 310.

minimum evidence required to do so.¹⁰⁰ Hoffa had no constitutional right to be arrested and advised of his right to counsel as soon as the government knew of his jury-tampering efforts.

B. Protective Doctrines

1. The separate offense rule

¶37 Indictment of an accused for one offense does not give Sixth Amendment protection to incriminating statements made regarding another crime. This rule derives from the decision in Hoffa v. United States,¹⁰¹ and it has been explicitly adopted in most of the federal circuits.¹⁰²

¶38 The definition of a separate offense turns on the specific acts which constitute an offense. If the statements relate to a new crime that grows out of the pending criminal proceedings, such as bribery or attempt to obstruct justice,

¹⁰⁰Id.

¹⁰¹Supra note 95, 385 U.S. at 308. See discussion supra ¶35.

¹⁰²Grieco v. Meachum, 533 F.2d 713, 718 (1st Cir.), cert. denied, 45 U.S.L.W. 3253 (1976); United States v. Frank, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); United States v. Osser, 483 F.2d 727, 733-734 (3rd Cir.), cert. denied, 414 U.S. 1028 (1973); United States v. Missler, 414 F.2d 1293, 1303 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970); United States v. Hayles, 471 F.2d 788, 792 (5th Cir.), cert. denied, 411 U.S. 969 (1973); United States v. Merritts, 527 F.2d 713, 716 (7th Cir. 1975); Vinyard v. United States, 335 F.2d 176, 184 (8th Cir.), cert. denied, 379 U.S. 930 (1964); Gascar v. United States, 356 F.2d 101, 102 (9th Cir.), cert. denied, 385 U.S. 865 (1966). See also State v. Hill, 26 Ariz. App. 37, 545 P.2d 999, 1002 (1976).

there is a separate offense.¹⁰³ If a defendant is charged regarding certain criminal acts, and those acts are part of the basis for a subsequent and broader indictment, statements elicited post-charge about those acts are probably not admissible.¹⁰⁴

¶39 The Sixth Circuit adopted a very restrictive definition of a separate offense in United States v. Valencia.¹⁰⁵ The defendant had been charged in one city for smuggling narcotics, and he was represented with regard to those charges by an attorney. The charges were later dismissed, but in the interim, he was indicted in another city, along with his attorney, for conspiracy to import and distribute cocaine. The acts forming the basis for the smuggling charges were part of the ongoing activity that formed the basis of the conspiracy charge. But the specific acts leading to the conspiracy indictment were different. The court held that the dismissal of the first charge did not terminate the formal prosecution of the defendant, and that subsequent criminal conversations with his attorney were constitutionally protected by the attorney-client relationship formed as to the first charge.¹⁰⁶ Once the judicial process is invoked for specific

¹⁰³See United States v. Osser, supra note 102; United States v. Missler, supra note 102; United States v. Merritts, supra note 102; Vinyard v. United States, supra note 102.

¹⁰⁴See United States v. Hayles, supra note 102.

¹⁰⁵541 F.2d 618 (6th Cir. 1976).

¹⁰⁶Id. at 621.

acts associated with ongoing criminal activity, it seems, the defendant is immunized against use at a separate trial of incriminating statements regarding later criminal acts that are of a like nature. This contradicts the seemingly obvious proposition that one is not entitled to counsel while committing a crime.¹⁰⁷ But Valencia may be distinguishable on its facts. There, the informant was the attorney's secretary. The conversations overheard included trial strategy as well as the planning to commit the crime. The informant/secretary also turned over copies of the attorney's files to the government. This, the court held, infringed upon the attorney-client privilege and violated the client's Sixth Amendment right; the indictment, therefore, was dismissed.¹⁰⁸ Valencia is also distinguishable from the typical decision, where the overheard conversations are not conversations between the attorney and his client. Valencia, too, can be distinguished from Hoffa, where the offenses were clearly distinguishable, and the informant's actions did not directly infringe upon the attorney-client privilege. In Valencia, the offenses arose out of the same dealings and the informant's actions were a direct intrusion on the attorney-client privilege.

¹⁰⁷ United States v. Garcia, 364 F.2d 306, 308 (10th Cir. 1966).

¹⁰⁸ Supra note 105, at 621.

¶40 Despite the prohibition in Massiah against admission of incriminating statements improperly obtained, exceptions have been made when the statements were obtained during investigation of a separate offense.¹⁰⁹ In Grieco v. Meachum¹¹⁰ a defendant indicted for a state offense was the subject of a covert investigation by federal agents who knew nothing of the state charges. His incriminating statements made during the commission of a new crime were admissible "incidentally" at the state trial.¹¹¹ Further, statements inadmissible as direct evidence may find their way into the trial record in other ways. The Second Circuit implied that they may be admissible to impeach a defendant who testifies.¹¹²

2. The "government agent" distinction

¶41 Statements made to a person who is not a government informant (agent) at that time are not protected from disclosure at trial even if the person subsequently becomes

¹⁰⁹ See People v. Clark, No. 127, slip op. (N.Y. Apr. 12, 1977). See also discussion infra of the "accidental overhear" cases, ¶43.

¹¹⁰ Supra note 102.

¹¹¹ Id., 533 F.2d at 718. The court emphasized the government's good faith in investigating only the second offense, stumbling onto evidence relating to the first. It was also important that the evidence was damaging on the second charge as well. This appears to be an application of the deliberate elicitation rule. See ¶43 infra.

¹¹² United States v. Frank, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976). In an earlier case, improperly obtained statements had been introduced in the form of a question upon cross-examination of the witness-defendant. The court held that any error was harmless, since there was no jury. United States v. Sanchez, 349 F.2d 354, 357 (2d Cir. 1965).

an informant.¹¹³ The Seventh Circuit adhered strictly to this rule in admitting testimony of the defendant's fellow prisoner who had regularly reported the defendant's statements to the FBI. The fellow prisoner had acted voluntarily and independently;¹¹⁴ the government was a passive receiver of the information. Thus, the fellow prisoner was never an agent.¹¹⁵ At least two state courts¹¹⁶ and one federal court¹¹⁷ have held, however, that an incriminating statement made to a private individual acting independently of the government may be inadmissible if the private individual uses coercion in obtaining the statement. The reasoning is that

¹¹³Paroutian v. United States, 370 F.2d 631, 632 (2d Cir.), cert. denied, 387 U.S. 943 (1967); United States ex rel. Baldwin v. Yeager, 428 F.2d 182, 184 (3rd Cir. 1970), cert. denied, 401 U.S. 919 (1971); Carter v. United States, 362 F.2d 257, 259 (5th Cir. 1966); Stowers v. United States, 351 F.2d 301, 302 (9th Cir. 1965).

¹¹⁴Another federal court held that an individual has a Fourteenth Amendment right not to be forced to be a police informant. In Tomko v. Lees, 416 F.Supp. 1137 (W.D. Pa. 1976) the plaintiff sustained a civil rights suit against a district attorney, assistant district attorney, and a state police officer. He alleged that he had been threatened and coerced to act as an informant. The court held that the officials' conduct deprived the plaintiff of his freedom of choice, a personal liberty protected by the Fourteenth Amendment. 416 F.Supp. at 1139.

¹¹⁵United States ex rel. Milani v. Pate, 425 F.2d 6, 8 (7th Cir.), cert. denied, 400 U.S. 867 (1970).

¹¹⁶People v. Haydel, 12 Cal.3d 190, 524 P.2d 866, 115 Cal. Rptr. 394 (1974); Commonwealth v. Mahnke, ____ Mass. ____, 335 N.E.2d 660 (1975).

¹¹⁷United States v. Hearst, 412 F.Supp. 880 (N.D. Cal. 1976).

it is the coercion that taints the confession and not the status of the recipient.¹¹⁸ This is also supported by Bram v. United States¹¹⁹ where the Supreme Court said:

A [coerced] confession . . . whether made upon an official examination or in discourse with private persons . . . is not admissible evidence.¹²⁰

In this situation, the question is whether the confession was voluntary and not to whom it was made; issues of right to counsel, too, are not decisive.

C. The Deliberate Elicitation Rule

1. The deliberate elicitation rule

¶42 Several of the federal circuits,¹²¹ and at least two states, have adopted¹²² an interpretation of the Massiah

¹¹⁸Commonwealth v. Mahnke, supra note 116, at 672; United States v. Hearst, supra note 117, at 883.

¹¹⁹168 U.S. 532 (1897).

¹²⁰Id. at 547 (quoting Hawkins' Pleas of the Crown, ch. 46, sec. 3 (6th ed. 1787)).

¹²¹United States v. Garcia, 377 F.2d 321, 324 (2d Cir.), cert. denied 389 U.S. 991 (1967); United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970); United States v. Aloisio, 440 F.2d 705, 710 (7th Cir. 1971), cert. denied, 404 U.S. 824 (1972); Narten v. Eyman, 460 F.2d 184, 191 (9th Cir. 1969); United States v. Brown, 466 F.2d 493, 495 (10th Cir. 1972); Greenwell v. United States, 336 F.2d 962 (D.C. Cir.), cert. denied, 380 U.S. 923 (1964).

¹²²People v. Griffin, 23 Ill. App. 3d 461, 381 N.E.2d 671, 675 (1974); State v. Killary, 133 Vt. 604, 349 A.2d 216, 217 (1975). The same basic rule applies in New York although it is based on state common law rather than on an interpretation of Massiah. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70, (1961); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); People v. Townes, 20 Crim. L. Rptr. 2324 (N.Y.Ct. App. Dec. 20, 1976).

rule that focusses on acts of government agents that elicit incriminating statements. The rule can be stated as follows: after the formal accusatorial process has been invoked against an individual, the government may not deliberately elicit incriminating statements from him in the absence of counsel, either by overt interrogation or surreptitious means. The rule does not apply to spontaneous or voluntary statements, or to statements made after an effective waiver of the accused's Sixth Amendment right to assistance of counsel.

2. The "accidental-overhear" cases

¶43 There are relatively few cases in which the deliberate elicitation rule has been applied to covert investigation. One group of cases involve statements accidentally overheard by government agents who in no way sought to elicit them. If an informant happens to be at the right place at the right time and "stumbles" onto incriminating statements without any intention of eliciting them, the statements are admissible under the rule.¹²³ Persons in custody who indiscreetly talk too loud when police officers are present may find their

¹²³ United States v. Garcia, supra note 116 (undercover agent arranging a narcotics "buy" who was unaware that the seller was under indictment for assault, could testify to incriminating statements about assault made spontaneously and voluntarily by defendant); United States v. Aloisio, supra note 116 (informant arrested and jailed with defendant to maintain his cover could testify to incriminating statements made to others which informant overheard); State v. Killary, supra note 116 (statements made by jailed accused to undercover agent, in jail to protect his cover regarding a different investigation, could be used against the accused when they were made spontaneously, voluntarily, and without coercion).

incriminating statements used against them at trial.¹²⁴

3. Electronic eavesdropping

¶44 Incriminating statements that have been lawfully intercepted electronically are admissible under the deliberate elicitation rule because they are voluntary and spontaneous.¹²⁵ The continuing vitality of this interpretation of the Massiah decision must be seriously questioned, however, in light of recent cases.¹²⁶

4. Continuing investigation of the crime charged

¶45 Government agents who are actively pursuing an investigation of the crime charged, and who engage in conversation with the accused, have not been allowed to testify to the

¹²⁴Marten v. Eyman, *supra* note 116 (conversation between defendant and his wife in sheriff's office, overheard by police officer present in the room, was not deliberately elicited and was therefore admissible). In People v. Griffin, *supra* note 117, the Illinois court admitted statements made by defendant in a telephone conversation which were heard by an officer present in the room. The court found Massiah inapplicable since the defendant was not indicted (but see discussion, *infra*, ¶50 applying the rule of Miranda v. Arizona, 384 U.S. 436 (1966) (the court made a finding of no elicitation)).

¹²⁵United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (post-indictment statements lawfully intercepted by wiretap admissible); Williams v. Nelson, 457 F.2d 376, 377 (9th Cir. 1972) (conversation with co-defendant intercepted by "bug" in police interrogation room following confession admissible). Miranda does not present a problem even though a subject is in custody, when there is no interrogation or elicitation of an admission by the police and the statements intercepted are otherwise made voluntarily. See also annot., 57 A.L.R. 3rd 176 (1974).

¹²⁶See discussion, *infra*, ¶45-48.

accused's incriminating statements. If the informant has intentionally elicited the statements, his conduct falls squarely within the Massiah holding and the deliberate elicitation rule.¹²⁷

¶46 The Fifth Circuit has held that where the informant pursuing an investigation has not elicited the incriminating statements, however, the rule would admit the testimony. In Beatty v. United States¹²⁸ the indicted defendant requested an interview with the undercover agent, initiated the conversation, and spontaneously made incriminating statements regarding the acts for which he was charged. He also threatened future violence against the agent-prospective witness. The Court of Appeals for the Fifth Circuit, focussing on the voluntary nature of the statements, ruled that they were all admissible.¹²⁹ The Supreme Court granted certiorari and

¹²⁷United States v. Anderson, 523 F.2d 1192, 1196 (5th Cir. 1975) (testimony of undercover agent, who had deliberately elicited incriminating conduct from indicted defendant for use at trial, was inadmissible); United States v. Brown, 466 F.2d 493, 495 (10th Cir. 1972) (incriminating statements deliberately elicited from accused in custody by friend induced to act for the government were not admissible; Dismukes v. Florida, 324 So.2d 201, 202 (Fla. App. 1975) (incriminating conversations initiated and taped after defendant had been charged were inadmissible).

¹²⁸377 F.2d 181 (5th Cir.), rev'd per curiam, 389 U.S. 45 (1967).

¹²⁹Id. at 190.

reversed without an opinion, citing Massiah.¹³⁰

¶47 The distinction made by the court of appeals, that the informant did not elicit the statements, was apparently rejected by the Supreme Court in its curt refusal. One way of interpreting the ruling is to define any conversation between an informant investigating a charge already pending and the person against whom the charge is filed as deliberate elicitation. The Supreme Court of Kansas adopted this interpretation of Beatty in State v. McCorgary.¹³¹ Interrogation, or the lack of it, is irrelevant; the focus is rather on the intent of the government to obtain additional incriminating evidence through surreptitious means.¹³²

¶48 It is difficult to see, however, why the Supreme Court reversed the admission of the defendant's threats against the informant. These statements constitute a separate offense;

¹³⁰ 389 U.S. 45 (1967).

The Fifth Circuit has continued to develop the deliberate elicitation distinction despite the Beatty reversal. In United States v. DeLoy, 421 F.2d 900 (5th Cir. 1970), an indicted defendant appeared at an FBI office and requested an interview with an agent. He was repeatedly advised of his rights, but waived his right to counsel. The court said his statements were admissible because they weren't deliberately elicited. 421 F.2d at 902.

¹³¹ 218 Kan. 358, 543 P.2d 952, 957 (1975), Appeal docketed, No. 75-1545.

¹³² See also State v. Smith, 107 Ariz. 100, 482 P.2d 863, 866 (1971) (informant placed in cell next to defendant; incriminating statements inadmissible). But see Montgomery v. State, 15 Md. App. 7, 288 A.2d 628 (1972) (informant placed in cell near defendant with purpose of obtaining incriminating statements; statements admissible; no Sixth Amendment argument discussed). See also People v. Clark, supra note 109, at 4 (statements elicited in a good faith investigation independent of that for which the defendant has been indicted are admissible).

they should be admissible under the separate offense rule.¹³³

The reversal also fails to answer why the Massiah rule is not a deliberate elicitation rule, when the facts of that case turned on the informant's attempts to elicit the statements.

D. The Per Se Rule

¶49 The Third Circuit interpreted the Beatty reversal as support for a per se rule of unconstitutionality.¹³⁴ This rule, adopted by the First,¹³⁵ Third,¹³⁶ and Fourth¹³⁷ Circuits, can be stated as follows: all incriminating statements made by an accused to government agents in the absence of counsel, or effective waiver of counsel, are inadmissible against the accused regardless of how they were obtained.¹³⁸ The per se

¹³³ See discussion, supra, ¶37-40.

¹³⁴ United States ex rel. Baldwin v. Yeager, 428 F.2d 182, 184 (3d Cir. 1970), cert. denied, 401 U.S. 919 (1971).

¹³⁵ Hancock v. White, 378 F.2d 479, 482 (1st Cir. 1967).

¹³⁶ United States ex rel. Baldwin v. Yeager, supra note 134.

¹³⁷ United States v. Slaughter, 366 F.2d 833, 840 (4th Cir. 1966).

¹³⁸ New Jersey has also adopted a per se rule. See State v. Green, 46 N.J. 192, 215 A.2d 546, 551, cert. denied, 384 U.S. 946 (1965). In New York, once counsel has entered a criminal proceeding the defendant cannot waive his right to counsel unless his lawyer is present. People v. Ramos, 40 N.Y.2d 610, 614 (1976). Such strict insulation of an accused suggests a per se approach to the Massiah problem. But see People v. Clark, supra note 109. Jurisdictions applying the deliberate elicitation rule in cases of covert investigation admit statements made voluntarily to a police officer or those made after a defendant has unilaterally waived his right to counsel, in cases of overt investigation. See, for example, United States v. Barone, 467 F.2d 247 (2d Cir. 1972); United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970); United States v. Gardner, 347 F.2d 405, 408 (7th Cir. 1965); Cephus v. United States, 352 F.2d 663, 665 (D.C. Cir.), cert. denied, 384 U.S. 1012 (1965).

rule may be too strict in light of the "accidental-overhear" and lawful electronic interception cases.¹³⁹ It has not yet been applied by a circuit court to a case of covert interrogation; the few cases that do apply the rule deal with overt interrogation or statements volunteered to officials.¹⁴⁰

E. The Accusatorial Stage

¶50 The rule in federal courts is that once there is an indictment,¹⁴¹ or once judicial proceedings have been initiated¹⁴² by a formal charge, preliminary hearing, information or arraignment, the defendant is entitled to assistance of counsel and the Massiah restrictions apply. This is true whether the incriminating statements are elicited while the defendant is in custody¹⁴³ or free on bail¹⁴⁴ and whether overt¹⁴⁵ or surreptitious¹⁴⁶ interrogation is used. Never-

¹³⁹ See discussion supra, ¶43-44.

¹⁴⁰ See cases noted supra, notes 123-126.

¹⁴¹ Massiah v. United States, supra note 87.

¹⁴² Brewer v. Williams, 20 Crim. L. Rptr. 3095 (March 23, 1977).

¹⁴³ In United States v. Brown, 466 F.2d 493 (10th Cir. 1972); United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966).

¹⁴⁴ United States v. Hayles, 471 F.2d 788 (5th Cir. 1973), cert. denied, 411 U.S. 969 (1974); United States v. Holmes, 452 F.2d 249 (7th Cir. 1971), cert. denied, 405 U.S. 1016 (1972).

¹⁴⁵ Brewer v. Williams, supra note 142; United States v. Slaughter, supra note 143.

¹⁴⁶ United States v. Hayles, supra note 144; United States v. Holmes, supra note 144; United States v. Brown, supra note 143.

theless, peripheral scope of the Massiah right to counsel is very much a subject of contention.¹⁴⁷ Some courts¹⁴⁸ read Massiah with Escobedo v. Illinois¹⁴⁹ to extend the right to cover post-arrest interrogation. The Second Circuit¹⁵⁰ has refused to extend the Massiah rule beyond the scope clearly defined by the Supreme Court.¹⁵¹ Other courts¹⁵² have read Massiah as supplementary to Miranda v.

¹⁴⁷Brewer v. Williams, *supra* note 142 at 3098.

The right to counsel accrues upon the initiation of formal judicial process against a defendant. *Supra* notes 141-142. The peripheral scope problem is whether an arrest initiates that process, and, if it does, what constitutes an arrest. With the exception of the Second Circuit the lower federal courts seem to be applying Massiah to post-arrest situations by way of different routes. *Infra* notes 148-150, 152. The possible anomaly in this will arise if the common law definition of arrest, i.e. holding a person on or for a charge, is applied. 4 W. Blackstone, Commentaries *289. Hence, detaining a person for questioning would be exempted from Massiah even though this would seem to be the type of situation that Massiah was designed to cover. See Morales v. New York, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 734, vacated and remanded, 396 U.S. 102 (1969). Definitions of arrest as any deprivation of liberty, in a constitutional sense, would avoid this problem. See Henry v. United States, 361 U.S. 98 (1959). The significance of this question is especially pressing in the context of covert post-arrest interrogation, e.g. obtaining incriminating statements by post-arrest use of an informant, or wiretap, etc.

¹⁴⁸United States v. Slaughter, *supra* note 143; United States v. Holmes, *supra* note 144.

¹⁴⁹378 U.S. 478 (1963).

¹⁵⁰United States v. Duvall, 537 F.2d 15 (2d Cir. 1976).

¹⁵¹*Supra* notes 141-142, 147.

¹⁵²United States v. Hayles, *supra* note 144; United States v. Brown, *supra* note 143.

Arizona.¹⁵³ The Massiah right to counsel can be waived,¹⁵⁴ but the burden of showing that the waiver was an intentional relinquishing of a known right is on the government.¹⁵⁵

F. The Harmless Error Rule

¶51 Federal courts have sustained convictions where the admission at trial of statements obtained in violation of Massiah was harmless error.¹⁵⁶

VI. THE SIXTH AMENDMENT--INTRUSIONS INTO THE ATTORNEY-CLIENT RELATIONSHIP

A. In General

1. Intrusions rarely found

¶52 Federal courts have seldom found informant or electronic surveillance to be an unconstitutional intrusion into the attorney-client relationship guaranteed by the Sixth Amendment. Since the D.C. Circuit opinions in Caldwell v. United

¹⁵³ 384 U.S. 436 (1966).

¹⁵⁴ United States v. Duvall, supra note 150; United States v. Ramirez, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973).

¹⁵⁵ Brewer v. Williams, supra note 142 at 3100.

¹⁵⁶ United States v. Sanchez, 349 F.2d 354 (2d Cir. 1965); United States v. Hayles, 471 F.2d 788, 793 (5th Cir. 1973), cert. denied, 411 U.S. 969 (1974).

But see Commonwealth ex rel. Firmstone v. Myers, 431 Pa. 628, 246 A.2d 371 (1968) (deprivation of counsel at critical stage requires automatic reversal).

States¹⁵⁷ and Coplon v. United States¹⁵⁸ in the 1950's, and the Supreme Court decisions in Hoffa v. United States,¹⁵⁹ Black v. United States,¹⁶⁰ and O'Brien v. United States¹⁶¹ in the 1960's, discussed infra, there have been only two circuit court cases in which an unconstitutional intrusion was found.

2. The evidentiary privilege

¶53 The constitutional right to effective assistance of counsel is not co-extensive with the evidentiary attorney-client privilege. Within the federal rule, confidential communications may be overheard, and even divulged under certain circumstances, without violating a defendant's constitutional rights.¹⁶² On the other hand, nonconfidential conversations, if overheard and divulged to the prosecution, may

¹⁵⁷205 F.2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 930 (1955).

¹⁵⁸191 F.2d 749 (D.C. Cir.), cert. denied, 342 U.S. 926 (1952).

¹⁵⁹385 U.S. 293 (1966).

¹⁶⁰385 U.S. 26 (1966).

¹⁶¹386 U.S. 345 (1967).

¹⁶²Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir.), aff'd, 394 U.S. 316 (1968) (agents monitoring wiretap overheard privileged conversations unrelated to offense at trial).

endanger the defendant's Sixth Amendment rights.¹⁶³

3. Distinguish Massiah

¶54 Unlike the right preserved by Massiah, protection of the attorney-client relationship is not related to the stages of the criminal justice system. There is less likelihood, of course, that attorney-client conversations will be relevant to the crime in question at early stages of an investigation.¹⁶⁴

B. The Federal Rule

1. The rule

¶55 An alleged intrusion by an informant or electronic surveillance into a confidential attorney-client relationship is a deprivation of the defendant's Sixth Amendment rights requiring suppression of the evidence, a new trial, or dismissal of the indictment only if: (a) the intrusion was "gross;" or (b) the intrusion resulted in the gaining of information which was used to prejudice the defendant at trial.

¹⁶³United States v. Seale, 461 F.2d 345, 364 (7th Cir. 1972) (electronic eavesdropping on conversation which relays a communication from the attorney to the defendant is an intrusion into attorney-client communication).

¹⁶⁴Attorney-client conversations relating to ongoing criminal activity or future crimes are not privileged. 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence §2298 (3d ed. 1940); In re Selser, 15 N.J. 393, 105 A.2d 395 (1955).

2. Genesis of the rule

¶156 In Hoffa v. United States¹⁶⁵ the Supreme Court discussed the D.C. Circuit opinions in Caldwell v. United States¹⁶⁶ and Coplon v. United States.¹⁶⁷ In those cases, the government deliberately and surreptitiously intruded into attorney-client conversations to gain access to trial strategy. The remedy for such "gross" intrusions, said the Court, was a new trial.¹⁶⁸ The opinion also suggested that an intrusion into the defense camp may be so pervasive as to render it impossible for the defendant to obtain a fair trial on remand. In that case, the remedy is dismissal of the indictment.¹⁶⁹

¶157 In Black v. United States,¹⁷⁰ reports concerning electronic interception of attorney-client conversations were made available to the prosecution for use at trial. The prosecution did not, however, know the source of the information until after trial. The Supreme Court remanded for a new trial to give the defendant an opportunity "to protect himself from the use of evidence that might otherwise be inadmissible."¹⁷¹

¹⁶⁵ Supra note 159.

¹⁶⁶ Supra note 157.

¹⁶⁷ Supra note 158.

¹⁶⁸ Hoffa v. United States, 385 U.S. at 307.

¹⁶⁹ Id.

¹⁷⁰ Supra note 160.

¹⁷¹ Id. at 28-29.

¶58 In O'Brien v. United States,¹⁷² attorney-client conversations regarding the defendant's trial were electronically intercepted. There was no evidence that the information was communicated to anyone connected with the trial. The Supreme Court reversed the defendant's conviction and remanded for a new trial without an opinion. This case has suggested a rule that intrusions into relevant attorney-client conversations are per se unconstitutional. The Supreme Court recently repudiated this interpretation of Black and O'Brien:

If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced directly or indirectly, any of the evidence offered at trial.¹⁷³

C. Application of the Prejudice Rule

1. Uniformly applied

¶59 The Second,¹⁷⁴ Fifth,¹⁷⁵ Sixth,¹⁷⁶ Eighth,¹⁷⁷ and Ninth¹⁷⁸ Circuits have explicitly adopted the rule. Most cases in

¹⁷²Supra note 161.

¹⁷³Weatherford v. Bursey, 20 Crim. L. Rptr. 3059, 3061 (Feb. 22, 1977).

¹⁷⁴United States v. Rosner, 485 F.2d 1213, 1225 (2d Cir.), cert. denied, 417 U.S. 950 (1973).

¹⁷⁵United States v. Zarzour, 432 F.2d 1, 4 (5th Cir. 1970).

¹⁷⁶United States v. Valencia, 541 F.2d 618, 620 (6th Cir. 1976).

¹⁷⁷United States v. Crow Dog, 532 F.2d 1182, 1198 (8th Cir. 1976).

¹⁷⁸United States v. Choate, 527 F.2d 748, 752 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976).

other circuits are not inconsistent.¹⁷⁹

2. Intrusion

¶60 There must be an actual intrusion into the attorney-client relationship. Circumstances suggesting the possibility of an intrusion are insufficient to show an actual intrusion.

¶61 For example, the temporary presence of an informant in an attorney's office is insufficient proof that a protected relationship has, in fact, been invaded.¹⁸⁰ Even when an informant infiltrated an organization, several members of which were under indictment, and the informant had access to defense meetings and files, absent evidence that the informant was present at meetings discussing defense matters relevant to the instant trial, there was no intrusion.¹⁸¹ An intrusion sufficient to endanger the Sixth Amendment right may occur, however, when the conversation overheard is not between an attorney and client, but is one in which legal advice relevant to the defense is conveyed through intermediaries.¹⁸²

¹⁷⁹ See discussion infra.

¹⁸⁰ United States v. DiLorenzo, 429 F.2d 216, 218 (2d Cir.), cert. denied, 402 U.S. 950 (1970) (informant taped conversation with defendant in attorney's office when attorney was not present); United States v. Choate, supra note 178 (informant engaged in many conversations with defendant's attorney, but no confidential information was divulged).

¹⁸¹ United States v. Crow Dog, supra note 177, at 1197.

¹⁸² United States v. Seale, supra, note 163 at 364. But cf. People v. Gallegos, 179 Col. 211, 499 P.2d 315, 316 (1972) (defendant's conversation with attorney overheard by officer present in room; incriminating statements admissible).

Whether the intrusion itself is deliberate or inadvertent is irrelevant to the constitutional question.¹⁸³

3. Prejudice: requirement of transmission

¶62 Except where a "gross intrusion" is found,¹⁸⁴ the defense must demonstrate that relevant defense information obtained through an informant or electronic surveillance was actually communicated to persons involved with the prosecution of the charge in question.¹⁸⁵ Circumstances suggesting an opportunity to convey confidential information are insufficient to show actual transmission.¹⁸⁶

¹⁸³South Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973) (prosecutor taped attorney-client conversation at trial; tape erased at direction of the court; court found no prejudice to defendant). See also United States v. Mosca, 475 F.2d 1052, 1061 (2d Cir.), cert. denied, 412 U.S. 948 (1973) (informant attended defense strategy meetings to maintain cover; no communication of confidential information to prosecution); Weatherford v. Bursey, supra note 173.

¹⁸⁴See discussion infra, ¶69.

¹⁸⁵United States v. Rosner, supra note 174 at 1225.

¹⁸⁶See, for example, United States v. Fanning, 477 F.2d 45, 47 (5th Cir.), cert. denied, 414 U.S. 1006 (1973) (attorney -co-conspirator-informant taped conversations with defendant, whom he no longer represented. Information not transmitted to government); Weatherford v. Bursey, supra note 173.

In a case where the transmission of confidential information to the prosecution was assumed but not shown, the State of Washington developed the rule that an intrusion in the attorney-client relationship was unconstitutional per se and to be remedied only by dismissal of the indictment. State v. Cory, 62 Wash.2d 371, 378, 382 P.2d 1019 (1963). The rule was seriously undermined in State v. Baker, 78 Wash.2d 327, 474 P.2d 254 (1970), where the court held that dismissal is available as a remedy only when the defendant has been prejudiced. 78 Wash.2d 332-333. Cory

¶63 If a participant in the criminal activity with access to defense strategy decides to cooperate with the government there is a clear opportunity for transmitting protected information. But courts have required a demonstration that the information was, in fact, divulged.¹⁸⁷ The same rule applies when an undercover agent infiltrates an ongoing conspiracy or an organization under investigation.¹⁸⁸

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was distinguished but not overruled. In State v. Grant, 9 Wash. App. 260, 511 P.2d 1013 (1973), cert. denied, 419 U.S. 849 (1974), in an opinion by Horowitz, J., who is now a member of the Supreme Court of Washington, the rule was further undercut. A confidential conversation intercepted electronically was excluded from the trial. The defendant was allowed discovery of a summary of the evidence to be used at trial and had an opportunity to object to evidence before trial. The court found that there was no prejudice to the defendant and reversal was not required. The Washington cases continue to assume that, if prejudice is shown, the remedy must be dismissal. In Hoffa v. United States, however, the Supreme Court suggested that dismissal would be required only if the intrusion were so pervasive as to prejudice the defendant's Sixth Amendment rights at a new trial as well. 385 U.S. 308; Accord, People v. Pobiner, 32 N.Y.2d 356, 365, 345 N.Y.S. 2d 482, cert. denied, 416 U.S. 905 (1973).

¹⁸⁷United States v. Rosner, supra note 174 (co-conspirators access to defense strategy meetings cooperating with government only regarding different matters); United States v. Mosca, supra note 183 (co-conspirator divulged evidence of past events excluding trial strategy information; continued attendance at defense strategy sessions but did not have further contact with government); United States v. Fanning, supra note 186.

See also People v. Slocum, 52 Cal. App. 3d 867, 125 Cal. Rptr. 442, 449 (1975) (allegation that informant with access to trial strategy divulged information to prosecution only speculative).

¹⁸⁸United States v. Zarzour, supra note 175 (remand for determination whether informant gave FBI relevant information and whether FBI gave prosecution relevant information); United States v. Crow Dog, supra note 177; United States v. Cooper, 397 F.Supp. 277, 281 (D. Neb. 1975).

¶64 The circuits have responded differently to the question of how the court is to determine whether damaging information was divulged. The Second Circuit is willing to take the government's word.¹⁸⁹ The Fifth and Eighth Circuits require in camera inspection of agency files by the trial judge to determine whether the informant reported defense secrets.¹⁹⁰ The Seventh Circuit requires sworn testimony from government witnesses, subject to cross examination.¹⁹¹

4. Prejudice in fact

¶65 Even if the prosecution learns protected confidential information, the disclosure may be incapable of prejudicing the case.¹⁹² No new trial will be required. This would

¹⁸⁹ United States v. Arroyo, 494 F.2d 1316, 1323 (2d Cir.), cert. denied, 419 U.S. 827 (1974). See also United States v. Rosner, supra note 173 at 1225.

¹⁹⁰ United States v. Zarzour, supra note 174, at 4; United States v. Crow Dog, supra note 176, at 1197.

¹⁹¹ United States v. Seale, supra note 163, at 364, citing United States v. Fannon, 435 F.2d 364 (7th Cir. 1970).

¹⁹² United States v. Brown, 484 F.2d 418, 424 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974) (confidential attorney-client conversation electronically intercepted as part of security measures at state facility; contents not disclosed until after conviction); South Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973) (prosecutor taped attorney-client conversation at trial; tape erased at direction of the court; court found no prejudice to defendant); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir.), aff'd, 394 U.S. 316 (1968) (information disclosed unrelated to matters at trial).

seem to conflict with the rule of United States v. Cooper,¹⁹³ that prejudice is to be presumed when it can be shown that the prosecutor had knowledge of the overheard information.¹⁹⁴ In that case, however, no question was raised regarding the prejudicial effect of overheard information because the court found that no relevant information was either overheard or divulged.¹⁹⁵ Presumably, the harmless error rule is to be applied.

5. United States v. Valencia

¶66 The Sixth Circuit applied the rule requiring a showing of prejudice in fact in United States v. Valencia.¹⁹⁶ Upon a showing that information gained from an informant in defendant's attorney's office may have been used against the defendant, the Court of Appeals remanded for a hearing on whether or not the prosecutor had used evidence from the

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See also People v. Poblner, 32 N.Y.2d 356, 360, 345 N.Y.S. 2d 482, cert. denied, 416 U.S. 905 (1973) (no showing that improperly obtained confidential information adversely affected defendant at trial, where prosecution agreed to exclude wiretap and derived evidence). In People v. Holman, 78 Misc. 2d 613, 356 N.Y.S. 2d 958 (Sup. Ct. 1974), a New York court found that admission of taped statements of defendant's counsel made during a conversation with defendant and the District Attorney would deny the defendant effective assistance of counsel. 78 Misc. 2d at 616. Defendant's statements were admissible since he agreed to their use at trial before the interview.

¹⁹³ 397 F.Supp. 277 (D.Neb. 1975).

¹⁹⁴ Id. at 285.

¹⁹⁵ Id. at 286.

¹⁹⁶ 541 F.2d 618 (6th Cir. 1976).

informant against the defendant. Proving possession of relevant knowledge was insufficient. The defendant had to demonstrate that items of evidence used at trial could only have derived from the informant.¹⁹⁷

¶67 Further, the result of that hearing was to determine the rights of co-defendants who did not have an attorney-client relationship with the attorney under surveillance. The court held under its supervisory authority that if information obtained from the informant was used against other defendants, they, too, were entitled to a new trial or dismissal of the indictment,¹⁹⁸ even though they had no Sixth Amendment standing to object.

¶68 This case is unique. The attorney-client relationship existed with regard to a prior charge; the charge at trial here was for a conspiracy of which the attorney was a member. Thus, communications with regard to that charge were not privileged.¹⁹⁹ Nonetheless, under the rule of Valencia even such unprotected conversations are to be suppressed. The rationale of the opinion erroneously assumes that the relationship regarding the ongoing conspiracy was a protected one and that the presence of the informant in the attorney's office is per se an intrusion into the relationship.²⁰⁰

¹⁹⁷ Id. at 623.

¹⁹⁸ Id. at 621-622.

All indictments resulting from information gained solely from the informant were dismissed.

¹⁹⁹ Supra note 164.

²⁰⁰ See discussion of intrusion, supra, ¶60-61.

6. "Gross intrusion"

¶69 The rule applied by the federal courts is that only those intrusions which are of the "grossest kind" are unconstitutional per se; otherwise the court must determine if there was prejudice in fact.²⁰¹ The "gross intrusion" concept derives from the Supreme Court's discussion in Hoffa v. United States of the Caldwell and Coplon cases.²⁰² The intrusions there were explicitly for the purpose of learning defense secrets. More recent cases have focussed not on the government's intent but rather on the potential for prejudice inherent in the particular circumstances.²⁰³ No new instances of a "gross intrusion" have been found, however, and the concept remains confined for all practical purposes to the Caldwell-Coplon cases.

D. The "Sham Defendant"

1. The fact situation

¶70 Where a government agent is indicted along with his confederates for a crime in which he took part as a government agent, and where he maintains his cover throughout the period of trial preparation, some courts have found the inherent prejudice to the defendant presumptively impossible

²⁰¹United States v. Rosner, supra note 174, at 1127; See also United States v. Cooper, supra note 188, at 285.

²⁰²Supra notes 157-158.

²⁰³Taglianetti v. United States, supra note 192 (intrusion must be relevant to matters at trial); United States v. Cooper, supra note 188 (information obtained by informant must be transmitted to prosecutor).

to segregate and prove. The damage to the judicial system of the "fraud" on the court and jury is found to be reprehensible. In some cases reversal and remand for a new trial were automatic; no prejudice in fact was required to be shown.

2. The rationale of the rule

¶71 In United States v. Rispo²⁰⁴ a government informant was indicted, pleaded guilty, and went to trial with his confederates on a conspiracy charge. His identity as an informant was known to the prosecution, but not to the judge, jury, or defense counsel. When the sham came to light post-trial, the prosecution alleged that no prejudice could be demonstrated and any error was harmless. The court, however, found the perverting effect of the "sham" defendant to be so pervasive that no prejudicial element could be segregated from the trial as a whole.²⁰⁵ A new trial was required. The court was concerned that a "false impression" of the evidence was left with the jury, that things might have happened otherwise if the informant had not participated in the trial.²⁰⁶ The court also objected to the deception practiced on everyone except the prosecution. The court relied on Black and O'Brien, saying:

²⁰⁴460 F.2d 965 (3d Cir. 1972).

²⁰⁵Id. at 974.

²⁰⁶Id. at 973.

In both cases the danger posed by such intrusions was considered to be real enough to require reversal and new trial [T]he concern expressed by the court in those cases regarding the very real likelihood of prejudice, and the need to eliminate such likelihood from the trial process in order to satisfy the requirements of due process, convinces this court that a new trial is required here. It should be noted that the intrusion in the above cases was once removed from that which occurred in this case.²⁰⁷

¶72 The Supreme Court has, however, recently rejected the automatic reversal rule of Rispo.²⁰⁸ Cases following it, therefore, must be reconsidered. The new interpretation given Black and O'Brien in Weatherford v. Bursey²⁰⁹ requires a showing of prejudice.

3. Alternative approaches

¶73 Allowing a co-defendant to plead guilty in the presence of the jury may be prejudicial error whether or not he is a government agent.²¹⁰ The Second Circuit held in 1971 that it is reversible error to allow an informant to be indicted and profess guilt before a jury. The government bore a heavy burden of showing the error to be harmless.²¹¹ The court in Rispo declined to apply the harmless error rule because

²⁰⁷Id. at 977.

²⁰⁸Weatherford v. Bursey, supra note 173, and discussion infra.

²⁰⁹Id.

²¹⁰Hudson v. North Carolina, 363 U.S. 697 (1960); United States v. Hamilton, 492 F.2d 1110 (5th Cir. 1974).

²¹¹United States v. Lusterinto, 450 F.2d 572 (2d Cir. 1971).

the persuasiveness of the fraud worked on the court.²¹² The more appropriate approach would have been to consider the guilty plea error and require the government to show that it was harmless as in United States v. Lusterinto.²¹³

4. Weatherford v. Bursey²¹⁴

¶74 In Bursey v. Weatherford²¹⁵ the agent participated in meetings with his co-defendant's attorney at which the trial was discussed. He did not go to trial with the defendant, however, and he instead testified against the defendant. The evidence established that the informant did not divulge any defense strategy to his supervisor or to the prosecution. The Fourth Circuit held that even without a showing of prejudice, the defendant's Due Process and Sixth Amendment rights had been violated.²¹⁶ The court upheld as valid a civil rights claim under 42 U.S.C. §1983 against both the informant and his supervisor. The Supreme Court reversed.²¹⁷

¶75 The Court held that there is not a per se rule for

²¹²Supra note 204, at 974.

²¹³Supra note 211.

²¹⁴20 Crim. L. Rptr. 3059 (Feb. 22, 1977).

²¹⁵528 F.2d 483 (4th Cir. 1975), rev'd, 20 Crim. L. Rptr. 3059 (Feb. 22, 1977).

²¹⁶Id. at 487.

²¹⁷Supra note 214.

bidding an undercover agent to meet with a defendant's counsel.²¹⁸ In the event that an undercover agent does meet with a defendant's counsel, the information gained must be communicated to the prosecution in order for there to be an infringement of the defendant's Sixth Amendment rights.²¹⁹ The Court also held that there is not a constitutional right to discovery in criminal cases.²²⁰

²¹⁸Id. at 3061.

²¹⁹Id. at 3061-3062. See discussion, supra, ¶58, note 173.

²²⁰Id. at 3063.

**SIMULATED
OFFENSE**

The Simulated Offense: Practice and Theory

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SUMMARY

¶1 The simulated offense is an investigative tactic where a police agent is arrested and indicted for a fabricated crime. The agent then probes the criminal justice system for corrupt officials willing to fix his case. There are two reported uses of the simulated offense. Three courts have reviewed its legality in dicta. Two appellate courts have condemned it; a trial court has approved it. No court has analyzed the issues involved adequately.

¶2 At trial, corrupt public officials may raise three defenses relating directly to the simulated offense: entrapment, fruit of the poisonous tree, and the due process defense. Each should fail: entrapment on the issue of predisposition; fruit of the poisonous tree on the fact that bribery is an independent illegal act and that, in any event, the defendant lacks standing to raise the issue; and the due process defense on the insufficient nexus between alleged police misconduct and violation of the defendant's rights.

¶3 Three other objections to the simulated offense are that it is illegal, outrageous, and intolerable. The simulated offense entails conduct that would otherwise violate penal statutes; it is not, however, illegal under the doctrines of justification, lack of felonious intent, law enforcement justification, or the police decoy rule. The simulated offense could be found outrageous; the conscience

of the court makes that determination. The fundamental criticism of the simulated offense is that it is arguably intolerable because it subverts the criminal justice process. This criticism may be vitiated through formalized notice or authorization requirements.

¶4 Under present law, the simulated offense is a legal investigative tool. Modification and a clear holding supporting its legality are necessary for it to become an effective method of detecting and deterring corruption in the criminal justice system.

I. THE SIMULATED OFFENSE IN PRACTICE

¶15 The simulated offense is a technique for gathering evidence of corruption in the criminal justice system. A police agent is arrested and indicted for a fabricated crime. The agent then attempts to fix his case by offering bribes to those suspected of corruption.¹

¶16 The two reported uses of the simulated offense occurred in New York City. In early 1972, agents of the Bureau of Narcotics and Dangerous Drugs (hereinafter, BNDD), the office of the United States Attorney for the Southern District of New York, and Vincent Murano, a New York City policeman initiated an investigation of corruption in the Queens' criminal justice system.² Sante Bario (here alias Salvatore Barone), a BNDD special agent, was "arrested" by Murano for unauthorized possession of two loaded weapons.³

¹A simulated offense establishes the credentials of agents by processing them through the criminal justice system. Once within the system, they are able to probe for corruption. Contrast this with the exposure of corruption within the system by means of informers. Also contrast the simulated offense with narcotic and counterfeiting cases where police agents participate in activities otherwise illegal outside the criminal justice system.

² The United States Attorney disclosed the plan to a member of the state judiciary with administrative responsibility over the state court system in Queens.

United States v. Archer, 486 F.2d 670, 683 (2d Cir. 1973) (on petition for rehearing) (per curiam).

³A felony under N.Y. Penal Law §265.05 (McKinney 1967).

Murano filed a complaint and arrest affidavit; Barone was arraigned, fingerprinted, and admitted to bail. The BNDD posted bail through an agent posing as Barone's father.

¶7 Barone then began to inquire discreetly about a fix. Wasserberger, an associate of a Manhattan bail bondsman, arranged a meeting with Klein, a Queens attorney with "strong connections." Barone retained Klein as his attorney and arranged with him to have the charges dismissed in return for \$15,000. Klein, in turn, contacted Archer, the Queens assistant district attorney in charge of the Barone grand jury. Archer agreed to have the case turned out at the grand jury stage in return for a portion of the \$15,000.

¶8 After several interstate telephone calls confirming the arrangements, Barone paid the requested fee. Several days later, Barone presented the grand jury a story fabricated by Klein in cooperation with Archer. Archer made several statements to the grand jury bolstering Barone's testimony. Murano falsely testified about the original "arrest." The grand jury returned no indictment.

¶9 Archer, Klein and Wasserberger were convicted in federal court for violation of the Travel Act.⁴ On appeal, the Second Circuit, in a sharply worded opinion by Judge Friendly, condemned the "arrogant disregard of the sanctity of the state judicial and police processes"⁵ shown by the federal agents.

⁴18 U.S.C. §1952 (1970). The government argued the existence of federal jurisdiction due to the use of interstate facilities in commission of violations of N.Y. Penal Law §§200.00 and 200.10 (McKinney 1975).

⁵United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973) [hereinafter referred to as Archer I].

The court attacked the degree of government participation in illegal conduct.⁶ Yet it reversed on the narrow ground of lack of sufficient interstate activity to trigger federal jurisdiction. It did not rule on the argument that the police

⁶The foundation of the majority's position is the dissent of Mr. Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (1928):

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker. It breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

The Archer court admits:

Justice Brandeis' statement is eloquent but his view, taken in full breadth has never commanded the support of a majority of the Supreme Court...[T]he Court has steadfastly refused to rule that government participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense.

486 F.2d 670, 675 (2d Cir. 1973).
Yet, the court concludes:

We are not sure how we would decide this question if decision were required. Our intention inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in Olmstead.

486 F.2d at 676.

activity so tainted the convictions that dismissal was required.⁷

¶10 Soon after the decision in Archer I, the New York Special Prosecutor initiated a simulated offense to obtain evidence of corruption in the criminal justice system of Brooklyn. An undercover policeman posed as an armed robber, Vitale. Both the "victim" and the "arresting" officer were participants in the ruse that produced a false felony complaint. Vitale was arraigned and admitted to bail. He was indicted by a grand jury on the basis of the false arrest papers and the testimony given by his "victim."⁸

¶11 While awaiting grand jury review and trial, Vitale and one Mrs. Gatti moved to fix the case. They had conversa-

⁷486 F.2d 670, 677 (2d Cir. 1973):

Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part.

On petition for rehearing, 486 F.2d at 683, the government informed the court that a Queens state court official had prior knowledge of the simulated offense. The court found:

While this lessens the offensiveness to the State of the conduct here at issue, local invitations cannot expand the constitutional and legislative limitations on federal criminal jurisdiction.

The request for rehearing was denied.

⁸The grand jurors, the presiding judge and the district attorney who presented the case were not aware that it was a simulated offense. The opinion and briefs do not indicate that other court officials were notified.

tions with Paul Rao, Sr., a judge of the United States Customs Court; his son, Paul Rao, Jr., an attorney; and Salvatore Nigrone, law partner of Rao, Jr. The conversations were secretly recorded.

¶12 Rao, Sr., Rao, Jr. and Nigrone were later called before the Special Prosecutor's Extraordinary Special Grand Jury. The grand jury was aware of the Vitale charade. Statements made to the grand jury contradicted the tapes; all three were indicted for perjury. No bribery charges were brought.

¶13 The defendants moved to dismiss the indictments on the bases of prosecutorial misconduct and violations of due process. The appellate division heatedly criticized the Special Prosecutor's conduct.⁹ Nevertheless, the court declined to dismiss the perjury indictments; the perjury was "a new and independent inexcusable wrong."¹⁰ Two dissenting justices objected more strenuously; they would have dismissed the indictments to deter police misconduct.¹¹

⁹Matter of Nigrone v. Murtagh, 46 App. Div.2d 343, 347, 362 N.Y.S.2d 513, 516-517 (2d Dep't 1974) [hereinafter referred to as Rao]

The deception of grand jurors, Judges and Assistant District Attorneys, and the filing of false official documents are absolutely intolerable. The criminal justice system operates to protect the individual from both unsubstantiated accusations of guilt and illegal or outrageous conduct by an over-reaching prosecutor...When as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before the fact, its impartiality is destroyed and contempt for the law encouraged.

¹⁰Id. at 350, 362 N.Y.S.2d at 519.

¹¹Id. at 352, 362 N.Y.S.2d at 521.

¶14 In late 1973, the State of New York indicted the Archer I defendants on state charges. Both the appellate division and the Court of Appeals rejected defendants' double jeopardy arguments.¹² The trial court was directed to develop a full record of the simulated offense.¹³

¶15 The Rao ruling preceded a decision in Archer II. Rao was dispositive of the defenses raised by the Archer II defendants. Justice Sandler,¹⁴ although constrained to follow Rao, disagreed with the dicta castigating the Special Prosecutor's conduct:

I share the deep disquiet expressed by appellate judges with the deception of the court system in the technique used here and in Rao. . .but I am persuaded that the carefully selective use of the contrived crime under appropriately compelling circumstances comes close to being indispensable in

¹²Matter of Klein v. Murtagh, 44 App. Div.2d 465, 355 N.Y.S.2d 513 (2d Dep't), aff'd, 34 N.Y.2d 988, 318 N.E.2d 606, 360 N.Y.S.2d 416 (1974).

¹³Id. at 474-474, 355 N.Y.S.2d at 631 (separate opinion, majority concurring):

While I am in general agreement with the disapproval voiced by Judge Friendly in United States v. Archer, [486 F.2d 670 (2d Cir. 1973)], the question of whether such conduct constituted government induced criminality...or was otherwise of such a nature as to violate principles of fundamental fairness sufficient to preclude the prosecution of the petitioners... or whether the indictment should be dismissed in the interest of justice...should be decided at the trial level on a full record containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out.

¹⁴Justice Sandler is designated to hear most of the Special Prosecutor's cases.

the investigation of corruption at levels that touch intimately the basic integrity of the criminal justice system.¹⁵

¶16 The court overruled defendants' motions to dismiss on due process grounds. Since Rao permitted overruling the motions to dismiss the bribery indictments without regard to the tactic's legality,¹⁶ the lawfulness of the simulated offense was addressed only in dicta.¹⁷

II. THE SIMULATED OFFENSE FROM THE PERSPECTIVE OF THE DEFENDANT: DEFENSES

¶17 A simulated offense presents two questions of legality. First, is the technique lawful? Second, does the lawfulness of the technique have any bearing on defendants' defenses? The second issue is the less complex; it is governed by a substantial body of precedent.

¹⁵People v. Archer, 47 N.Y.L.J. 13 (daily ed. March 10, 1977). [hereinafter referred to as Archer II].

¹⁶Id. at 13:

The defendants have argued here that the Rao decision turned on the fact that the crime ultimately charged was perjury committed before an Extraordinary Special Grand Jury. I have carefully examined the majority opinion and do not believe that it rests upon the nature of the crime charged.

¹⁷For an adequate history of the procedural complexities of Rao, see People v. Rao, 53 App. Div. 904, 386 N.Y.S.2d 441 (2d Dept't 1975). A subsequent decision affirmed the indictments against Nigrone and Rao, Jr. but the indictment against Rao, Sr. was dismissed. See People v. Rao, 52 N.Y.L.J. 14 (daily ed. March 17, 1977).

¶18 The simplest model of a simulated offense is found in a combination of the facts of Archer and Rao. A police agent is arrested for carrying a concealed weapon. A grand jury indicts the agent on the false testimony of the arresting officer. The defendant-agent then attempts to fix his case with the district attorney or a judge. If it is assumed that the policeman's conduct arguably violates only the perjury law and that the public official is charged with receiving a bribe,¹⁸ the model can then be appropriately analyzed.

¶19 The defendants might raise three legal defenses distinct from any defenses based on the facts. These are: entrapment, fruit of the poisonous tree, and due process.

A. Entrapment

¶20 The defense of entrapment¹⁹ has usually not been suc-

¹⁸See N.Y. Penal Law §200.10 (McKinney's 1975):

A public servant is guilty of bribe receiving in the second degree when he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action or exercise of discretion as a public servant will thereby be influenced.

See also N.Y. Penal Law §200.12 (McKinney 1975):

A public servant is guilty of bribe receiving in the first degree when he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that his...action...will thereby be influenced in the investigation, arrest, detention, prosecution or incarceration of any person for the commission...of a class A felony. . . .

¹⁹The defense of entrapment is not of constitutional dimension. It focuses on the predisposition of the

cessful in bribery cases.²⁰ One who accepts a bribe is generally predisposed to commit the crime.²¹ While the entrapment defense has been successfully raised where law enforcement officials induced the action,²² the rule is virtually unchallenged that a decoy may offer a public official a bribe to test his integrity without the offer having been improperly solicited;²³

[P]ublic policy demands that corrupt and crooked dealings of public officials should be uncovered and the offenders brought to punishment, and. . . it is not the invasion of any absolute right of an individual to subject suspected persons to a test of their integrity. It is no valid excuse, for the commission of a crime by a person holding public office, that he was tempted. His integrity must be above temptation.²⁴

19 (continued)

defendant and not the conduct of law enforcement officers. It is decided as a matter of fact unless so clear as to be decided as a matter of law.

See Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrello v. United States, 287 U.S. 435 (1932). See also United States v. Steinberg, 551 F.2d 510 (2d Cir. 1977).

²⁰ See Annot., 69 A.L.R. 2d 1397, 1431 (1930).

²¹ United States v. Russell, 411 U.S. 423 (1973) (a finding of defendant's predisposition to commit the crime charged is the determinative factor in finding whether entrapment had occurred). See also United States v. Tartar, 439 F.2d 1300 (9th Cir. 1971) and United States v. Greenberg, 444 F.2d 369 (2d Cir. 1971).

²² See, e.g., State v. Murphy, 320 Mo. 219, 6 S.W. 2d 877 (1928); see also Annot., 69 A.L.R.2d 1397, 1401 (1930).

²³ See Scriber v. United States, 4 F.2d 97 (6th Cir. 1925). See also Annot. 69 A.L.R. 2d 1397, 1426 (1930).

²⁴ State v. Dougherty, 86 N.J.L. 525, 93 A.98, 102 (Sup. Ct.), rev'd on other grounds, 88 N.J.L. 209, 96 A. 56 (Court of Errors and Appeals, 1915).

B. Fruit of the Poisonous Tree

¶21 Defendants in Rao²⁵ argued that their perjury indictments should have been dismissed because they were fruit of the illegal acts committed by the Special Prosecutor. In Wong Sun v. United States,²⁶ the Supreme Court established the test for determining when evidence must be excluded from a criminal trial because of the illegality of police actions in obtaining it:

[Was] the evidence come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

¶22 A strict interpretation of Wong Sun gives support to the defendants' argument;²⁷ the Special Prosecutor intended to exploit the illegality. Defendants probably would not have accepted a bribe from one whose credibility had not been established by arrest, arraignment and, possibly, grand jury indictment. Thus, exploitation is present.

¶23 The courts, however, have usually taken a common-sense approach to fruit of the poisonous tree defenses in bribery cases. In Vinyard v. United States,²⁸ the Eighth Circuit held that a legal arrest was not an essential prerequisite to conviction for bribery prompted by happenings

²⁵46 App. Div. 2d 343, 362 N.Y.S. 2d 513 (2d Dep't 1974).

²⁶371 U.S. 471, 488 (1963).

²⁷This assumes that law enforcement officials did act outside the law.

²⁸335 F.2d 176, 181 (8th Cir.), cert. denied, 379 U.S. 930 (1964).

subsequent to the arrest. In United States v. Perdiz,²⁹ the court states: "Wong Sun. . . does not stand for the proposition that an independent criminal act is to be ignored because it was made during an illegal arrest." Evidence of an intervening criminal act of free will is obtained by means "sufficiently distinguishable" from the police illegality to purge the primary taint.³⁰ Independent cause is, therefore, also present rendering exploitation irrelevant.

¶24 The Rao court rejected the fruit of the poisonous tree argument as a defense to perjury. Perjury is rarely excused by illegal police acts at any stage of the criminal justice process.³¹ Perjury cannot be the fruit of any

²⁹ 256 F. Supp. 805, 806 (S.D.N.Y. 1966).

³⁰ See also United States v. Soles, 482 F.2d 105, 108 (2d Cir.), cert. denied, 414 U.S. 1027 (1973); United States v. Gentile, 525 F.2d 252, 259 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976), and United States v. Bravo, 403 F. Supp. 297, (S.D.N.Y. 1975). But see United States v. Armedo-Sarmiento, 545 F.2d 785, 796, (2d Cir. 1976) (proffered bribes not independent from an illegal search).

³¹ See United States v. Wong, 21 Crim. L. Rptr. 3045 (Sup. Ct. May 25, 1977); United States v. Mandujano, 425 U.S. 564 (1976); United States v. Knox, 396 U.S. 77 (1969); and United States v. Remington, 208 F.2d 567 (2d Cir. 1953), aff'd, 347 U.S. 913 (1954) where A. Hand, J. states:

[To] call perjury a fruit of the government's conduct here is to assume that a defendant will perjure himself in his defense.

See also Harris v. New York, 401 U.S. 222 (1971); Bryson v. United States, 396 U.S. 64 (1969); and People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966).

illegality since it is "a new and independent inexcusable wrong."³² In Archer II, Justice Sandler followed the Rao analysis in ruling on defendants' motion to dismiss the bribery indictments.³³ Although bribery presents some issues that distinguish it from perjury,³⁴ the requirement of free will makes the crimes similar for purposes of analysis under Wong Sun.

1. The problem of standing

¶25 In Alderman v. United States,³⁵ the Supreme Court held that a defendant had no standing to suppress damaging evidence that was obtained by an illegal wiretap on a phone not in defendant's control and of a conversation in which

³²Rao, supra note 9, 46 App. Div. 2d at 350, 362 N.Y.S. 2d at 519 (2d Dep't 1974).

³³47 N.Y.L.J. 13 (daily ed. March 10, 1977).

³⁴A defense of legal impossibility would be available to defendant if the statute and indictment charged him with accepting favors to affect a pending prosecution, since, arguably a simulated offense is not a pending prosecution. But see N.Y. Penal Law §200.10 (McKinney 1975) (supra n.18) which looks only to the acts of the public official. New York does not recognize the defense of legal or factual impossibility. See N.Y. Penal Law §110.10 (McKinney 1975).

³⁵394 U.S. 165 (1969). See also Jones v. United States, 362 U.S. 257, 261 (1960):

In order to qualify as a 'person aggrieved by an unlawful search and seizure one must have been a victim of a search or seizure,' one against whom the search was directed as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

defendant was not a party.³⁶ Under Alderman, there is no valid objection to the admission of evidence as long as the personal constitutional rights of the defendant have not been abridged.³⁷ The simulated offense may be found to violate only public rights. If so, the arguable illegality only touches public interest, and it is doubtful that the defendant would have standing to attack the police conduct.

C. Due Process

¶26 The availability of a due process defense is an unsettled issue. The basis of the defense is that some police activity so completely offends criminal justice standards that the courts must refuse to convict a culpable defendant to uphold due process of law.³⁸

¶27 The due process defense finds support in Rochin v. California.³⁹ In Rochin, the Supreme Court refused to sustain a narcotics conviction that was based upon evidence

³⁶For an explanation of the rationale behind the standing rule, see United States v. Calandra, 414 U.S. 338, 348 (1974).

³⁷But see United States v. Turk, 526 F.2d 654 (5th Cir. 1976) (a party to a conversation recorded by a second party and illegally seized therefrom granted standing, on a "judicial integrity theory"). Such a theory might have been accepted in Archer I. See United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973).

³⁸This philosophy is eloquently expounded by Brandeis, J. dissenting in Olmstead v. United States, 277 U.S. 438 (1928). See supra note 6.

³⁹342 U.S. 165 (1952).

obtained by the forcible pumping of the defendant's stomach. Application of the Rochin rule depends on the conscience of the court. A culpable defendant is set free because the court will not condone egregious police conduct. The analysis is ad hoc; Rochin has little deterrent effect. The Rochin rule is predicated on a nexus between the police misconduct and violation of defendant's rights.

¶28 The Supreme Court recently touched on the scope of the due process defense in Hampton v. United States⁴⁰ with inconclusive results. Hampton involved a "buy" from the defendant, by government agents, of narcotics allegedly supplied to defendant by another government agent.

The Court was forced to interpret language from Russell v. United States:⁴¹

We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952).

Rehnquist, J., for a three-justice plurality, declared:

If the police engage in illegal activity with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.⁴²

¶29 Powell, J., with whom Blackmun, J. joined, concurred in the result, but they did not approve of the plurality's

⁴⁰ 425 U.S. 484 (1976).

⁴¹ 411 U.S. 423, 431-432 (1973).

⁴² 425 U.S. 484, 490 (1973).

rejection of the possibility of a due process defense based on police misconduct:

I am not unmindful of the doctrinal and practical difficulties of delineating limits to police involvement in crime that do not focus on predisposition, as Government participation ordinarily will be fully justified in society's "war with the criminal classes" ... This undoubtedly is the concern that prompts the plurality to embrace an absolute rule. But we left these questions open in Russell, and this case is controlled completely by Russell. I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the government is able to prove predisposition.⁴³

Significantly, Mr. Justice Powell's opinion cites Archer I as an instance where government overinvolvement in unlawful activities outside the realm of contraband offenses might give rise to a due process defense.⁴⁴

¶30 Brennan, J., with whom Stewart, J. and Marshall, J. joined, dissented. Arguing first that the defense of entrapment is of constitutional dimension, he stated:

In addition, I agree with Mr. Justice Powell that Russell does not foreclose imposition of a bar to conviction--based on our supervisory power or due process principles--where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed.'⁴⁵

⁴³Id. at 494-495.

⁴⁴Id. at 493.

⁴⁵Id. at 497.

The dissent finds three distinct uses for due process principles. Violations of due process can trigger an entrapment defense which does not depend on predisposition. Second, due process violations can justify exercise of the courts supervisory powers. Third, due process violations can themselves form the basis of a defense.

By a five to three majority (Stevens, J. took no part in the decision), the Supreme Court, therefore, recognizes the possibility of a due process defense.

¶31 As in Rochin, the Court in Hampton focuses on violations of defendant's rights.⁴⁶ If illegal, the simulated offense may violate public rights only. Police conduct before a grand jury does not affect the rights of defendant. Insufficient nexus exists between police misconduct and violation of defendant's due process rights.⁴⁷

¶32 In Archer I, Judge Friendly did not reach the issue of due process defense; he found insufficient grounds for exercise of federal jurisdiction. In dicta, Friendly indicates that a due process defense based upon the philosophy of Mr. Justice Brandeis' dissent in Olmstead v. United States⁴⁸ and the invitation of Mr. Justice Rehnquist in Russell v. United States would decide the case.⁵⁰ The

⁴⁶Rehnquist, J. for the Hampton plurality states:

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant.

425 U.S. 484, 490 (1976).

⁴⁷This is in reference only to the due process defense and not to due process that may trigger a defense of entrapment or the exercise of the court's supervisory powers.

⁴⁸277 U.S. 438, 485 (1928).

⁴⁹411 U.S. 423, 431 (1973).

⁵⁰486 F.2d 670, 676 (2d Cir. 1973). See note 6 supra.

Rao Court recognized the existence of the due process defense, but rejected its application on those facts.⁵¹ Justice Sandler did not discuss the issue in Archer II, but overruled defendants' motion to dismiss the bribery indictments of due process grounds.⁵²

III. THE SIMULATED OFFENSE FROM THE PERSPECTIVE OF LAW ENFORCEMENT OFFICERS: THE VALIDITY OF THE SIMULATED OFFENSE

¶33 Archer I and Rao criticized the simulated offense; they argued that such conduct by law enforcement officers should not be permitted. Justice Christ in Rao, for example, characterized the simulated offense as "illegal, outrageous and intolerable."⁵³ Both courts, however, spoke in conclusory language; neither adequately analyzed the underlying issues.

A. The Legality of the Simulated Offense

¶34 The simulated offense must be legal to be a continuing and viable investigative tool for exposing corruption in the criminal justice system. Law enforcement officers

⁵¹46 App. Div. 2d 343, 350, 362 N.Y.S.2d 513, 519 (2d Dep't 1974).

⁵²47 N.Y.L.J.13 (daily ed. March 10, 1977).

⁵³Matter of Nigrone v. Murtagh, 46 App. Div.2d 343, 347, 362 N.Y.S.2d 513, 517 (2d Dep't 1974).

are permitted, of course, to violate the literal terms of certain penal statutes. No one seriously doubts, for example, that they may possess narcotics, number slips etc. The issue is one of kind and degree. Some conduct of law enforcement officers in undercover roles is clearly illegal; at some point feigned participation in a crime bears such resemblance to the crime itself that society cannot tolerate the conduct. No one doubts that they could not work in an undercover role in the investigation of a juvenile rape gang and actually participate in a rape. On the other hand, courts have been tolerant in permitting extensive police participation in certain illegal activities. The question is how far may police and prosecutors go in engaging in conduct that would otherwise be a crime?

¶35 The common meaning of illegal is conduct contrary to existing law.⁵⁴ Although a simulated offense may violate the literal terms of penal statutes, its validity may be upheld on the basis of four principles: general justification, lack of felonious intent, law enforcement justification, or the police decoy rule.

⁵⁴Black's Law Dictionary 882 (4th ed. 1968) states:

Sometimes this term means merely that which lack authority or support from law; but more frequently it imports a violation...[I]n ordinary use...the idea of censure or condemnation for breaking the law is usually presented. Tiedt v. Carstensen, 61 Iowa 334, 16 N.W. 214

It is important to differentiate between "illegal" conduct and "unlawful" conduct. Black's Law Dictionary 1705 (4th ed. 1968) states:

1. General justification

¶36 The model penal code defense of justification follows the venerable "choice of evils" doctrine:

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that...the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.⁵⁵

A defense based on this formulation would be available to a police agent charged with perjury committed during a simulated offense. Since the choice of evils is wedded completely to the facts of the case, this doctrine stifles analysis of the conduct's legality.⁵⁶ Different juries could arrive at different verdicts on the same facts. Further, an acquittal does not indicate whether a jury viewed the agent's conduct as legal, illegal, evil, or unlawful.

54 (continued)

Unlawful and illegal are frequently used as synonymous terms, but, in the proper sense of the word, 'unlawful,' as applied to promises, agreements, considerations and the like, denotes that they are ineffectual in law because they involve acts which although not illegal, i.e. positively forbidden, are disapproved of by the law...either because they are immoral or because they are against public policy.

If the simulated offense is unlawful it needs only modification to comport with public policy. If the simulated offense is illegal then legislative action would be required to make it a viable tool.

⁵⁵Model Penal Code §3.02(a) (Proposed Official Draft, 1962).

⁵⁶The use of this defense is tantamount to an admission that the conduct charged was illegal.

2. Lack of felonious intent

¶37 Actus non facit reum, nisi mens sit rea is a maxim of the criminal law.⁵⁷ Feigned accomplices have successfully raised the defense of lack of felonious intent.⁵⁸ Judge Friendly in Archer I distinguishes the simulated offense from the use of feigned accomplices in respect to this issue:

In cases of that sort [undercover agents participating in narcotic transactions], the Government agents have actually not committed a crime at all since they have had no criminal intent. In this case, by contrast, the Government 'authorized' Bario and Murano to engage in crimes under New York law, several of them prior to the discovery of any criminal activity on the part of the defendants and quite independent of the crimes the defendants committed.⁵⁹

The Special Prosecutor, nevertheless, suggested to the Rao court that the agent could not have violated the law as he lacked the requisite intent.⁶⁰

⁵⁷ Blackstone's translation is:

An unwarrantable act without a vicious will
is no crime at all,

reprinted in S. Kadish and M. Paulsen, Criminal Law and Its Processes 214 (2d ed. 1969).

The permanence of this concept suggests that, as a rule of law, lack of felonious intent absolves. Analytically this is incorrect. If lack of felonious intent absolved one of all criminal liability, ignorance of the law would be an absolute defense.

⁵⁸ See Aguero v. State, 164 Tex. Crim. 265, 298 S.W.2d 822 (1957); Wilson v. People, 103 Colo. 441, 87 P.2d 5 (1939); People v. Emmons, 7 Cal. App. 685, 95 P. 1032 (3rd Dis't 1908). See also Annot., 120 A.L.R. 1501. But see Commonwealth v. Sezbert, 4 Pa. D. & C. 152 (1814).

⁵⁹ 486 F.2d 670, 675 (2d Cir. 1973).

⁶⁰ People's Memorandum of Law to the Appellate Division,

¶38 Archer I and the suggestion of the Special Prosecutor to the contrary notwithstanding, the so-called, 'lack of felonious intent' analysis ought to have no application to the simulated offense or to the possession of narcotics by undercover agents. In both cases, agents have the requisite "intent." The case law employs the lack of felonious intent rationale in two ways. First, lack of felonious intent is viewed as a defense. Second, it warrants a finding of feigned complicity for use as a defense or for circumventing accomplice corroboration rules. Actually, the courts implicitly employ the doctrine of general justification in the first instance⁶¹ and the doctrine of law enforcement justification or the police decoy rule in the second.⁶² General justification reflects a balance of evils--the agents conduct prevented greater harm or, given his limited culpability, punishment would be greater evil than the questioned conduct. Law enforcement justification or the police decoy role reflects the courts' reluctance to punish law enforcement officials who apparently violate penal statutes in the course of

60 (continued)

Second Department, July 3, 1974, at 14, Matter of Nigrone v. Murtagh, 46 App. Div. 2d 343, 362 N.Y.S.2d 513 (1974).

⁶¹See W. LaFave and A. Scott, Criminal Law 384-385 (1972), especially note 16.

⁶²See Commonwealth v. Earl, 91 Pa. Super. Ct. 447, 454 (1927) and Wilson v. People, 103 Colo. 441, 87 P.2d 5 (1939).

their duty. Analysis of felonious intent should not take place independently, but should be subsumed in analyses of justification, law enforcement justification, and the police decoy rule.⁶³

3. Law enforcement justification

¶39 Law enforcement officers are privileged to engage in conduct which would be criminal if engaged in by private citizens. This rule is well recognized and, often, uncodified.⁶⁴ A law enforcement justification statute, however, has been enacted in New York:

Conduct which would otherwise constitute an offense is justifiable and not criminal when ...such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions.⁶⁵

⁶³In most cases lack of felonious intent as a defense is falsely applied. This is evident in Judge Friendly's analysis in Archer I. In both cases, law enforcement officials possessed the requisite criminal intent as defined by statute. The possession of narcotics was justified; Friendly presents no compelling reason why perjury is not.

⁶⁴Twenty-eight states have recently revised their criminal codes. Nineteen have included law enforcement justification statutes roughly equivalent to Model Penal Code §3.03 (1962). See Ark. Stat. Ann. §41-503 (1975); Colo. Rev. Stat. §18-1-701 (1973); Conn. Gen. Stat. §53a-17 (1977); Del. Code tit. 11, §462 (1975); Ga. Code §26-901(b) (Supp.1976);

Haw. Rev. Stat. §703-307 (Supp. 1975); Iowa Code ch. 1 §411 (Special Pamphlet 1977); Ky. Rev. Stat. §433c. 1-040 (1974); La. Rev. Stat. Ann. §14.18(1) (West 1974); Me. Rev. Stat. tit. 17a; §102 (Pamphlet 1976); N.H. Rev. Stat. Ann. §627.2; (1973); N.Y. Penal Law §35.05(1) (McKinney 1975); N.D. Cent. Code §12.1-05-02(1976); Ohio Rev. Code Ann. §2901.05(c)(2) (Special Supp. 1973); Or. Rev. Stat. §161.195 (1975); 18 Pa. Cons. Stat. Ann. §504 (1973); Tex. Penal Code Ann. §921 (Vernon 1974); Utah Code Ann. §76-2-401 (Supp. 1975); Wisc. Stat. §939.45 (1958).

⁶⁵N.Y. Penal Law §35.05(1) (McKinney 1975).

The Practice Commentary states that this subdivision, "codifies an obviously necessary principle of criminal law."⁶⁶

¶40 Application of a law enforcement justification statute results in a determination of the legality of police conduct rather than a balance of two evils. If the conduct is within the reasonable exercise of the policeman's duty then it is not criminal. "Reasonable exercise" is a question of law. The term is not well defined. Reasonable is, "fit and appropriate to the end in view,"⁶⁷ or, perhaps, necessary under the circumstances.

¶41 The simulated offense is reasonable conduct given the nature of corruption in the criminal justice system. Corrupt public officials carry out their illegal dealings in strict secrecy. The crime of bribery produces no complaining witnesses. The accomplice corroboration

⁶⁶N.Y. Penal Law §35.05 (McKinney 1975) discussed in Hechtman, "Practice Commentaries". Hechtman continues:

As originally enacted, justification for conduct extended to that which was "required or authorized by a provision of law or by a judicial decree." It was designed to exempt peace officers and other public servants from criminal liability for conduct reasonably performed by them in the course of their duties which would be criminal if engaged in by private citizens acting with other motives. The provision was and is aimed at conduct such as possession of narcotics, policy slips, and tear gas, all of which is criminal in general but which obviously should not be so regarded in the case of a police officer performing official functions of criminal investigation of maintaining public order.

⁶⁷Black's Law Dictionary 1431 (4th ed. 1968).

rule makes decoys necessary. A decoy must establish "criminal legitimacy" to make his bribery attempt credible. False testimony to the grand jury may be fit and appropriate to the end in view--a reasonable exercise of a police officer's duty.

¶42 In the absense of precedent construing the law enforcement justification statute, judges have relative freedom in defining "reasonable exercise." The courts in Rao and Archer I considered the simulated offense unreasonable.⁶⁸ Justice Sandler in Archer II cautiously spoke to the issue:

I share the deep disquiet expressed by appellate judges with the deception of the court system inherent in the technique used here and in Rao. On the other hand, no one could have served for over a year in my present assignment without becoming acutely aware of how difficult it is to develop corruption cases on the prosecutorial and judicial levels particularly in light of the statutory requirement that accomplice testimony must be independently corroborated.⁶⁹

Sandler would find the simulated offense, with some modifications, a reasonable exercise of police duty.⁷⁰ If this position is sustained on appeal, simulation would not be illegal.

4. The police decoy rule

¶43 The police decoy rule permits law enforcement officers to engage in conduct that apparently violates penal statutes to obtain evidence of criminal conduct. The rule

⁶⁸Neither court mentioned N.Y. Penal Law §35.05 (McKinney 1975).

⁶⁹People v. Archer, 47 N.Y.L.J. 13 (daily ed. March 10, 1977).

⁷⁰Id. at 13.

operates without resort to balancing tests. Certain police conduct, however, remains punishable as criminal.⁷¹ The limits of the police decoy rule are ill-defined since law enforcement officers are rarely prosecuted for overzealous investigation.⁷²

¶44 A "model" simulated offense might well require conduct that could be termed subornation of perjury, perjury, filing of false instruments, and obstruction of justice. In New York, police decoys have legally participated in

⁷¹See United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), aff'd, 546 F.2d 910 (D.D. Cir. 1976), cert. denied, 97 S. Ct. 1155 (1977). Ehrlichman was convicted of violating a citizen's Fourth Amendment rights under 18 U.S.C. §§241 and 242. It is less clear whether a defense of official sanction would have prevailed against a state charge of burglary since the lack of felonious intent defense has been upheld in burglary cases. See, e.g., Wilson v. People, 103 Colo. 441, 87 P.2d 5 (1939).

⁷²See also United States v. Archer, 486 F.2d 670, 676-677 (2d Cir. 1973):

It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums.

Cited in United States v. Hampton, 425 U.S. 484, 493 (1976) (Powell, concurring).

The law on excessive use of force in apprehending a person for questioning or investigation is clear. Physical harm of a citizen should not be excused in undercover activity if it is not excused (absent forceful resistance) during the normal course of an arrest for investigative purposes. See Annot., 18 A.L.R. 1368 (1922), supplemented in 61 A.L.R. 321 (1929).

See Crawford v. Ferguson, 5 Okla. Crim. 377, 115 P. 278 (1911) (One who incites a riot is guilty therefor, regardless of intent to enforce the law.) (dicta) and State v. Torphy, 78 Mo. App. 206 (1899) (An agent who joins a gang of murderers is guilty if he participates in the act.) (dissenting opinion).

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bribing a juror⁷³ and theft of court records.⁷⁴ A decoy may file false instruments;⁷⁵ this has been institutionalized in witness relocation programs. A police decoy in Nevada actually participated in subornation of perjury.⁷⁶ Police officers have also induced citizens, through deception, to act as unwitting decoys to obtain evidence against quack doctors.⁷⁷ Although all these cases can be distinguished from one involving a simulated offense, the simulated offense is not illegal simply because agents transgress certain penal provisions not normally violated by law enforcement officers. The analysis of the court in Archer I: "[Perjury] is substantially more offensive than the common cases where government agents induce the sale of narcotics

⁷³People v. Bennett, 182 App. Div. 871, 170 N.Y.S. 718 (2d Dep't), aff'd, 224 N.Y. 594, 129 N.E. 876 (1918).

⁷⁴People v. Mills, 91 App. Div. 331, 86 N.Y.S. 529 (1st Dep't), aff'd, 178 N.Y. 274, 70 N.E. 786 (1904).

⁷⁵Papadakis v. United States, 208 F.2d 945 (9th Cir. 1953) (Accountant, with knowledge of the I.R.S., filed false returns for his client to obtain evidence in a tax fraud case.). See also Benson v. California, 336 F.2d 791 (9th Cir. 1964), cert. denied, 380 U.S. 951 (1965).

⁷⁶State v. Busscher, 81 Nev. 587, 407 P.2d 715 (1965) (The agent posed as a customer for a quickie divorce, and hired a lawyer who regularly suborned perjurious testimony to the effect that his clients had been seen in the state for six weeks (the length of the Nevada residence requirement). The lawyer elicited the testimony from his accomplice and both were immediately arrested in the courtroom. The Nevada Supreme Court approved the tactic: "Deception may be permissible when done by one acting in good faith, with the purpose of detecting crime...There is no suggestion of bad faith or unlawful purpose here.")

⁷⁷Perry v. State, 138 Tex. Crim. 155, 134 S.W.2d 283 (1939).

in order to make drug arrests,"⁷⁸ is insufficient in light of the case law.⁷⁹

¶45 Proactive police investigative methods are entirely proper and necessary: "Traps, decoys and deception...[are required in our] war with the criminal classes."⁸⁰ The simulated offense should be carefully circumscribed and, perhaps, modified, but it should not be considered presumptively illegal.

B. The Simulated Offense as "Outrageous" Conduct

¶46 If the simulated offense is not illegal because it is criminal, it may be unlawful because it is "outrageous." "Outrageous" is almost a term of art in cases involving allegedly excessive police participation in crimes.

The term was employed recently in United States v. Russell⁸¹ where Mr. Justice Rehnquist suggested that the Court,

May someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California.

⁷⁸United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973).

⁷⁹Police payment of a citizen decoy to submit to sodomy in order to convict the perpetrator is probably more offensive to most people than the commission of perjury to obtain evidence against corrupt officials in the criminal justice system. The former conduct was upheld by the Missouri Supreme Court in State v. Dingman, 232 S.W.2d 919 (1950).

⁸⁰Sorrells v. United States, 287 U.S. 435, 453-454 (1932) (Roberts, J., separate opinion).

⁸¹United States v. Russell, 411 U.S. 423, 431-432 (1973).

¶47 In Rochin, police officers saw the defendant swallow two capsules that they believed to be narcotics. They arrested him and immediately took him from his home to a hospital where a doctor pumped his stomach, obtaining the evidence required to convict him. The Court, through Mr. Justice Frankfurter, called the police methods, "conduct which shocks the conscience,"⁸² and overturned the conviction under the Due Process Clause of the Fourteenth Amendment.

The Court found incorporated in the Clause, "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."⁸³ Rochin represents an equitable limitation on police conduct--a moral boundary which law enforcement officers may not transgress.

¶48 Rochin implicitly assumes that outrageous police misconduct is unlawful and can be grounds for not convicting a culpable defendant. If the simulated offense is "outrageous" under Rochin, it is unlawful. As with all questions of equity, the Rochin standard presents precedential and moral questions.

¶49 Precedent is thin; only three cases since 1952 have held the Rochin standard expressly controlling.⁸⁴

⁸² Rochin v. California, 342 U.S. 165, 172 (1952).

⁸³ Id. at 416 (quoting Malinski v. New York, 324 U.S. 401, 416-417 (1945)).

⁸⁴ LeGrande v. Redman, 423 F. Supp. 524 (D. Del. 1976); United States ex rel. Guy v. McCauley, 385 F. Supp. 197 (D. Wis. 1974); United States v. Townsend, 151 F. Supp. 378 (D. D.C. 1957). See also United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

In each case, the conduct in issue was a gross violation of defendant's bodily privacy.⁸⁵ The paucity of case law permits the Chancellor's conscience to control. The Rao court castigated the Special Prosecutor's conduct in strikingly moral terms. The majority spoke of "deception" of the grand jury,⁸⁶ "pervasion,"⁸⁷ "corruption and manipulation of the criminal justice system,"⁸⁸ and his "charade composed of lies."⁸⁹ The dissent is even more emotional:

Infiltration by deceit without the utilization of the judicial process may well be necessary in the never ending and legitimate war against crime, but despoliation of the fountain of justice itself must be refused sanction as violative of every sense of decency, enlightened public policy and a due regard for the observance of good morals and ethical conduct.⁹⁰

⁸⁵ Guy and Townsend both involved forced examination of defendants' genitals by police who thereby obtained incriminating evidence. LeGrande involved the use of tear gas in a maximum security prison building.

The Rochin rule apparently has been applied only to police conduct which involved physical abuse. This reflects an unarticulated principle of law manifest in several doctrines, i.e., duress, self-defense and justification--the enforcement of the law will fall before the right to bodily integrity.

⁸⁶ Matter of Nigrone v. Murtagh, 46 App. Div.2d 343, 347, 362 N.Y.S.2d 513, 516 (2d Dep't 1974).

⁸⁷ Id. at 347, 362 N.Y.S.2d at 517.

⁸⁸ Id. at 348, 362 N.Y.S.2d at 517.

⁸⁹ Id. at 347, 362 N.Y.S.2d at 517.

⁹⁰ Id. at 355, 362 N.Y.S.2d at 524.

This court would have found the simulated offense outrageous.⁹¹

Morality, however, is not always what it seems to be.

Not all "lies" are thought to be immoral. Analysis here, too, is required.

¶50 The conflict between deontological and teleological ethics underlies the analysis of the morality of lying. The deontological school holds that certain acts are morally obligatory regardless of their consequences. The teleological school subordinates duty and moral obligations to socially desirable ends.

¶51 Kant sets forth the deontologists' position on the morality of lying:

The highest violation of the duty owed by man to himself...is a departure from truth, or lying ...[E]very deliberate untruth in uttering one's thoughts must bear this name.⁹²

This absolutist position comports with that held by St. Augustine and the traditional Catholic writers as well as Aristotle.⁹³ W.D. Ross, a twentieth century deontologist, argues that the fact that any act violates a moral rule is a prima facie reason for not performing that act.

⁹¹The court in Archer I did not speak to this issue, preferring to analyze the simulated offense solely from the perspective of defenses, United States v. Archer, 486 F.2d 670 (2d Cir. 1974). The court in Archer II would not have found the simulated offense outrageous. State v. Archer, 47 N.Y.L.J. 13 (daily ed. March 10, 1977).

⁹²Kant, The Metaphysic of Ethics 267 (J. Semple, trans. 1836).

⁹³See VII New Catholic Encyclopedia 1107-1110 (1966).

In a situation of conflict between moral rules, however, consequences may be considered.⁹⁴

¶52 Pufendorf, an empiricist, sets forth the teleological position:

Some feigned speeches [which] procure...any benefit or convenience for others, which could not have been obtained by direct and open expressions, are not only to be exempted from the number of lies, but to be applauded as so many instances of wisdom.⁹⁵

An alternative analysis admits the immorality of all lying but allows the moral wrong to be outweighed by the desirable consequences.⁹⁶

¶53 The absolutist theory does not adequately deal with extreme hypothetical situations; i.e. lying to the 'murderer at the door.' The modern Catholic writers attempt to justify deception;⁹⁷ the teleogists would find justifiable false speech.⁹⁸ It is likely that most twentieth century Americans believe that the murderer must be told a lie and an effective one. The question again is one of degree and kind. When is false speech justified?

¶54 Corruption within the criminal justice system is morally unacceptable. Using teleological analysis, misleading

⁹⁴See 2 Encyclopedia of Philosophy 343 (1967).

⁹⁵S. Pufendorf, IV Law of Nature and Nations in Eight Books, ch. I, subch. 16 (B. Kennett, trans. 1729).

⁹⁶See 8 Encyclopedia of Philosophy 88 (1967).

⁹⁷See VIII New Catholic Encyclopedia 1110 (1966).

⁹⁸See 8 Encyclopedia of Philosophy 88 (1967).

a grand jury may be morally preferable; the control of corruption is a socially desirable consequence.⁹⁹ Coupled with the practical necessity of the simulated offense (given the inherent problems of exposing bribery) a moral imperative for deception may exist.

¶55 As legal policy, it may be better to tolerate corruption in the criminal justice system than to sanction perjurious testimony. Perjury, however, may be morally justifiable. Judicial analysis must not obscure the fact that although the simulated offense may be outrageous, so is official corruption.¹⁰⁰

C. The Simulated Offense as "Intolerable Conduct"

¶56 The most powerful objection to the simulated offense is that it subverts the criminal justice system. The courts argue that the simulated offense undermines impartiality by utilizing the grand jury as an unwitting accomplice. This argument is appealing given the pristine model of the adversary system where the court is an, "impartial arbiter, exercising its judgment...after law enforcement authorities have completed their function of detecting crime and apprehending the alleged criminal."¹⁰¹

⁹⁹ Judge Friendly admits this in United States v. Archer, 486 F.2d 670, 683 (1973) (petition for rehearing):

That Archer has been dismissed from his post as a result of the Government's efforts is indeed a 'good' result.

¹⁰⁰ See generally A. Ludwig, The Importance of Lying (1965).

¹⁰¹ Matter of Nigrone v. Murtagh, 46 App. Div.2d 343, 347, 362 N.Y.S.2d 513, 516 (2d Dep't 1974).

In practice, the prosecutor constantly uses the system's rules and powers to advance the interests of law enforcement.

¶57 The Supreme Court in Branzburg v. Hayes¹⁰² outlined the function of the grand jury; it relied on an earlier view expressed in Wood v. Georgia:¹⁰³

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

This formulation, however, does not reflect adequately the dual function of the grand jury as it has developed in Anglo-American law.¹⁰⁴ In England, the grand jury originated with the summoning of townspeople before a public official to answer questions under oath. These inquiries served various administrative purposes.¹⁰⁵ In 1164,

¹⁰²Branzburg v. Hayes, 408 U.S. 665, 686-687 (1971).

¹⁰³Wood v. Georgia, 370 U.S. 375, 390 (1961).

¹⁰⁴See generally L. Orfield, Criminal Procedure from Arrest to Appeal 137-140 (1947); Note, "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590 (1961); National Commission on Law Observance and Enforcement, Report on Prosecution 34 (1968); Blakey, "Aspects of the Evidence-Gathering Process in Organized Crime Cases: A Preliminary Analysis", printed in Task Force on Organized Crime, Annotations and Consultants' Papers 80, 83 (1967).

¹⁰⁵Among these was the compilation of the Domesday Book of William the Conqueror.

the Crown created the first criminal grand jury—twelve knights accused individuals of crimes on the basis of public knowledge.¹⁰⁶ This grand jury served two functions. First, it ferreted out crime by giving the central government the benefit of local knowledge. Second, it protected the accused from malicious and unfounded private accusations. In 1166, Henry II in the Assize of Claredon, reshaped the grand jury--it then more closely resembled its modern counterpart. During the 13th and 14th centuries, the grand jurors served also as petit jurors.¹⁰⁷ It was not until 1681 that the grand jury began to serve as a buffer between the state and the citizenry¹⁰⁸--the function described in Wood v. Georgia. No decision has eroded the inquisitorial function of the grand jury.¹⁰⁹

¹⁰⁶This grand jury heard no witnesses as such.

¹⁰⁷It was not until these roles were separated and the scope of each defined that Crown witnesses were examined in secret before the grand jury.

¹⁰⁸In that year grand juries heard the Royal prosecutor's evidence in Colledges' Case, 8 How. St. Tr. 550, and the Earl of Shaftesbury's Case, 8 How. St. Tr. 759, and refused to indict.

¹⁰⁹The Supreme Court has called the grand jury "a grand inquest". See Blair v. United States, 250 U.S. 273, 282 (1919). Recently, the Supreme Court has expanded the scope of grand jury investigation. For centuries the grand jury could issue only two types of subpoena: subpoena duces tecum and subpoena ad testificandum. In 1973, the Supreme Court in United States v. Dionisio, 410 U.S. 1 (1973) held that the grand jury could subpoena a witness to display identifiable physical characteristics (here, voice prints). The rule was needed because police techniques for detection and investigation had developed beyond the ambit of the traditional grand jury subpoenas.

¶58 In New York, the district attorney may call any witness,¹¹⁰ ask any pertinent question,¹¹¹ and pursue any criminality or official nonfeasance.¹¹² He may call as a witness a person whom the grand jurors may have wanted to indict, thereby granting the witness full transactional immunity.¹¹³ The district attorney may question that witness about his criminal knowledge and conduct solely to obtain information useful in other investigations. Here, the grand jury is, if not an unwitting accomplice, an unwilling one.

¶59 A prosecutor conducting an investigation of organized crime may wish to neutralize a particularly important or dangerous participant. He is able to create a "Hobson's Choice"¹¹⁴ for such an individual through the grand jury mechanism by questioning him as a witness about the criminal activities of his associates. The witness often will not testify or will give false testimony since he will be held responsible should his testimony incriminate his confederates. The witness must choose between perjury and contempt and face jail in either circumstance. The

¹¹⁰N.Y. Crim. Proc. Law §190.50 (McKinney 1971).

¹¹¹N.Y. Crim. Proc. Law §190.55(e) (McKinney 1971).

¹¹²Id.

¹¹³N.Y. Crim. Proc. Law §190.40 (McKinney 1971).

¹¹⁴People v. Einhorn, 74 Misc.2d 958, 960, 346 N.Y.S.2d 326, 330 (Sup. Ct. 1973).

grand jurors need not have asked a single question, voted on an indictment, or otherwise fulfilled their traditional role.

¶60 A second argument is that the simulated offense uses the grand jury in a way not consistent with its traditional functions. In Rao, Justice Christ, after delineating the traditional role of the grand jury, states:

The Special Prosecutor, however, has used the grand jury for an entirely different purpose. The Vitale case was presented to it, not for a determination as to whether Vitale had, in fact, committed a crime for which he should be prosecuted, but rather to legitimatize Vitale's undercover role as a criminal facing prosecution and to set in motion the events which would, in the Special Prosecutor's estimation, induce the defendants at bar to attempt to fix the criminal prosecution.¹¹⁵

¶61 The use of the grand jury to establish the credentials of undercover agents is precedented but unlitigated.

George Demmerle, an F.B.I. informant who had infiltrated a radical bomb plot, was indicted by a New York grand jury to protect him from reprisals by unapprehended co-conspirators.¹¹⁶ A police officer has allowed himself to be arrested, convicted, and sentenced to maintain his cover in the investigation of a gambling operation.¹¹⁷ Viewed in light of the tolerance

¹¹⁵ Matter of Nigrone v. Murtagh, 46 App. Div.2d 343, 347, 362 N.Y.S.2d 513, 517 (2d Dep't 1974).

¹¹⁶ New York Times, May 17, 1970, at 18, col. 6. The grand jury that indicted Demmerle knew that he had not committed a crime.

¹¹⁷ New York Post, June 30, 1972, at 2.

exhibited by the courts reviewing other questionable tactics in investigations of corruption,¹¹⁸ the use of the grand jury to establish the credentials of undercover agents may not be inherently improper.

IV. MODIFICATIONS OF THE SIMULATED OFFENSE

¶62 The simulated offense must be circumscribed and refined to be a viable and reliable investigative tool. It must respect the sanctity of the judicial system to be approved by reviewing courts. It must not destroy the credibility of the criminal justice system. Too frequent use of the simulated offense without adequate safeguards would foster doubts about the authenticity of all cases and breed distrust in grand jurors, judges, and the public.

¶63 Prior notification of a responsible court official would protect the credibility of the criminal justice system and prevent abuse of the simulated offense.¹¹⁹ A court official would not countenance frequent or indiscriminate use of the simulated offense; he need only

¹¹⁸ See ¶¶43-45 supra. See also Osborn v. United States, 385 U.S. 323 (1966) (decoy used to secure evidence of jury tampering in a pending criminal trial).

¹¹⁹ The simulated offense in Archer met this notice requirement, United States v. Archer, 486 F.2d 670, 683 (2d Cir. 1973) (petition for rehearing). Judge Friendly felt, "this lessens the offensiveness to the state of the conduct here at issue." Id. at 683. The simulated offense in Rao did not include prior notice.

publicize the activity to stop it. Notification maintains the neutrality envisioned in an adversary system. The benefits of prior notification outweigh the possibility that corrupt public officials may be forewarned.

¶64 Notification alone may not satisfy the reviewing courts. Justice Sandler in Archer II states:

I would think it critically important that a serious effort be made to determine whether the method may not be reconciled with basic principles of fairness and justice by accompanying it with safeguards of judicial supervision and disclosure to responsible heads of the institutions under investigation.¹²⁰

The Report of the Task Force on Organized Crime suggests:

Prosecutors should undertake operations involving violations of the law in judicial proceedings, e.g. embracing false oaths, only after they have obtained judicial authorization upon a showing of the intended nature of the operation, where and when it will occur,¹²¹ and the names of the persons to be involved.

¶65 A warrant procedure is a practical remedy for the present weaknesses of the simulated offense. Law enforcement officers could apply to a judge at an uncorruptable judicial level for authorization to initiate a simulated offense.¹²² The authorization would issue upon a showing of a reasonable and articulable suspicion of corruption

¹²⁰ People v. Archer, 47 N.Y.L.J. 13 (daily ed. March 10, 1977).

¹²¹ Report of the Task Force on Organized Crime 52-53 (1976).

¹²² Application to appellate level courts (of different districts if necessary) should be sufficient to protect the simulated offense from discovery.

in a branch of the criminal justice system.¹²³ Such a warrant procedure was employed in Osborn v. United States,¹²⁴ to authorize an informant's surreptitious recording of his conversations with an attorney who sought to tamper with a jury. The ad hoc warrant was not required¹²⁵ but was sought because the undercover activity involved corruption within the criminal justice system and entailed the deception of an officer of the court.¹²⁶ The Supreme Court found "it was imperative to determine whether the integrity of the court was being undermined."¹²⁷ The Court found the warrant procedure to meet the requirements of the concurring and dissenting opinions in Lopez v. United States as well as those of the majority.¹²⁸

¶66 Judicial supervision of the simulated offense would vitiate many objections. The integrity of the criminal

¹²³To require probable cause that a particular public official is engaging in corrupt activities would destroy the simulated offense as an investigative probe.

¹²⁴Osborn v. United States, 385 U.S. 323 (1966). See also National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Commission Hearings, vol. 2, 964 (1976).

¹²⁵See Lopez v. United States, 373 U.S. 427, 439-440 (1963) (electronic recording of consensual conversation with an informant does not require a warrant).

¹²⁶See Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting).

¹²⁷Osborn v. United States, 385 U.S. 323, 330 (1966).

¹²⁸Lopez v. United States, 373 U.S. 427 (1963) discussed in Osborn v. United States, 385 U.S. 323, 327 (1966).

justice system would be protected as the courts would no longer be the unwitting or unwilling accomplices of the prosecutor. Use of the simulated offense would be limited to prevent distrust by grand jurors, judges, and the public. Further, the integrity of the judicial system would be enhanced by the existence of an effective mechanism for detecting and deterring corruption.

¶67 Judicial supervision will affect the simulated offense itself by prospectively preventing abuse in its application. The introduction of a neutral magistrate to establish that requisite cause exists for the use of this extreme investigative tactic will prevent too frequent or poorly conceived undercover operations. The participation of law enforcement officers in illegal activity is necessary to control corruption, however, it must be circumscribed to prevent public mistrust or contempt.

¶68 Modifications of the simulated offense could originate with either the legislature or the courts. Before such changes can be effected, the courts must first hold that the simulated offense with mere notice is a viable and legal investigative tactic. The case law, the doctrines of justification and the police decoy rule, and pressing need to develop an effective mechanism for controlling corruption would support such a holding. The simulated

offense, refined over time, will become a credible and indispensable tool for detecting and deterring corruption in the criminal justice system.¹²⁹

¹²⁹New York Special Prosecutor John Keenan announced his intention to re-evaluate the simulated offense in light of Judge Sandler's opinion of People v. Archer, 47 N.Y.L.J. 13 (daily ed. March 10, 1977). See New York Times, April 10, 1977, §E at 6.

Consensual Electronic Surveillance

Outline

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Appendix

Summary

¶1 Electronic surveillance¹ is a useful law enforcement technique for the control of organized crime. Consensual electronic surveillance is not subject to the complex federal statutory limits on other forms of electronic surveillance. It is not a search under the Fourth Amendment. Individual states must meet at least the federal standards on electronic surveillance, though they are free to pass more restrictive legislation. New York's laws controlling consensual surveillance closely follow the federal pattern, while the Massachusetts and New Jersey statutes are each more restrictive.

¶2 Problems remain with consensual surveillance usage, most notably what constitutes a valid consent. There are also potential Fifth and Sixth Amendment issues, as well as the possibility of claims of entrapment.

¹As used in these materials, the phrase electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, xiii (1976).

I. Introduction

¶3 Electronic surveillance is an effective technique in gathering evidence of the activities of organized crime. Two of the most useful consensual electronic surveillance techniques are recording or transmitting with the consent of one of the participants to a conversation. Consensual surveillance, however, may encompass three discrete, though related, situations where a party to a conversation, under the direction of a government agency and without the consent of the second party:

1. records his conversation with the other party;
2. uses electronic equipment to transmit the conversation to government agents; or
3. authorizes law enforcement personnel to use electronic devices to overhear and record the incriminating communication.

¶4 Electronic surveillance, but particularly consensual surveillance, offers law enforcement personnel several advantages.² A recorded conversation may be more reliable and often is more convincing than the testimony of the monitoring agent. The prosecution's case, too, cannot be weakened because of the fallibility of human perception and memory. Moreover, the credibility of a tape recording is far superior to that of a government informant with a "blemished" character. Such a recording can also supply the corroboration often required

² See Appendix for excerpts from the Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976) on their findings on the effectiveness and usage of consensual surveillance.

for an accomplice's testimony.³ Electronic surveillance can be used to establish the recorded individual's state of mind or intentions. This can be particularly important in conspiracy cases. Consensual surveillance also minimizes the possibility that an unreliable informant will cease cooperating with the authorities prior to the trial. The existence of a well-guarded recording reduces the incentive for killing a key witness prior to trial. If an informant succumbs to threats of physical violence and refuses or is unable to testify, the recorded conversation can be introduced without the consenting participant's testimony. The recorded conversation can also be introduced into evidence even if the informant dies before trial.⁴ Finally, the use of electronic surveillance minimizes the risk of physical harm to a police agent during an investigation. The actual conversation between the informant and the criminal can be monitored by police to ensure the agent's safety in the event that his identity is suspected.

³Eliminating credibility as an issue can be particularly important in political corruption cases. A reliable recording can prevent the crooked official from turning his trial into a credibility contest, relying on his position to gain acquittal; it can also act to exonerate the innocent victim of the irrational or political grudge accusation and prevent an unjust indictment.

⁴See, e.g., United States v. Lemonakis, 485 F.2d 941, 948-49 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).

II. Federal Law

A. Statutory Provisions

¶15 Section 2511(2)(c) of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) allows a person "acting under color of law" to intercept wire or oral communications where the person is either a party to the conversation or where one of the participating parties has given prior consent to such monitoring.⁵ Consensual surveillance, therefore, is an exception to the general federal rule which imposes warrant and other requirements on electronic surveillance.⁶

¶16 Section 605 of the Federal Communications Act of 1934, which also prohibits the interception or divulgence of interstate and foreign communications, expressly excepts those procedures permitted by Title III of the Omnibus Crime Control and Safe Streets Act.⁷

⁵18 U.S.C.A. §2511(2)(c)(1970); 18 U.S.C.A. §2511(2)(d)(1970) also allows the interception of wire or oral communications by a person "not acting under color of law" provided that:

1. the person is a party to the conversation or has obtained the prior consent of one of the participants for such monitoring; and
2. the person does not use the intercepted communication to commit a criminal, tortious, or injurious act.

⁶18 U.S.C.A. §2516(1970), as amended, (Supp. 1976).

⁷47 U.S.C.A. §605 (1962), as amended, (Supp. 1976). Section 605 only restricts the actions of private parties. Under the 1968 amendments to section 605, "person does not include a law enforcement officer acting in the normal course of his duties." S. Rep. No. 1097, 90th Cong., 2nd Sess. 108 (1968). This changes the prior rule. See United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956).

¶7 The issues surrounding consensual surveillance are, therefore, not based on problems of statutory authority; the legality of the technique depends upon an analysis of Fourth Amendment guarantees.

B. Federal Case Law--The Emergence of the White Rationale

¶8 Since 1952, the United States Supreme Court has consistently held that various forms of consensual surveillance do not violate Fourth Amendment guarantees against unreasonable searches and seizures. In On Lee v. United States,⁸ a narcotics prosecution, the defendant sought to suppress two incriminating conversations which were transmitted to federal agents by an informant wired for sound. Only the agents monitoring the conversation testified at the defendant's trial. Justice Jackson, writing for the majority, relied heavily upon Olmstead v. United States,⁹ which held that police surveillance without any physical trespass fell outside the scope of the Fourth Amendment. He observed that no technical trespass had been committed in placing the transmitter within the vicinity of On Lee. Consequently, there had been no search and seizure, and the defendant's incriminating remarks were admissible.¹⁰ On Lee also con-

⁸343 U.S. 747 (1952).

⁹277 U.S. 438 (1928); subsequently overruled in Katz v. United States, 389 U.S. 347 (1967), discussed infra, ¶11.

¹⁰343 U.S. at 751-52.

tains language suggesting that the legality of the agents' monitoring was based on On Lee's indiscretion with one he mistakenly trusted.¹¹

¶9 Rathbun v. United States¹² considered whether an incriminating telephone conversation, overheard by law enforcement officials, was admissible evidence where one party to the communication gave the police permission to listen to the discussion on a pre-existing telephone extension. The Court, in an opinion by Chief Justice Warren, concluded that there was no prohibited "interception" under section 605 of the Federal Communications Act. Recourse was not made to the "trespass" doctrine followed in On Lee. Instead, the Court focused upon the individual's expectation of privacy, or its lack, when placing a telephone call.¹³

¶10 The "misplaced trust" rationale of Rathbun appeared again in 1963 in Lopez v. United States.¹⁴ Lopez was convicted of attempted bribery of an Internal Revenue agent

¹¹Id. at 753-54. The precise fact pattern of On Lee, surveillance of an indicted defendant, is no longer permissible under expanded concepts of the Sixth Amendment. Massiah v. United States, 377 U.S. 201 (1964); discussed infra, ¶21.

¹²355 U.S. 107 (1957).

¹³Id. at 111. Chief Justice Warren observed:

Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.

But see ¶38 infra, concerning the individual's expectations when using a party line.

¹⁴373 U.S. 427 (1963).

on the strength of a recording containing incriminating statements that he made to a federal agent. The Court reasoned that since the agent could testify concerning the appellant's statements, Lopez took the risk that his remarks would be reproduced, and whether the medium was the agent's memory or a mechanical recording was inconsequential.¹⁵

¶11 The legality of consensual surveillance remained a matter of only academic concern, so long as it was valid under either the "trespass" or "misplaced trust" rationale. It became, however, increasingly a practical concern for law enforcement as the Court moved away from the trespass rationale of Olmstead.¹⁶ Finally, in Katz v. United States,¹⁷ the Supreme Court overruled the Olmstead "trespass" doctrine and concluded that electronic surveillance without the consent of

¹⁵Id. at 439. The "misplaced trust" rationale was directly dealt with in Hoffa v. United States, 385 U.S. 293, 301-03 (1966) (an informant situation without electronic surveillance). The Court stated at 301-02:

What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area. . . .

* * * *

Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

¹⁶Berger v. New York, 388 U.S. 41 (1967), cast doubt on the validity of a warrantless wiretap, regardless of a trespass, although since an entry was involved in Berger, Olmstead survived until Katz, 389 U.S. 347 (1967).

¹⁷389 U.S. 347 (1967).

one of the parties was a "search and seizure" within the Fourth Amendment. In that case, federal agents attached an electronic listening and recording device to the outside of a public telephone booth. Prior to the interception, the agent obtained neither a warrant nor the consent of either of the parties to the conversation. The Court concluded that the surveillance violated the defendant's justified expectation of privacy.¹⁸

¶12 Although Katz did not involve consensual surveillance, its rejection of the Olmstead "trespass" doctrine made the validity of On Lee and Lopez uncertain. If they were seen as resting on the "trespass" doctrine, then consensual surveillance which violated an individual's reasonable expectation of privacy would be a search and seizure, requiring a warrant. If they were seen as resting on the "misplaced trust" rationale, then consensual surveillance would not be a search and seizure, and no warrant would be required.

¶13 This uncertainty was subsequently faced in United States v. White.¹⁹ In a plurality opinion,²⁰ Mr. Justice White concluded that Katz did not impose a warrant requirement where one of the parties to the conversation voluntarily consented to the monitoring of the communication by law

¹⁸ Id. at 353.

¹⁹ 401 U.S. 745 (1971).

²⁰ The plurality consisted of Chief Justice Burger and Justices White, Stewart, and Blackmun. Justice Black concurred on the grounds that the Fourth Amendment did not apply to any electronic eavesdropping and Justice Brennan concurred in the result only on the ground that Katz should not be given retroactive effect.

enforcement personnel. In White, a narcotics prosecution, the defendant sought to exclude the testimony of government agents who monitored a conversation between the defendant and a government informant equipped with a transmitting device. The informant could not be located and did not testify at the trial. The question presented to the Court was whether an individual could justifiably expect that, absent a warrant, his conversation would not be simultaneously transmitted to a third party. The defendant argued that under Katz he had a reasonable expectation of privacy in his conversations and that a warrant was required. The plurality rejected the defendant's argument, finding that the constitutional propriety of consensual surveillance did not rest on the "trespass" doctrine, but upon the "misplaced trust" rationale:

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. Hoffa v. United States, 385 U.S., at 300-03 If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

* * * *

. . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.²¹

²¹ 401 U.S. at 751-52.

The White plurality clearly rejected any distinction between recording and transmitting,²² and reaffirmed this aspect of On Lee in light of Katz.²³

C. Post-White Problems

¶14 Although White was decided by a plurality opinion, federal courts uniformly accept White and sustain consensual surveillance against constitutional challenges.²⁴ There are, however, several problems that arise in applying White.

1. The Problem of Consent

¶15 The validity of consensual surveillance depends on a

²²As a separate ground for reversal of the lower court decision, the Court (the plurality plus Justice Brennan) held that under Desist v. United States, 394 U.S. 244 (1969), the decision in Katz had only prospective application. The surveillance involved in White occurred several years prior to the Katz decision.

²³Justices Brennan, Douglas, Harlan, and Marshall deemed On Lee no longer to constitute "sound law." 401 U.S. at 755.

²⁴United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973) (consensual wiretap); United States v. Santillo, 507 F.2d 629 (3d Cir.), cert. denied, 421 U.S. 968 (1975) (consensual wiretap); United States v. Dowdy, 479 F.2d 213, 229 (4th Cir.), cert. denied, 414 U.S. 823 (1973) (consensual recording of phone and personal conversations--a warrant obtained by the agents as a precautionary measure was seen by the court as unnecessary in light of White); Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973) (consensual wiretapping and bugging); United States v. Lippman, 492 F.2d 314, 318 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975) (consensual bugging); United States v. Quintana, 508 F.2d 867, 872 (7th Cir. 1975) (consensual wiretap); United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (consensual wiretap); Holmes v. Burr, 486 F.2d 55, 59-60 (9th Cir.), cert. denied, 414 U.S. 1116 (1973) (consensual wiretap--the court specifically stated that it was bound by the plurality decision of White); United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877 (1972) (consensual wiretap); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (consensual bugging).

valid consent. In each case, it must be shown that consent was given prior to the surveillance, that it was validly given, that the consenting party had the capacity to consent, and that the consent was voluntary.

¶16 Sections 2511(2)(c) and (d) of Title III require prior consent of a party to the communication.²⁵ This rule parallels the case law under section 605 of the Federal Communications Act.²⁶ In Weiss v. United States,²⁷ the Supreme Court read section 605 to require that consent be given prior to the government interception or divulgence for it to be valid.

¶17 The defendant carries the burden of showing that electronic surveillance of himself occurred. The government then carries the burden of persuasion to show that the evidence is free from illegal taint.²⁸ Thus, where a defendant challenges the consent to the surveillance, the government carries the burden of proving its validity. Nevertheless, in the absence of a consenting party's testimony, validity can be inferred from the surrounding circumstances. In United States v. Bonanno, where the consenting party was incompetent to testify at the time of trial, the court stated:

²⁵ 18 U.S.C.A. §§2511(2)(c) and (d) (1970). Retroactive authorization is not permitted. S. Rep. No. 1097, 90th Cong., 2nd Sess. 94 (1968).

²⁶ 47 U.S.C.A. §605 (1962), as amended (Supp. 1976).

²⁷ 308 U.S. 321, 330 (1939).

²⁸ Nardone v. United States, 308 U.S. 338, 341 (1939); Nolan v. United States, 423 F.2d 1031, 1041 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970).

[T]he extent of proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that needed to show consent to a physical search. . . . Hence, it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about.²⁹

The court inferred a valid consent from testimony by government agents that the consenting party was aware of their presence and purpose, yet he still engaged in the conversations.

¶18 The most difficult consent problem for the government is shown by United States v. Napier.³⁰ In Napier the defendant, a Miami policeman implicated in drug transactions, challenged the capacity of the government informer to consent. The informer was incompetent at the trial, and the defense argued that he was incompetent at the time of recording, pointing to his long history of mental illness. The Fifth Circuit held that consistent with its burden to prove consent, the government also had to prove capacity to consent.³¹ While real, the Napier problem is of limited applicability, since few consenting parties are incompetent.

¶19 The most common problem facing the government is to show that consent was given voluntarily. Most federal courts will not find that consent was involuntarily given unless there is some proof that the consenting party's ". . . will was overcome by threats or improper inducement amounting to coercion or

²⁹ 487 F.2d 654, 658 (2d Cir. 1973).

³⁰ 451 F.2d 552 (5th Cir. 1971).

³¹ Id. at 553.

duress."³² Promises or hopes of leniency,³³ immunity,³⁴ or the receipt by the consenting party of "special considerations" from the government³⁵ are all insufficient to vitiate voluntariness.

2. Fifth and Sixth Amendment Problems and the Issue of Entrapment

¶20 Most electronic surveillances are challenged on Fourth Amendment grounds, but Fifth and Sixth Amendment objections may also be raised.³⁶ The Fifth Amendment protection against self-incrimination, enunciated in Miranda v. Arizona,³⁷ prevents an individual's statements from being used against him, if they are obtained after his freedom of movement is restrained and he does not receive the Miranda warnings. Courts, however,

³²United States v. Silva, 449 F.2d 145, 146 (1st Cir. 1971), cert. denied, 405 U.S. 918 (1972).

³³Id.; United States v. Jones, 433 F.2d 1176, 1180 (D.C. Cir. 1970), cert. denied, 402 U.S. 950 (1971).

³⁴United States v. Osser, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973); United States v. Rich, 518 F.2d 980, 985 (8th Cir. 1975).

³⁵United States v. Franks, 511 F.2d 25, 31 (6th Cir.), cert. denied, 422 U.S. 1042 (1975) (informer received an "extremely nice apartment," a living allowance, the use of a new Cadillac, in addition to not being prosecuted).

³⁶See Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," Task Force Report: Organized Crime (1967), at 96-98, for a discussion of the various constitutional objections to electronic surveillance. Many courts simply reject out of hand Fifth and Sixth Amendment arguments, citing White as controlling. See, e.g., Stephan v. United States, 496 F.2d 527, 528 (6th Cir. 1974); United States v. Leonard, 363 F. Supp. 1348, 1350-51 (N.D. Ill. 1973).

³⁷384 U.S. 436 (1966).

do not extend these rules to defendants against whom recordings are introduced in evidence. They stress that the conversations do not occur under circumstances of custodial interrogation; they occur without deprivation of the individual's liberty.³⁸ The Fifth Circuit (other courts seem not to have found the issue to merit discussion) has refused to attach Fifth Amendment significance to the fact that the consenting party initiated the recorded conversation, rejecting an attempt to analogize the inquiries of the recording or transmitting party to custodial interrogation. The court emphasized the presence of a consenting party, and cited White.³⁹

¶21 The Sixth Amendment objection to electronic surveillance is an outgrowth of United States v. Massiah.⁴⁰ In Massiah, the fruits of an otherwise valid consensual electronic surveillance were suppressed because the defendant, Massiah, was under indictment at the time of the recording. To question him in the absence of his attorney was a denial of his right to counsel. The fact that the defendant was indicted was a signal that the trial process had begun, bringing the Sixth Amendment into play. The Ninth Circuit, in United States v. Keen,⁴¹ considered a situation where recordings were made

³⁸United States v. Bastone, 526 F.2d 971, 977-78 (7th Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4061 (May 19, 1976); Koran v. United States, 469 F.2d 1071, 1072 (5th Cir. 1972).

³⁹United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877 (1972).

⁴⁰377 U.S. 201 (1964).

⁴¹508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975).

prior to any indictment. Relying on Miranda, the court found that where the defendant believed he was talking over the phone only to an acquaintance and not to the police, there was no custodial interrogation, and no "possibility of moral or physical coercion." Consequently, there was no deprivation of his Sixth Amendment right to counsel.⁴²

¶22 Another issue which can arise in a consensual surveillance case is entrapment. The defendant may argue that he originally lacked the intent to commit the criminal act, but that the actions of a government agent directly resulted in the necessary state of mind and criminal conduct.⁴³ The government action in a consensual surveillance situation would be the initiation by the recording or transmitting party of conversations which ultimately dealt with criminal conduct. The principal element of the entrapment defense is the defendant's lack of pre-disposition to commit the crime.⁴⁴ Thus, it is doubtful that merely initiating conversations with an individual, who subsequently makes incriminating statements, would be seen as influencing that individual to such an extent as to constitute

⁴²Id. at 989. See also Wallace v. United States, 412 F.2d 1097, 1100-01 (D.C. Cir. 1969), cert. denied, 402 U.S. 943 (1971) (surveillance occurred after the defendant and his attorney had met with the prosecutor to discuss possible cooperation of the defendant).

⁴³In at least the Ninth Circuit, the accused may now assert the defense of entrapment without actually admitting guilt. Such an admission is generally required to use the defense. United States v. Demma, 523 F.2d 981 (9th Cir. 1975).

⁴⁴United States v. Russell, 411 U.S. 423, 433 (1973); Hampton v. United States, 19 Crim. L. Rptr. 3039 (8th Cir. April 28, 1976).

entrapment.⁴⁵ To defeat an entrapment defense, law enforcement agents should always caution the consenting party not to suggest a criminal act.⁴⁶

D. The Limits of White

¶23 The White rationale has only been extended cautiously. The Second Circuit utilized it to permit the warrantless surveillance of a conversation, where neither party previously consented to the surveillance. In United States v. Pui Kan Lam,⁴⁷ the tenants of an apartment which was previously occupied by heroin importers complained to authorities about suspicious characters who unsuccessfully sought entry to the apartment. With the permission of the current tenants, government agents bugged the room. The two defendants were eventually admitted into the apartment by a government agent posing as a superintendent's helper. An incriminating conversation was recorded and subsequently introduced into evidence at the defendants' trial. Although the agents obtained neither a warrant nor consent, the court concluded that the defendants' Fourth Amendment rights against unreasonable searches and seizures were not violated. Citing White, the court found that the subjective expectation of privacy, which was allegedly

⁴⁵United States v. Greenberg, 445 F.2d 1158, 1161-62 (2d Cir. 1971).

⁴⁶If the defendant introduces some evidence of government initiation of the crime, then the burden is on the government to show beyond a reasonable doubt the defendant's original propensity to commit the crime. United States v. Warren, 453 F.2d 738, 744 (2d Cir.), cert. denied, 406 U.S. 944 (1972).

⁴⁷483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974).

violated by the government surveillance, was not "justifiable." The interception occurred in an apartment of complete strangers that was entered under suspicious circumstances.⁴⁸ Aside from the unusual nature of the situation, the court emphasized that another ground for dispensing with the warrant requirement was the lack of sufficient time to obtain a court order.⁴⁹ Thus, Pui Kan Lam may be limited to its unusual factual circumstances.

¶24 The First Circuit, however, took a more limited view of White in United States v. Padilla.⁵⁰ Federal agents installed an electronic listening device in a hotel room without prior judicial approval, but before the defendant occupied it. The bug was activated only when government agents entered the room. The government argued that such selective monitoring was comparable to the situation where agents actually concealed the recording or transmitting devices on their persons. The court, in rejecting the argument, expressed a fear that abuse might result if electronic devices were installed for long periods of time, even though for limited purposes, without prior judicial approval.⁵¹ It refused to extend White to allow such a procedure. The court observed:

⁴⁸Id. at 1206.

⁴⁹Id. at 1206-07.

⁵⁰520 F.2d 526 (1st Cir. 1975).

⁵¹See Lanza v. New York, 370 U.S. 139, 143 (1962) where the Court stated, in dicta, that a visitors room of a public jail was not a constitutionally protected area affording protection from surreptitious electronic surveillance, while a hotel room could be such an area.

No case has been presented to us which would allow the government to engage in unlawful electronic surveillance and profit from the fruits of that surveillance on the ground that had a different means been employed, the recordings would have been admissible. We reject the invitation so to extend the holding of White.⁵²

E. Miscellaneous Federal Regulations

¶25 Federal Communications Commission Regulation No. 132⁵³ states that a private citizen can record a telephone conversation only if his recorder-connector equipment contains a tone-warning device which produces a distinctive beep tone every fifteen seconds. This F.C.C. order does not, however, make a conversation recorded without a tone-warning device inadmissible in certain criminal prosecutions.⁵⁴ The purposes of sections 2511 (2)(c) and 2518(8)(a) of Title III⁵⁵ (requiring, if possible, the recording of intercepted communications) are seen as over-

⁵²520 F.2d 526, 528. It can be argued persuasively that Padilla was wrongly decided; the point can at least be made that the court ignored the substantial danger that the wire may be uncovered when informants or agents are wired. Wiring the room obviates this danger. As long as the bug is installed without an unlawful entry (i.e., before the guest rented the room), and it is activated only during conversation that could lawfully be recorded by "body bugs," there should be no objection to this technique. The court's fear of the universal installation of bugs to be ready in case surveillance might be useful should be grounds for suppression when the conduct is engaged in; there is no reason to suppress logically relevant evidence until that time.

⁵³Noted in Alonzo v. State, 283 Ala. 607, 619, 219 So.2d 858, 870 (1969).

⁵⁴Battaglia v. United States, 349 F.2d 556, 559-60 (9th Cir.), cert. denied, 382 U.S. 955 (1965).

⁵⁵18 U.S.C.A. §§2511(2)(c) and 2518(8)(a) (1970).

riding the purposes of the F.C.C. order, which otherwise would negate the congressional intent.⁵⁶

¶26 Section 301 of the Federal Communications Act⁵⁷ requires a license for the use of a radio transmitter. Courts, however, hold that evidence obtained by an unlicensed transmitter is admissible in court. The purpose of the licensing law is to prevent interference with radio communications. No right of the defendant is violated by the lack of a license; consequently, there is no policy reason for rendering the evidence inadmissible.⁵⁸

¶27 Finally, Federal Communication Commission Regulation No. 15262 prohibits the use between private parties of a radio device for surveillance without the consent of all the parties; law enforcement authorities, however, acting "under law authority" are exempted.⁵⁹

III. State Law

¶28 Section 2515 of Title III⁶⁰ prohibits the use of the contents of an intercepted communication as evidence in any court or other authority of the United States, any state, or

⁵⁶United States v. Buckhanon, 374 F. Supp. 611 (D.Minn. 1973).

⁵⁷47 U.S.C.A. §301 (1962).

⁵⁸See e.g., Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962).

⁵⁹47 C.F.R. §15.11 (March 4, 1966).

⁶⁰18 U.S.C.A. §2515 (1970).

political subdivision, if the disclosure of that information would be in violation of Title III.

¶29 States, although they must at least comply with federal standards on electronic surveillance, are free to pass stricter legislation. The Senate Report accompanying Title III states that:

The State statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.⁶¹

¶30 Where states do enact more restrictive legislation, such laws do not affect the admissibility of evidence in federal prosecutions.⁶² In considering this issue, the Third Circuit recently said:

So long as the information was lawfully obtained under federal law and met federal standards of reasonableness, it is admissible in federal court despite a violation of state law.⁶³

It is probably more accurate to point out that state electronic surveillance laws are inapplicable to federal electronic surveillance efforts. The Second Circuit, in United States v. Pardo-Bolland,⁶⁴ interpreted New York statutes then in force not to apply to federal law enforcement officers. The court observed:

⁶¹S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968).

⁶²United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

⁶³United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976).

⁶⁴348 F.2d 316 (2d Cir.), cert. denied, 382 U.S. 944 (1965).

[I]t seems most likely that the policing of federal officers was intended to be left to federal statute and the supervision of federal courts. . . .⁶⁵

Some states, by statute, explicitly exclude officers of federal investigative and law enforcement agencies from the coverage of their wiretap laws.⁶⁶

A. New York

¶31 New York follows federal law in permitting electronic surveillance where one of the participating parties voluntarily consents. Instead of providing an explicit statutory exception for consensual surveillance, however, the New York legislature defines the terms "wiretapping," "mechanical overhearing of a conversation," and "intercepted communication," and excludes consensual surveillance:

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. . . .;

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment;

* * * *

3. "Intercepted communication" means (a) a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by

⁶⁵Id. at 323.

⁶⁶Md. Ann. Code art. 27, §585 (1976), discussed in Wallace v. United States, 412 F.2d 1097, 1100 (D.C. Cir. 1969), cert. denied, 402 U.S. 943 (1971); Mass. Gen. Laws Ann. ch. 272, §99 (D)(1)(c) (1968).

means of any instrument, device or equipment, or (b) a conversation or discussion which was intentionally overheard or recorded without the consent of at least one party thereto, by a person, not present thereat, by means of any instrument, device, or equipment.⁶⁷

¶32 The most recent New York Court of Appeals case considering the issue of consensual surveillance was decided in 1969, prior to United States v. White. Nevertheless, in People v. Gibson,⁶⁸ the Court of Appeals concluded that the recording of incriminating conversations, made by the defendant to a police informer equipped with a concealed radio device, was not a violation of the defendant's Fourth Amendment rights. The court relied upon On Lee and Lopez, and distinguished Katz as not dealing with a situation where there was voluntary disclosure by a participating party.⁶⁹ Subsequent New York court decisions cite both White and Gibson for the proposition that Fourth Amendment guarantees are not infringed where one party voluntarily consents to the electronic surveillance of a conversation.⁷⁰

B. Massachusetts

¶33 The Massachusetts statute governing consensual electronic

⁶⁷ N.Y. Crim. Pro. Law §700.05 (McKinney 1971); this section defines "wiretapping" and "mechanical overhearing of a conversation" as those terms are defined in N.Y. Penal Law §250.00 (McKinney 1967).

⁶⁸ 23 N.Y.2d 618, 298 N.Y.S.2d 496, 246 N.E.2d 349 (1969), cert. denied, 402 U.S. 951 (1971).

⁶⁹ Id. at 620, 298 N.Y.S.2d at 498, 246 N.E.2d at 351.

⁷⁰ See, e.g., People v. Brannaka, 46 App. Div. 2d 929, 361 N.Y.S.2d 434 (3d Dept. 1974); People v. Holman, 78 Misc.2d 613, 356 N.Y.S.2d 958 (Sup. Ct. New York County 1974); People v. Neulist, 72 Misc.2d 140, 162-63, 338 N.Y.S.2d 794, 817 (Sup. Ct. Nassau County 1972), rev'd on other grounds, 43 App. Div.2d 150, 350 N.Y.S.2d 178 (2d Dept. 1973).

surveillance is more restrictive than its federal counterpart. Consensual surveillance is authorized only in the investigation of certain specified offenses in connection with organized crime:

. . . it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.⁷¹

The class of "designated offenses" is broad enough, however, not to hinder the use of consensual surveillance in connection with organized crime.⁷²

⁷¹Mass. Gen. Laws Ann. ch. 272, §99(B)(4)(1968); "investigative or law enforcement officer" is defined in §99(B)(8):

The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

⁷²Mass. Gen. Laws Ann. ch. 272, §99(B)(7)(1975):

The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

"Organized crime" is defined in the preamble as "consist[ing] of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services." §99(A).

The Supreme Judicial Court of Massachusetts recently considered the whole Massachusetts wiretap act (ch. 272, §99), though not specifically the aspects dealing with consensual surveillance, and found it to comply with state and federal constitutional and statutory requirements. Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819 (1975).

¶34 The leading Massachusetts decision to address the legality of consensual surveillance is the 1968 case of Commonwealth v. Douglas.⁷³ Police placed a tape recorder on an extortion victim's telephone with his consent, but without prior judicial approval. The court found this to be acceptable under the relevant statutory and constitutional provisions, observing that such procedures were necessary to combat the "underworld."⁷⁴ The Court noted that:

A defendant who speaks incriminating words over the telephone runs the risk that the person with whom he talks may be an informer (see Hoffa v. United States, 385 U.S. 293, 302-03) or that the conversation (as in the Rathbun case) may be overheard on an extension telephone. In the interests of sound law enforcement, in these days when telephone talks often supplant face to face encounters, he also should be held to take the risk that his words may be recorded by his listener. See Lopez v. United States. . . .⁷⁵

The Court distinguished Berger and Katz as not dealing with situations where consent was given.

C. New Jersey

¶35 New Jersey recently amended its Wiretapping and Electronic Surveillance Control Act, making it more restrictive than Title III. Consensual electronic surveillance is permitted without prior approval where an investigative or law enforcement officer is a party to the communication to be intercepted, or where another officer who is a party to the communication requests or

⁷³ 354 Mass. 212, 236 N.E.2d 865 (1968), cert. denied, 394 U.S. 960 (1969).

⁷⁴ Id. at 222-23, 236 N.E.2d at 872.

⁷⁵ Id. at 221-22, 236 N.E.2d at 871-72.

requires such interception.⁷⁶ Electronic surveillance is also permitted where a party to the communication gives his prior consent, provided there is prior approval by the Attorney General or his designee, or a county prosecutor within his authority, who determines that there exists "a reasonable suspicion that evidence of criminal conduct will be derived from such interception."⁷⁷

¶36 A recent New Jersey Superior Court case, State v. McCartin,⁷⁸ considered a situation where a malfunctioning private telephone was receiving a conversation between two unknown individuals concerning gambling activities. The owner summoned the police who, with the owner's permission, recorded the telephone con-

76 It shall not be unlawful under this act for:
. . . .

b. Any investigative or law enforcement officer to intercept a wire or oral communication, where such officer is a party to the communication or where another officer who is a party to the communication requests or requires him to make such interception.

N.J. Stat. Ann. §2A:156A-4(b) (1975).

77 It shall not be unlawful under this act for:
. . . .

c. Any investigative or law enforcement officer or any person acting at the direction of an investigative or law enforcement officer to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the Attorney General or his designee or a county prosecutor within his authority determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. . . .

N.Y. Stat. Ann. §2A:156A-4(c) (1975).

⁷⁸135 N.J. Super. 81, 342 A.2d 591 (1975).

versations. The court denied a motion to suppress the recordings, alleged to be inadmissible under Title III and under New Jersey law. The court found those laws to be directed against willful interceptions, while in this case the interception was inadvertent.⁷⁹ Consequently, the recordings were admissible.

¶37 In reaching its decision, the court carefully distinguished the United States Supreme Court case of Lee v. Florida.⁸⁰ In that case, the police installed a telephone directly to the defendant's party line, specifically for the purpose of recording the defendant's conversations. Incriminating conversations were recorded and introduced into evidence. The Supreme Court found this to be a violation of Section 605 of the Federal Communications Act.⁸¹ There was neither consent of any parties to the telephone conversation, nor a regularly used telephone. Unlike Rathbun, the phone in McCartin was installed solely for the purpose of surveillance.⁸² The New Jersey court distinguished McCartin from Lee as not being a case of a deliberate interception.⁸³

D. Other States

¶38 Other states, either legislatively or judicially, have not

⁷⁹Id. at 87-88, 342 A.2d at 595.

⁸⁰392 U.S. 378 (1968).

⁸¹47 U.S.C.A. §605 (1962), as amended (Supp. 1976).

⁸²392 U.S. at 381-82.

⁸³135 N.J. Super. at 86, 342 A.2d at 594.

reached terribly different conclusions in the consensual surveillance area. What follows is a consideration of several of the more important statutes and decisions which depart from the national pattern.

¶39 The Michigan Supreme Court was faced with a situation almost indential to that in White in People v. Beavers.⁸⁴ In Beavers, the defendant engaged in a drug sale with a police informer, who simultaneously transmitted the conversation to police officers a short distance away. The court held inadmissible the testimony of the police officers pertaining to the overheard conversations, relying on the "search and seizure" clause of the Michigan Constitution.⁸⁵ While finding that a party's recording of a conversation was not a search and seizure the court, unconvinced by White, found that the transmitting of the same conversation was a search and seizure. Consequently, a search warrant is required in Michigan for the testimony or recordings of the monitoring agent to be admissible.

¶40 The Wisconsin Supreme Court adopted a unique analysis of the section of the Wisconsin statute allowing consensual surveillance,⁸⁶ the language of which is identical to §2511(2)(c) of Title III.⁸⁷ Both sections provide that electronic sur-

⁸⁴393 Mich. 554, 227 N.W.2d 511 (1975), cert. denied, 44 U.S. L.W. 3206 (Oct. 7, 1975).

⁸⁵Mich. Const. Art. I, §11.

⁸⁶Wis. Stat. Ann. §968.31(2)(b) (1971).

⁸⁷18 U.S.C.A. §2511(2)(c) (1970).

veillance is "not unlawful" where a person acting under color of law is a party to the communication. In State ex rel. Arnold v. County Court,⁸⁸ the petitioner's telephone conversations with a consenting informant were intercepted and recorded. While agreeing that such interception was not unlawful under the Wisconsin statute, the court held that the conversations were not admissible as evidence. The court defined "not unlawful" as protecting the police from the civil and criminal penalties of the act, but refused to apply the exception to permit disclosure of the recordings in court.⁸⁹

¶41 Pennsylvania and Washington have restrictive statutes controlling consensual surveillance. In both states, the consent of all parties to the communication is required before electronic surveillance can be used.⁹⁰ Both states do allow limited exceptions. In Pennsylvania, law enforcement officers acting pursuant to a court order, may intercept a conversation when the personal safety of the officers is in jeopardy. The officers may not record any of the intercepted conversations, and any such recordings are inadmissible as

⁸⁸ 51 Wis.2d 434, 187 N.W.2d 354 (1971).

⁸⁹ Id. at 442-43, 187 N.W.2d at 358-59. The court felt that such conversations were privileged unless a warrant is obtained.

⁹⁰ Wash. Rev. Code Ann. §9.73.030(1) (Supp. 1976); Pa. Stat. Ann. tit.18, §5702 (1973), as construed in Commonwealth v. Papszycki, 442 Pa. 234, 238-39, 275 A.2d 28, 30 (1971). Pa. Stat. Ann. tit. 18, §5701 (Supp. 1976) was amended in 1974, adding a definition of "eavesdropping," and defining it to be without the knowledge of the person whose voice is being monitored or recorded. The 1974 amendments, adding the above definition and §5705, were intended to broaden the scope of the Pennsylvania statute to include "eavesdropping" as well as wiretapping. The statute, as in force prior to the amendments, was construed to apply only to wiretapping. Commonwealth v. Donnelly, 233 Pa. Super. 396, 336 A.2d 632, 639 (1975).

evidence.⁹¹ Washington allows interceptions where a court order is issued, but only in certain cases of grave danger.⁹² The police may record incoming phone calls to police and fire stations, without the consent of the caller, but only for the purpose of verifying the accuracy of emergency calls.⁹³

¶42 Illinois recently amended its statute controlling consensual surveillance. Previously, law enforcement officers could intercept and record conversations where there was one consenting party. As of July 1, 1976, the new Illinois statute requires either the consent of all parties to the conversation, or the consent of one party and prior judicial authorization.⁹⁴ The requirements for judicial authorization are closely analogous to those required for the issuing of a federal order permitting non-consensual surveillance under Title III.⁹⁵ There is a provision for "emergency situations," which allows interception without prior judicial authorization where there is insufficient time to obtain judicial approval, or there is need to protect a law enforcement officer. The officer must reasonably believe that an order permitting the interception could have been issued had there been a prior hearing.⁹⁶

⁹¹ Pa. Stat. Ann. tit. 18, §5705(c)(3) (Supp. 1976).

⁹² Where national security or human life is endangered, or arson or a riot is about to be committed. Wash. Rev. Code Ann. §9.73.040 (Supp. 1976).

⁹³ Wash. Rev. Code Ann. §9.73.090(1) (Supp. 1976).

⁹⁴ Ill. Rev. Stat. ch. 38, §14-2 (Supp. 1976).

⁹⁵ Ill. Rev. Stat. ch. 38, §108A (Supp. 1976).

⁹⁶ Ill. Rev. Stat. ch. 38, §108A-6 (Supp. 1976).

Appendix

Electronic Surveillance, Report of the National Commission
for the Review of Federal and State Laws Relating to Wire-
tapping and Electronic Surveillance, 11-12, 113-17 (foot-
notes omitted).

B. EFFECTIVENESS OF CONSENSUAL ELECTRONIC SURVEILLANCE IN CRIMINAL INVESTIGATIONS

1. The Commission finds that:

Consensual electronic surveillance by law enforcement authorities is especially vital for the investigation of certain criminal activities, particularly official corruption, extortion, and loan-sharking. It also serves to protect police officers, informants, and complainants, or whoever is the consenting participant to the conversation.

Court authorization for such surveillance is unnecessary for the protection of privacy because it is not a "search" within the meaning of the Fourth Amendment of the Constitution, i.e., it serves not to intercept conversations, but merely to corroborate them, thereby improving the accuracy of evidence for use in court.

Further, court authorization would be impractical because many "consensuals" are done under circumstances requiring immediate action.

In some cases, inadequate record keeping, not the absence of court authorization, has provided the opportunity for misuse and theft of electronic surveillance equipment.

Recent reports by the Attorney General indicate a sharp increase in the number of consensual electronic surveillances conducted by Federal agents. Conversely, the annual report of the Administrative Office of the United States Courts indicates a trend toward declining use of Title III, non-consensual surveillance.

[A substantial minority of the Commission believes that these trends raise the possibility that Federal law enforcement authorities may be shifting from court-authorized to consensual surveillances for the purpose of avoiding the legal safeguards inherent in Title III. This shift from court approved to unregulated consensual surveillance is alarming.]

Commentary

I. B. 1. The distinction between non-consensual electronic surveillance and one-party consensual electronic surveillance, as used by law enforcement, should be clearly understood. Consensual electronic surveillance is not a search for criminal conversations; its basic use is to corroborate such conversations and to protect the consenting participant. It is a vital investigative means when an undercover police officer has been able to penetrate a criminal conspiracy, or when a cooperative citizen or informant wishes to expose criminality in which he has become

involved. For example, if a citizen reports that a bribe has been demanded of him, or an informant reports that he is buying narcotics from a particular source, recording his conversations with the suspect is the best and most certain means of proving exactly what was said. Further, insofar as an undercover police officer or an informant must deal with dangerous suspects, allowing him to transmit his conversations with them to nearby officers will protect him. We have taken testimony on the harmful effects on law enforcement (especially in corruption investigations) of Pennsylvania's recent legislation which bars the use of court-authorized consensual electronic surveillance recordings as evidence, even if the recording contained the only evidence of the identity of the murderer of a law enforcement officer who was wearing the recorder at the time of his death.

Some critics propose that a court order be required for police use of consensual electronic surveillance. This is impractical. In many situations, criminal conspirators move quickly; there is no time to obtain a court order for the agent or informant who must promptly consummate a bribe or a narcotics sale or any other criminal transaction. Moreover, the evidence to support many consensual surveillances cannot meet the probable cause requirements of a court order. The very purpose of the recording, in these cases, is to corroborate the story of a person accusing a respectable public official of a bribe attempt, or to corroborate a disreputable narcotic addict in his claims as to who is selling him dope.

Recording incoming police emergency calls is also widely and appropriately practiced. Yet it is doubtful that it is a practice that could be successfully meshed with a court-order system.

2. The Commission recommends that:

To prevent loss or misuse of consensual electronic-surveillance equipment, law enforcement authorities should subject such equipment to careful administrative controls, such as check-out—check-in records, authorizing officer signatures, and inventories reflecting the location and use of equipment. Title III should not be amended to make a court order a pre-requisite to the use of consensual electronic equipment by law enforcement agents in criminal investigations, but Congress should examine the increasing use of consensual electronic surveillance by Federal law enforcement authorities to determine whether legislative safeguards should be provided.

[A substantial minority of the Commission opposes all of this recommendation except the last clause of the last sentence, starting with "Congress should ..."]

B. SURVEILLANCE WITH THE CONSENT OF A PARTY TO THE CONVERSATION

Title III expressly excludes from its coverage surveillance by private citizens and public officers where one of the parties to the conversation has consented to the overhearing. Section 2511(2)(c) allows persons acting under color of law to participate in such consensual interception without restriction. Private citizens can use consensual surveillance under § 2511(2)(d), with the proviso that such surveillance not be used "for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act."

Prior to enactment of Title III, the issue of consensual surveillance had been before the Supreme Court on a number of occasions. In *Rathbun v. United States*, the Court held that it was not improper for a law enforcement officer to listen to a telephone conversation on an extension line with the consent of one party. In *On Lee v. United States*, transmission by a wired informant was upheld, as was recording by an Internal Revenue Service agent in *Lopez v. United States*.

Since the enactment of Title III, the issue of whether consensual recording could be conducted by law enforcement officers without a warrant has been before the Supreme Court in *United States v. White*. In a plurality decision, with four justices dissenting, the Supreme Court reversed a lower court's ruling that a court order should have been obtained prior to the consensual overhearing. Justice Black, who believed that electronic surveillance did not constitute a search in Fourth Amendment terms, provided the fifth vote for the majority.

The legality of consensual surveillance by law enforcement officers as authorized by § 2511(2)(c) was not before the Supreme Court in *White*, because the overhearing occurred before enactment of Title III. Nonetheless, it is clear that the effect of *White*, coupled with *Rathbun*, *On Lee*, and *Lopez*, which have never been overruled, is to apply the imprimatur of constitutionality to consensual surveillance without a prior court order.

Despite the generally accepted position that warrantless consensual surveillance by officers and private citizens is constitutional, the issues involved were vigorously debated during the Commission's hearings. One of the recurrent questions addressed by the Commissioners to witnesses was whether the Commission should recommend legislative enactment of a warrant requirement or other controls over either public or private consensual eavesdropping. The Commission developed considerable information about the purpose and amount of such surveillance, the ways in which it is used, and the potential effects of various controls.

1. The Purposes, Extent, and Impact of Consensual Surveillance

Consensual surveillance serves a variety of law enforcement purposes. This variety contributes to the high rate of use in many jurisdictions, and it is not surprising that such an easy to use, versatile, and effective device is popular. Extensive use of consensual surveillance, however, may create increased risks to conversational privacy.

In consensual surveillance, the consenting party is often an informant of somewhat dubious character. Quite often the informant's consent to interception is obtained to establish his veracity and credibility, which might otherwise be impossible. Wiring the informant is thus related to establishing sufficient probable cause, once his credibility is established, for a surveillance order or an arrest or search warrant. As one prosecutor stated, this is frequently the "first step" in an investigation. Also, when informants' conversations are overheard or recorded, they themselves are kept honest, later impeachment becomes impossible, and informants' covers can be preserved. Furthermore, by recording an informant's conversation, the government obtains a form of insurance against later recantation.

As a result of consensual surveillance, officers generally believe, the best possible evidence is acquired, and no better means of corroborating an informant's information or a witness's testimony is available. This is particularly important in corruption cases and similar situations involving the word of one person against another.

Furthermore, wiring a person who is alleging official impropriety can benefit the official involved. Not infrequently, persons making such charges withdraw them when asked to be wired. In such circumstances, the official is protected, and it has been suggested that elimination of consensual surveillance would adversely affect innocent people and potential defendants as much as it would harm law enforcement. In any event, where consensual surveillance is not available, satisfactory resolution of corruption allegations may be difficult, if not impossible.

Another very important use of consensual surveillance is to protect the agent or informant. Particularly in narcotics cases, where acts of violence against agents have increased substantially in recent years, wiring the officer can add a measure of protection not otherwise available. On the other hand, if the officer is discovered wearing the device, he is likely to be more endangered. Where such danger is anticipated, bugging the room or area where the conversation will take place is a better solution.

Consensual surveillance gives officers mobility and flexibility. Not only can immediate protective action be taken if the officer is assaulted, but raids and

related activities can be more efficiently coordinated. Finally, consensual surveillance can also play an important part in gathering intelligence.

Consensual surveillance has, however, some inherent limitations. Technical problems can reduce the range and audibility of devices, particularly in areas with large buildings. One critic of consensual surveillance doubted whether a consent recording created under adverse conditions was in fact more accurate than the individual's memory. Additionally, law enforcement officers indicated that informants are not always told the truth or the complete facts. The most damaging conversations sometimes occur after the informant leaves. Not infrequently, informants are used in a counterintelligence role by being given information that requires a police response, which in turn discloses the informant's role.

Despite these limitations, and in view of the diversity of purposes, consensual surveillance is a frequently used tactic. It is "a daily tool, as indispensable as the cop on the beat." Figures supplied by the Justice Department show that consensual surveillance by Federal officers is increasing.

Furthermore, consensual surveillance substantially exceeds the use of court-ordered electronic surveillance. The Federal government reported that 6,698 telephone and nontelephone (bugs) consensual surveillances had been conducted from 1969-1974. During the same period, 957 court orders authorized Title III electronic surveillance by Federal officers. In only one jurisdiction with substantial surveillance activity does a reverse ratio appear.

Attorney General Edward Levi gave three reasons for the increase in Federal consensual surveillance. The number of investigations suited to such eavesdropping technique has been increasing. Second, Federal agencies have adopted a policy of encouraging such use. Finally, technical factors, including improvement in the quality of equipment, have contributed to the increase.

At the State level, figures on the amount of such activity are generally unavailable, because many offices do not keep records. Recordkeeping is especially difficult where officers own or have unlimited access to consensual surveillance equipment. Where statistics are available, they show that the amount of State consensual surveillance is also increasing. In Miami, State officials used consensual surveillance on 25 occasions in 1973 and 124 times in 1974. There are indications that more State consensual surveillance would occur if the equipment was available to State officials.

In the opinion of one critic of electronic surveillance, Professor Herman Schwartz, consensual

surveillance "can be limited to very specific targets, and time periods, and does not strike at speech and association the way third-party surveillance does."

Another critic of electronic surveillance, Professor R. Kent Greenawalt, stated that the impact of consensual surveillance depends on three variables: who is overhearing or recording the conversation, what the purposes of the surveillance are, and what means and devices are used for making the interception. In Professor Greenawalt's view, recording cuts more deeply into the unaware speaker's expectations of privacy than merely allowing another person to overhear the conversation.

Other factors pertinent to the issue of the impact on privacy of consensual surveillance were suggested to the Commission. One was the degree to which a consenting party can control the direction and substance of the conversation. In one instance a consenting party "was in control of what would be said in this conversation and would naturally have steered it along the lines of probable cause." In such circumstances, control over the conversation's direction by the consenting party may be transformed into indirect control by the monitoring officers. In this case, according to the official, "we controlled exactly what she said [and] how she would say it."

Such control by either the consenting party directly or the officers indirectly appears to be quite unusual. In most situations, the consenting party is often involved in the criminal enterprise and reluctant to acknowledge his own role or make self-incriminating statements that could be overheard by the officers. Also, law enforcement officers can coerce unwilling persons to provide consent to overhearing, which can reduce the consenting party's willingness to steer the conversation or further implicate himself. On the other hand, it was suggested that the use of an informant after applying pressure "really becomes a search . . . and interrogation."

2. Regulation of the Use of Consensual Surveillance

Title III specifies no procedures for the use of consensual surveillance. This permits absolute discretion to individual jurisdictions and agencies to develop their own regulatory methods. At the Federal level, guidelines require prior upper-level authorization of nontelephone consensual surveillance and impose on agency heads a general duty to oversee consensual surveillance involving telephones. At the State level, the decision to use consensual surveillance is generally decentralized and often left to police officers.

A second method by which the use of consensual surveillance is controlled is through restrictions on

access to equipment. Practices in this regard vary, however, and often appear to be most loose in State jurisdictions that impose little or no centralized prosecutorial control over the decision to use consent techniques.

a. **The Decision to Use Consensual Surveillance:** Justice Department regulations require all Federal departments and agencies, except in emergencies, to obtain advance approval from the Assistant Attorney General in charge of the Criminal Division or the Deputy Assistant Attorney General before using non-telephone consensual surveillance without the consent of all parties to the conversation. To obtain such approval, the officer must submit a written request, stating his reasons for desiring authority to use nontelephonic consensual surveillance and identifying the persons to be overheard.

These regulations define an emergency as a threat to safety or imminent loss of essential evidence. Even in such circumstances, an informant cannot be wired, nor can other use be made of nontelephonic consensual surveillance, without prior approval of the head of the agency or department or his designee. Thereafter the Assistant Attorney General in charge of the Criminal Division must be promptly notified of the surveillance.

Justice Department regulations charge each department head with the responsibility for controlling telephonic consensual surveillance and assisting in adoption of agency guidelines on the subject. Agency chiefs are required to exercise responsibility over the inventory of surveillance devices used by their officers.

In the official opinion of the Justice Department, "present regulations . . . are both flexible enough to allow our investigative agents to use this technique effectively, and yet restrictive enough to assure that abuses do not occur." Requests for authorization to use "body bugs" have been turned down on the basis that the proposed use would be too intrusive upon privacy, the particular case was not sufficiently significant or had proceeded beyond the stage when such devices should be used, or the anticipated use was deemed inappropriate.

Approximately 50 percent of the occasions in which nontelephonic consensual surveillance is used fall within the emergency category. In such circumstances, prior upper-echelon review and approval does not occur. This statistic and fact were troublesome to one critic of the Justice Department's policies and use of consensual bugs. He suggested that the high percentage of emergency consensuials showed a lack of adequate control, rather than the need for warrantless consensual surveillance.

With reference to Federal agencies, however, emergency consensual surveillance involving bugs

must be approved at lower levels regardless of the circumstances. In the FBI this procedure requires a call from the field office to the Section Chief at Bureau headquarters, who in turn obtains approval from the Assistant Director. If there is no time to obtain further oral approval from the Justice Department, either FBI Director Clarence Kelley or the Assistant Director in Charge of Special Operations can give approval, pursuant to special authorization by the Department.

With reference to consensual surveillance involving the telephone, FBI regulations require written consent from the consenting party plus the approval of an Assistant United States Attorney or a Federal Strike Force attorney and the FBI Special Agent in Charge. An FBI field officer testified that the Bureau's regulations on consensual surveillance have not caused delay, and that if he could not reach one official in the hierarchy another would be available. He had no objections to centralized control over the decision to use consensual surveillance.

Procedures in the Drug Enforcement Administration are similar to those used in the FBI, though somewhat less elaborate. The DEA Manual requires an agent to obtain the approval of his Regional Director for emergency nontelephonic consensual surveillance. Approval even in nonemergency situations takes very few hours. When such approval is made it may authorize a series of uses in the particular case, which can last for up to 30 days without renewed approval being required. In at least some DEA regions, approval of the Regional Chief is also required for consensual surveillance involving use of a telephone.

The Treasury Department and its divisions have adopted guidelines based on the Justice Department regulations. For consensual surveillance using a telephone, Treasury Department guidelines require approval at the level of the Special Agent in Charge, who must also submit a report to the Department.

The New York City Joint Federal-State Strike Force follows Federal requirements for the consensual use of bugs. Some criticism of this procedure was made, with the suggestion that the United States Attorney should have full authority to authorize consensual surveillance.

At the State level practices vary substantially from jurisdiction to jurisdiction. In some, prosecutors are heavily involved in the decision to use consensual surveillance, while there is no such involvement in other areas. A formalized approach is taken in Essex County, New Jersey, where requests for consensual surveillance are processed in the same manner as requests for court-ordered surveillance. Both heads of the Joint City-County Strike Force must approve the

request, and the surveillance must be conducted by members of the force's Electronic Surveillance Unit. These controls are not deemed to be too burdensome, and this careful treatment of consensual surveillance extends to recordkeeping. Files similar to those for court-ordered surveillance are maintained for each consensual surveillance.

Prosecutorial control is mandated by statute in Illinois, where approval of the State's Attorney is required before any form of consensual surveillance can occur. In Cook County, which includes Chicago, the State's Attorney himself personally approves each request, a practice not followed in some of the other counties of the State. In Chicago, the investigating officer contacts a deputy of the Special Prosecutor's Bureau, who checks with the State's Attorney. The State's Attorney, whose approval can be given orally, is informed of the facts, persons involved, and other details. Among the criteria used by the deputy to go forward with a request are apparent probable cause, potential effectiveness of the consensual surveillance, and character of the person to be wired. If the officers appear to be making the request to avoid legwork, it may be rejected. The limit on authority to conduct consensual surveillance is three days.

Consensual surveillance practices vary among the offices in the New York City area, as they do for other kinds of electronic surveillance generally. In two counties, where the District Attorney's office is conducting an investigation, the Bureau Chief's approval is required, whereas, in a third county, any Assistant District Attorney can authorize consensual surveillance in such circumstances. In the office of the Special Corruption Prosecutor, approval must be obtained from the Assistant Special Prosecutor in charge of the investigation, the Bureau Chief, and the Chief Counsel.

Where investigations are being conducted by the police without prosecutorial involvement, the decision to use any form of consensual surveillance is viewed in New York City as a police decision. The only exception is in the office of the Special Corruption Prosecutor, where the Prosecutor participates in all investigations. Additionally, a recent amendment to the New Jersey Surveillance Statute requires prosecutorial control over the use of consensual surveillance.

Elsewhere, if there is no prosecutorial involvement, there nonetheless appears to be some internal control within the police department. In Miami, the decision to use consensual surveillance is made by an investigatory section supervisor and reviewed by a commanding officer. In Phoenix, there are no procedures for consensual telephone surveillance,

though consensual bugs must be approved by the head of the intelligence section as to necessity and choice of equipment. Prosecutorial control over the decision was believed by some State prosecutors to be quite important.

b. Control over Equipment: Federal practices with reference to control exercised over consensual surveillance equipment appear to be generally standardized. Each agency head is required to exercise control over such devices, and submit an annual inventory and statement of results obtained. Several agencies have adopted regulations concerning custody over all surveillance equipment.

The Drug Enforcement Administration keeps its equipment in its regional offices, with the exception of two KEL-SETS (popular name of a widely used body transmitter) kept in district offices. FBI equipment is signed out to an agent individually, and an inventory card is maintained on each item by equipment number.

At the State level, some prosecutor's offices and police departments have developed inventory and sign-out procedures to control equipment. In many jurisdictions, however, it seems that no prosecutorial control is exercised over police access to equipment.

3. The Effect of Requiring a Warrant or Imposing Title III Procedures on Consensual Surveillance

Although it is clear, under the cases beginning with *On Lee v. United States* and continuing through *United States v. White*, that no prior court order, much less an order as complex as a Title III order, is constitutionally required before consensual surveillance can occur, several witnesses recommended that some form of court-order procedure be adopted for consensual surveillance. Law enforcement personnel were almost unanimous in their opposition to this proposal.

This opposition was not diminished by the fact that court orders have been obtained in individual cases. Prior judicial approval has been solicited by a few prosecutors in the hope of avoiding later allegations of impropriety, as in the *Osborn* case, and in a recent investigation of Illinois State legislators. Occasional use of a court order by a prosecutor does not constitute endorsement of a warrant requirement, as noted by the testimony of United States Attorney James Thompson, who obtained an *ad hoc* order for an investigation involving Illinois legislators.

There is nearly unanimous opposition to the suggestion of imposing the procedures of § 2518, dealing with nonconsensual electronic surveillance, on con-

sensual surveillance. Even most defense attorneys who testified before the Commission stated that § 2518 procedures were not necessary in the consensual situation, and they proposed only an order process similar to that for a conventional warrant. Nor did the several academic proponents of a warrant requirement for consensual surveillance argue that the procedures of § 2518 would be essential or even desirable components of a consensual surveillance warrant. In sum, there were few supporters of any proposal to incorporate § 2518 procedures into consensual surveillance warrants.

Law enforcement opposition to requiring a conventional search warrant procedure is, however, almost as vigorous as it is to a procedure that would incorporate the detailed requirements of § 2518. The predictions about the consequences to law enforcement of a warrant requirement ranged from statements that a warrant requirement would end the use of consent devices, destroy their usefulness, and cause the loss of a very important tool, to concerns about reduced efficiency and a reduction in use by about 50 percent. One prosecutor asserted that law enforcement could live without court-ordered surveillance but not without consensual surveillance. Another stated that a warrant requirement would be an unwise impediment.

Several other reasons were given in support of opposition to imposing a warrant requirement on the use of consensual surveillance. Probable cause to support such a warrant, it was argued, would often be difficult if not impossible to obtain, particularly if unreliable informants were the only source of information to support an application to conduct consensual surveillance.

If consensual surveillance were to be used to obtain probable cause for a surveillance order or an arrest or search warrant, as is often the case, a warrant procedure, if it had a probable cause requirement, would be impossible to obtain. It would require officers to have probable cause to use a device for obtaining probable cause. In other situations, such as drug transactions, two meetings instead of one would be required: the first to acquire probable cause, the second to record the conversation. Questions were also raised about the time limit on a consensual surveillance order if it were based on a single showing of probable cause.

Furthermore, opponents of a warrant requirement asserted that such a requirement would limit the use of informants. One participant at the Law Enforcement Effectiveness Conference stated that an informant would run out of the office if he were told he would have to appear before a judge.

Proponents of a warrant requirement responded that probable cause would be relatively easy to establish, as when the device is to be worn to protect an agent or informant from danger or when a purchase of narcotics had been arranged. For the limited purpose of obtaining a consensual surveillance order, it was suggested, cause to wear the device could be established without verification of the informant's reliability, and a reduced showing, such as that approved for a stop and frisk by *Terry v. Ohio*, might be acceptable.

A second major objection to a warrant requirement was the time required to prepare a consensual surveillance application and order, find a judge, and have the order issued. Several law enforcement officers asserted that this process would cause significant and adverse delays in a situation in which officers needed to react quickly. One official suggested that one result of a warrant requirement would be that every situation calling for its use would be considered an emergency, and the requirement would be simply bypassed by using the emergency exception.

A third objection was that the administrative burdens would be "enormous," especially with reference to manpower needed to draft and process applications. As stated by representatives of one prosecutor's office, time spent on paperwork is time lost from investigation. Other prosecutors described a warrant requirement as impractical and unworkable.

Finally, one prosecutor argued that the interest advanced by the use of consensual surveillance is accuracy, rather than trespass. The proponents of a prior warrant for consensual surveillance, on the other hand, would define the interest protected as conversational privacy.

Some prosecutors' offices must already obtain prior warrants, and, although the use of consensual surveillance is infrequent, prosecutors in those jurisdictions did not appear to feel particularly hindered by this requirement. The police did not necessarily agree, however. Other prosecutors indicated that they would have no objection to a warrant requirement, and that they would not be "aghast at the thought of putting consensual devices under court order." Their views, however, were clearly in the minority. The strongest support for a warrant requirement came from defense attorneys and professors. The same defense attorneys indicated that a showing short of probable cause would be acceptable, and a broader range of cases in which such surveillance could be used was also endorsed. The main concern appeared to be to establish a procedure

whereby officers would be required to appear before a judge and describe the reasons, the proposed supervision, and the unavailability of alternatives.

Proponents of a warrant requirement also indicated a willingness to accept less formal procedures in the event of an emergency. Telephone approval was considered acceptable in such circumstances. The important consideration in an emergency was to make a record before using the device if a judge could not be found.

Pennsylvania officials described the adverse effects of a warrant requirement where the only basis for approval in the statute is danger to the officers. In one case, officers could not show potential danger and were frustrated in their efforts to apprehend participants in an interstate operation. If a warrant requirement were imposed, the statute should permit the investigation of a reasonably broad range of activities.

CONSENSUAL ELECTRONIC SURVEILLANCE: ADDENDA AND ERRATA

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Addenda and Errata

(Double underlining indicates corrected material)

¶20, Note 38: Correction: United States v. Bastone,
 cert. denied, 425 U.S. 973 (1976).

¶22, Note 44: Add:

There is a similar defense not based
on the suspect's predisposition to commit a crime.

In United States v. Russell 411 U.S. 423, 431-2

(1973) Justice Rehnquist stated:

...we may someday be presented with a
situation in which the conduct of law
enforcement agents is so outrageous
that due process principles would ab-
solutely bar the government from invoking
the judicial process to obtain a conviction...

In United States v. Ryan, 548 F.2d 782, 788-9 (1976)

the Ninth Circuit recognized, as it had to, the
existence of the "objective approach," but found
that the government's actions in particular case
in securing the agreement of the informant to engage
in one party consent surveillance did not sink
to the level described by Justice Rehnquist, where:

(1) informant was repeatedly told he would go to jail
for 10 years if he did not cooperate;

(2) informant was told not to get an attorney, or
he would no longer be useful as an informer;

(3) informant was told that his health would deteriorate
in jail;

(4) informant was promised that his friends would
be "kept out of it;" and

(5) informant was told he would be indicted if he

did not cooperate. The court noted:

...that the due process channel which Russell kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice.

The court also held that the informant's conduct had been "voluntarily" secured, 548 F.2d at 789-91.

¶30, Note 62: Add: United States v. Testa, 548 F.2d 847, 855-6 (9th Cir. 1977) (Reviewing prior Ninth Circuit decisions, and concluding that evidence is admissible in federal court if it is legal under federal law, even though its acquisition is inconsistent with a more restrictive state law).

Where state agents arrest a suspect pursuant to a legal federal wiretap (not authorized under the state's law), the DiRe doctrine (United States v. DiRe, 332 U.S. 581 (1948)) does not mandate suppression in federal court of evidence seized after the arrest. United States v. Hall, 543 F.2d 1279, 1232-3 (9th Cir. 1976).

For a discussion of DiRe, Turner (note 66 infra), and the interrelation of state and federal law on the question of search and seizure, see Doppelt and Karaczynski, "Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power," 62 Cornell L. Rev. 364 (1977).

¶31, Note 66: Add: Where Federal officers are not specifically exempted under Cal. Penal Code, §631 (West 1970), the Ninth Circuit has held that conversations are

nevertheless not to be excluded under 18 U.S.C.

§2514(4). (exclusion of privileged communications).

United States v. Feldman, 535 F.2d 1175 (9th Cir.

1976). See also United States v. Turner, 528 F.2d

143 (9th Cir. 1975), and Note 62 supra.

¶35, Note 77: Correction: N.J.

¶39, Note 84: Correction: cert. denied 423 U.S. 878
(1975).

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Crim. L. Rptr. examined through issue dated April 6, 1977.

Electronic Tracking Devices

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Summary

¶1 Recent decisions have held that the use of electronic tracking devices is subject to Fourth Amendment limitations. A convincing argument can be made, however, that the warrantless installation of such devices does not constitute an unreasonable search within the Fourth Amendment. A "bumper beeper" monitors only the physical location of a motor vehicle that is knowingly exposed to the public. Moreover, physical location of a motor vehicle is observable from public areas. Consequently no reasonable expectation of privacy exists against the use of such tracking devices.

¶2 An electronic tracking device is a means of visual, not aural, surveillance; it provides information concerning the physical characteristic of an individual (location); it does not intercept communications. A "bumper beeper" is a mechanical aid used to augment visual surveillance analogous to binoculars or flashlights. Because it is electronic, it should not be confused with wiretaps.

I. Introduction

¶3 Electronic tracking devices (ETD), commonly known as "bumper beepers," are small transmitters which emit periodic radio signals. Directional finders are used by police to determine the location of the object to which an ETD is attached. Law enforcement officials often use ETD's to enhance visual surveillance of a motor vehicle. The use of this investigatory technique dramatically reduces both the expense and the number of police officers needed to conduct effective visual surveillance of an automobile. Moreover, electronic tracking devices minimize the chance of detection by a suspect and render any evasive action ineffective.

¶4 Although visual surveillance of a motor vehicle on a public street does not constitute a search within the meaning of the Fourth Amendment,¹ two recent decisions hold that visual surveillance augmented by electronic tracking devices is subject to Fourth Amendment limitations. These materials will analyze the constitutionality of using ETD's without obtaining prior judicial approval in light of the Fourth Amendment. They conclude that such surveillance ought not be held subject to Fourth Amendment limitation.

¹See discussion in text, infra, at ¶32.

II. Scope of the Fourth Amendment

A. Reasonable Expectation of Privacy

¶5 The constitutional parameters of the Fourth Amendment's protection against unreasonable searches and seizures were reformulated by the Supreme Court in Katz v. United States.² In Katz, government agents attached an electronic listening device to the outside of a public telephone booth without obtaining prior judicial approval. Observing that the Fourth Amendment protects persons rather than places, the Court concluded that the warrantless eavesdropping violates an individual's justifiable expectation of privacy. It constitutes, therefore, a search and seizure within the Fourth Amendment.³ The majority explained that although a person was not entitled to Fourth Amendment protection if he knowingly exposed something to the public, whatever he sought to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁴ Two tests must be met if the courts are to find a reasonable expectation of privacy:

1. the person must have "exhibited an actual (subjective) expectation of privacy," and
 2. the expectation must be one that society is
-

²389 U.S. 347 (1967).

³Id. at 351, 353.

⁴Id. at 351-52.

willing to recognize as "reasonable."⁵

Since the reasonableness of an expectation of privacy will most likely influence the determination of whether the defendant actually entertained such an expectation, the prosecutor's primary task is to demonstrate that such an expectation of privacy was unreasonable in light of the surrounding circumstances.

¶6 Katz indicated, in dictum, that the "reasonableness" of an individual's expectation of privacy from police surveillance varies according to the type of surveillance involved. For example, while the defendant in Katz could have had a reasonable belief that his conversation would not be overheard after entering the glass-enclosed telephone booth, i.e., reasonable in an "auditory" sense, he could not have entertained a reasonable expectation of privacy in a "visual" sense, since he was as visible after entering the booth as he would have been if he had remained outside. The Court observed: "[W]hat he sought to exclude when he entered

⁵Id. at 361 (Harlan, J. concurring). The Katz notion of a "reasonable" expectation of privacy was subsequently reiterated by the Court in U.S. v. White, 401 U.S. 745 (1971), a plurality decision:

Our problem is not what the privacy expectations of particular defendants in particular situations may be. . . . Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable"-- what expectations, the Fourth Amendment will protect in absence of a warrant.

Id. at 751-52.

the booth was not the intruding eye--it was the uninvited car."⁶

¶7 Katz may be cited, therefore, as recognizing a valid constitutional distinction between audio and visual surveillance. This belief that certain types of visual surveillance do not constitute searches within the Fourth Amendment is embodied in the "plain view" and the "open fields" doctrines.

B. The "Plain View" and "Open Fields" Doctrines

¶8 Traditionally, courts hold that the observation of an object or activity in "plain view" does not constitute a search within the Fourth Amendment. In Harris v. United States,⁷ the Supreme Court observed: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." Consequently, a search within the Fourth Amendment is not conducted when police officers maintain visual surveillance of a motor vehicle on a public road.⁸

⁶ 389 U.S. at 352.

⁷ 390 U.S. 234, 236 (1968) (where routine search of an impounded automobile produced automobile registration which, revealing the car to be stolen, was admitted into evidence).

⁸ United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975), reh. granted, 525 F.2d 1364 (5th Cir. 1976); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975). See discussion in text, infra, ¶¶34-44.

¶9 Nevertheless, the "plain view" doctrine is subject to limitations. It is applicable only if the officer has a right to be in the position from which the object or activity is observed.⁹ Further, the evidence must be discovered inadvertently. Mr. Justice Stewart, in his plurality opinion in Coolidge v. New Hampshire, observed:

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.¹⁰ (emphasis added)

¶10 Courts also consistently hold under the "open fields" doctrine that the Fourth Amendment does not prohibit the warrantless search of an individual's property which lies beyond the dwelling house and immediately adjacent area. In Hester v. United States,¹¹

⁹ Harris v. United States, *supra*, note 7. See also Ker v. California, 374 U.S. 23, 42-43 (1963) (plurality opinion).

¹⁰ 403 U.S. 443, 466 (1971) (plurality opinion). See also United States v. Holsey, 414 F.2d 458 (10th Cir. 1969).

¹¹ 265 U.S. 57, 59 (1924).

Justice Holmes stated: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."

¶11 Nevertheless, the Court's decision in Katz was followed by uncertainty concerning the continued validity of the "open fields" doctrine. In light of Katz's rejection of the "physical trespass" rule and the possibility that a person might entertain a reasonable expectation of privacy concerning property situated outside the curtilage, commentators advocated the abandonment of the "open fields" doctrine.¹² Despite these suggestions, the Supreme Court reaffirmed the validity of the "open fields" doctrine.¹³ In Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., the Court concluded that conducting an air quality test without consent or warrant¹⁴ was not an unreasonable search and seizure. Although the inspection took place on the defendant's property, there was no indication the premises were closed to the public; the Court observed that any alleged invasion of privacy

¹²See 1 Anticau, Modern Constitutional Law §2:8(1969); Mascolo, "The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis," 20 Buf. L. Rev. 399, 409-13 (1971).

¹³416 U.S. 861, 865 (1974).

¹⁴At the time of the test, no state statute existed requiring a warrant. Colorado later adopted a search warrant requirement for the investigation of air pollution violations. 416 U.S. at 863.

was "abstract and theoretical."¹⁵ As the investigator only observed what was visible to anyone near the site, the "open field" exception to the Fourth Amendment was applied to uphold the inspector's conduct.¹⁶

C. Constitutionality of Various Surveillance Techniques Augmented by Mechanical Aids

1. Aural Amplification and Recording Devices

¶12 Katz, on the other hand, did not prohibit all forms of warrantless aural surveillance. In Katz, government agents used an electronic listening device to amplify the substance of a conversation that the defendant sought to keep private. Thus, the warrantless eavesdropping intruded upon an expectation of privacy that society was willing to recognize as "reasonable." In United

¹⁵Id. at 865.

¹⁶Cf. In Gedko v. Heer (18 Crim. L. Rptr. 2006 (W.D. Wisc. Aug. 27, 1975)), the court held that police eavesdropping and observation of marijuana, conducted on defendant's fenced "open field" bearing a no trespassing sign, violated his reasonable expectation of privacy. The court asserted that the effect of the Katz decision:

. . . was to make the area in which the intrusion took place one of several factors to be considered in evaluating the reasonableness of an expectation of privacy as to activities carried on in that place; that Hester no longer has any independent meaning except insofar as it indicated that "open fields" were not areas in which one traditionally could have expected privacy, so that the court might view more strictly an assertion of privacy in an open area; but that the final determination of the issue requires a close examination of all the facts.

Id. at 2006.

States v. Fisch,¹⁷ however, the Ninth Circuit held that conversations overheard without any electronic listening devices did not constitute an unreasonable search and seizure. In Fisch, police agents situated "just a few inches away from the crack below the door connecting. . . two adjoining [motel] rooms"¹⁸ listened to the defendant's incriminating conversation; they did not use any electronic equipment. The court concluded that even if the defendant actually sought to keep his conversations private, his subjective expectation was not one society was prepared to recognize as reasonable:

Listening at the door to conversations in the next room is not a neighborly or nice thing to do. It is not genteel. But so conceding we do not forget that we are dealing here with the "competitive enterprise of ferreting out crime."

.

. . . The type of information received from the aural surveillance is a factor to be considered in attempted delineation of the limits "of what society can accept given its interest in law enforcement," whether society can "reasonably be required to honor that expectation [of privacy] in all cases."

.

Upon balance, appraising the public and the private interests here involved, we are satisfied that the expectations of the defendants as to their privacy, even were such expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement. In sum, there has been no justifiable reliance, the expectation of privacy not being "one that society is prepared to recognize as reasonable."¹⁹

¹⁷474 F.2d 1071 (9th Cir. 1971), cert. denied, 412 U.S. 921 (1973).

¹⁸Id. at 1076.

¹⁹Id. at 1077-79 (footnotes omitted).

Thus, one of the factors that will determine the reasonableness of an expectation of privacy is the type of information obtained by the surveillance.²⁰

¶13 In United States v. Dionisio,²¹ the Supreme Court also recognized the permissibility of obtaining certain types of aural information with electronic recording equipment without prior judicial approval. In Dionisio, the defendant, when subpoenaed by a grand jury to make voice exemplars by reading a prepared transcript into a recording device, argued that such voice exemplars constituted a search and seizure violative of the Fourth Amendment. Rejecting the defendant's argument, the Supreme Court observed that the shape of an individual's voice, as opposed to the substantive content of his words, is one of the physical characteristics that is constantly exposed to the general public:

No person can have a reasonable expectation [of privacy] that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.²²

²⁰ See also U.S. v. McLeod, 493 F.2d 1186 (7th Cir. 1974).

²¹ 410 U.S. 1 (1972).

²² Id. at 14. See also Davis v. Mississippi, 394 U.S. 721, 727 (1969) (fingerprinting of an individual, i.e., a physical characteristic, did not involve the "probing into an individual's private life and thoughts that marks an interrogation or search").

¶14 An examination of several other cases dealing with various types of visual surveillance reveals that the use of a mechanical aid to augment visual surveillance of a suspect will generally not render otherwise lawful surveillance violative of the Fourth Amendment.

2. Binocular Observation

¶15 Generally, binocular observation by law enforcement officials does not constitute an unreasonable search within the Fourth Amendment. Although it has not directly addressed the issue, the Supreme Court indicated in dictum, at least, that warrantless binocular "searches" do not violate an individual's constitutional rights.

¶16 In United States v. Lee,²³ the Coast Guard discovered contraband on the defendant's boat by shining a searchlight upon its deck. Concluding that the use of a searchlight was not an unreasonable search, Mr. Justice Brandeis observed: "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution."²⁴

²³ 274 U.S. 559 (1927).

²⁴ Id. at 563. Mr. Justice Brandeis apparently relied upon the "open fields" doctrine to support his statement that binocular observation did not constitute an unreasonable search. The Supreme Court also recognized the constitutionality of binocular observation in On Lee v. United States, 343 U.S. 747 (1952). In On Lee, a narcotics prosecution, the defendant sought to suppress two incriminating conversations which were transmitted to federal agents by a government informant wired for

¶17 Despite the uncertainty caused by Katz,²⁵ lower federal courts in the post-Katz era continue to hold that binocular observation without judicial approval is not a violation of the Fourth Amendment. The position of the observer is of critical importance. Most courts considering the legality of binocular observation approach the issue by determining whether the surveillance would have been constitutionally proper had binoculars not been used. For example, in Fullbright v. United States,²⁶ the Tenth Circuit observed that any warrantless surveillance within the area immediately surrounding a dwelling house, i.e., the curtilage, constituted a per se intrusion upon the individual's reasonable expectation of privacy. But since the police were outside the curtilage, the mere use of high powered binoculars to

24 (continued)

sound. Concluding that the warrantless eavesdropping did not violate the defendant's Fourth Amendment rights, the Court, in dictum, compared the electronic surveillance to the use of binoculars:

The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. Id. at 754 (dictum).

²⁵The Supreme Court, in United States v. White, 401 U.S. 745 (1971), a plurality opinion, was unable to agree whether On Lee remained good law in light of the principles enunciated in Katz. This uncertainty, however, related to the validity of one party consent surveillance rather than to the dictum concerning binocular observation.

²⁶392 F.2d 432 (10th Cir.), cert. denied, 393 U.S. 830 (1968).

observe the defendant operating a still within the curtilage, did not render illegal the otherwise lawful observations:²⁷

If the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. But observations from outside the curtilage of activities within are not generally interdicted by the Constitution.

By this we do not mean to say that surveillance from outside a curtilage under no circumstances could constitute an illegal search in view of the teachings of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

It is our opinion, however, that on the record before us in light of Hester the observations in question may not be deemed an unreasonable search if they were made from outside the curtilage of the [defendant's] farm.²⁸

¶18 Other decisions uniformly uphold the warrantless use of binoculars. In United States v. Minton,²⁹ for example, binocular observation of the defendant unloading illicit liquor approximately 80 to 90 feet away was held not to constitute an unreasonable search and seizure. The court explicitly found that the defendant lacked

²⁷The court relied upon an earlier decision, United States v. McCall, 243 F.2d 858 (10th Cir. 1957), to support the proposition that the mere use of binoculars did not alter the character or admissibility of evidence. In McCall, the court held that an agent's observation through binoculars specially made for night vision furnished sufficient probable cause for him to conduct a warrantless search.

²⁸392 F.2d at 434-35 (footnotes omitted).

²⁹488 F.2d 37 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

a "reasonable" expectation of privacy, since he could not justifiably believe that he would not be observed unloading the illicit whiskey.³⁰

¶19 The impact of Katz upon the constitutionality of binocular observation was also directly addressed by the Pennsylvania Superior Court in Commonwealth v. Hernley.³¹ In Hernley, a federal agent stood on a four foot ladder situated on public property approximately 35 feet from the defendant's print shop. The agent used binoculars to observe the defendant printing illegal football parley sheets. The Pennsylvania court concluded that the use of the ladder and binoculars did not constitute an unreasonable search. In determining whether Katz rendered warrantless binocular observation illegal, the court observed that the defendant manifested no concern for or expectation of privacy:

[A]lthough Katz does eliminate the physical intrusion requirement in electronic eavesdropping situations, it also emphasizes the need for a justifiable expectation on the part of the suspect that he is conducting his activity outside the sphere of possible governmental intrusion.

³⁰ Id. at 38. Similarly, in United States v. Grimes, 426 F.2d 706 (5th Cir. 1970), the court, relying upon the "open fields" doctrine, held that binocular observation made from a field belonging to another person, about 50 yards from the defendant's house, did not constitute an illegal search.

³¹ 216 Pa. Super. 177, 263 A.2d 904 (1970), cert. denied, 401 U.S. 914 (1971).

Our case presents the situation in which it was incumbent on the suspect to preserve his privacy from visual observation. To do that the appellees had only to curtain the windows. Absent such obvious action we cannot find that their expectation of privacy was justifiable or reasonable. The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy.³²

3. Airborne Observation

¶20 The general proposition that the mere use of a visual aid does not render an otherwise constitutional search unlawful is further supported by the police helicopter cases. In one of the earlier helicopter decisions, People v. Sneed,³³ the court concluded that the use of a helicopter to view marijuana in a yard, not otherwise visible from a public road, constituted an unlawful search. In Sneed, the helicopter was specifically directed by a deputy to search for marijuana plants growing on the defendant's premises. Moreover, at one point in the search, the helicopter hovered as low as 20-25 feet above the defendant's premises. In concluding that the defendant had a reasonable expectation of privacy to be "free from noisy police observation by helicopter from the air at 20-25 feet," the court emphasized that the police

³² Id. at 181-82, 263 A.2d at 907 (footnote omitted).

³³ 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (5th Dist. 1973).

officers did not have the right to be in such a position for observation:

In the case at bench, the officers were at the Fowler ranch for the purpose of exploring the premises for the marijuana plants. They had no other legitimate purpose for flying over the property. The marijuana plants were not discovered by happenstance as an incident to other lawful activity [citations omitted]. The helicopter activity was a seeking out, manifestly exploratory in nature.³⁴

In Dean v. Superior Court,³⁵ however, another California court rejected the Sneed approach; it concluded, under similar circumstances, that there could be no "reasonable expectation" of privacy from aerial surveillance. In Dean, police directed an airplane to make a special search for a marijuana farm believed to be located in an isolated area of the Sierra foothills. Although the court conceded 1) that a person's reasonable expectations of privacy could ascend into the airspace over his property, and 2) that the defendant had such an actual expectation of privacy, it concluded that this expectation of privacy was not recognized by society as "reasonable," and hence, not within the sphere of the protections of the Fourth Amendment:

When the police have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is not search in a

³⁴Id. at 542, 108 Cal. Rptr. at 150-51 (emphasis added).

³⁵35 Cal. App.3d 112, 110 Cal. Rptr. 585 (3d Dist. 1973).

constitutional sense; the evidence so displayed is admissible [citations omitted]. One who establishes a three-quarter-acre tract of cultivation surrounded by forests exhibits no reasonable expectation of immunity from overflight. The contraband character of his crop doubtless arouses an internal, uncommunicated need for secrecy; the need is not exhibited, entirely subjective, highly personalized, and not consistent with the common habits of mankind in the use of agricultural and woodland areas. Aside from an uncommunicated need to hide his clandestine activity, the occupant exhibits no reasonable expectation of privacy consistent with the common habits of persons engaged in agriculture. The aerial overflights which revealed petitioner's open marijuana field did not violate Fourth Amendment restrictions.³⁶

Since other farmers could not reasonably expect their crops to be concealed from aerial observation, the defendant's expectation of privacy concerning his marijuana patch was unreasonable.

¶21 Similarly, in People v. Superior Court ex rel. Stroud,³⁷ a police helicopter on routine patrol was requested to look for automobile parts that were recently stripped from a stolen car. Using gyrostabilized binoculars, the officer in the helicopter, hovering at an altitude of 500 feet, observed the missing auto parts in the defendant's backyard. The backyard was fenced in and its contents were not visible from the public street, although they could be seen from a neighbor's yard. The court concluded

³⁶Id. at 117-18, 110 Cal. Rptr. at 589-90 (footnotes omitted).

³⁷37 Cal. App.3d 836, 112 Cal. Rptr. 764 ___ P.2d ___ (2d Dist. 1974).

that the defendant lacked a "reasonable" expectation of privacy concerning the storage of stolen goods in his backyard:

Patrol by police helicopter has been a part of the protection afforded the citizens of the Los Angeles metropolitan area for some time. The observations made from the air in this case must be regarded as routine. An article as conspicuous and readily identifiable as an automobile hood in a residential yard hardly can be regarded as hidden from such a view.³⁸

Moreover, the court concluded that Sneed was inapposite, since the defendant's property in Sneed was not customarily subject to aerial observation from either crop-dusting airplanes or routine police helicopter patrols.

4. Flashlight Decisions

¶22 The flashlight search decisions also support the general proposition that the use of certain visual aids does not render an otherwise lawful search unconstitutional. For example, in Lee, as noted above, the Supreme Court held that an examination of a boat with a searchlight did not constitute an unreasonable search within the meaning of the Fourth Amendment.³⁹

¶23 Despite the uncertainty caused by Katz, lower federal courts continue to hold that flashlight illumination does not render an otherwise legal search

³⁸Id. at 839, 112 Cal. Rptr. at 765.

³⁹See discussion in text, supra, at ¶16.

violative of the Fourth Amendment. In United States v. Hood,⁴⁰ for example, the Ninth Circuit concluded that the use of a flashlight to look into a car at night did not constitute a search under the Fourth Amendment. Similarly, in Cobb v. Wyrick,⁴¹ the court observed that the nighttime use of a flashlight to locate spent shell casings did not constitute a search:

[T]he use of a light to notice that which would also be in plain view in the daytime does not transform that which would not be a search in the daytime into a search at an hour when the sun is not fully exposed.

5. Mail Covers

¶24 A mail cover is a fourth type of visual surveillance technique used by police to secure information comparable to the type of information obtained from electronic tracking devices. The post office conducts a "mail cover" by furnishing the government with information that appears on the outside of all mail addressed to a specific address. The mail, which is never opened, is subsequently delivered to the addressee, and only the name and address of both the addressee and the sender, the postmark, class of mail, etc. are sent to the police.⁴²

⁴⁰493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974).

⁴¹379 F. Supp. 1287, 1292 note 3 (W.D. Mo. 1974).

⁴²403 F.2d 472, 475 note 2 (7th Cir. 1968), cert. denied, 402 U.S. 953 (1971).

This means of visual surveillance enables the police to learn the names, addresses, or approximate geographical location of the people corresponding with a person.

¶25 No court has held that the Fourth Amendment prevents the post office from conveying such information to law enforcement officials. The Ninth Circuit, in Lustiger v. United States,⁴³ for example, recognized that an individual's mail is protected by the Fourth Amendment, but it concluded that a mail cover was permissible, provided no substantial delay occurs in the delivery of the mail:

The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails [citations omitted]. Thus, first class mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant. See Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L.ed 652. . . . However, the Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved.⁴⁴

¶26 Other circuit courts similarly uphold the constitutionality of mail covers.⁴⁵ In addition,

⁴³386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

⁴⁴Id. at 139.

⁴⁵United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3624 (May 3, 1976); United States v. Van Leeuwen, 397 U.S. 249 (1970); Canaday v. United States, 354 F.2d 849, 856 (8th Cir. 1966); United States v. Costello, 255 F.2d 876, 881-82 (2d Cir.), cert. denied, 357 U. S. 937 (1958). Moreover, in United States v. Isaacs, 347 F. Supp. 743, 750 (N.D. Ill. 1972), a federal district court explicitly concluded that Katz did not render mail cover operations unconstitutional.

mechanical mail covers are upheld. In United States v. Leonard, the mail cover investigation received the benefit of mechanical assistance and high speed copiers. Photo-stats were made of the faces of all suspect envelopes. The machine did nothing that investigators themselves could not do by hand; it simply did it with greater efficiency. The comparison with the electronic tracking device is obvious. Mechanical surveillance should be upheld in either case.

D. Unreasonable Searches of Automobiles: A Significant Constitutional Distinction

¶27 Although Katz stated that the Fourth Amendment protects persons rather than places from unreasonable searches and seizures, the Supreme Court has also recognized over the years a significant constitutional distinction between the search of an automobile and the search of a dwelling. In Carroll v. United States,⁴⁶ federal agents sought to introduce evidence of contraband liquor seized in the warrantless search of an automobile. After surveying the historical development of the Fourth Amendment, the Court concluded that a car might be searched without a warrant in circumstances which would not otherwise justify a warrantless search of an individual's home:

We have made a somewhat extended reference to these statutes to show that the guaranty of

⁴⁶267 U.S. 132 (1925).

freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.⁴⁷

An automobile's mobility does not, however, justify the warrantless search of every vehicle driven on a public road:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . .⁴⁸

The court in Carroll justified the warrantless search, on the existence of probable cause:

The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.⁴⁹

^{¶28} Carroll remains good law. It was reaffirmed in Brinegar v. United States,⁵⁰ Dyke v. Taylor Implement Mfg. Co.,⁵¹ and most recently, in Chambers v. Maroney.⁵²

⁴⁷ Id. at 153.

⁴⁸ 267 U.S. at 153-54.

⁴⁹ 267 U.S. at 155-56.

⁵⁰ 388 U.S. 160 (1949).

⁵¹ 391 U.S. 216, 221 (1968).

⁵² 399 U.S. 42 (1970).

In Chambers, the occupants of an automobile were arrested and the vehicle taken to the police station, where it was searched without a warrant, producing incriminating evidence. Although the police had sufficient time to obtain a warrant for the search of the car following the defendant's arrest, the court found that the vehicle,

could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of a car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforeseeable cause to search a house.⁵³

The court added in a footnote:

It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.⁵⁴

The court observed that,

if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.⁵⁵

⁵³Id. at 52; accord, Texas v. White, 96 S. Ct. 304 (1975) (per curiam), reh. denied, 96 S. Ct. 869 (1976).

⁵⁴Id. at 52 note 10.

⁵⁵Id. at 51.

The court then added in a footnote:

Following the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search.⁵⁶

If an automobile is being used in the perpetration of a crime (e.g., getaway car or transportation for contraband, etc.) and if police have probable cause to search it, Chambers authorizes law enforcement officials to conduct an immediate search of the vehicle without obtaining judicial approval, even though the car could be effectively immobilized until a search warrant was procured.

¶29 A warrantless search is, however, permissible only if the police have probable cause to search and the vehicle is a "fleeting target." For example, in Coolidge v. New Hampshire, the defendant was arrested at his home for a murder. Two vehicles parked in his driveway were subsequently searched without a valid warrant. Asserting that the mere existence of probable cause did not furnish a sufficient basis for the warrantless search, the Court concluded that the Carroll-Chambers "automobile exception" was inapplicable:

As we said in Chambers, . . . "exigent circumstances" justify the warrantless search of "an automobile stopped on the highway," where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." "[T]he opportunity to search is fleeting. . . ." (emphasis supplied).

⁵⁶Id. at 51 note 9.

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When the police arrived at the [defendant's] house to arrest him, two officers were sent to guard the back door while the main party approached from the front. [The defendant] was arrested inside the house, without resistance of any kind on his part, after he had voluntarily admitted the officers at both front and back doors. There was no way in which he could conceivably have gained access to the automobile after the police arrived on his property. . .

The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States--no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," Carroll, . . . and the "automobile exception," despite its label, is simply irrelevant.⁵⁷

¶30 Finally the Supreme Court, in Cardwell v. Lewis,⁵⁸ acknowledges a distinction between the substantive invasion of an individual's privacy and the mere identification of an automobile's physical characteristics. In a plurality opinion, the Court held that the testing of paint scrapings and tire tread was not a search subject to the warrant requirement. The Court did refer to the existence of probable cause for the examination, which may not always be present in a "bumper beeper" investigation. Nevertheless, the

⁵⁷ 403 U.S. at 460-62 (footnote omitted).

⁵⁸ 417 U.S. 583 (1974) (plurality opinion).

Court's conclusion that the physical identification of a motor vehicle is not a search removes such an investigation from the Fourth Amendment. Pointing up privacy as opposed to property interests, the plurality noted that a motor vehicle is not usually a residence, but rather a means of transportation and its occupants and contents are exposed to plain view.⁵⁹

E. Suggested Fourth Amendment Analysis of Electronic Tracking Devices: A Summary

¶31 As noted above, the Fourth Amendment protects an individual from unreasonable searches and seizures when the person has an actual expectation of privacy which is recognized by society as reasonable.⁶⁰ An analysis of electronic tracking devices in light of this twofold test reveals that the warrantless installation of an electronic tracking device should not be

⁵⁹ The Supreme Court in Cady v. Dombrowski, 413 U.S. 433 (1973) also noted the greater degree of routine police-citizen contact involving automobiles, i.e., the broad regulation of motor vehicles, traffic, and the frequency of automobile disability and accidents. This extensive, non-criminal contact with automobiles brings police in "plain view" of contraband, evidence, and fruits and instrumentalities of crime and under such circumstances renders warrantless searches appropriate. In United States v. Ware, 457 F.2d 828 (7th Cir.), cert. denied, 409 U.S. 888 (1972) the police checked the confidential vehicle identification number stamped on the frame of an automobile thought to be stolen. Even though the examination requires some degree of physical intrusion into the car, i.e., opening the door or lifting the hood, the court asserted "that this was not actually a search, but a mere check on the identification of an automobile . . . " Id. at 830. Similarly, location on a public way should not receive special protection.

⁶⁰ 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

considered an unreasonable search within the scope of the Fourth Amendment.

¶32 Law enforcement officials use electronic tracking devices to enhance visual surveillance of a motor vehicle. It is well established that surveillance of an automobile using a sufficient number of skilled police officers does not violate the suspect's constitutional rights. A person who knowingly exposes his movements upon a public road lacks a reasonable expectation of privacy.⁶¹ Society is generally not willing to subordinate the public interest in law enforcement to the individual's subjective expectation of privacy concerning visual surveillance augmented by mechanical aids. It is only when electronic devices are used to intercept the substance of a conversation that society is willing to give recognition to the individual's expectation of privacy.

¶33 Electronic tracking devices do not, however, reveal the substantive content of conversations. There is no need to place them under special rules. Congress, for example, did not subject the "bumper beeper" to the strict limitations of Title III.⁶² Electronic tracking

⁶¹Id. at 351-52.

⁶² Paragraph (4) defines 'intercept' to include the aural acquisition of the contents of any wire or oral communication by an electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation.

devices monitor only a physical characteristic of the individual, i.e., motion and location. United States v. Dionisio indicates that if only a physical characteristic of an individual, rather than the substantive contents of a conversation, are obtained through the use of electronic devices, the Supreme Court would be unwilling to recognize as reasonable an expectation of privacy. Electronic tracking devices, voice exemplars, and mail covers are all evidence-gathering devices, but since none of these investigatory tools reveals the substantive contents of an individual's communications, their use should not be deemed searches within the Fourth Amendment. Such tracking devices are no more intrusive than the use of high powered binoculars, searchlights, airplanes, or helicopters. Since electronic tracking devices merely augment constitutionally acceptable surveillance techniques, there is no apparent rationale for concluding that the use of such devices renders otherwise permissible searches unconstitutional:

If such surveillance without such technology is not a "search" within the Fourth Amendment, there is no reason to hold otherwise, where such technology is present, unless civil liberties are somehow seen to call for inherently inefficient police work; inefficiency itself ought not be the goal of limitations in this field. Such a proposition would, for example, if pressed to limits of its logic, argue that a blind policeman would be better for civil liberties than a sighted policeman, not because he could not see where he ought not look, but because he could not see at all. Freedom rests in measured police power, not hobbled police work.⁶³

⁶³ Electronic Surveillance, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 205-06 (concurring remarks).

III. Recent Decisions Analyzing Electronic Tracking Devices

¶34 Two recent decisions directly address the question of whether the warrantless installation of an electronic tracking device (ETD) in motor vehicles constitutes an unreasonable search within the Fourth Amendment. The Fifth Circuit, in United States v. Holmes, has initially held that the warrantless use of a "bumper beeper" violates the Fourth Amendment, but a rehearing en banc is pending and the decision may be reversed.

¶35 In Holmes, state police attached an electronic tracking device to a van owned by a person who had agreed to sell an undercover agent 300 pounds of marijuana. The agents did not secure a search warrant. Two days later, airborne narcotic agents followed the transmitting signal to a shed which housed 1,200 pounds of marijuana and arrested several people. At trial, the defendants argued, inter alia, that the installation of the "bumper beeper" constituted an unlawful search. The district judge concluded that the use of the beeper constituted an illegal search because the agents failed to obtain a search warrant prior to installing the electronic tracking device.

¶36 The Fifth Circuit affirmed the decision, stating that the installation of the electronic tracking device constituted a search within the Fourth Amendment since the purpose of the beeper was "to unearth evidence of crime and the identity of associates in crime for

criminal prosecution. . . ."⁶⁴

¶37 The court also asserted that the warrantless use of the "bumper beeper" violated the defendant's reasonable expectation of privacy. Nevertheless, a more recent Fifth Circuit decision, United States v. Perez,⁶⁵ indicates a possible shift in the court's attitude. In Perez, a tracking device was installed in a television set bartered for drugs. The Fourth Amendment issue was not presented on appeal and the court indicated that it "need not at this time solve the riddle of whether an electronic 'bug' installed in the television found in [defendant's] car at the time of his arrest. . . constituted a search within the strictures of the Fourth Amendment."⁶⁶ The court, however, took the opportunity to hold that the defendant had no reasonable expectation that the television would be "cleansed of any device designed to uncover the tainted transaction or identify the parties."⁶⁷

⁶⁴ 521 F.2d at 864.

⁶⁵ 526 F.2d 859 (5th Cir. 1976).

⁶⁶ Id. at 862-63.

⁶⁷ Id. at 863. The court did, however, distinguish the case from Holmes. It noted the lack of probable cause in Holmes which was present in Perez.

Additionally, unlike Holmes where the bug was put on the defendant's vehicle then in the constructive possession of the defendant, the "bug" here was installed while the TV was in the rightful possession of the government agents. Id. at 863.

¶38 In United States v. Martyniuk, a suspected drug dealer ordered two large drums of caffeine from a chemical company. Government agents learned of the order and placed an electronic tracking device in one of the drums without securing a prior court order. Although the defendant drove "circuitously" after picking the order up, federal agents in an airplane were able to follow him to a garage. Pursuant to a court order, a second electronic tracking device was installed in a pickup truck parked in the garage. When this second "beeper" malfunctioned, the agents obtained another court order to repair or replace the device. The defendant, who was subsequently prosecuted for possession of narcotics, argued that the warrantless installation of the electronic tracking device in the drum of caffeine constituted a search in derogation of his reasonable expectation of privacy. The government maintained, inter alia, 1) that the installation of the "beeper" did not constitute either a search or seizure, and 2) that the defendant had no reasonable expectation of privacy while traveling on a public road. The court summarily concluded that the installation of the electronic tracking device constituted a search since it aided the agents in discovering "evidence and instrumentalities of crime which would incriminate [the defendant]." ⁶⁸

⁶⁸395 F. Supp. at 44.

The court did recognize that the "beeper" merely augmented visual surveillance, "which is not proscribed by the Fourth Amendment" and that the use of the electronic tracking device was not comparable to the electronic eavesdropping in Katz.⁶⁹ Nevertheless, it concluded that a person could entertain a reasonable expectation of privacy concerning his movement and location:

Not only criminals take steps to ensure that they are not followed. People conceal the location of their personal property for legitimate purposes. The beeper makes this impossible. While [the defendant's] expectation of privacy may seem minimal when compared to that expected in private conversations, it is nevertheless real. I will not allow the government to ride roughshod over that right. The implanting of the beeper infringed an expectation of privacy protected by the Fourth Amendment.⁷⁰

¶39 The court identified three significant factors:

1. the Fourth Amendment's protection against unreasonable searches and seizures should be liberally construed;⁷¹
2. the government's admittedly contradictory position that a warrant was not necessary for the initial electronic tracking device notwithstanding the fact that judicial approval was sought for the other two "beepers"; and

⁶⁹The court stated:

I do not equate the uninvited shadower in this instance with the "uninvited ear" described in wiretapping and "bugging" cases. The Supreme Court decisions dealing with the use of electronic surveillance have all involved the interception of conversations. Any surreptitious listening to the privately spoken word invades an area in which we have an extraordinary expectation of privacy. Id. at 44.

⁷⁰Id.

⁷¹Citing Boyd v. United States, 116 U.S. 616 (1886).

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3. the absence of any "exigent circumstances" that would have prevented the agents from obtaining a search warrant.⁷²

¶40 Both Holmes and Martyniuk concluded that the agents would not have been able to obtain the same evidence without the tracking device. It can be argued, however, that several hundred skilled agents reinforced by airborne patrols might have been able to maintain constant visual surveillance without the "bumper beeper," albeit at a prohibitively high cost. It is difficult to see how the suspect's constitutional right to privacy would be no less intruded upon if one hundred skilled officers trailed him instead of one agent equipped with electronic tracking equipment.

¶41 Both Holmes and Martyniuk recognize that unaided visual surveillance is not proscribed by the Fourth Amendment.⁷³ There are two differences between the use of an electronic tracking device and unaided visual surveillance:

1. a suspect is much less likely to detect surveillance which utilizes a "bumper beeper";
2. the electronic tracking device is considerably more efficient given the limited resources of most police forces.

¶42 The Holmes decision is partially attributable to its reliance upon the "trespass doctrine." Instead of comparing the use of an electronic tracking device

⁷²395 F. Supp. at 43.

⁷³521 F.2d at 866; 395 F. Supp. at 44.

to police surveillance by several experienced officers, the Holmes court decided that:

[t]here appears to be slight if any difference between installing a beacon on the underside of a car and hiding an agent in the trunk who signals the location of the car by radio.⁷⁴

As discussed earlier, Katz abandoned the "physical trespass" doctrine in favor of a "reasonable expectation of privacy" test for determining whether a search was within the parameters of the Fourth Amendment.

¶43 Holmes's equating the electronic tracking device with an unauthorized wiretap was rejected in Martyniuk. An electronic tracking device conveys information comparable to that obtained by voice exemplars. If an individual's location and movement are not deemed constitutionally protected when hundreds of skilled agents and airborne patrols equipped with gyrostabilized binoculars and searchlights follow an individual, why should the rule be different for electronic tracking device surveillance?

¶44 Both Holmes and Martyniuk also failed to consider the worthlessness of any procured search warrants if the van or drum were to be driven out of the local court's jurisdiction. Neither case looked to the Supreme Court's resolution of a similar problem in Carroll and Chambers. Neither Holmes nor Martyniuk directed attention toward the demonstrably lower constitutional protection

⁷⁴ 521 F.2d at 865 note 11.

traditionally accorded vehicles and other mobile objects. Consequently, it is suggested that a more complete analysis might have yielded different results.

IV. Court Order to Install Electronic Tracking Devices

¶45 These materials argue that the use of electronic tracking devices does not constitute a search within the meaning of the Fourth Amendment. There is no requirement, therefore, that law enforcement officials obtain a warrant, for example, under Rule 41 of the Federal Rules of Criminal Procedure.⁷⁵ An investigating officer may, however, secure a judicial order⁷⁶ sanctioning the use of a "bumper beeper," authorized under Rule 57(b).⁷⁷ Although such a sanction is not constitutionally mandated, it may be a useful defense should the party under surveillance institute a civil suit against the investigating officer.⁷⁸

⁷⁵Fed. R. Crim. P. 41.

⁷⁶See Osborn v. United States, 385 U.S. 323 (1966).

⁷⁷Fed. R. Crim. P. 57(b):

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

⁷⁸W. Prosser, Law of Torts §25 (4th ed. 1971). For cases dealing with good faith defenses see Bivens v. Six Unknown Agents, 456 F.2d 1339, 1347 (2d Cir. 1972); Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

¶46 If the analysis of these materials is accepted, the court order would not have to be based on a showing of probable cause. Nevertheless, such an order, issued by a detached and independent magistrate, would lend greater legitimacy to the investigatory technique.

¶47 Although a court order might be desirable for these reasons, it should not, as discussed above, be necessary. It must be emphasized, too, that a danger exists that, should investigating officers establish a policy of obtaining prior judicial approval, the courts may then hold them to that policy.⁷⁹ The officer might effectively circumvent this pitfall by asserting, when called upon to justify this investigatory technique, that no prior judicial authorization was required, but that he took the additional precaution of securing the court order to protect himself from tort liability.

¶48 Finally, the extra-jurisdictional effect of a court order authorizing the installation of an electronic tracking device must be considered since it is likely that the monitored motor vehicle will occasionally be driven out of the issuing court's jurisdiction. Since

⁷⁹In United States v. Martyniuk, the court asserted:

The government advances contradictory positions. They contend that placing the beeper in the drum was not a search, nor did it invade any expectation of privacy. However, the government sought court approval to install the second and third beepers.

the issuing court will probably be a court of limited jurisdiction, the electronic tracking device order will have no effect outside of the court's jurisdiction. The monitoring agents will be required, absent special circumstances, to obtain a new court order in each jurisdiction through which the vehicle passes. It could be argued that removal of the electronic tracking device from the local jurisdiction, in which an order had been issued, constitutes "exigent circumstances" in which it would not be necessary to obtain a court order. For example, driving the monitored vehicle out of the jurisdiction is comparable to police officers chasing a fleeing felon out of the jurisdiction of their commission as officers.⁸⁰ Moreover, since the basic constitutional purpose of securing a warrant, i.e., a determination of probable cause made by a neutral and detached magistrate, would have been satisfied in the jurisdiction which initially issued the court order, no constitutional infirmities can be perceived in such an "exigent circumstances" analysis.

⁸⁰Cf. United States v. Bishop, 19 Crim. L. Rptr. 2134 (5th Cir. April 28, 1976).

Electronic Tracking Devices: Addenda and Errata

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Addenda and Errata

(Double underling indicates corrected material)

¶8, Note 8: Correction: United States v. Holmes,
521 F.2d 859, 866 (5th Cir. 1975), aff'd en banc by
an equally divided court, 537 F.2d 227 (5th Cir. 1976);
United States v. Martyniuk, 395 F.Supp. 42, 45 (D. Ore.
1975), rev'd in part sub nom. United States v. Hufford,
539 F.2d 32 (9th Cir. 1976), cert. denied, (1976).

¶11, Note 13: Accord, United States v. Freie, 545 F.2d
1217, 1223 (9th Cir. 1976) (Given Katz, the Hester "Open
Field" doctrine has no independant meaning, but now
means under Katz that a person has no reasonable expectation
of privacy with regard to open fields).

¶11, Note 16: Correction: Cf. In Gedko v. Heer, 406
F.Supp. 609 (W.D. Wisc. 1975), ...

¶19A: Doubts have recently been expressed about
the warrantless use of binoculars and telescopes as aids
to visual surveillance. United States v. Kim, 415 F.Supp.
1252 (D. Hawaii 1976). The court held that the use of
artificial aids ("special equipment not generally in use")
to observe activity in a person's home intrudes on privacy
and constitutes a search. Id. at 1256. The court felt
that if government agents have probable cause to suspect
criminal activity and feel the need for telescopic surveillance,
they can apply for a search warrant. "Plain view" means
"unaided plain view" and the defendant's subjective
expectation of privacy is irrelevant to the test under
Katz. Here, the defendant left his curtains open and

and himself used binoculars to check if he was under surveillance. The court refused to follow Fullbright and Hernley (discussed at ¶¶17, 19, supra) and stated:

It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search.

Id.

¶19B: Kim raises legitimate concerns, but the precise and reasonable holding in the case is not as broad as the court's statements above would indicate. First, the court ruled that there is no reasonable expectation of privacy regarding shared public areas in apartments or condominiums or regarding open balconies. What the court found objectionable was the use of high powered telescopes to view the interior of the apartment. Another crucial fact relied on by the court was that the apartment, located many stories up in a high rise building, was only open to visual surveillance by telescopic means. In fact, the court suggests that the case might be different where other private parties have a plain (unaided) view of the defendant's premises, but agents are forced to use visual aids because they can't get as close as the other private parties. Here, no such plain unaided view was available. Id. at 1256 n.4.

¶23A: Recent cases continue to uphold the warrantless use of flashlights and other lights. United States v. Coplen, 541 F.2d 211 (9th Cir. 1976), cert. denied (1976) (agent shined flashlight into the back of private plane parked in hangar area); BalEDGE v. State,

554 P.2d 1388 (Okla. Crim. App. 1976) (shining flashlight into car to view what is in plain sight is not a search); People v. Rudasil, 386 N.Y.S.2d 408 (App. Div. 1st Dep't 1976) (shining flashlight into front seat of car is not a search); People v. Wesley, 387 N.Y.S.2d 34 (App. Term, Sup. Ct. 1976) (fire chief's shining ultraviolet light on defendant's hands to check for type of paste placed on fire alarm box handles was not a search).

¶24, Note 42: Correction: United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968), cert. denied, 402 U.S. 953 (1971).

¶26, Note 45: Correction: cert. denied, 425 U.S. 958 (1976);...

¶26A: A recent case, United States v. Choate, 422 F.Supp. 261 (C.D. Cal. 1976), raises questions about the legality of warrantless mail covers. The court suppressed all evidence derived from a mail cover on the defendant. In an opinion by Ferguson, District Judge, two independent grounds were given for suppression:

- (1) The mail cover failed to comply with the governing postal regulation and so was not legally authorized;
- (2) Defendant's Fourth Amendment rights were violated where the government's only stated basis for the cover was that agents "felt" that the defendant was smuggling narcotics.

¶26B: The postal regulation governing mail covers states in relevant part:

(e) (1) All Postal Inspectors in Charge... may order mail covers within their districts under the following circumstances:.....

(ii) Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would... assist in obtaining information concerning the commission or attempted commission of a crime.

39 C.F.R. §233.2(e)(1)(ii) (1975) (emphasis added)

Focusing on the italicized language above, the court found insufficient the following statement in a letter of request from government narcotics agents:

The above named subject [Choate] is currently under investigation by this office for the suspected smuggling of large quantities of narcotics into the United States. CHOATE is currently organizing a large narcotic smuggling ring with the primary source located in South America. It is felt that CHOATE and the source in South America correspond by mail. Return addresses on the mail received at the above addresses would be of aid in identifying the source in South America and other members of the smuggling ring....

CHOATE is not under indictment as a result of any investigation conducted by this office nor does this office have any knowledge of any indictments pending against CHOATE.

Choate, supra at 264-5 n.5

¶26C: The court's argument can be summarized as follows. A bare statement from government agents that they "feel" that the defendant is involved in smuggling and corresponds with a source in South America does not constitute a specification of reasonable grounds that the mail cover would reveal information about the commission of a crime. Id. at 265. The "reasonable grounds" provision was added to postal regulations by congressional investigations concerning the invasion of privacy by government agencies. Abuse of mail covers was a topic

discussed in hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. Senator Edward Long, Chairman of the Subcommittee, had introduced a bill which would have barred warrantless use of mail covers, but did not press the measure in light of the amendment to the regulation. Id. To allow government agents to obtain mail covers without a proper specification of reasonable grounds would rob the amendment of all significance and run counter to congressional intent. The mail cover on the defendant was not legally authorized. Consequently, evidence derived from the cover must be suppressed.

¶26D: The argument summarized above, which was actually presented by the court in Choate, can draw support from the Supreme Court's treatment of provisions of the Federal wiretap law, 18 U.S.C. sections 2510-20 (1971). The Court laid down a two-question test for dealing with suppression problems regarding the wiretap law. First question: Does the statutory provision violated "directly and substantially" implement the legislative scheme to prevent abuse of wiretaps? United States v. Giordano, 416 U.S. 505, 527 (1974). If not, then suppression is never an appropriate remedy. If the answer is yes, then the second question must be asked: Has the purpose of the provision been satisfied despite the violation? United States v. Chavez, 416 U.S. 562, 574-5 (1974). If the answer is yes, then suppression is still inappropriate. If not, then suppression is appropriate. (In United States v. Donovan, 97 S.Ct.

658, 673-4 n.26 (1977), the Supreme Court left open the question of whether any intentional government violation of a statutory provision would warrant suppression).

If the postal regulation amendment is viewed as part of a legislative scheme to prevent the abuse of mail covers, the analogy is clear.

¶26E: Is the argument presented in Choate sound? The question is difficult, but the answer is probably no. There is no indication that the government intentionally sought to bypass the "reasonable ground" provision. If there was a violation of the regulation, it was either inadvertent or due to an inadequate understanding of the regulation. That the letter dealt with the possibility that Choate might be under indictment tends to show good faith on the government's part regarding constitutionally sensitive matters. Second, it is not clear that the regulation was violated. The government letter stated clearly the nature of the crime under investigation and the general situation. Why could this not count as a specification of reasonable grounds? The only thing lacking is a disclosure to postal authorities of investigative leads and information already uncovered. The danger of disclosing such matters to postal authorities regarding an ongoing investigation is obvious. Such disclosure would be necessary to meet the constitutional requirement relating to applications for search warrants, that is, that the government must not merely assert that it has probable cause, but must introduce concrete facts from which a "neutral magistrate" could draw his own

conclusion. Spinelli v. United States, 393 U.S. 410 (1969). Yet there is nothing in the 1965 amendment to indicate that Congress meant to apply Fourth Amendment standards to mail cover authorizations. The Postal Service does not interpret its own regulation that way. United States v. Leonard, 524 F.2d 1076, 1088 (2d Cir. 1975). It would be implausible to think that Congress and the Postal Service so completely misunderstood each other. That Senator Long introduced a bill which would have applied Fourth Amendment standards, yet finally accepted the amendment, may indicate only that he got the best compromise he could.

¶26F: It is implausible to think that the "reasonable grounds" provision was meant to incorporate something like a Spinelli requirement. That would require postal officials to play the role of judges passing on questions of probable cause. Did Congress assume that postal officials have adequate knowledge of the criminal law or would act like "neutral magistrates?" If that is the effect Congress wanted, why did it not simply require judicial approval for mail covers?

¶26G: There is also no indication that Congress intended that suppression would be required for violation of the regulation. The amendment says nothing about suppression. The most plausible reading of the amendment is that it represents an inter-agency check on the use of mail covers designed to insure that proper records of requests were made and that the power of authorization was limited to responsible postal officials.

¶26H: Finally, even assuming, implausibly, that Congress intended suppression as a remedy for violations of the amendment, the government may well have met the test laid down by the Supreme Court in Giordano and Chavez. Assume that the "reasonable grounds" provision was central to the legislative scheme. Since the government violation was not intentional, one may ask the second Giordano question: Was the purpose of the "reasonable grounds" provision satisfied despite the violation? Was not the purpose of the provision met if the government in fact had reasonable grounds for requesting the mail cover? The letter the government actually sent does constitute a record which shows the general contours of suspected criminal activity. Were a question raised about the propriety of that request, the government would have to show that, prior to making the request, it had reasonable grounds relating to that particular criminal activity. In other words, the letter serves to make specific what the government would have to show and provides Congress and the courts with a record. Since postal officials cannot reasonably be expected to make quasi-judicial evaluations (in light of Spinelli-type requirements) of government mail cover requests, the government's having reasonable grounds and being able to show that it had them should satisfy any purpose within effective reach of the regulation.

¶26I: This same argument tends to show that the government did not violate the regulation at all. If making a full disclosure of the particular facts constituting reasonable grounds could serve no purpose under the

regulation, there is little reason to suppose that it requires such disclosure. The court in Choate did not even consider the question of whether the government in fact had reasonable grounds for requesting the mail cover. That the government agent who wrote the letter the words 'it is felt that' does not show that reasonable grounds did not exist. Government statements and affidavits used to initiate investigative procedures should be judged in a commonsense and realistic fashion. United States v. Ventresca, 380 U.S. 102, 108 (1965); United States v. Harris, 403 U.S. 573, 579 (1971).

¶26J: The court in Choate also based its suppression decision on constitutional grounds: The mail cover violated defendant's "reasonable expectation of privacy" under Katz v. United States, 389 U.S. 347 (1967). The court rejects prior cases (discussed and cited at ¶24-5 supra) upholding the warrantless use of mail covers because they were decided without the benefit of the Katz holding or because their application of Katz was inadequate. Choate, supra at 267.

¶26K: The court does try to distinguish Leonard (supra at ¶26E) on the ground that in that case the mail cover was on incoming international mail. In Leonard, the Second Circuit, per Judge Friendly, thought that there was no reasonable expectation of privacy with respect to the outside of international mail especially since such mail is subject to customs inspection. In Choate, although the government request was predicated on tracing the defendant's narcotics source in South America, the

their tasks. Choate, supra at 270. Although true, both these contentions beg crucial questions in the present context. Are mail covers "searches" and are they "constitutionally sensitive means"?

¶260: Does the Choate court have a substantive argument that warrantless mail covers violate one's reasonable expectation of privacy? It does.

It cannot be denied that a reasonable person's expectation of privacy with regard to return addresses on mail is a somewhat limited one. He understands that this information is necessary to postal operations and will be examined and utilized in order to route items when the name and address of the addressee is incorrect, absent, or illegible. But the disclosure mandated by these circumstances is not broad or for all purposes: a reasonable person still expects (1) that the information contained in the return address will only be used for postal purposes, and (2) that it will be utilized only in a mechanical fashion without any records being kept. The recording and disclosure to non-postal authorities for non-postal purposes that results from a mail cover extends far beyond these narrow bounds.

Id.

This argument is not sound, legally or otherwise. The court is clearly interpreting the phrase 'reasonable expectation of privacy' to mean that a reasonable person could rationally believe or predict that the relevant information, here return addresses, will not in fact become known to law enforcement agencies. Precisely the same thing can be said, a fortiori, about a person's bank records (checks and deposit slips). Given the relevant probabilities, a person can rationally believe that such information will not be made known to law enforcement agencies. But this cannot be, under current law, what is

meant by a 'reasonable expectation of privacy.' The Supreme Court has flatly held that a person has no legitimate expectation of privacy regarding bank records because they are not "private papers" or "confidential communications." United States v. Miller, 425 U.S. 435 (1976). Return address inscriptions on the outside of envelopes are in no sense confidential communications.

¶26P: What the reasonable expectation of privacy test under Katz means is not a function of what a person expects will remain undisclosed, though this is a factor to take into consideration in applying the test. Rather, the test turns on what a person may reasonably expect to have kept private, i.e., turns on what ought to be kept private. The test implies a balancing between the constitutional interest in keeping private information of a certain kind and quality and legitimate government interests in controlling crime. When the balance is tipped in favor of the first interest, then by definition, one has a reasonable expectation of privacy regarding the kind of information in question. Given the Supreme Court's holding in Miller, there is no constitutional ground for the view that mail covers violate reasonable expectations of privacy. Cf. Fisher v. United States, 425 U.S. 391 (1976).

¶28, Note 50: Correction: 338 U.S. 160 (1949).

¶28, Note 53: Correction: Id. at 52; Accord, Texas v. White, 423 U.S. 67 (1975) (per curiam), reh. denied, 423 U.S. 1081 (1976).

¶30, Note 59: Accord, United States v. Sherriff, 546 F.2d

604 (5th Cir. 1977).

¶32, Note 61:Cf. Johnson v. United States, 367 A.2d 1316 (D.C. Ct. App. 1977) (decision to place a car under surveillance does not invoke Fourth Amendment standards; there is no invasion of constitutionally protected privacy in observing what is visible for all to see).

¶34: (Holmes was affirmed en banc by an evenly divided court. 537 F.2d 227 (5th Cir. 1976).)

¶37, Note 65:Correction: 526 F.2d 859 (5th Cir. 1976),
cert. denied (1976).

¶48, Note 80:Correction: Cf. United States v. Bishop,
530 F.2d 1156 (5th Cir. 1976), cert. denied
(1976).

¶48A: As indicated by several recent cases, the law concerning ETDs remains uncertain. Some courts continue to hold that attaching a beeper to the exterior of a car or plane constitutes a search in Fourth Amendment terms. Holmes, supra at 865-6; United States v. Bobisink, 415 F.Supp. 1334, 1336 (D. Mass. 1976). Others reject the view that mere exterior attachment constitutes a "search." United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); United States v. Frazier, 538 F.2d 1322, 1326 (8th Cir. 1976). These courts rely on the Supreme Court's holding in Cardwell v. Lewis that a warrantless examination of a car's exterior was not unreasonable under the Fourth Amendment. 417 U.S. 583, 592 (1974) (discussed supra at ¶30). There is general agreement, however, that placing a beeper inside a vehicle or opening a closed

package over which the suspect has constructive or actual possession constitutes a "search." United States v. Hufford, 539 F.2d 32, 34 (9th Cir. 1976); United States v. Emery, 541 F.2d 887, 888 (1st Cir. 1976); United States v. French, 414 F.Supp. 800, 803 (W.D. Okla. 1976).

¶48B: Warrantless use of beepers has been sustained by applying traditional exceptions to the Fourth Amendment warrant requirement. Where a package has been opened by customs agents and a beeper inserted, the "border search" exception has excused a preinstallation warrant. Emery, supra at 888-9; French, supra at 803. Where a beeper has been placed into a container or object before its delivery to the suspect, the consent exception has been applied. Hufford, supra at 34. Contra, Bobisink, supra at 1338 n.5. Warrantless installation has also been upheld where exigent circumstances foreclosed the opportunity to secure prior judicial approval. French, supra at 804; Frazier, supra at 1324-5.

¶48C: In Hufford, supra at 33-4, the court upheld warrantless monitoring of beepers attached to cars on the ground that one has no reasonable expectation of privacy while driving on public roads. The court in Frazier, supra at 1324, reached the same conclusion. Cf. Johnson v. United States, 367 A.2d 1316 (D.C. Ct. App. 1977). The court in Hufford also found persuasive the argument (discussed supra at ¶32, 40) that ETDs merely serve to augment visual surveillance.

Pen Registers (and In-Progress Traces)

Outline

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Summary

A pen register logs outgoing numbers dialed from a particular telephone; an in-progress trace identifies the numbers from which incoming calls originate. The use of the pen register or the in-progress trace does not appear to be constrained by either the First, Fourth, or Fifth Amendments. Litigation has dealt almost exclusively with the pen register. The pen register is not subject to Title III. Similarly, the trend of recent cases is to find 47 U.S.C. §605 inapplicable to pen registers. Judicial authorities for these investigative devices may be obtained in one of three ways:

1. an order, analogous to a search warrant, supported by probable cause (possibly accompanied by an order compelling telephone company cooperation);
2. an order not based on probable cause (probably not accompanied by an order compelling telephone cooperation), even though a search-warrant-like order is not required;
3. a grand jury subpoena, not based on probable cause, even if a search-warrant-like order is required.

I. The Device

¶2 A pen register logs numbers dialed from a particular telephone.¹ Attached to a given telephone line, usually at a central office, the pen register records on a paper tape dashes equal in number to the number dialed. The numbers from which incoming calls originate are not identified. The pen register does not indicate whether the call is completed or the receiver answered and neither records nor monitors conversations. A Touch Tone decoder, a device analogous to the pen register, is used for touch telephones and prints out the number in arabic numerals, rather than as a series of dashes.² In the normal course of telephone company business, the pen register is employed to determine whether a home phone is being used to conduct a business,³ to check for a defective dial,⁴ to check for overbilling,⁵ or to document wire fraud violations.⁶ The pen register is also used within the con-

¹United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part, dissenting in part).

²United States v. Focarile, 340 F. Supp. 1033, 1039-40 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522, 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974) (description of TR-12 Touch Tone Decoder).

³Schmukler v. Ohio-Bell Tel. Co., 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Common Pleas, Cuyahoga Co. 1953).

⁴United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966).

⁵Id.

⁶United States v. Clegg, 509 F.2d 605 (5th Cir. 1975) (use of "blue box").

text of an ongoing criminal surveillance, in which the monitoring is performed without the consent or knowledge of either the telephone subscriber or the intended recipient of the telephone call. In this context, however, the use of the pen register has engendered considerable controversy and, unfortunately, needless confusion.⁷ Questions concerning the pen register are answered in different ways by different courts or are often not answered at all.

¶3 An in-progress trace complements the pen register and identifies the number from which incoming calls originate.⁸ The trace is often used in tracking down the source of annoying or obscene telephone calls.⁹ The device, however, like the pen register, is also useful in electronic surveillance.¹⁰ Litigation over the use of in-progress traces, unlike the pen register, is scant. Reflecting the similarity of the intrusions, the devices will, however, probably be treated similarly.

⁷ National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Report on Electronic Surveillance 120 (1976).

⁸ State v. Hibbs, 123 N.J. Super. 152, 301 A.2d 789 (Mercer Co. 1972), aff'd, 123 N.J. Super. 124, 301 A.2d 775 (App. Div. 1973).

⁹ Id.; see also State v. Vogt, 130 N.J. Super. 465, 327 A.2d 672 (App. Div. 1974).

¹⁰ See In re In-Progress Trace, 138 N.J. Super. 404, 351 A.2d 356 (App. Div. 1975).

II. Is a court order necessary to authorize a pen register?

A. Federal Constitutional Constraints

¶4 The relation of the pen register to search and seizure within the Fourth Amendment is unsettled in the courts.¹¹ For the most part, courts only state that the pen register is not a general search and seizure.¹²

¶5 An analysis of existing precedent supports the conclusion, however, that the use of a pen register does not constitute a "search and seizure" of which the phone subscriber may complain. The following arguments may be made in support of this proposition:

¶6 First, as a threshold matter, it is necessary to show standing to raise the Fourth Amendment issues. The rights guaranteed by the Amendment are personal and a defendant must show that his rights were invaded before a court will permit him to present the question for decision.¹³ By analogy to the recent cases involving

¹¹ See United States v. Giordano, 416 U.S. 505, 554 n.4 (1974) (dissenting opinion of four Justices).

¹² See, e.g., In re Alperen, 355 F. Supp. 372, 374-75 (D. Mass.), aff'd, 478 F.2d 194 (1st Cir. 1973); United States v. Lanza, 341 F. Supp. 405, 433 (D. Fla. 1972).

¹³ See Wong Sun v. United States, 371 U.S. 471 (1962).

bank records,¹⁴ the pen register tapes appear to be the property of the telephone company and not of the subscriber. A typical defendant, therefore, would be without standing to complain.¹⁵

¶7 Second, the Fourth Amendment protects the information that a reasonable and prudent man would consider to be hidden from the public. The proper standard with which to measure the pen register under the Fourth Amendment requires, not only that there be an actual expectation of privacy on the part of the telephone subscriber, but also a showing that the expectation is one which is recognized by society as reasonable.¹⁶

¶8 A strong argument can be made that there is no reasonable expectation of privacy with respect to the dial pulses detected and recorded by the telephone company. In placing a call, a telephone subscriber uses equipment owned by the telephone company and voluntarily exposes the dial pulses to the company and its employees. Consequently, it is unreasonable for a subscriber to assume that his call, passing through the telephone

¹⁴United States v. Miller, 44 U.S.L.W. 4528, 4529 (Sup. Ct., April 21, 1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

¹⁵But cf. Mancusi v. Deforte, 392 U.S. 364 (1968).

¹⁶United States v. White, 401 U.S. 745 (1971) (plurality opinion); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

system, will remain a secret from the telephone company.¹⁷
Once this is accepted, it is clear that based on the concept
concept of "shared privacy " there can be no further reason-
able expectation that law enforcement authorities will
not learn of the call from the telephone company.

[The Supreme] Court has held repeatedly
that the Fourth Amendment does not pro-
hibit the obtaining of information re-
vealed to a third party and conveyed by
him to government authorities, even if the
information is revealed on the assumption
that it will be used only for a limited
purpose and the confidence placed in the
third party will not be betrayed. 18

Thus, under a "shared privacy analysis," if the tele-
phone company reveals the information, with or without
legal process, the subscriber cannot complain.¹⁹

¶9 It is also well settled that toll call records

¹⁷ See United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974); United States v. Gallo, 123 F.2d 229, 231 (2d Cir. 1941); cf. United States v. Miller, 44 U.S.L.W. 4528, 4530 (Sup. Ct., April 21, 1976); DiPiazza v. United States, 415 F.2d 99, 103-04 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

¹⁸ United States v. Miller, 44 U.S.L.W. 4528, 4530 (Sup. Ct., April 21, 1976); see Hoffa v. United States, 385 U.S. 293, 302-03 (1966); Lopez v. United States, 373 U.S. 427, 438-39 (1963). But see Burrows v. Superior Court, 13 Cal. 3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974) (bank voluntarily relinquishing deposit records violates privacy).

¹⁹ In United States v. Matlock, 415 U.S. 164, 171 n.7 (1974), the Supreme Court explained that the relationship or authority required to justify a third-party consent search is a "mutual use of the property by persons generally having joint access or control for most purposes. . . ." See also Frazier v. Cupp, 394 U.S. 731, 740 (1969).

are not within the scope of reasonable expectation of privacy.²⁰ There seems to be no valid distinction between the expectations associated with local calls and those calls that cross the local billing zone. The majority of subscribers probably do not know the boundaries of their "local call" zone. Consequently, there should be no more privacy associated with long distance than with local calls.

¶10 It is, moreover, not clear whether the dial pulses are "seized" by the pen register. The Fourth Amendment is held not to bar the operation of a mail cover when no substantial delay in delivery is involved.²¹ By analogy, just as mail passes through the postman's hands as he copies the information written on the envelopes, the pen register and in-progress trace have no delaying effect on the dial pulses as they pass through the device.

¶11 Other commonly encountered constitutional objections are not present with respect to the pen register. There is no violation of the Fifth Amendment privilege

²⁰ See Baxter and DiPiazza cases in note 17 supra.

²¹ Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); United States v. Leonard, 524 F.2d 1076 (2nd Cir. 1975) (mechanically assisted mail cover upheld).

against compulsory self-incrimination because there is no compulsion upon a subscriber to dial.²² Similarly, a claim that the pen register has a "chilling effect" upon the exercise of First Amendment freedom of speech is insufficient to bar the use of the device. A proper First Amendment examination entails a balancing of interests that must necessarily be performed on a case by case basis, and it is only partly dependant upon the investigative technique involved. It is doubtful, therefore, that the pen register would be held to constitute a restraint per se on First Amendment freedoms.²³ Moreover, in a criminal law enforcement context, the pen register is used without the actual knowledge of the telephone subscriber. The only "chilling effect" possible would be attributable to a concern that there may be a pen register on the telephone.

B. Statutory Constraints

1. Title III

¶12 It is well-settled that Title III²⁴ is not applicable

²² See Olmstead v. United States, 277 U.S. 438, 462 (1928); State v. Holliday, 169 N.W.2d 768, 772 (Iowa 1969); Fisher v. United States, 44 U.S.L.W. 4514 (Sup. Ct., April 21, 1976); Hoffa v. United States, 385 U.S. 293, 303-04 (1966).

²³ See Laird v. Tatum, 408 U.S. 1 (1971); Donohue v. Duling, 330 F. Supp. 308 (E.D. Va. 1971), aff'd, 405 F.2d 196 (4th Cir. 1972).

²⁴ Public Law 90-351, 82 Stat. 197, 18 U.S.C. §§ 2510-20 (1970).

to pen registers.²⁵ The reason most often given is that the device does not "intercept" communications as that term is defined in the statute because there is no "aural acquisition of [the] contents of any wire or oral communication."²⁶ The legislative history supports this conclusion: "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example would be permissible."²⁷

¶13 A pen register used concurrently with a wiretap, however, is subject to Title III.²⁸ In this situation judicial authorization for the pen register is necessary. Nevertheless, at least the Third Circuit holds that "an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate

²⁵ See, e.g., United States v. Giordano, 416 U.S. 505, 553 (1974) (dissenting opinion of four Justices); United States v. Illinois Bell Telephone Co., 531 F.2d 809, 811-12 (7th Cir. 1976); United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974).

²⁶ 18 U.S.C. §2510(4) (1970).

²⁷ S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

²⁸ See, e.g., Korman v. United States, 486 F.2d 926 (7th Cir. 1973); In re Alperen, 355 F. Supp. 372 (D. Mass.), aff'd, 478 F.2d 194 (1st Cir. 1973); United States v. Lanza, 341 F. Supp. 405, 422 (M.D. Fla. 1972); see also United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522, 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974) (TR-12 Touch Tone decoder governed by Title III if used contemporaneously or subsequently with a sound transducer which converts the dial pulses into audible clicks).

order for the latter is necessary."²⁹ It should be easy enough to incorporate a request for authorization of the pen register into the application for the accompanying wiretap.

2. Section 605

¶14 In essence, section 605³⁰ provides that, except as authorized by Title III, "no person" involved in receiving or transmitting interstate or foreign communications by wire or radio may reveal the "existence" or "substance" of that communication except upon "demand of. . .lawful authority" or in certain other limited instances. The confusion in the case law on the pen register under section 605 may be briefly summarized:

1. Supreme Court---United States v. Giordano:³¹
"Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." The opinion went on to indicate in a footnote:

The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in

²⁹United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). Accord, Commonwealth v. Vitello, ____ Mass. ____, 327 N.E.2d 819, 850 (1975).

³⁰47 U.S.C. §605 (1970).

³¹416 U.S. 505, 553-54 (1974) (dissenting opinion).

my view the constitutional guarantee,
assuming its applicability, was satisfied
in this case. 32

2. Third Circuit---United States v. Falcone:³³
pen registers are not within section 605 after 1968.

3. Fifth Circuit---cf. United States v. Clegg:³⁴
pen register probably not within section 605; United States v. Lanza,³⁵ (dictum): pen register probably not within section 605 after 1968.

4. Sixth Circuit---United States v. Caplan:³⁶
pen register violates section 605; I.R.S. summons also held insufficient for disclosure of pen register tapes and would require a search warrant or grand jury subpoena. But see DiPiazza v. United States,³⁷ Internal Revenue Service investigative summons held sufficient for disclosure of toll records if involved with potential civil liability.

5. Seventh Circuit---United States v. Finn:³⁸
pen register violates section 605; search warrant is sufficient "lawful authority." See also Korman v. United States;³⁹ United States v. Dote.⁴⁰

6. Eighth Circuit---United States v. Brick:⁴¹
pen register not controlled by section 605.

³²Id. at 554 n.4.

³³505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

³⁴509 F.2d 605, 611 (5th Cir. 1975).

³⁵341 F. Supp. 405, 422 (M.D. Fla. 1972) (dictum).

³⁶255 F. Supp. 805 (E.D. Mich. 1966).

³⁷415 F.2d 99 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

³⁸502 F.2d 938 (7th Cir. 1974).

³⁹486 F.2d 926 (7th Cir. 1973).

⁴⁰371 F.2d 176 (7th Cir. 1966). Note that Dote was overruled in part by Korman, supra n. 39, at 931-32 n. 11.

⁴¹502 F.2d 219, 224 (8th Cir. 1974).

7. Ninth Circuit---United States v. King:⁴²
pen register violates section 605; a search warrant under Rule 41 is sufficient. (Request by special agent of United States Customs Agency Service also held insufficient for disclosure of toll records under section 605.)

8. State Law---(a) Commonwealth v. Coviello,⁴³
pen register violates section 605 without warrant;
(b) People v. Fusco,⁴⁴ pen register along with wiretap permissible; (c) Commonwealth v. Stehley,⁴⁵ use of pen register not prohibited by state wiretap statute; (d) Bixler v. Hille,⁴⁶ (id.).

¶15 The inconsistency in these holdings is readily apparent. A close examination of the statute and its legislative history permits, however, the conclusion that the use of the pen register should not be constrained by section 605.

¶16 The pen register, unlike conventional electronic surveillance, does not divulge the existence of a communication. It records only a subscriber's efforts to establish a communication.⁴⁷ Its use should not, therefore, be governed by section 605,

⁴²335 F. Supp. 523 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973).

⁴³____ Mass. _____, 291 N.E.2d 416 (1973).

⁴⁴75 Misc.2d 981, 348 N.Y.S.2d 858 (Nassau Co. Ct. 1973).

⁴⁵235 Pa. Super. 150, 338 A.2d 686 (1975).

⁴⁶80 Wash.2d 668, 497 P.2d 594 (1972).

⁴⁷Compare United States v. Dote, 371 F.2d 176 (7th Cir. 1966), with Bixler v. Hille, 80 Wash. 2d 668, 497 P.2d 594 (1972). See Note, "The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell L. Rev. 1028, 1039-41 (1975); In re In-Progress Trace, 138 N.J. Super. 404, 412, 351 A.2d 356, 364 (App. Div. 1975).

which limits the interception of "communications."

¶17 The legislative history of the 1968 amendment of section 605 clearly indicates, moreover, a congressional intent to eliminate the influence of pre-1968 case law on wiretaps and pen registers under section 605:

This [new] section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed [Title III]....⁴⁸

Thus, as amended in 1968, the sole subject of section 605 is radio communication.

¶18 Finally, the section was to regulate the conduct of communications personnel only: "'Person' [within section 605] does not include a law enforcement officer acting in the normal course of his duties."⁴⁹ It should not, therefore, include a telephone company employee acting as an agent of the government.

¶19 Even assuming that the pen register is within section 605, the "demand of lawful authority" exception need not necessarily be limited to subpoenas, summonses, or search warrants. There is no reason

⁴⁸ S. Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968). See also United States v. Hall, 488 F.2d 193, 195 (9th Cir. 1973).

⁴⁹ S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). Compare Nardone v. United States, 302 U.S. 379, 381 (1937).

to exclude an official request of a police officer involved in a legitimate criminal investigation.⁵⁰

III. Can a court order be obtained to authorize a pen register?

¶20 A law enforcement officer may seek an order authorizing the pen register either because he believes the law (Fourth Amendment, statute, etc.,) requires it or because he desires to reduce the likelihood of success of a subsequent challenge (civilly or on a motion to suppress) to his use of the device.

A. Jurisdiction of the Court

¶21 To issue an order, the court must have jurisdiction. The Seventh Circuit recently stated that the federal district courts, despite the absence of express statutory authority, have inherent power to issue an order authorizing the pen register.⁵¹ (A

⁵⁰ See United States v. King, 335 F. Supp. 523, 534 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973).

⁵¹ United States v. Illinois Bell Telephone Co., 531 F.2d 809, 813, 814 (7th Cir. 1976). But see Application of United States, 407 F. Supp. 398 (W.D. Mo. 1976) (Oliver, J.). There is a fatal flaw in a key element of the court's opinion in In Re Application in reference to Title III and the pen register. The court's position is apparently based, in major part, on the assumption that a law review article, Blakey and Hancock, "A Proposed Electronic Surveillance Control Act," 43 Notre Dame Law. 657, 662 n.10 (1968), was the origin of a particularly crucial passage in S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), dealing with congressional intent. The Committee

contrary holding would, if such an order were re-
quired, effectively eliminate the use of the pen
register outside of Title III, which does provide
for orders authorizing pen registers accompanying
wiretaps.)

¶22 The court's inherent power with respect to pen
register orders may be supported by an analogy to
the inherent powers of a court, recognized for
centuries, to issue search warrants⁵² or contempt
orders.⁵³ Similarly, the United States Supreme
Court has not hesitated in upholding the power of
a court to fashion orders authorizing the seizure of
evidence in other than traditional ways.⁵⁴

51 (continued)

Report, however, was ordered to be printed in April
1968, while the article was not published until
June 1968. The explanation of the "but see"
footnote appearing in 60 Cornell L. Rev. at 1035
n. 44 to which the court refers, is correct. For
other examples of the same citation technique, see
S. Rep. No. 1097, 90th Cong., 2d Sess. 100, 108
(1967), indicating that the common-law rule of State
v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913) (conversation
overheard by surveillance loses privilege), was set
aside by 18 U.S.C. §2517(4) (privilege retained
even if overheard) and that the statutory construc-
tion of United States v. Sugden, 226 F.2d 281 (9th
Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956)
(law enforcement officer "person" within §605), of
47 U.S.C. §605 was not to obtain under the substi-
tute section 605 (law enforcement officer not a
person within §605).

⁵²Cf. Entick v. Carrington, 95 Eng. Rep. 807 (K.B.
1765) (dicta).

⁵³See Fisher v. Pace, 336 U.S. 155, 159 (1949).

⁵⁴See, e.g., United States v. Dionisio, 410 U.S.
1 (1973) (identifying physical characteristic
obtained by grand jury subpoena); Osborn v.
United States, 385 U.S. 323 (1966) (warrant for one-
party-consent surveillance sustained).

B. Procedural Mechanism

¶23 Once the court's jurisdiction is recognized, the problem of fitting the pen register order within established procedural mechanisms, however, still remains. Rule 41 of the Federal Rules of Criminal Procedure, for example, which describes the federal procedure of issuing search warrants, is limited to a search for and seizure of "tangible" property.

¶24 Further, a traditional search warrant as authorization of a pen register may be of doubtful utility. Rule 41(d) requires prompt return of the search warrant accompanied by a written inventory of any property taken, and Rule 41(c) establishes a ten-day time limit for execution of the warrant itself. Although several cases indicate that the return and inventory requirements are ministerial and that any inadvertent failure does not invalidate the warrant,⁵⁵ at least one court has held that the proper sanction for a conscious disregard of a similar inventory requirement in Title III is suppression of evidence so obtained.⁵⁶ Thus, by analogy to the wiretap statute, the effective lifetime of a pen register operated pursuant to a search warrant appears to be ten days, after which the surveillance must be disclosed.

⁵⁵ See, e.g., United States v. Hooper, 320 F. Supp. 507 (D. Tenn. 1969), aff'd, 438 F.2d 968 (6th Cir.), cert. denied, 400 U.S. 929 (1970).

⁵⁶ United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972).

Unlike Title III, Rule 41 on its face makes no provision for an order of postponement of the inventory requirement. Such an order might be within the court's discretion under Federal Rule of Criminal Procedure 57(b), which allows the court to fashion new rules not inconsistent with the other rules. A question then arises as to whether postponement is truly consistent with Rule 41. Similar problems would, no doubt, arise under state legislation dealing with traditional forms of search and seizure.

¶25 Alternatively, Rule 57(b) may allow the court to fashion an order in its entirety, analogous to the search warrant, thereby avoiding the problems of Rule 41.

¶26 If the Fourth Amendment is held applicable to pen registers, contrary to the analysis of these materials, a judicial order under either Rule 41 or 57(b) based upon probable cause will be required. If the Amendment is not applicable, such an order should still be available (if the government wishes voluntarily to accept the more restrictive requirements of probable cause).⁵⁷

¶27 If the pen register is not subject to the Fourth Amendment, however, the government should be able to obtain an order under Rule 57(b) authorizing the device without establishing probable cause. The

⁵⁷ See In re In-Progress Trace, 138 N.J. Super. 404, 413, 351 A.2d 356, 366 (App. Div. 1975).

court, in effect, is merely determining the legitimacy of the government's intended use of the pen register. Such an order would undoubtedly be of benefit to law enforcement authorities in subsequent civil litigation should it arise by according the officer a per se good faith defense.⁵⁸

IV. Is a collateral order available to compel telephone company cooperation?

¶28 Even if a court order authorizing the pen register is obtained, the telephone company may still refuse to cooperate. AT&T apparently "recommended" to its subsidiaries that they refrain from participation in pen register installation "effected outside the safeguards of the federal wiretap statutes."⁵⁹ This attitude may reflect a fear of civil liability (possibly based upon a breach of a telephone subscriber's contract) or criminal liability (possibly based upon 47 U.S.C. §§501, 605 [1970]). Thus, as a result of the specialized knowledge and skills required to connect

⁵⁸W. Prosser, Law of Torts §25 (4th ed. 1971). See also Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972) (good faith defense), on remand from, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); accord, Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

⁵⁹In re Joyce, 506 F.2d 373, 375 (5th Cir. 1975).

and operate the device, an order compelling the company to assist is usually helpful.

¶29 According to a recent Seventh Circuit decision, the Federal All Writs Act, 28 U.S.C. §1651 (1970), authorizes a district court to issue an order directing the telephone company to provide facilities, services, and technical assistance.⁶⁰ The court stated that "[t]he authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former, the latter would be worthless."⁶¹ The court noted that such an order would be a complete defense in any criminal or civil suit.⁶²

¶30 An order to compel the telephone company to cooperate may be, however, ancillary only to an order authorizing the pen register that is based on probable cause. Requiring compliance with an order based on less than probable cause would accord law enforcement authorities a power, in effect, to subpoena the telephone company. Traditionally, the prosecutor, acting alone, has no such power in conducting investigations, and it is probable that the courts would refuse to create such power through case law.

⁶⁰United States v. Illinois Bell Telephone Co., 531 F.2d 809, 814 (7th Cir. 1976).

⁶¹Id.

⁶²Id. at 814-15.

¶31 In place of an order authorizing the pen register and an order compelling cooperation, the prosecution, when assisting a grand jury investigation, may be able to use a grand jury subpoena to require the telephone company to install and maintain a pen register.⁶³ The standards for the issuance of a grand jury subpoena are well established, requiring only "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."⁶⁴

⁶³In re In-Progress Trace, 138 N.J. Super. 404, 407-08, 351 A.2d 356, 359-60 (App. Div. 1975).

⁶⁴Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946). See Hale v. Henkel, 201 U.S. 43 (1906).

This memorandum is based on a more complete discussion in Note, "The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell Law Rev. 1028 (1975).

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Addenda and Errata

(Double underlining indicates corrected material)

¶4, Note 12: Correction: United States v. Lanza, 341 F.
Supp. 405, 421 (D. Fla. 1972).

¶6, Note 13: Correction: Wong Sun v. United States, 371
U.S. 471 (1963).

¶6, Note 14: Correction: United States v. Miller, 425
U.S. 435 (1976).

(Also at ¶8, Note 18)

¶10, Note 21: Correction: United States v. Leonard, . . .
cert. denied, 426 U.S. 922 (1976).

¶11: Correction: A proper First Amendment examination
entails a balancing of interests that must
necessarily be performed on a case by case
basis

¶11, Note 22: Correction: Fisher v. United States, 425
U.S. 391 (1976).

¶11, Note 23: Correction: Donohue v. Duling, . . . aff'd,
465 F.2d 196 (4th Cir. 1972).

¶14: Correction: Following United States v. King: (Request
by special agent of United States Customs
Agency Service also held sufficient for
disclosure of toll records under section
605).

¶29: Note 60: Accord, Southwestern Bell Tel. Co. v. United

States, 546 F.2d 243 (8th Cir. 1976);
Contra, In re Application of the United
States, 538 F.2d 956 (2d Cir. 1976). The
issue is now before the Supreme Court of
the United States. In re Application of
the United States, 538 F.2d 956 (2d Cir.
1976), cert. granted sub nom. United States
v. New York Tel. Co., 45 U.S.L.W. 3508
(Jan. 25, 1977).

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ELECTRONIC SURVEILLANCE: BRIBERY, EXTORTION, AND GRAFT



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SUMMARY

¶1 Electronic surveillance can be an effective tool in the investigation of bribery, extortion, and graft. Authorization of a bug or wiretap for investigation of these crimes is not, however, uniformly available in all jurisdictions. Colorado, Delaware, Florida, Nevada, New Jersey, New York and Rhode Island provide for electronic surveillance in bribery, extortion and graft cases. Arizona, the District of Columbia, Georgia, Kansas, Massachusetts, Nebraska, New Hampshire, South Dakota, Virginia, Wisconsin, Maryland and Connecticut permit surveillance for bribery and extortion. Minnesota authorizes wiretapping only for bribery. Oregon authorizes wiretapping only for extortion. Washington does not provide for authorization for bribery, extortion, or graft.

I. INTRODUCTION

A. Bribery, Extortion and Graft: General Definitions

¶2 Traditionally, governmental corruption has been attacked by laws prohibiting bribery, extortion and graft. These generic terms are variously defined in different jurisdictions. The following general definitions, therefore, can only serve as referents for this survey of the availability of electronic surveillance in corruption cases.

¶3 Bribery: is offering or giving any thing of value¹ to a public servant as payment for an official act done or to be done with intent² to influence the official's conduct. Soliciting or receiving a valuable thing by a public servant in return for an official act also generally falls within the offense.

¶4 (a) Conduct: Generally, a public official receiving a bribe need only "agree to accept" (rather than actually accept) the bribe. No result is required in many jurisdictions, although a few require proof of actual acceptance.³ Some variant of "accept" or "agree" is commonly used to describe the requisite conduct of an offeree.

¶5 Usually an offeror of a bribe need only "confer" or "offer" or "promise" to give a benefit for valued return. Some jurisdictions use "asked" or "solicited" for the official's conduct, and "offered" or "promised" for the offeror's conduct, thus including an attempt to bribe within the definition of the offense.⁴

¹Subjective value to the potential receiver is sufficient; e.g. an offer to perform sexual acts. Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (Ohio 1923).

²Intent in the mind of the accused is sufficient; the intent of the other party is not an element. Razette v. United States, 199 F.2d 44 (6th Cir. 1952) cert. denied, 344 U.S. 904 (1952); Williams v. State, 178 Wis. 78, 189 N.W. 268 (1922).

³See, e.g., Alaska Stat. §11.30.050 (1976); N.J. Rev. Stat. §2A:93-1 (1969) (accepts or receives). See also United States v. Russell, 255 U.S. 138, 143 (1921).

⁴See United States v. Jacobs, 431 F.2d 754, 760 (2d Cir. 1970), cert. denied, 402 U.S. 950, rehearing denied, 403 U.S. 912 (1971).

¶6 (b) Surrounding Circumstances: Statutes generally define bribery either by or of a "public official or employee". In most cases, the official being bribed need not have the authority to perform the requested act.⁵ Payments made through a third party acting as the official's agent also fall within the offense.⁶

¶7 (c) State of Mind: Generally, intent to influence is required on the offeror's part. The public official's state of mind is often undefined.⁷ An offeror may be convicted of bribery even though the offeree-official had no intention

⁵ United States v. Anderson, 509 F.2d 312 (D.C. Cir.), cert. denied, 420 U.S. 991 (1974); United States v. Hall, 245 F.2d 338 (2d Cir. 1957); Wilson v. United States, 230 F.2d 521 (4th Cir.), cert. denied, 351 U.S. 931 (1956); Commonwealth v. Avery, 301 Mass. 605, 18 N.E.2d 353 (1938); People v. Mitchell, 40 App. Div. 2d 117; 338 N.Y.S.2d 313 (3d Dep't 1974); People v. Herskowitz, 80 Misc.2d 693; 364 N.Y.S. 350 (Orange County Ct. 1975), aff'd, slip op. No. 253 (Court of Appeals May 10, 1977) (official capacity, not individual capacity, is criterion); Pa. Stat. Ann. tit. 18 §4701 (1973). See also 122 A.L.R. 951 and 73 A.L.R.3d and cases cited therein.

⁶ See, e.g., Commonwealth v. Connolly, 308 Mass. 481, 33 N.E.2d 303 (1941); United States v. Rosner, 352 F. Supp. 915 (S.D.N.Y. 1972) (18 U.S.C. §201 [b] expressly prohibits indirect as well as direct payments); West Virginia Code §61-5A-3 (1976) (directly or indirectly); State v. Ferro, 128 N.J. Super. 353, 320 A.2d 177 (1974) (statute covers the peddling of influence by person in an apparent position of access to a public official).

⁷ Some states do, however, specifically require an intent on the part of the public official. Mass. Gen. Law Ann. §268A:2 (1968); Ga. Code §26-2301 (1972); Md. Crim. Law §27:23 (1976). At the other end, other states only require that the official accept the benefit with knowledge of the offeror's intent. Miss. Code Ann. §97-11-13 (1972); N.H. Rev. Stat. Ann. §640:2(I)(6) (1974); N.J. Rev. Stat. §2A:93-1 (1952). See State v. Begyn 134 N.J. 35, 167 A.2d 661 (1961).

of altering his conduct.⁸

¶8 Extortion: is the use of a threat of injury to person, family or property, or force or violence upon the person, family or property to procure some action, or to obtain any thing of value. Obtaining anything of value under color of office is also sometimes within the offense.

¶9 (a) Conduct: The dual aspect of extortion is manifest in the Hobbs Act, which defines extortion as:

the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.⁹

The first aspect of the offense applies to any individual who uses force or threat of force to gain anything of value. The second¹⁰ aspect of the offense prohibits mere intentional receipt of unauthorized payment by an official; it contemplates wrongful use of office, without regard to coercion or force.

⁸ See, e.g., Commonwealth v. Hurley, 311 Mass. 78, 40 N.E.2d 248 (1942).

⁹ 18 U.S.C. §1951 (b) (2) (1970). State extortion statutes adopting this definition, with minimal differences, are: Cal. Penal Code §518 (1970); Idaho Code §18-2801 (1948); Okla. Stat. tit. 21 §1481 (1958).

¹⁰ This separate second offense was not recognized by the courts until 1972 in United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972), cert. denied, 409 U.S. 914 (1973). This offense, however, was the only one with which the common law definition of extortion was concerned. See United States v. Mazzei, 521 F.2d 639, 645 (3d Cir.), cert. denied, 423 U.S. 1014 (1975), where the court said:

[U]nder the common law definition of extortion, color of public office took the place of the coercion implied in the ordinary meaning of the word extortion.

¶10 Many states distinguish these two types of extortion. "Private" extortion statutes often require, at least, that the victim be placed in some sort of fear. "Public official" extortion statutes generally have no such requirement.

¶11 (b) Surrounding Circumstances: In general, "private" extortion statutes require that the use of force or fear be "wrongful."¹¹ "Public official" statutes limit the crime to acts committed "under color of office."¹²

¶12 (c) State of Mind: In most statutory schemes intent to deprive or instill fear is required. If a plan of extortion has been proven, however, proof of receipt of valuables by an official may be tantamount to proof of intent.¹³

¶13 Graft: is offering or giving money or any valuable thing in return for past official acts, or in order to exert any general influence upon an official. Soliciting or accepting any valuable thing as compensation for such past official acts also usually falls within the offense.

¶14 (a) Conduct: The general conduct requirement is "giving, offering, promising, or accepting or agreeing to accept" a thing of value. Many states define graft in terms of reward for past actions; bribery involves intent to influence future

¹¹The Supreme Court has held that "wrongful" limits the coverage of the federal extortion statute (18 U.S.C. §1951 (1970)) to those instances in which the extortionist has no lawful claim to the property sought. United States v. Enmons, 410 U.S. 396 (1973).

¹²See, e.g., Cal. Penal Code §518 (1970).

¹³See United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1974).

actions.¹⁴

¶15 (b) Surrounding Circumstances: These are generally the same as those required for bribery. The recipient must be a public official, and the transaction must involve "something of value".

¶16 (c) State of Mind: Generally, no specific state of mind is needed. Knowledge that the transfer was not provided for by law may be required.¹⁵

¶17 Graft and bribery are often distinguished on the basis of intent, or the timing of the official act. Bribery is generally prospective, and requires an intent to effect a specific illegal influence. Graft is retrospective, or else without that intent. Graft differs from extortion in the component of force involved--graft is merely accepting or soliciting payment; extortion involves the threat of force to gain payment. Color of law extortion often cannot be distinguished from graft.

¹⁴ See, e.g., N.Y. Penal Law §§200.20, 200.22, 200.25, 200.27. (official misconduct); §§200.30, 200.35 (graft) (McKinney, 1975).

¹⁵ See Cal. Penal Code §70 (1970); Colo. Rev. Stat. §18-8-304 (1973); Del. Code tit. 11 §§1205, 1206 (1974); D.C. Code §1-1181 (d) (1973); Ga. Code §§89-9909, 89-9910 (1972); Haw. Rev. Stat. §84-11 (1968); Ind. Code §4-2-6-5 (1975); Iowa Code §2102 (1946); Me. Rev. Stat. tit. 170A §605 (1968); Miss. Code Ann. §97-11-13 (1942); Mont. Rev. Codes Ann. §94-70104 (1947); N.H. Rev. Stat. Ann. §640:5 (1974); N.Y. Penal Law §200.30 (McKinney 1975); Okla. Stat. tit. 74 §§1404(3), 1409(f) (1958); Or. Rev. Stat. §244.040(2) (5) (1953); S.D. Compiled Laws Ann. §22-12A-8 (1967); Tex. Penal Code Ann. tit. 8 §36.08 (Vernon 1974); Utah Code Ann. §67-16-5 (1953); Va. Code §2.1-351(c) (1950); Wash. Rev. Code §42.22.040(2) (1972); W. Va. Code §62-5A-2(a) (1977).

B. Electronic Surveillance in Corruption Investigations

¶18 Electronic surveillance often is an indispensable tool in a bribery, extortion or graft investigation. Wiretaps and bugs are particularly effective in establishing the intent needed for a bribery or extortion conviction. Incriminating conversations, moreover, are frequently conducted by telephone; payoffs are often arranged between parties who have never actually met. Investigation of a wary official may be impossible without the use of electronic surveillance techniques.

¶19 Electronic surveillance in political corruption cases is not, however, always possible. Probable cause for a wiretap or bug may be lacking. It is often difficult to predict when and where illegal conversations will occur. Suspicious officials may not use their home or office phones for incriminating conversations. Frequently they avoid the use of telephones altogether, and they meet in locations where bugging is impractical. Where probable cause can be established for a bug or tap on a public official, investigators must comply with federal or state requirements for proper authorization and minimization and must obtain extensions, if needed, of the original warrant.

¶20 These logistical difficulties will, of course, present problems for the prosecutor and the officer in the field for which there is no easy solution. Compliance with federal or state regulations, however, is important. Investigative procedures must be made to conform to these requirements before an otherwise valid conviction is lost.

C. Use of Intercepted Information in Prosecution

¶21 Three additional problems arise after a legitimate tap or bug has been installed.

1. May an investigative or law enforcement officer disclose the contents or evidence to another investigative or law enforcement officer?

2. May an investigative or law enforcement officer use the contents or evidence of intercepted communications in performing his official duties?

3. To what extent may the intercepted communications be introduced into evidence in a criminal proceeding?

¶22 Most states have modeled their legislation on the language of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §2517 (1970), in part, provides:

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by his chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence

while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

¶23 Section 2517 and its state counterparts govern the disclosure, use, and introduction into evidence of intercepted communications relating to offenses designated in the authorization order. When communications relating to offenses other than those designated in the original authorization order (e.g., gambling overheard on a narcotics tap), are intercepted, section 2517(5) governs. It provides:

When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections(1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection(3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

¶24 Most, but not all, states now have provisions similar to those of subsection (5). Amendment becomes particularly important, then, where intercepted communications relate to offenses other than those designated in the order.

¶25 If the communication was properly in "plain view," the original order valid, and the surveillance lawful, amendment is not a problem.¹⁶

¹⁶Note, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 127 (1975).

¶26 Under a prospective amendment to a surveillance order the court, in effect, enlarges the scope of the original order by issuing another order. This amendment will only be granted where the government establishes (along with all normal statutory requirements) probable cause that further communications related to the new crime will be intercepted.¹⁷

¶27 Under a continuing surveillance, amendment is important to authorize the interception of further evidence of the new crime. If the monitors continue to listen to evidence of crimes not specified in the original authorization order, electronic surveillance may be deemed unreasonable. The Fourth Amendment prohibits unreasonable searches. Judicial approval of a continuing surveillance should be obtained without delay (at least at the time of any extension) to avoid constitutional objections. If the amendment is timely, according to 18 U.S.C. §2517(5) (1970) and relevant state statutes, the evidence of new crimes may be introduced into evidence in a criminal proceeding.

D. Authorization: Statutory Limitations

¶28 Twenty-three states have enacted electronic surveillance laws. Each places limitations on the circumstances under which an authorization for a bug or wiretap may issue. Limitations of the character of the offenses for which electronic surveillance may be authorized fall within four general categories:

¹⁷Id.

designated offenses (e.g. "murder," "bribery," etc.); general terms ("crime"); status ("organized crime activity," "national security," etc.); and result ("harm to the person").

II. FEDERAL LAWS

¶29 18 U.S.C. §2516(1)(b) (Supp. 1976) provides for authorization of electronic surveillance where such interception may provide evidence of a violation or violations of 18 U.S.C. §186 (concerning payments and loans to labor unions,¹⁸ or 29 U.S.C. §501(c) (embezzlement of union funds), or "any offense which involves . . . extortion."¹⁹

¹⁸29 U.S.C. §186 (1965, Supp. 1975) proscribes payments or loans to officials or representatives of labor organizations. Section (b)(1) provides:

It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (c) of this section.

¹⁹Extortion is defined in 18 U.S.C. §§871-877, under these headings:

- §871 Threats against President and successors to the the Presidency,
- §872 Extortion by officers or employees of the United States,
- §873 Blackmail,
- §874 Kickbacks from public works employees,
- §875 Interstate communications,
- §876 Mailing threatening communications,
- §877 Mailing threatening communications from foreign country.

¶30 18 U.S.C. §2516(1)(c) (Supp. 1976) permits authorization for:

any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault).

Subsection(f) provides for authorization concerning "any offense including extortionate credit transactions under sections 892, 893 or 894 of this title" Section(g) adds "any conspiracy to commit any of the foregoing offenses."

III. STATE LAW

A. Designated Offenses

¶31 A majority of states having wiretap statutes permit authorization of electronic surveillance only for certain designated offenses. In such jurisdictions the parameters of permitted surveillance are readily ascertainable. These

states, however, do not uniformly provide for electronic surveillance in bribery, extortion and graft investigations. The following survey indicates which jurisdictions permit surveillance in such cases; it notes variations from the general definitions set forth in paragraphs 2 through 17.

1. Arizona

¶32 Arizona permits authorization of electronic surveillance for certain designated offenses and for other felonies defined by result. Ariz. Rev. Stat. Ann. §13-1057(A) (Supp. 1973) specifically includes bribery and extortion among the enumerated offenses, as well as "any felony dangerous to life, limb or property or any conspiracy to commit any of the foregoing offenses."

¶33 Bribery is proscribed in sections 13-281 to 13-291 of the Criminal Code.²⁰ Extortion is covered in Ariz. Rev. Stat.

²⁰ Ariz. Rev. Stat. Ann. §13-281 to 13-291 (1965). The following are categories of bribery described:

- §13-281 Bribery of public officers
- 282 Public officer asking or agreeing to receive bribe
- 283 Bribery of councilman, commissioner or board member
- 284 Bribery of member of political caucus, convention, or committee
- 285 Bribery of legislator
- 286 Legislator asking or receiving bribe; reciprocity voting
- 287 Bribery of judicial officer or trier
- 288 Judicial officer or trier asking or receiving bribe
- 289 Bribery or corruption of witness

Ann. §§13-401 to 13-403.²¹ These sections follow the general definitions set forth in paragraphs 2 through 17 above.

Arizona's bribery law requires intent to influence a future act, or intent to do a future act for compensation. Section 13-546 of the Criminal Code and section 38-444 of the Public Officers and Employees Code cover graft.

¶34 Arizona has not enacted a statute governing admissibility of wiretap or bugging evidence in criminal proceedings.

Arizona has also recently rewritten parts of its criminal code. A copy of the new code was not available at the time of this writing.

2. Colorado

¶35 Section 16-15-102 of the Colorado Criminal Justice Code (Col. Rev. Stat. Ann. §16-15-102 (1973)) provides for authorization of electronic surveillance for designated crimes, including "bribery" and "extortion," and for offenses defined by result--"crimes dangerous to life, limb, or property."

¶36 Bribery is defined in section 18-8-302,²² and it is comparable to the general definition set forth in paragraphs 3 through 7. Also included are statutes on "attempt to influence a public servant" (§18-8-306), "designation of a supplier" (§18-8-307), and "misuse of official information" (§18-8-402).

²¹§13-401 Definition; inducing fear

-402 Attempted extortion by letter or writing

-403 Attempted extortion by verbal threat

-403 Obtaining signature by extortionate means

²²Col. Rev. Stat. Ann. §18-8-302 (1973).

¶37 Section 18-8-303, "compensation for past official behavior,"²³ is also included in the list of enumerated offenses. This is graft. Lesser graft offenses, however, are not included.²⁴

¶38 One type of extortion-like statute enumerated is menacing:

A person commits the crime if, by any threat or physical action, he intentionally places or attempts to place another person in fear of imminent serious bodily injury.²⁵

Menacing is a misdemeanor, unless a deadly weapon is used, in which case it is a felony. In accordance with sections 16-15-102(1)(a)(VII) and 16-15-102(1)(b), wiretapping authorization is available only for felonies.

¶39 Colo. Rev. Stat. Ann. §16-15-102(12), (13), (14), (16) is virtually identical to 18 U.S.C. §2516(1970).

²³18-8-303. Compensation for past official behavior. (1) A person commits a class 5 felony, if he:

(a) Solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised a discretion in his favor, whether or not he has in so doing violated his duty; or

(b) Offers, confers, or agrees to confer compensation, acceptance of which is prohibited by this section.

²⁴Mere solicitation of graft (that is, a request by a public official for compensation for performance of an action which he was required to perform by law) is a misdemeanor, and it is beyond the scope of the wiretap statute. Offering or soliciting compensation for political appointments or nominations is also beyond the scope of the electronic surveillance statute. Colo. Rev. Stat. Ann. §§18-8-304, 18-8-305 (1973).

²⁵Colo. Rev. Stat. Ann. §18-3-206 (1973).

3. Delaware

¶40 Del. Code tit. 11, §1336(g) (1975) provides for authorization of electronic surveillance for bribery and extortion.

¶41 Bribery is defined in sections 1201, 1203, 881 and 882. Section 1201(1) and (2) sets forth what is defined as bribery in paragraphs 3 through 7 supra. Section 1201(3)²⁶ refers to past violation of the official's duty, and is thus equivalent to graft as defined above. Sections 881 and 882 define bribery of individuals who are not public servants--"private bribery".²⁷ Section 1203(a) and (b) deals with a public servant receiving bribes; section 1203(c) concerns an official receiving graft.²⁸

¶42 Extortion is defined in section 846; it is similar to the general definition of "private" extortion above. The crime of improper influence (§1207) is similar to "public" extortion. Private extortion is a class A misdemeanor, the improper influence a class D felony. The person being "influenced" under section 1207 may be a "public servant, party officer, or voter."

¶43 The provisions of Del. Code Ann. tit. 11, §1336(o) are similar to those of 18 U.S.C. §2517(1970).

²⁶"... offers, confers, or agrees to confer a personal benefit upon a public servant for having violated his duty as a public servant."

²⁷This statute expressly includes situations where the consideration is a "benefit to another in whose welfare [the accused] is interested." Bribery involving witnesses and jurors is also specifically prohibited. See §§1209, 1261, 1264 and 1265.

²⁸Sections 881 and 882 deal with "bribery" of an employee, a labor union representative, a participant in a sporting event, and an official in a sporting event.

4. District of Columbia

¶44 The District of Columbia enumerates all offenses for which an electronic surveillance order may issue.²⁹ Section 23-546 of the D.C. Code Ann. (1970) also enumerates the relevant Code sections for included offenses. Both bribery and extortion are included.

¶45 Bribery is proscribed in sections 22-701, 22-702 and 22-704, each of which is included among the enumerated offenses of §23-546. Section 22-701 is similar to the definition of bribery above in paragraphs 3 through 7 supra.³⁰ Section 22-702 deals with bribery of District of Columbia Commissioners. Section 22-704 addresses bribery of officials generally.³¹

²⁹D.C. Code Ann. §23-546(c)(1).

³⁰Section 22-701 includes bribery of witnesses and jurors. It also includes bribery which is intended merely to create "any opportunity for the commission of any fraud, D.C. Code Ann. §22-701 (1967).

³¹Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation, or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia or any employee or other person acting in any capacity for the District of Columbia, or any agency thereof...

Whosoever corrupts or attempts, directly or indirectly, to corrupt any special master, auditor, juror, arbitrator, umpire, or referee, by giving, offering, or promising any gift or gratuity whatever, with intent to bias the opinion, or influence the decision of such officer, in relation to any matter pending in the court, or before an inquest, or for the decision of which such arbitrator, umpire, or referee has been chosen or appointed, and every official who receives, or offers or agrees to receive, a bribe in any of the cases above mentioned shall be guilty of bribery and upon conviction thereof shall be punished as hereinbefore provided. D.C. Code Ann. §22-704 (1967).

¶46 Extortion is defined in D.C. Code Ann. §§22-2305, 22-2306 22-2307 (Supp. 1976), each of which is included among the enumerated offenses of §23-546.

¶47 The District of Columbia has no provisions for graft as is generally defined above. D.C. Code Ann. §22-703 proscribes the use of threats or force to obstruct justice, and is included among the crimes enumerated in section 23-546.

¶48 D.C. Code Ann. §23-553(1975) follows 18 U.S.C. §2517 (1970).

5. Florida

¶49 Fla. Stat. Ann. §934.07 enumerates those crimes for which an eavesdropping order may issue. It includes bribery and extortion, but makes no specific reference to other sections of the Code. Bribery is defined in sections 838.014 and 838.015; it is equivalent to the general definition in paragraphs 3 through 7 supra.³²

¶50 Extortion is proscribed by section 812.021(1)(e). It includes the taking of property by threatening to:

1. Accuse anyone of a criminal offense.
2. Expose any secret tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute.
3. Take or withhold action as a public servant.
4. Bring about or continue a strike, boycott, or other collective unofficial action if the property is not demanded or received for the benefit of the group in whose interest the defendant purports to act.³³

³² Specific provisions prohibit bribery of witnesses (Fla. Stat. Ann. §914.14 (Supp. 1976)) and bribery involving poultry inspections (id. §585.341).

³³ Fla. Stat. Ann. §812.021(1)(c).

¶51 Graft is also proscribed by section 838.016 which outlaws "unlawful compensation or reward for official behavior." The issue of whether this section is included under the heading "bribery" in section 934.07 has not been decided. There is a good argument that section 838.016 was intended to be separate from section 838.015.³⁴ If this reasoning is applied in a surveillance warrant situation, such a warrant would not be available for section 838.016. The use of enumerated offenses without specific section references, however, leaves this question open.

¶52 Fla. Stat. Ann. §934.08 follows 18 U.S.C. §2517 (1970).

6. Georgia

¶53 Ga. Code Ann. §26-3004(c) (1972) authorizes the issuance of a surveillance order for:

any felony involving bodily harm, or any crimes involving. . .blackmail, extortion, [or] bribery. . . .

¶54 Bribery is described in Ga. Code Ann. §26-2301, and is similar to the general definition in paragraphs 3 through 7 supra. Extortion is defined in section 26-1804. The crime of "improperly influencing legislative action," proscribed in section 26-2304, is similar to bribery,³⁵ yet conviction on improper influencing, etc. and acquittal on a bribery charge is possible.³⁶ In view of the similar nature of the offenses,

³⁴See Williams v. Christian 335 So.2d 358, 360 (1976), construing §838.06 and §838.12 (the precursors of §838.15 and §838.16).

³⁵See Ansley v. State, 185 S.E.2d 562 (1971).

³⁶Id.

however, a surveillance order may be possible for "improperly influencing" as a type of bribery.

¶55 Ga. Code Ann. §26-3004(g) (1972) is comparable to 18 U.S.C. §2517(1970). It provides:

When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications or in the observation in the manner authorized herein, intercepts wire or oral communications or obtains fruits of observation relating to offenses for which an investigative warrant may issue other than those specified in the order of authorization, the contents or fruits thereof, and evidence derived therefrom, may be disclosed or used in the same manner as if a surveillance warrant covering said crimes had been used (emphasis added).

7. Kansas

¶56 Kan. Stat. Ann. §20-2515(1)(j) (1974) provides for authorization of an electronic surveillance order for bribery, commercial bribery and sports bribery.

¶57 Bribery is described in section 21-3901, and follows the general definition in paragraphs 3 through 7 supra. The offenses of "official misconduct" (§21-3902) and "compensation for past official acts," however, are seemingly not within the definition of bribery in section 20-2515.³⁷

³⁷ "Compensation for past official acts" is similar to graft. See Judicial Council Comments to Kan. Stat. Ann. §21-3903 (1974), 1968:

This section is a complement to the bribery prohibition. Bribery contemplates prospective official action. The present section covers the instance where the breach of official duty has already occurred.

¶58 Certain instances of extortion may fall under the heading of crimes "directly and immediately affecting the safety of a human life or national security."³⁸

¶59 Kan. Stat. Ann. §22-2515(2)-(6) follows 18 U.S.C. §2517 (1970).

8. Massachusetts

¶60 Under Mass. Gen. Laws Ann. ch. 272 §99(F) (Supp. 1975) an electronic surveillance order may issue only for a designated offense. According to Mass. Gen. Laws Ann. ch. 272 §99(B) (7) (Supp. 1975):

The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble. . . extortion, . . . bribery, . . . intimidation of a witness or juror (emphasis added).

The phrase "in connection with organized crime," limits the availability of an electronic surveillance order. To obtain authorization, it must be established that there is a link between "extortion," "bribery," or "intimidation of a witness or juror" and "organized crime." Mass. Gen. Laws Ann. ch. 272, §99(A) defines "organized crime" as

a continuing conspiracy among highly organized and disciplined groups to engage in illegal goods and services.

¶61 Bribery is proscribed by ch. 268A, which includes bribery of state, county or municipal employees, members of the judiciary, witnesses, etc.³⁹

³⁸ 22-2515(1)(a).

³⁹ See ch. 268A §2. See also ch. 268 §§13, 14.

¶62 Extortion is described in ch. 265, §25, and is similar to the general definition in paragraphs 8 through 12 supra.

¶63 Mass. Gen. Laws Ann. ch. 272, §99(D)(2) is based on 18 U.S.C. 2517(1970). Massachusetts does not, however, have a statute comparable to 18 U.S.C. §2517(5)(1970).

9. Minnesota

¶64 Minn. Stat. Ann. §626A.05(2) (Supp. 1976) enumerates all crimes for which a surveillance order may issue: it indicates appropriate code sections detailing those crimes. The statute provides for authorization for bribery investigations.

¶65 Bribery is defined in section 609.42 (Supp. 1976). Parts (1) and (2) of subdivision one are similar to the general definition of bribery in paragraphs 3 through 7 supra.

Parts (3) through (6) concern bribery of witnesses.

¶66 Minn. Stat. Ann. §626A.09 (Supp. 1976) follows 18 U.S.C. §2517 (1970).

10. Nebraska

¶67 Neb. Rev. Stat. §86-703 (1976) authorizes issuance of surveillance orders for investigation of bribery and extortion.

Bribery is proscribed by Neb. Rev. Stat. §28-703 et seq.

Extortion is proscribed by Neb. Rev. Stat. §28-441 et seq.

Neb. Rev. Stat. §86-704 follows 18 U.S.C. 2517 (1970).

11. Nevada

¶68 Nev. Rev. Stat. §179.460(1)(1975) enumerates all offenses for which an electronic surveillance order may issue. Included are bribery and extortion.

¶69 Bribery involves public employees, and it is defined in sections 197.010 through 197.040. Also proscribed, and probably included under the term "bribery" are: "offering reward for appointment" (§197.080), "bribery in elections" (§293.584), "bribery of health officers and poultry inspectors" (§583.543).

¶70 Nevada also proscribes "extortion by a public officer," a crime which resembles graft in the definition above:

Every public officer who shall ask or receive, or agree to receive a fee or other compensation for his official service, either:

1. In excess of the fee or compensation allowed to him by statute therefor; or
2. Where no fee or compensation is allowed to him by statute therefor, commits extortion and shall be punished by imprisonment in the state prison for not less than 1 year or more than 10 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

Since it is entitled "extortion," surveillance warrants may issue for violations of this section. Section 205.320 defines "extortion" as it is set forth in paragraphs 8 through 12 supra.

¶71 Nev. Rev. Stat. §179.465 follows 18 U.S.C. §2517 (1970).

12. New Hampshire

¶72 N.H. Rev. Stat. Ann. §570-A:7 (1974) provides for:

an order authorizing, or approving the interception of wire or oral communications by law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of organized crime, as defined in RSA 570-A:1, XI, or evidence of commission of the offenses of homicide, kidnapping, gambling, bribery, extortion, blackmail, or dealing in narcotic drugs, marijuana or other dangerous drugs, or any conspiracy to commit any of the foregoing offenses.

¶73 N.H. Rev. Stat. Ann. §570-A:1, XI (1974) defines "organized crime" as:

the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including, but not limited to homicide, gambling, prostitution, narcotics, marijuana or other dangerous drugs, bribery, extortion, blackmail and other unlawful activities of members of such organizations (emphasis added).

§74 Thus, New Hampshire provides for a well-defined generic description and enumerated offenses in its wiretap statute. Included are bribery and extortion.

§75 Bribery is proscribed by sections 640:1 through 640:7. Section 638:7 describes commercial bribery. Section 638:8 describes sports bribery.

§76 Section 637:5 describes theft by extortion in terms similar to the definition in paragraphs 8 through 12 supra.

¶77 N.H. Rev. Stat. Ann. §570-A:8 (1974) follows 18 U.S.C. §2517 (1970).

13. New Jersey

¶78 N.J. Stat. Ann. §2A:156A-8 (Supp. 1975) authorizes electronic surveillance for bribery and extortion.

¶79 Extortion is prohibited by N.J. Stat. Ann. §2A:105-3 and 4 (Supp. 1975).

¶80 Bribery is covered by sections 2A:93-1 through 14. Included are the offenses of bribery of judges or magistrates (93-1), legislators (93-2), government employees (93-3 to 6), representatives of a union (93-7), witnesses (93-9), and

individuals concerned with sporting contests (93-10 through 93-14). Graft involving a public officer, judge, or magistrate is prohibited. Section 2A:105-1. This crime has been referred to as "extortion" by the New Jersey courts and is probably included in that term as it is used in N.J. Stat. Ann. §2A:156-8 (Supp. 1975).⁴⁰

¶81 N.J. Stat. Ann. §2A:156A-17 (Supp. 1976) is modeled on 18 U.S.C. §2517 (1970).

14. New Mexico

¶82 N.M. Stat. Ann. §40-12-1.1(A) provides for electronic surveillance authorization for extortion, but not for bribery or graft.

¶83 Extortion is defined in N.M. Stat. Ann. §40A-16-8, much as it is set forth in paragraphs 8 through 12 supra.

¶84 N.M. Stat. Ann. §40A-12-1.8 (Supp. 1975) follows 18 U.S.C. §2517 (1970). N.M. Stat. Ann. §40A-12-1.9(B) (Supp. 1975) follows 18 U.S.C. §2517(5) (1970).

15. New York

¶85 New York enumerates the offenses for which surveillance may be authorized; it provides specific code references (N.Y. Crim. Pro. Law §700.05(8) (McKinney Supp. 1976)). Section 700.05(8)(d) refers to article 180 of the Penal Law, covering "commercial bribing, commercial bribe receiving, bribing a labor official, bribe receiving by a labor official, sports bribing

⁴⁰ See State v. Matule, 54 N.J. Super. 326, 148 A.2d 848 (App. Div. 1959). The scope of N.J. Stat. Ann. §2A:105-1 is also broad enough to include statutory bribery. State v. Attanasio, 92 N.J. Super. 267, 223 A.2d 42 (App. Div. 1966).

hundred of the penal law." Section 700.05(8)(g) adds: "bribing a witness, bribe receiving by a witness, bribing a juror and bribe receiving by a juror, as defined in article two hundred fifteen of the penal law."

¶86 Graft as defined in paragraphs 13 through 16 supra is proscribed by Penal Law §§200.20, 200.22, 200.25, 200.27, 200.30 and 200.35.

¶87 Extortion as defined in paragraphs 8 through 12 supra is proscribed by Penal Law §155.40 (Grand Larceny in the first degree); it is included among the enumerated crimes in §700.05(8) of the Criminal Procedure Law.

¶88 N.Y. Crim. Pro. Law §700.65 follows 18 U.S.C. §2517 (1970).

16. Rhode Island

¶89 R.I. Gen. Laws Ann. §12-5.1-1(g) (Supp. 1975) defines "designated offense" as used in the Rhode Island wiretapping statute, to include bribery and extortion. No reference is made to specific sections of the Criminal Code.

¶90 Bribery is proscribed by R.I. Gen. Laws Ann. §§11-7-7 to 11-7-10.⁴¹ Sections 11-7-1 and 11-7-2, dealing with bribery

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- ⁴¹11-7- 1. Bribery of juror or person exercising judicial function.
- 11-7- 2. Acceptance of bribe by juror or person exercising judicial function.
- 11-7- 3. Solicitation or acceptance of bribe by agent, employee, or public official.
- 11-7- 4. Bribery of agent, employee, or public official.
- 11-7- 5. Penalty for violations.

of jurors, are similar to the definition of bribery above. Sections 11-7-3, 11-7-4 and 11-7-8, however, do not require intent, nor influence of a future event,⁴² and are thus similar to graft as defined in paragraphs 13 through 16 supra.

¶91 Extortion is defined by sections 11-42-1 and 11-42-2. Section 11-42-1 deals with extortion by an "officer appointed by the state or by any town in the state" under color of law. Section 11-42-2 follows "private" extortion as defined in paragraphs 8 through 12 supra.

¶92 R.I. Gen. Laws Ann. §12-5.1-10 follows 18 U.S.C. §2517 (1)-(3) (1970). Section 12-5.1-6(a) of R.I. Gen. Laws Ann. is equivalent to 18 U.S.C. §2517(5) (1970).

17. South Dakota

¶93 S.D. Compiled Laws §23-13A-3 (Supp. 1976) defines the offenses for which authorization of communications interception may be granted. They include bribery and extortion.

41 (continued)

11-7- 6. Civil liability for bribery.

11-7- 8. Accepting bribe to obtain preferential military treatment.

11-7- 9. Corruption of sports participant or official.

11-7-10. Acceptance of bribe by sports participant or official.

⁴²e.g. §11-7-3:

... No agent, employee, or servant... shall corruptly accept... any gift or valuable consideration... as an inducement... or for having done or foreborne to do any act... (emphasis supplied) R.I. Gen. Laws Ann. §11-7-3 (1970).

¶94 "Bribe" is defined in section 22-1-2. Bribery is proscribed by section 12-26-15 (bribery of a voter), section 12-26-16 (acceptance of bribe by voter), section 12-26-17 (forfeiture of office for violation of either section). S.L. 1976, ch. 158 revised the criminal code of South Dakota. Sections 12-A-1 through 12-A-10 proscribe bribery of various public officials; they follow the general definition set forth above.

¶95 Extortion is defined in sections 23-31-1 through 22-31-7 and is unchanged by S.L. 1976, ch. 158.⁴³

¶96 S.D. Compiled Laws Ann. §23-13A (Supp. 1976) follows 18 U.S.C. §2517 (1970).

18. Virginia

¶97 Va. Code Ann. §19.2-66 (Supp. 1976) provides for surveillance authorization for "a felonious offense of extortion [or] bribery."

¶98 Bribery is defined in section 18.2-447. Sections 18.2-438 and 18.2-439 proscribe bribery of officers or candidates for office. Section 18.2-440 deals with bribes to prevent service of process. Section 18.2-441 covers bribes to commissioners, jurors, etc. Sections 18.2-442 through 18.2-444 proscribe bribery in sporting events.

¶99 "Private" extortion is proscribed by Section 18.2-59.

"Public official" extortion is covered by section 18.2-470.

While labelled "extortion," however, this crime is analogous to

⁴³ See also §22-12-10, as amended 1976 Fla. Law ch. 158, and §12-5 (proscribing extortion by a public officer).

graft as defined in paragraphs 13 through 16 supra.

¶100 Va. Code Ann. §19.2-67 (Supp. 1976) follows 18 U.S.C.

§2517 (1970). Va. Code Ann. §19.2-67(5) limits disclosure to derivative evidence of violent crimes or "official corruption:"

(5) When an investigative or law-enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization the contents thereof, and evidence derived therefrom, shall not be disclosed or used as provided in subsections (1), (2) and (3) of this section, unless such communications or derivative evidence relate to crimes of violence or official corruption punishable as a felony, in which case use or disclosure may be made as provided in subsections (1), (2) and (3) of this section. Such use and disclosure pursuant to subsection (3) of this section shall be permitted only when approved by a judge of competent jurisdiction.

19. Wisconsin

¶101 Wisc. Stat. Ann. §968.20 (Supp. 1976) provides for authorized electronic surveillance for both bribery and extortion.

¶102 Bribery of public officials is proscribed by section 946.10, and is defined similarly to the general definition above.

¶103 Extortion is proscribed by Wisc. Stat. Ann. §943.30 ("threats to injure or accuse of crime") and §943.31 ("threats to communicate derogatory information") (Supp. 1976).

¶104 Wisc. Stat. Ann. §968.29 duplicates 18 U.S.C. §2517 (1970).

B. General Terms

¶105 Where a state chooses to provide for issuance of surveillance orders to intercept communications relating to "a crime" (or like generic term), the limitations of 18 U.S.C.

§2516(2) (1970) still apply, effectively limiting surveillance to the enumerated crimes therein.

1. Maryland

¶106 Maryland is the only state that provides for electronic surveillance for "general offenses." Md. Cts. & Jud. Pro. Code Ann. §10-403 (1974) provides in part:

(a) Application.--An ex parte order for the interception of telephonic and telegraphic communications may be issued by a judge of a circuit court, the Supreme Bench of Baltimore City, or the District Court upon the verified application of the Attorney General or a state's attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(1) There are reasonable grounds to believe that a crime has been committed or is about to be committed.

(2) There are reasonable grounds to believe that evidence will be obtained essential to the solution of a crime, or which may enable the prevention of a crime.

¶107 Section 10-403 has been construed by the Court of Special Appeals of Maryland in State v. Seigel⁴⁴ and by the United States District Court for the District of Maryland in United States v. Curreri.⁴⁵ In Seigel, Judge Orth stated:

Although there is in this State the requisite statutory authority for the application and entering of an order authorizing the interception of wire or oral communications with respect to the offenses specifically set out in §2516(2) of the federal act, there is no statutory designation in Maryland of any "other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year. . . ."

⁴⁴13 Md. App. 444, 285 A.2d 671 (1971), aff'd 266 Md. 256, 292 A.2d 86 (1972).

⁴⁵United States v. Curreri, 388 F. Supp. 607 (D. Md. 1974).

Thus it is that we find that the various State's attorneys in this state, and the Attorney General to the limited extent above set out, have authority to apply to a judge of the circuit court of a county or a judge of the Supreme Bench of Baltimore City, presiding in the Criminal Court of Baltimore, for an order and extensions thereof authorizing the interception of wire or oral communications. An order authorizing such interception may be entered only with respect to the offenses of murder, kidnapping, gambling, robbery, bribery, extortion, dealing in narcotic drugs, marijuana or other dangerous drugs, and any conspiracy to commit any of those offenses. The application, the order, extensions thereof and all procedures with regard thereto and with regard to the interception of communications and procedures thereafter, including disclosure and admissibility of the contents and evidence derived therefrom in evidence, must be in accordance with the federal act. Interception of communications without antecedent approval is not permissible under the present status of laws of this state.⁴⁶

In Curreri, Judge Miller stated:

In accord with this court's view of the intent of Congress in enacting §2516(2), I hold that the phrase therein, 'designated in any applicable state statute authorizing such interception' modifies only the preceding phrase commencing 'or other crime dangerous to life. . . .' and not the offenses enumerated theretobefore.⁴⁷

Since Maryland has not designated (by enumerating) other offenses, authorization of electronic surveillance is limited to the specified crimes of 18 U.S.C. §2516(2)(1970), which include, of course, bribery and extortion.⁴⁸

¶108 Maryland does not have any statutes comparable to 18

⁴⁶13 Md. App. at 462, 285 A.2d at 681-682.

⁴⁷388 F. Supp. at 614.

⁴⁸See ¶¶29-30 supra.

U.S.C. §2517(1), (2), and (5) (1970). Md. Cts. & Jud. Pro. Code Ann. §10-406 (1974) is related to 18 U.S.C. §2517(3) (1970), but the Maryland law is more restrictive in the admissibility of evidence:

Only evidence obtained in conformity with the provisions of this subtitle is admissible, and then only in a prosecution for the crime or crimes specified in the order of the court (emphasis added).

C. Status

¶109 A state may, of course, limit the provisions of 18 U.S.C. §2516(2) (1970) by ascribing a "status" to the crimes for which surveillance will be permitted which restricts the ambit of the enumerated crimes in section 2516(2).

1. Connecticut

¶110 Conn. Gen. Stat. Ann. §54-41(b) (Supp. 1975) permits the electronic surveillance of "the commission of offenses involving 'gambling, [narcotics]. . .or involving felonious crimes of violence.'"

¶111 The courts of Connecticut have not interpreted this provision, but it seems unlikely that bribery or graft can be defined as "involving felonious crimes of violence." Certain types of extortion might fall within this category, e.g., "blackmail" (Conn. Gen. Stat. Ann. §53-40) or "kidnapping" (Conn. Gen. Stat. Ann. §53-27), but extortion under color of right, not involving the use of force, probably does not.

¶112 Conn. Gen. Stat. Ann. §54-41p (Supp. 1976) encompasses the purpose outlined by 18 U.S.C. §2517(1), (2), and (3) (1970).

But the Connecticut statute is more restrictive than the U.S. Code:

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire communication, or evidence derived therefrom, may, if specially authorized by the order authorizing the interception of such communication, disclose such contents to any investigative or law enforcement officer designated in such order to the extent that such disclosure is appropriate to the conduct of the investigation specified in the application for such order. Any person who has received, by any means authorized by this chapter, any information concerning a wire communication, or evidence derived therefrom, intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence only insofar as it relates to the crimes set forth in section 54-41b while giving testimony under oath or affirmation in any criminal proceeding before any court or grand jury. . . (emphasis added).

2. Massachusetts

¶1113 (See supra ¶¶60 through 63.)

3. New Hampshire

¶1114 (See supra ¶¶72 through 77.)

D. Result

¶1115 Limitations on the provisions of 18 U.S.C. §2516(2) (1970) may take the form of circumscription of the result required before surveillance orders will issue for certain proscribed activities.

1. Oregon

¶1116 Ore. Rev. Stat. §133.725 (1975) authorizes electronic surveillance for "a crime directly and immediately affecting the safety of human life or, the national security. . ."

¶117 It is probable that bribery and graft, alone, will have no conceivable "direct" and "immediate" effect on human safety.

¶118 Extortion, as defined in section 164.075(a) might qualify under this definition.

2. Washington

¶119 Wash. Rev. Code Ann. §9.73.040(1)(a) (Supp. 1976) provides for issuance of an interception order where:

There are reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed. . . .

¶120 Washington has no statute comparable to 18 U.S.C. §2517 (1970).

ES: AUTHORIZATION

Electronic Surveillance:

Authorization for Court Order

Outline

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Summary

¶1 Law enforcement agencies may obtain a warrant allowing the use of electronic surveillance¹ to intercept certain conversations. This exception to the general prohibition against wiretapping and eavesdropping was designed to aid law enforcement agencies in the investigation of organized crime. The federal statute (Title III) sets minimum standards for state statutes to meet. These statutes incorporate basic limitations on who can apply for a surveillance order, on what can be investigated, on when and for what reasons approval can be granted, and on who can grant approval. Title III requires applications to be authorized by highly-placed, politically responsible officials; failure to obtain such approval may result in suppression of evidence. Proper approval in fact is required; misidentification of the proper official is only a clerical matter if proper approval in fact exists. The federal statute's strict limitations on who may authorize applications do not pertain to the states. A

¹ As used in these materials, the term electronic surveillance generally includes wiretapping and bugging. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation.

state statute may authorize the principal prosecuting attorney of the state or of any political subdivision to authorize applications.

¶2 Title III is explicit in describing the requirements for a valid application for, and an order authorizing, electronic surveillance. The application and order must describe the specific crime under investigation; electronic surveillance is authorized only for those crimes listed in the statute. They must also describe with "particularity" the conversations sought and the place or location of the facilities where the communications are to be intercepted. The persons whose communications are to be intercepted must also be identified. The application must state that other investigative techniques have been tried and failed, or will fail, or be too dangerous, and the judge must determine the validity of this statement before authorizing the interception. The application and order must state the duration for which the interception is authorized, in no case to exceed thirty days without an extension. The order must also include a statement as to whether or not the interception will automatically terminate upon first obtaining the described communication. Finally, the application must include a description of all previous applications for electronic surveillance authorization involving the same persons, facilities,

or places. Absence of any of the information requirements, as well as a failure to comply with the formalities of swearing, signing, and dating, can lead to the suppression of evidence resulting from the electronic surveillance order.



I. Introduction

¶3 The United States Supreme Court redefined the constitutional premises for electronic surveillance in two 1967 cases, Katz v. United States^{1a} and Berger v. New York.² Katz placed electronic surveillance within the limits of the Fourth Amendment; the government could accordingly no longer use electronic surveillance to intrude upon a person's reasonable expectation of privacy without a warrant. Berger outlined the standards of particularity which such a warrant must meet under the Fourth Amendment. Modern electronic surveillance statutes must, therefore, comply with these constitutional guidelines.³

¶4 The federal electronic surveillance statute prohibits all willful interception or use of wire or oral communications,⁴

^{1a}389 U.S. 347 (1967).

²388 U.S. 40 (1967).

³The courts hold electronic eavesdropping constitutional under federal and state constitutions. See, e.g., Commonwealth v. Vitello, Mass., 327 N.E.2d 819 (1975); United States v. Cirillo, 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); State v. Christy, 112 N.J. Super. 48, 270 A.2d 306 (Essex County Crim. Ct. 1970); Wilson v. State, 343 A.2d 613 (Del. 1975).

⁴18 U.S.C.A. §§2510-20, as amended (Supp. 1976). Adopted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See specifically §2511. (The statute shall be referred to as Title III in these materials.)

with certain designated exceptions.⁵ Exceptions relevant to law enforcement include interception made with the consent of one of the parties to the conversation⁶ and interception made pursuant to a valid electronic surveillance warrant. These materials will focus on the law governing warrants.

¶5 The procedures outlined in Title III are designed to aid law enforcement agencies in combating organized crime. Sections 2516(1) and 2518 set out the procedures

⁵ Exceptions not relevant to law enforcement are the communications carrier exception (18 U.S.C.A. §2511 (2)(a)(i), as amended [Supp. 1976]) and the Federal Communications Commission exception (§2511(2)(b), as amended [Supp. 1976]). Another exception may exist in cases involving national security matters. The Supreme Court held that wiretapping of a domestic organization without prior judicial warrant was unconstitutional in United States v. United States District Court, 407 U.S. 297, 309 (1972). The Court specifically left open, however, the question of whether warrantless surveillance of agents of foreign powers, both within the United States and abroad, is permitted by Title III.

⁶ 18 U.S.C.A. §2511, as amended (Supp. 1976):

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication and has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

for obtaining court orders authorizing the electronic surveillance of persons committing certain designated offenses. Sections 2516(2) and 2518 establish minimum standards which all state statutes permitting court-ordered electronic surveillance must meet. The states may, however, establish more restrictive standards. These sections further specify that state law enforcement agencies may use court-ordered electronic surveillance only in those states enacting such legislation. Twenty-two states and the District of Columbia have approved statutory provisions in accordance with these federal standards.⁷

A law enforcement agency's failure to meet the federal

⁷The 23 jurisdictions and their respective statutes are:

Ariz. Rev. Stat. Ann. §§13-1051 to -1061 (Supp. 1973); Colo. Rev. Stat. Ann. §§16-15-101 to -104, 18-9-301 to -310 (1973); Conn. Gen. Stat. Ann. §§53a-187 to -189, 54-41a to 41s (Supp. 1975); Del. Code Ann. tit. 11, §§1335-36 (1974); D.C. Code Ann. §§23-541 to -556 (1973); Fla. Stat. Ann. §§934.01-.10 (Supp. 1975); Ga. Code Ann. §§26-3001 to -3010 (1972); Kan. Stat. Ann. §§22-2514 to -2519 (1974); Md. Ann. Code C.J. §§10-401 to -408 (1974); Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1974); Minn. Stat. Ann. §§626A.01-.23 (Supp. 1975); Neb. Rev. Stat. §§86-701 to -707 (1971); Nev. Rev. Stat. §§179.410-.515, 200.610-.690 (1973); N.H. Rev. Stat. Ann. §§570-A:1 to A:11 (1974); N.J. Stat. Ann. §§2A:156A-1 to -26 (1971); N.M. Stat. Ann. §§40A-12-1.1 to 1.10 (Supp. 1973); N.Y. Crim. Pro. Law §§700.05-.70 (McKinney 1971); Ore. Rev. Stat. §§141.720-.990 (1974); R.I. Gen. Laws Ann. §§12-5.1-1 to -16 (Supp. 1974); S.D. Compiled Laws Ann. §23-13A-1 to -11 (Supp. 1974); Va. Code Ann. §§19.1 to 89.10 (Supp. 1975); Wash. Rev. Code Ann. §§9.73.030-.100 (Supp. 1974); Wis. Stat. Ann. §§968.27-.33 (Supp. 1975).

(List compiled in Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing and Inventories," 61 Cornell L. Rev. 92, 94 note 9 [1975]).

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and state standards enables the aggrieved person to suppress evidence obtained through the faulty surveillance.⁸

¶6 Title III and the state statutes provide certain basic safeguards against an unreasonable search and seizure by electronic surveillance:

1. Only a court of competent jurisdiction may issue the warrants, and then only for certain designated crimes.
2. The warrant must state with particularity the conversation sought, the persons involved, the crimes being investigated, and the places or telephone involved. The application must also show probable cause, the inadequacy of conventional investigative techniques, and the feasibility of electronic surveillance under the circumstances.
3. Only certain officers of selected law enforcement agencies may apply for such warrants.
4. The warrants remain in effect only for limited periods of time.

⁸18 U.S.C.A. §§2515, 2518 (10) (1970).

II. Agents Authorized to Obtain Warrants

A. Giordano and Chavez

¶7 Congress restricted the power to obtain warrants to certain highly placed, politically responsible officials.⁹

Section 2516 of Title III provides:

The Attorney General [of the United States] or any Assistant Attorney General [of the United States] specially designated by the Attorney General may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense to which the application is made, 10

Similarly:

The principal prosecuting attorney of any state or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for . . . an order authorizing . . . such interception 11

⁹ This intent is clear in the legislative history. See S. Rep. No. 1097, 90th Cong., 2d Sess. 98-99 (1968). This limitation on the scope of the power to apply for an electronic surveillance warrant "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques." Id. at 97. See also United States v. Giordano, 416 U.S. 505 (1974).

¹⁰ 18 U.S.C.A. §2516(1), as amended (Supp. 1976).

¹¹ 18 U.S.C.A. §2516(2) (1970). N.Y. Crim. Pro. Law §700.10(1) (Supp. 1976) provides that:

a justice may issue an eavesdropping warrant upon ex parte application of an applicant who is authorized by law to investigate, prosecute, or participate in the prosecution of the particular designated offense which is the subject of the application.

The questions of what officer must actually authorize the application, and what officer must in fact appear before

ll continued.

An "applicant" is defined as a:

district attorney or the attorney general [of the State of New York] or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force. If a district attorney or the attorney general is actually absent or disabled, the term "applicant" includes that person designated to act for him and perform his official function in and during his actual absence or disability. Id. at 700.05(5).

Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1976) grants the power to apply to:

The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communication.

This grant of power is wider than that mandated by 18 U.S.C.A. §2516(2). The Supreme Judicial Court upheld the constitutionality of the provision in Commonwealth v. Vitello, Mass., 327 N.E.2d 819, 838-39 (1975). The court cited a statement in S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968) that the issue of delegation would be a question of state law.

N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8(1975) provides:

The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission or a person designated to act for such an official and to perform his duties in and during his actual absence or disability may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation

the court to make the application have been widely litigated.¹² The Supreme Court took up these questions in United States v. Giordano.¹³

¶18 In Giordano, the defendant moved to suppress evidence obtained under a wiretap order on the grounds that the Attorney General's executive assistant signed the order rather than the "Assistant Attorney General specially designated by the Attorney General"¹⁴ named in the application. Neither the Attorney General nor any specially designated Assistant Attorney General reviewed the application. The district court held that section 2516(1) meant what it said; applications were to be made by the designated individuals only, and authority to approve applications could not be delegated.¹⁵ The Fourth Circuit affirmed,¹⁶ and the Supreme Court granted certiorari.

¹² See, e.g., United States v. Tortorello, 40 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Ianelli, 339 F. Supp. 171 (W.D.Pa.1972), aff'd, 477 F.2d 999, aff'd, 480 F.2d 918 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975), rehearing denied, 18 Crim. L. Rptr. 2428 (3d Cir. Jan. 26, 1976); United States v. King, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973); State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (Essex County Crim. Ct. 1973); People v. Fusco, 75 Misc.2d 981, 348 N.Y.S.2d 858 (Nassau County Ct. 1973).

¹³ 416 U.S. 505 (1974).

¹⁴ 18 U.S.C.A. §2516(1), as amended (Supp. 1976).

¹⁵ 340 F. Supp. 1033 (D.Md. 1972).

¹⁶ 469 F.2d 522 (4th Cir. 1972).

¶9 The government contended in Giordano that this procedure did comply with Title III, and that even if the procedure was inconsistent with the statute, suppression was not required since there had been no constitutional violation. The first contention rested on 28 U.S.C. §509, which provides, inter alia, for delegation of the duties of the Attorney General to his staff.¹⁷ The Court, however, found that Congress intended to make Title III an exception to section 509;¹⁸ Title III's enumeration of empowered officials was thus exhaustive. The Court rejected the second contention also, holding that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extra-ordinary investigative device."¹⁹ Applying this rule, the Court found approval by the proper senior official in the Justice Department to be such an essential requirement,²⁰ and held that its violation required suppression of the wiretap evidence.

¹⁷United States v. Giordano, 416 U.S. 505, 513-14 (1974).

¹⁸"Hearing on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary," 87th Cong., 1st Sess. 356 (1961).

¹⁹United States v. Giordano, 416 U.S. 505, 527 (1974).

²⁰Id. at 527-28.

¶10 In a companion case to Giordano, United States v. Chavez,²¹ an application recited approval by an Assistant Attorney General, but was, in fact, approved by the Attorney General himself. The Court held that Title III merely required approval by a proper official, and that since the Attorney General was such an official the requisite approval was obtained. The error was a clerical matter and did not effect the validity of the order.²² Chavez, in short, holds that proper approval in fact must exist, but that failure to state precisely such approval does not necessarily destroy the validity of the order.²³ Proper authorization on the face of the order, however, presents clear evidence of the actual approval procedure. The prosecutor should, therefore, secure such on-the-face authorization, or he will be forced to use affidavits and other evidence to establish the propriety of his application.

²¹ 416 U.S. 562 (1974).

²² Id. at 570.

²³ The official approving an application may even be able to communicate his approval orally. See United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975) (the United States Attorney General was allowed to orally direct his Executive Assistant to sign the Attorney General's name to the wiretap authorization). But see State v. Cocuzzo, 123 N.J. Super. 14, 18, 301 A.2d 204, 206 (Essex County Crim. Ct. 1973) (proper authorization must be in writing); Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 825 (1975) (authority to apply for each wiretap must be specifically granted in writing by the Attorney General or the District Attorney).

B. Vacancy in the Attorney General's Office

¶11 Authorization problems develop when the office of the Attorney General is vacant. When an Attorney General leaves office his power, obviously, terminates. The person nominated by the President as his successor has no power until confirmation.²⁴ Statutory authority exists, however, for the Deputy Attorney General or other high Justice Department official to assume the duties of Attorney General during a vacancy.²⁵ An

²⁴ United States v. Swanson, 399 F. Supp. 441 (D.Nevada 1975) (Acting Assistant Attorney General whose appointment had not been confirmed by Senate did not have authority to authorize application for electronic surveillance).

²⁵ 5 U.S.C.A. §3345 (1967):

When the head of an Executive department or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

28 U.S.C.A. §508 (1968):

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

See United States v. McCoy, 515 F.2d 962 (5th Cir. 1975) (the Solicitor General, as acting Attorney General, had authority to give authorization under 18 U.S.C.A. §2516 for application for approval of electronic surveillance).

Acting Attorney General may thus authorize applications during the vacancy while an Attorney General may not until he is confirmed.²⁶

C. State Authorization Procedures

¶12 The strict limitations on the number of high officials who may authorize warrant application do not apply to the states. Section 2516(2) provides:

The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable state statute an order authorizing or approving the interception²⁷

Accordingly, a state statute may authorize the principal prosecuting attorney of the state, of any county, and of a city or other municipality to apply for an electronic

²⁶The courts are split, however, over whether an Acting Assistant Attorney General may be a specially designated Assistant Attorney General within the meaning of §§2516, 2518. See United States v. Acon, 377 F. Supp. 649, 651 (W.D.Pa. 1974), rev'd on other grounds, 513 F.2d 513, 516 (3d Cir. 1975) (Acting Assistant Attorney General is not a "publicly responsible official subject to the political process" and thus may not authorize wiretap applications). But see, United States v. Vigi, 350 F. Supp. 1008, 1009 (E.D.Mich. 1972) (specially designated Acting Assistant Attorney General may authorize wiretap applications).

²⁷18 U.S.C.A. §2516(2) (1971).

surveillance order.²⁸ The state statutes in Massachusetts,²⁹ New Jersey,³⁰ and New York³¹ authorize the principal prosecuting attorneys of both the state and the political subdivisions to apply for warrants. The New Jersey

²⁸The legislative history of Title III suggests that city attorneys would not have the authority to apply for orders. S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968). The wording of section 2516(2), however, does not seem to require this limitation. See also Price v. Goldman, 525 P.2d 598 (Nev. 1974) (term "district attorney" may not be construed to include his deputies).

²⁹Mass. Gen. Laws Ann. ch. 272, §99(F)(1) (Supp. 1976):

Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications.

³⁰N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8(1975):

The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission, or a person designated to act for such an official and to perform his duties in and during his actual absence or disability, may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication

³¹N.Y. Crim. Pro. Law §700.05(5) (Supp. 1976):

. . . [A] district attorney or the attorney general or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force . . . [may approve an application for an eavesdropping warrant, or] [i]f a district attorney or the attorney general is actually absent or disabled . . . that person designated to act for him and perform his official function in and during his actual absence or disability [may so apply].

statute also authorizes the State Commission of Investigation to apply for a warrant.³² Section 2516(2) of Title III makes no explicit provision for grants of authority to such an agency. This portion of the New Jersey statute may be, if used, vulnerable to a challenge on that basis.³³

¶13 The New Jersey statute contains another seeming anomaly. Section 2516(2) allows designated state officials to "make" applications; the New Jersey statute refers to their "authorization" of applications.³⁴ Under the provision an agent in New Jersey may authorize an application which can actually be made by another.³⁵

³² N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8 (1975). This provision survived the 1975 revision.

³³ See Note, "New Jersey Electronic Surveillance Act," 26 Rutgers L. Rev. 617, 622 (1974) which argues that the provision is invalid. The author cites In re Zicarelli, 55 N.J. 249, 262-64, 261 A.2d 129, 135-36 (1970), aff'd sub nom., Zicarelli v. New Jersey State Commission, 406 U.S. 472 (1972) as holding that the State Commission of Investigation is primarily a legislative agency, although it may aid law enforcement agencies in the investigation of crime. This holding may be interpreted as implying that the Commission's chairman cannot qualify as a principal prosecuting attorney under §2A:156A-8.

³⁴ Cf. 18 U.S.C.A. §2516(2) (1971) with N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8 (1975).

³⁵ See Note, "New Jersey Electronic Surveillance Act," 26 Rutgers L. Rev. 617, 622 (1974) which suggests that Title III requires the designated state officials to apply personally for the order. A comment in S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968), however, casts doubt on this interpretation:

Paragraph (2) [of §2516] provides that the principal prosecuting attorney of any state or the principal prosecuting attorney of any political subdivision of a state may authorize an application . . . (emphasis added).

This incongruity has not, however, affected the validity of the statute. The New Jersey Supreme Court has sustained applications approved by the proper official, but actually made in court by another agent.³⁶

¶14 Section 2516(2) of Title III does not provide explicitly for substitution of designated state officials in case of absence or disability. Nevertheless, state provisions for such substitution have been sustained as consistent with the purposes of Title III. The prosecutor should take care, however, that the delegation of authority be in writing.³⁸ He should also provide a statement in detail of why the delegation is necessary.³⁹

³⁶ State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972).

³⁷ See e.g., Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 837-38 (1975); State v. Travis, 125 N.J. Super. 1, 6, 308 A.2d 78, 81 (Essex County Crim. Ct. 1973), aff'd, 133 N.J. Super. 326, 336 A.2d 489, 491 (App. Div. 1975); People v. Fusco, 75 Misc.2d 981, 984-85, 348 N.Y.S.2d 858, 863-64 (Nassau County Ct. 1973).

³⁸ Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 837-38 (1975).

³⁹ State v. Travis, 125 N.J. Super. 1, 6, 10, 308 A.2d 78, 81, 83 (Essex County Crim. Ct. 1973), aff'd, 133 N.J. Super. 326, 336 A.2d 489 (App. Div. 1975); but see People v. Fusco, 75 Misc.2d 981, 984-85, 348 N.Y.S.2d 858, 863-64 (Nassau County Ct. 1973) where such a showing was not required.

III. Information Requirements

A. Crimes

¶15 Title III allows the use of electronic surveillance in the investigation of certain crimes. Section 2516(1)⁴⁰ describes the federal offenses which are included, and section 2516(2)⁴¹ lists those crimes for which the states may authorize electronic surveillance.

¶16 The federal crimes included under section 2516(1) are described by specific reference to the various sections of the United States Code.⁴² On the other hand, the state offenses listed in section 2516(2) are described in generic terms and have been construed broadly.⁴³ The New York electronic surveillance statute is much more specific, enumerating a long list of crimes by reference

⁴⁰18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976); the federal offenses can be divided into three categories:

1. national security offenses;
2. intrinsically dangerous crimes;
3. activities characteristic of organized crime.

⁴¹18 U.S.C.A. §2516(2) (1970). Under this system, the "principal prosecuting attorney . . ." can apply for a warrant authorizing electronic surveillance only if there is a state statute authorizing such an application.

⁴²18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976).

⁴³18 U.S.C.A. §2516(2) (1970). For example, lottery and bookmaking offenses may be included under "gambling." United States v. Pacheco, 489 F.2d 554, 563-64 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (lottery offenses as gambling); People v. Fusco, 75 Misc.2d 981, 985-86, 385 N.Y.S.2d 858, 864-65 (Nassau County Ct. 1973) (bookmaking offenses under N.Y. Penal Law §§225.05-225.20 [McKinney 1967] as gambling).

to sections of the penal law.⁴⁴ In contrast, the Massachusetts⁴⁵ and New Jersey⁴⁶ statutes make almost no reference to statutory crimes, but rather use the generic descriptions. The Florida electronic surveillance statute⁴⁷ also uses the generic descriptions, and it has been interpreted by the Florida Supreme Court as allowing the use of wiretap evidence only when directly or indirectly related to the enumerated offenses.⁴⁸ The court, however, did not give any examples of a crime directly or indirectly related to an enumerated offense; thus, it is not clear whether it intended to limit the broad construction of the generic terms.

¶17 There is some controversy at the state level over the question of whether the phrase "punishable by imprisonment for more than one year" in section 2516(2) identifies the entire list of crimes against which states may authorize electronic surveillance, or only

⁴⁴N.Y. Crim. Pro. Law §700.05(8) (McKinney 1971), as amended (Supp. 1976).

⁴⁵Mass. Gen. Laws Ann. ch. 272, §99(A)(7) (Supp. 1976).

⁴⁶N.J. Stat. Ann. §2A:156A-8 (1971), as amended New Jersey Statutes §2A:156A-8 (1975).

⁴⁷Fla. Stat. Ann. §934.07 (1973), as amended (Supp. 1976).

⁴⁸In re Grand Jury Investigation, 287 So.2d 43, 48 (Fla. 1973). The petitioner, not yet indicted, moved for suppression of recordings intended for use by the grand jury. The recordings dealt with crimes which were not specified in the case and apparently were not included under the statute.

the preceding phrase, "other crime[s] dangerous to life, limb, or property."⁴⁹ Two New York courts, among others, recently came out on opposite sides of the question.⁵⁰

A federal district court in Florida also analyzed this issue.⁵¹ The court concluded, in dicta, that states could use wiretaps only if the interception would provide evidence of an enumerated offense and that offense was punishable by imprisonment for more than one year. The court felt, however, that other offenses discovered during a proper intercept could be prosecuted, "regardless of the nature of the offense or the prescribed punishment."⁵² The legislative history of Title III indicates that the congressional intent was to allow electronic surveillance against all of the specified crimes, whether or not they were punishable by one year in prison. The phrase "punishable by imprisonment for more than one year" was intended only

⁴⁹18 U.S.C.A. §2516(2) (1970).

⁵⁰People v. Amsden, 82 Misc.2d 91, 93-94, 368 N.Y.S.2d 433, 436-37 (Sup. Ct. Erie County 1975) (wiretaps can be authorized only for those crimes punishable by imprisonment for a year or more). Contra, People v. Nicoletti, 84 Misc.2d 385, 390-93, 375 N.Y.S.2d 720, 725-28 (Niagara County Ct. 1975) (wiretaps may be authorized for the enumerated offenses whether or not they are punishable by imprisonment for one year or more); accord, United States v. Carubia, 377 F. Supp. 1099, 1104-05 (E.D.N.Y. 1974).

⁵¹United States v. Lanza, 341 F. Supp. 405 (M.D.Fla. 1972).

⁵²Id. at 413.

to modify "other crime[s] dangerous to life, limb, or property."⁵³

¶18 A warrant for electronic surveillance may issue when on the basis of facts submitted in the application, a judge finds there to be probable cause that an offense included under the statute has been or is about to be committed.⁵⁴ The application must state the "details as to the particular offense that has been, is being, or is about to be committed,"⁵⁵ and the order itself must specify "a particular description of the type of communication sought to be intercepted, and a statement

53 The interception of wire or oral communications by State law-enforcement officers could only be authorized when it might provide, or has provided evidence of designated offenses Specifically designated offenses include murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana, or other dangerous drugs. All other crimes designated in the State statute would have to be "dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year." (emphasis added).

S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968).

⁵⁴ 18 U.S.C.A. §2518(3)(a) (1970). The Third Circuit in United States v. Armocida, 515 F.2d 29, 35 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976) discussed the three different contexts in which a surveillance application must show probable cause:

The first is that an individual has or is about to commit one of several enumerated offenses, . . . ; the second: that particular communications relating to the charged offense will be obtained through the interception [see ¶19 of text]; third: the premises where the interception will be made are being used in connection with the charged offense [see ¶20 of text].

See 18 U.S.C.A. §§2518(3)(b), (d) (1970).

⁵⁵ 18 U.S.C.A. §2518(1)(b)(i) (1970).

of the particular offense to which it relates."⁵⁶

Generally, a reference to the statute allegedly violated, in conjunction with a description of the facts giving rise to probable cause, is sufficient to satisfy these requirements.⁵⁷

B. Particularity as to Conversations Sought

¶19 An application for an electronic surveillance order, and the order itself, must include "a particular description of the type of communication sought to be intercepted."⁵⁸ Most courts, conscious of the difficulty of particularizing a future conversation, take a pragmatic approach in their examination of the sufficiency of applications and

⁵⁶ 18 U.S.C.A. §2518(4)(c) (1970).

⁵⁷ See, e.g., United States v. Mainello, 345 F. Supp. 863, 872 (E.D.N.Y. 1972); United States v. King, 335 F. Supp. 523, 537 (S.D.Cal. 1971), modified on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); People v. Holder, 69 Misc.2d 863, 868, 331 N.Y.S.2d 557, 563 (Sup. Ct. Nassau County 1972).

⁵⁸ 18 U.S.C.A. §2518(1)(b)(iii) (1970); 18 U.S.C.A. §2518(4)(c) (1970). New York, New Jersey, and Massachusetts have each adopted similar formulations, though New Jersey has recently added an additional requirement of probable cause:

The application must contain:

* * * *

(iii) a particular description of the type of communications sought to be intercepted

N.Y. Crim. Pro. Law §700.20(2)(b)(iii) (McKinney 1971).
See also N.Y. Crim. Pro. Law §700.30(4) (McKinney 1971).

orders in meeting this requirement.⁵⁹

C. Particularity as to Place

¶20 The application and order must also describe the location of the facilities or the place where the communications are to be intercepted.⁶⁰

¶21 There is a special concern shown in some statutes where the surveillance involves public facilities or where

58 continued.

Each application . . . shall state:

* * * *

(3) The particular type of communication to be intercepted; and a showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted.

N.J. Stat. Ann. §2A:156A-9(c)(3) (1971), as amended New Jersey Statutes §2A:156A-9(c)(3) (1975). See also N.J. Stat. Ann. §2A:156A-12(d) (1971).

The application must contain the following:

* * * *

d. A particular description of the nature of the oral or wire communications sought to be overheard.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(d) (Supp. 1976). See also Mass. Gen. Laws Ann. ch. 272, §99(I)(4) (Supp. 1976).

⁵⁹ See, e.g., United States v. Tortorello, 480 F.2d 764, 780 (2d Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Mainello, supra note 57, at 871-72; People v. Holder, supra note 57, at 868, 331 N.Y.S.2d at 563.

60

Each application shall include the following information:

* * * *

(ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted

60 continued.

A warrant must contain the following:

* * * *

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted.

Mass. Gen. Laws Ann. ch. 272, §99 (I)(3) (Supp. 1976).

61

If the facilities from which a wire communication is to be intercepted are public, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire communications over such facilities.

If the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, a licensed practicing psychologist, an attorney at law, a practicing clergyman, or a newspaperman, or is a place used primarily for habitation by a husband or wife, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire or oral communications over such facilities or in such places. Special need as used in this section shall require in addition to the matters required by section 10 of this act, a showing that the licensed physician, licensed practicing psychologist, attorney-at-law, practicing clergyman or newspaperman is personally engaging in or was engaged in over a period of time as part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in section 8 of the act or that the public facilities are being regularly used by someone who is personally engaging in or was engaged in over a period of time as part of a continuing criminal activity or is committing, has or had committed or is about to commit such an offense. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act, shall lose its privileged character.

it threatens privileged communications. New Jersey requires that the court determine there to be a "special need" for

61 continued.

18 U.S.C.A. §2518(1)(b)(ii) (1970).

Each order . . . shall specify --

* * * *

(b) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted.

18 U.S.C.A. §2518(4)(b) (1970).

N.Y. Crim. Pro. Law §§700.20(2)(ii) and 700.30(3) (McKinney 1971) are identical to the federal provisions.

Each application . . . shall state:

* * * *

(4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted.

N.J. Stat. Ann. §2A:156A-9(c)(4) (1971).

Each order . . . shall state:

* * * *

c. The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted.

N.J. Stat. Ann. §2A:156A-12(c) (1971).

The application must contain the following:

* * * *

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines.

Mass. Gen. Laws Ann. ch. 272, §99 (F)(2)(c) (Supp. 1976).

federal requirement exists,⁶² although New York and Massachusetts require a statement in the application that the communications to be intercepted are not legally privileged.⁶³

D. Particularity as to Persons

¶22 Title III requires that applications and orders identify the person, if known, whose communications are to be intercepted.⁶⁴ These provisions have not been read, however, to require the government to name every participant in communications to be monitored.

⁶²See United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974).

⁶³N.Y. Crim. Pro. Law §700.20(2)(c) (McKinney 1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(e) (Supp. 1976).

⁶⁴ Each application shall include the following information:

* * * *

(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

18 U.S.C.A. §2518(1)(b)(iv) (1970).

Each order . . . shall specify --

a. the identity of the person, if known, whose communications are to be intercepted.

18 U.S.C.A. §2518(4)(a) (1970).

¶23 The leading Supreme Court case in this area is United States v. Kahn.⁶⁵ There, the warrant authorized interception of communications of Mr. Kahn, suspected of gambling violations, and "other persons as yet unknown." Conversations involving Mrs. Kahn and her husband, and Mrs. Kahn and a third party were intercepted and introduced in evidence against the Kahns. The Court denied a motion to suppress these conversations. It found that although the government lacked probable

64 continued.

The New York and New Jersey statutes are almost identical to their federal counterparts. N.Y. Crim. Pro. Law §§700.20(2)(b)(iv) (McKinney 1971) (modifying "offenses" in the requirements for the application by replacing "the" with "such designated") and 700.30(2) (McKinney 1971); N.J. Stat. Ann. §§2A:156A-9(c)(1) (1971) (adding "particular" in front of "person" in the requirements for the application) and 2A:156A-12(b) (1971) (allowing the order to state "a particular description of" the person or his identity). The Massachusetts statute requires the application to include a statement of probable cause:

The application must contain the following:

* * * *

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(b) (Supp. 1976). The warrant in Massachusetts need only contain "[a] particular description of the person" Mass. Gen. Laws Ann. ch. 272, §99 (I)(3) (Supp. 1976); see note 60.

⁶⁵ 415 U.S. 143 (1974).

cause to name Mrs. Kahn in the application for the warrant, she fell within the category of "other persons as yet unknown."⁶⁶ The Court held that:

. . . Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. ⁶⁷

¶24 The circuit courts of appeal are currently split over the issue of whether the government must name a known person where it has probable cause to believe that the individual is committing the specified offense. The Sixth Circuit in United States v. Donovan,⁶⁸ the Fourth Circuit in United States v. Bernstein,⁶⁹ and the District of Columbia Circuit in United States v. Moore,⁷⁰ read Kahn to require the government to name in the application for a wiretap order all persons that it believes to be involved in the criminal activity under investigation and whose conversations may be intercepted. Where such persons are known under a probable cause standard, these courts hold that the persons must be identified and failure to do so requires suppression of recordings made under the warrant for use against them.

⁶⁶Id. at 155.

⁶⁷Id.

⁶⁸513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

⁶⁹509 F.2d 996 (4th Cir. 1975), cert. pending.

⁷⁰513 F.2d 485 (D.C.Cir. 1975).

¶25 The Fifth Circuit reached a different result in United States v. Doolittle.⁷¹ There the court held that the government was not absolutely required to name all persons whom it had probable cause to believe were involved in the criminal activity under investigation. The court noted that the defendants did not allege or demonstrate any prejudice in not being named in the order. All defendants received an inventory of the overheard conversations, were allowed to listen to the tapes, and received transcripts prior to the trial. There was no indication of bad faith or subterfuge on the part of the government. These factors combined to convince the court that the essential purposes of the statute had been met, and that failure to name the defendants in the application and order did not require suppression of the wiretap evidence. The Eighth Circuit recently followed Doolittle in United States v. Civella.⁷² In that case, the named defendant was adequately identified, and the unnamed defendants were notified of the interception soon after its termination. The court concluded that sections 2518(1)(b)(iv) and (4)(a) of Title III⁷³ were substantially complied with and their

⁷¹ 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. pending.

⁷² 19 Crim. L. Rptr. 2136 (8th Cir. Apr. 16, 1976).

⁷³ 18 U.S.C.A. §§2518 (1)(b)(iv), (4)(a) (1970) (requiring in the application and the order the identification of persons whose communications are to be intercepted); see note 64.

purpose was achieved. It suggested, however, that a showing of bad faith on the part of the government in the omission of the names, or a demonstration that the issuing judge would have acted differently had he seen the omitted names might lead to a different result.

E. Inadequacy of Investigative Alternatives

¶26 Section 2518(1)(c) of Title III requires that:

Each application . . . shall include the following information:

* * * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.⁷⁴

New York, New Jersey, and Massachusetts all have similar provisions in their statutes.⁷⁵

⁷⁴ 18 U.S.C.A. §2518(1)(c) (1970); see also 18 U.S.C.A. §2518(3)(c) (1970) which requires the judge, before authorizing interception, to determine that:

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

⁷⁵ The application must contain:

* * * *

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, [sic] to obtain the evidence sought.

¶27 The Senate Report accompanying Title III discusses the intent of this provision:

75 continued.

N.Y. Crim. Pro. Law §700.20 (2)(d) (McKinney 1971).

An eavesdropping warrant may issue only:

* * * *

4. Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ.

N.Y. Crim. Pro. Law §700.15 (4) (McKinney 1971).

Each application . . . shall state:

* * * *

(6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

N.J. Stat. Ann. §2A:156A-9(c)(6) (1971).

Upon consideration of an application, the judge may enter an ex parte order . . . if the court determines . . . that there is or was probable cause for belief that:

* * * *

c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

N.J. Stat. Ann. §2A:156A-10(c) (1971), as amended New Jersey Statutes §2A:156A-10(c) (1975).

A warrant may issue only:

* * * *

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

Mass. Gen. Laws Ann. ch. 272, §99(E)(3) (Supp. 1976).

The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likelyWhat the provision envisions is that the showing be tested in a practical and commonsense fashion. 76

¶28 Most courts, based on the language of the Senate Report, require little more than a showing by the applicant that other investigative techniques are infeasible. They do not interpret these sections of Title III to require a full in-depth examination of the investigative alternatives.⁷⁷ The Ninth Circuit, on the other hand, in United States v. Kerrigan,⁷⁸ showed a greater degree of willingness to examine the application's statements that other investigative techniques have not or will not work. There, the court warned the government that ". . . the boilerplate recitation of the difficulties of gathering usable evidence . . . is not sufficient basis for granting a

⁷⁶S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968).

⁷⁷See United States v. Armocida, 515 F.2d 29, 37-38 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976); In re Dunn, 507 F.2d 195, 196-97 (1st Cir. 1974); United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

⁷⁸514 F.2d 35, 38 (9th Cir. 1975), cert. denied, ___ U.S. ___ (1976).

wiretap order." More recently, in United States v. Kalustian,⁷⁹ the Ninth Circuit granted a motion to suppress wiretap evidence because the application did not include a "full and complete statement of underlying circumstances" explaining why other investigative techniques would not work. The application included statements by the investigating officers that other methods of investigation would not work, based on their "knowledge and experience."⁸⁰

¶29 The purpose of section 2518(1)(c)⁸¹ is to ensure that electronic surveillance is not used "casually or with indifference to its risks."⁸² In preparing an application, it is important to recognize two considerations:

The first is that other investigative options must be evaluated closely. The second is that those options and their insufficiency must be detailed in the application, so that the judge can independently determine the necessity for surveillance. 83

⁷⁹17 Crim. L. Rptr. 2428 (9th Cir. Aug. 4, 1975), modified,
18 Crim. L. Rptr. 2411 (Feb. 11, 1976).

⁸⁰Id. Accord, United States v. Curreri, 388 F. Supp.
607 (D.Md. 1974).

⁸¹18 U.S.C.A. §2518(1)(c) (1970).

⁸²Electronic Surveillance; Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 67 (1976).

⁸³Id.

F. Period of Time Surveillance is to be Authorized

¶30 An application for an electronic surveillance order must include "a statement of the period of time for which the interception is required to be maintained."⁸⁴ The order itself must specify "the period of time during which such interception is authorized"⁸⁵ In no case can an order authorize an interception for a period in excess of thirty days, unless an extension is granted.⁸⁶ The thirty-day period, is an absolute maximum, however, and the intent of Title III is to limit interception to

⁸⁴ 18 U.S.C.A. §2518(1)(d) (1970). The New York, New Jersey, and Massachusetts sections are identical. N.Y. Crim. Pro. Law §700.20(2)(e) (McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976) (Massachusetts requires the application, if practicable, to designate hours of the day or night during which interception may reasonably be expected to occur).

⁸⁵ 18 U.S.C.A. §2518(4)(e) (1970). The New York and New Jersey sections are again identical. N.Y. Crim. Pro. Law §700.30(6) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971). Massachusetts requires that the warrant contain "[t]he date of issuance, the date of effect, and termination date" Mass. Gen. Laws Ann. ch. 272, §99 (I)(2) (Supp. 1976).

⁸⁶ 18 U.S.C.A. §2518(5) (1970); N.Y. Crim. Pro. Law §700.10(2) (McKinney 1971). New Jersey limits the duration of electronic surveillance to a maximum of twenty days. N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(f) (1975). Massachusetts allows a device to be installed for a period of thirty days, but authorizes interception only for a maximum of fifteen days within that period. Mass. Gen. Laws Ann. ch. 272, §99 (I)(2) (Supp. 1976).

a period no "longer than is necessary to achieve the objective of the authorization. . . ." ⁸⁷

¶31 In cases where the investigation requires that an interception continue to be authorized beyond the time when the described type of communication has been first obtained, the application must include "a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter." ⁸⁸ The order in all cases must include "a statement as to whether or not the interception shall automatically terminate when the described conversation has been first obtained." ⁸⁹ The

⁸⁷ 18 U.S.C.A. §2518(5) (1970). See N.Y. Crim. Pro. Law §700.10(2) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(f) (1975). The Massachusetts statute has no comparable language; see Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 841-44 (1975).

⁸⁸ 18 U.S.C.A. §2518(1)(d) (1970). The New York section is identical. N.Y. Crim. Pro. Law §700.20(2)(e) (McKinney 1971). The New Jersey and Massachusetts sections have slight variances. N.J. Stat. Ann. §2A:156A-9(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976).

⁸⁹ 18 U.S.C.A. §2518(4)(e) (1970). The New York and New Jersey sections are identical. N.Y. Crim. Pro. Law §700.30(6) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(F) (1975). The Massachusetts section states that:

If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide.

Mass. Gen. Laws Ann. ch. 272, §99(I)(2) (Supp. 1976).

actual period of authorization in a particular case depends on the facts of that case.⁹⁰ Several courts have suppressed evidence where the order authorized interception for the full thirty-day period without regard to whether the investigative objectives were reached, or where the order failed to include a statement as to whether or not the interception would automatically terminate when the desired communications were obtained.⁹¹

G. Prior Applications

¶32 Section 2518(1)(e) of Title III requires that each application include:

a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application. 92

⁹⁰S. Rep. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968).

⁹¹People v. Pieri, 69 Misc.2d 1085, 332 N.Y.S.2d 786 (Erie County Ct. 1972), aff'd, 41 App. Div. 2d 1031, 346 N.Y.S.2d 213 (4th Dept. 1973); Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); State v. Siegel, 266 Md. 256, 272-74, 292 A.2d 86, 95-96 (1972); see also United States v. Cafero, 473 F.2d 489, 496 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974). But see People v. Palozzi, 44 App. Div. 2d 224, 227, 353 N.Y.S.2d 987, 990 (4th Dept. 1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); United States v. Baynes, 400 F. Supp. 282, 300-10 (E.D.Pa.), aff'd mem., 517 F.2d 1399 (3d Cir. 1975).

⁹²18 U.S.C.A. §2518(1)(e) (1970). The provisions for New York, New Jersey, and Massachusetts are substantially similar.

A court may suppress evidence obtained pursuant to a surveillance warrant where the application fails to disclose the existence of previous applications.⁹³

92 continued.

The application must contain:

* * * *

(F) A full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the justice on each such application.

N.Y. Crim. Pro. Law §700.20(2)(f) (McKinney 1971).

Each application . . . shall state:

* * * *

e. A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application.

N.J. Stat. Ann. §2A:156A-9(e) (1971).

The application must contain the following:

* * * *

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(h) (Supp. 1976).

⁹³United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). There, a warrant was issued authorizing a wiretap of the defendant in a gambling investigation and the resulting evidence was suppressed because the application failed to indicate that the defendant was the subject of a wiretap in a previous unrelated narcotics investigation. But see United States v. Kilgore, 518 F.2d 496, 500 (5th Cir. 1975), cert. pending.

IV. Formal Requirements: Swearing, Signing, and Dating

¶33 Each application must be in writing and upon oath or affirmation.⁹⁴ Each order authorizing electronic surveillance must actually be signed by the judge, and failure to do so can lead to suppression of evidence.⁹⁵ Finally, each order must be dated, or again suppression can result.⁹⁶

V. What Court May Issue a Warrant

¶34 Applications for electronic surveillance warrants must be presented to a "judge of competent jurisdiction."⁹⁷ This is defined as "a judge of a United States district court or a United States court of appeals"⁹⁸ on the federal level, and at the state level it is "a judge of any court of general criminal jurisdiction of a

⁹⁴ 18 U.S.C.A. §2518(1) (1970); N.Y. Crim. Pro. Law §700.20(1) (McKinney 1971); N.J. Stat. Ann. §2A:156-9(1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(1) (Supp. 1976). The oath or affirmation need not be before the issuing judge. United States v. Tortorello, 342 F. Supp. 1029, 1035 (S.D.N.Y. 1972), aff'd 480 F.2d 764 (2d Cir.) cert. denied, 414 U.S. 866 (1973).

⁹⁵ United States v. Ceraso, 355 F. Supp. 126 (M.D.Pa. 1973).

⁹⁶ United States v. Lamonge, 458 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863 (1972).

⁹⁷ 18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976); 18 U.S.C.A. §2516(2) (1970) imposes the same requirement on the states.

⁹⁸ 18 U.S.C.A. §2510(9)(a) (1970).

State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications."⁹⁹ The intent of this section is to limit the judges who could authorize electronic surveillance warrants, and "to guarantee responsible judicial participation in the decision to use these techniques."¹⁰⁰ New York permits all trial judges down to the county court level to issue warrants,¹⁰¹ while Massachusetts permits any justice of the state superior court to do so.¹⁰² New Jersey, on the other hand, permits warrants to be issued only by judges of the superior court who are specifically designated for that purpose.¹⁰³

⁹⁹18 U.S.C.A. §2510(9)(b) (1970).

¹⁰⁰S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Normal search warrant practice permits U.S. Commissioners and city mayors to issue federal warrants, a practice "too permissive for the interception of wire or oral communications."

¹⁰¹N.Y. Crim. Pro. Law §700.05(4) (McKinney 1971).

¹⁰²Mass. Gen. Laws Ann. ch. 272, §99(B)(9) (Supp. 1976).

¹⁰³N.J. Stat. Ann. §2A:156A-2(i) (1971).

Electronic Surveillance: Authorization for Court Order:

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

- ¶3, Note 2: Correction: 388 U.S. 41 (1967).
- ¶4, Note 6: Correction: U.S.C.A. §2511(2)(c) and (2)(d),
as amended (Supp. 1977).
- ¶5, Note 7: Correction: Ore. Rev. Stat. §§133.723 to .727
(1975); Va. Code Ann. §§19.2-66 to -70 (1976).
- ¶7, Note 11: Correction: Mass. Gen. Laws Ann. ch 272, §99
(F)(1) (Supp. 1977);
- ¶7, Note 12: Correction: United States v. Iannelli . . .
motion for new trial denied without prejudice for
claim under 28 U.S.C. 2255, 18 Crim. L. Rptr.
2428 (3d Cir. Jan. 26, 1976).
- ¶10, Note 23: Add:

The official must be properly designated at the time he
authorizes the application; subsequent expiration of his
authority before trial has no effect on the validity of the
order. United States v. Florea, 541 F.2d 568, 574 (6th Cir.
1976).

Where words "specially delegated" were used instead
of "specially designated," transfer of authority was never-
theless valid. United States v. DiMuro, 540 F.2d 503, 509
(1st Cir. 1976).

And see also United States ex. rel. Machi v. U.S. Dept.
of Prob. and Par., 536 F.2d 179 (7th Cir. 1976) (Assistant
placed Attorney General's signature on memorandum of approval

after telephone approval was received).

¶14, Note 38: Correction: 327 N.E.2d 819, 838-9.

¶16, Note 45: Correction: Mass. Gen. Laws Ann. ch. 272, §99

(B) (7) (Supp. 1977).

¶17, Note 50: But see People v. DiFiglia, 50 A.D.2d 709,
374 N.Y.S.2d 891 (1975) (Ennumerated offenses
need not be felonies).

¶18, Note 54: cert. denied sub nom. Joseph v. United States, 423 U.S.
858 (1976).

¶21: Correction: There is a special concern shown in some
statutes where the surveillance involves public facilities
or where it threatens privileged communications. New Jersey
requires that the court determine there to be a "special need"
for the interception of the communications.⁶¹ No similar
federal requirement exists,⁶² although New York and Massachusetts
require a statement in the application that the communications
to be intercepted are not legally privileged.⁶³

¶24-¶25: Omit and substitute:

The Supreme Court recently faced the issue of whether
the government must name a known person where it has
probable cause to believe that the individual is committing
a specified offense in United States v. Donovan, 97 S.Ct. 658
(1977). During the course of a properly authorized wiretap
of suspected gambling operations, Government agents learned
that respondents Donovan, Robbins and Buzzaco were discussing
gambling with individuals named in the warrant. An authorized
extension identified five additional individuals and "others

as yet unknown," but did not mention respondents. Donovan, Robbins and Buzzaco were subsequently served with proper inventory notice, but moved for suppression of their intercepted conversations for failure to comply with 18 U.S.C. §§2518 (1) (b) (iv) and 2518 (4) (a). Id. at 664-65.

The court held in relevant part:

1. §2518(1) (b) (iv) requires the government to name all individuals it has probable cause to believe are involved in the suspect activities. Id. at 661.

2. Failure to notify the issuing judge of respondents' identities did not warrant suppression under §§2518 (10) (a) (i). Id.

Although suppression was not warranted in this case, the court followed the Eighth Circuit's suggestion (United States v. Civella, 533 F.2d 1395 [1976]) that if the government agents deliberately withheld information that would lead the court to the conclusion that probable cause was lacking, suppression might be warranted. 97 S.Ct. at 672.

The court further emphasized that strict compliance with Title III requirements is "more in keeping" with Congressionally imposed duties. Id. at 674.

In United States v. Votteller, 544 F.2d 1355, 1360 (6th Cir. 1976), the trial judge was properly presented with a "factual issue" as to probable cause to believe defendant Karem was involved. The standard of review of this decision is "clear error" or "abuse of discretion." This same standard was applied by the Eighth Circuit in United States v. Costanza

549 F.2d 1126, 1134 (1977) (citing Donovan and Civella).

In Costanza, the court noted that the defendants there were served with inventories (as was the case in Donovan) and would not be prejudiced by admission of the intercepted conversations.

See also United States v. Scibelli, 549 F.2d 222 (1st Cir. 1977) (Review of authorization not de novo, but based on minimal adequacy, tested in commonsense fashion).

¶28, Note 77: Correction: cert. denied, 423 U.S. 858 (1976); for recent circuit decisions requiring minimal showing, see, e.g., United States v. Fury, Nos. 76-1506, 76-1512, slip op. at 3208 (2nd Cir. Feb. 8, 1977) (Detectives stated that the suspects were "difficult to tail . . . very careful and . . . constantly changing routes." They had been successfully "bugged" before, and were consequently wary.).

The Sixth Circuit follows the Eighth Circuit in holding that, while investigating officers' conclusions based on prior experience are relevant, an affidavit based solely on such conclusions, without relation to the facts of the particular situation, would be invalid. United States v. Landmesser, No. 76-1540, slip op. at 5 (6th Cir. April 18, 1977) See United States v. Abramson, Nos. 76-1583, 76-1588, 76-1589, slip op. at 15-16 (8th Cir. April 26, 1977).

¶28, Note 77: Add: The Ninth Circuit has indicated that a general statement of the insufficiency of investigative alternatives in gambling cases is not sufficient to satisfy the requirements of §2518(1)(c); the insufficiency must be

related to the particular matter under investigation. In United States v. Feldman, 535 F.2d 1175 (9th Cir. 1976), the court found "interesting" and "persuasive" the argument "that law enforcement agencies may not rely upon the general difficulty of apprehending and convicting bookmakers to justify the use of wiretapping." Id. at 1178. The court did not reach this issue because the affidavit clearly indicated that alternative procedures had failed in this particular case.

The court also indicated, citing United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975), cert. denied sub nom. Kerrigan v. United States, 423 U.S. 924 (1975), that a wiretap need not be used only as a "last resort." See United States v. Smith, 519 F.2d 516 (9th Cir. 1975).

¶28, Note 78: Correction: cert. denied, 423 U.S. 924 (1976). In United States v. Spagnuolo, 549 F.2d 705, 710 (1977), the Ninth Circuit attempted "once more to promulgate a manageable standard between the Kerrigan and Kalustian decisions." It held:

1. To show "other investigative procedures have been tried and failed" the affidavit must reveal "that normal investigative techniques have been employed in a good faith effort. . ."

2. Where they were not tried, an "adequate factual history," sufficient to enable the reviewing judge to determine such techniques would be unsuccessful or dangerous, must be presented.

3. "The district judge, not the agents, must determine whether the command of Congress has been obeyed."

Add ¶28A:

In a recent New York case, however, the court displayed a willingness to look at the record in this issue, People v. Brennes, 53 A.D.2d 78, 385 N.Y.S.2d 530 (1st Dept. 1976). "In the instant case People failed to establish that 'normal investigative procedures' were unavailing. (CPL §700.15[4]). The police officers as well as the informers gained access to the building and actually observed alleged couriers entering and exiting both apartments. A 'buy' was even arranged In sum, it appears from the record that 'normal investigative procedures' were or could have been successful and the use of the wiretap was merely a useful additional tool. Accordingly, it should never have been authorized." Id. at 531-32.

Add ¶29 A:

On appeal, the courts have generally used a "commonsense" approach to the affidavit. In United States v. De La Fuente, 548 F.2d 528, 538 (1977), the Fifth Circuit tested the

affidavit "in a commonsense fashion" and found that it "alleged sufficient facts to support the court's finding that more traditional investigative procedures were both more dangerous and unlikely to succeed."

Accord, United States v. Woods, 544 F.2d 242, 256 (6th Cir. 1976); United States v. Anderson, 542 F.2d 428, 431 (7th Cir. 1976); United States v. Daly, 535 F.2d 434 (8th Cir. 1976).

¶31, Note 91: Correction: United States v. Baynes, 400 F. Supp. 285, 300-10.

¶32, Note 93: Correction: United States v. Kilgore, cert. denied, 425 U.S. 950 (1975).

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ES: EXECUTION

Electronic Surveillance: Execution of the Order

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Summary

¶1 Law enforcement officers engaged in electronic surveillance¹ must carry out four major post-authorization duties; failure in any one of them may result in suppression of part or all of wiretap evidence. The officers must:

1. minimize interception of nonpertinent conversations;
2. amend the surveillance order under appropriate circumstances;
3. seal the tapes upon termination of the tap; and
4. cause service of a notice of surveillance upon certain individuals.

The courts generally hold that the minimization requirement means that agents must make a reasonable good faith effort to minimize interception of nonpertinent and privileged conversations. Reasonableness is evaluated on a case-by-case basis. Agents must also obtain a prospective amendment, i.e., a new order, when they intercept evidence of a new crime where they have probable cause to believe that similar conversations will recur. A retroactive amendment is required when incidentally intercepted evidence of new crimes is to be used in either a grand jury or trial. Violations of the sealing and notice requirements have been treated in different fashions by the courts. Serious violations may cause suppression of all wiretap evidence and leads derived therefrom.

I. Minimization

¶2 Since electronic surveillance is a search and seizure, a wiretap must be conducted in strict compliance with the Fourth Amendment. Both the United States Constitution and applicable federal and state statutes thus require that the monitoring agents minimize intrusion on the suspect's privacy.^{1a} The federal statute, for instance, provides:

Every order and extension thereof shall contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. 2

¶3 The federal statute does not define the term "interception." The most prudent and logical definition is that a communication is intercepted when it is either overheard by a human ear or recorded by a mechanical

¹As used in these materials the term electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

^{1a}See generally Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 92, 94-106 (1975). These materials are based largely on this Comment.

²18 U.S.C. §2518(5) (1970).

device.³ The New York statute adopts this definition.⁴
A conversation can only be intercepted through the use of
an electronic or mechanical device; simple overhearing
by the naked ear does not constitute interception.⁵

A. What May Be Intercepted?

¶4 A communication is properly subject to interception
under the federal scheme if it provides "evidence of" a
violation of any of a designated list of offenses.⁶ Under
the New York statute, monitors must minimize interception
of communications that were "not otherwise subject to
eavesdropping under this article."⁷ A communication is
subject to interception if it "concern(s)" a
designated list of offenses.⁸ Under the New Jersey

³See, Comment, supra note 1a, at 99-105; Note,
"Minimization of Wire Interception: Presearch
Guidelines and Postsearch Remedies," 26 Stan. L. Rev.
1411, 1415-17 (1974).

⁴N.Y. Crim. Pro. Law §700.05(3) (McKinney 1971).
N.J. Stat. Ann. §2A:156A-2(c) (West 1971) defines
interception as "the aural acquisition of the contents
of any wire or oral communications through the use
of any electronic, mechanical or other device . . .,"
thus following 18 U.S.C. §2510(4) (1970) exactly. Mass.
Gen. Laws Ann. ch. 272, §99.B(4) (1976), however, follows
the New York rule.

⁵18 U.S.C. §2510(4) (1970). See, e.g., United States v.
McLeod, 493 F.2d 1186 (7th Cir. 1974) (overhearing
one-half of phone conversation without device not
"interception").

⁶Id. §2516(1).

⁷N.Y. Crim. Pro. Law §700.30(7) (McKinney 1971).

⁸Id. §700.15(3).

statute, monitors must "minimize or eliminate" interceptions of communications "not otherwise subject to interception under this act."⁹ The basic thrust of all three statutes is that conversations that are irrelevant to the investigation and that do not provide evidence of commission of a crime are not to be intercepted.

¶5 A conversation providing information useful and relevant to the investigation probably may be intercepted even if it does not provide direct evidence of the commission of a crime. For instance, one federal court allowed interception of a call to the telephone company

⁹ N.J. Stat. Ann. §2A:156A-12(f) (as amended, New Jersey Statutes §2A:156A-12(f) [1976]). The Massachusetts statute contains no explicit minimization language. The absence of such language formed the basis of an attack on that statute in Commonwealth v. Vitello, Mass., 327 N.E.2d 819 (1975). The defendants there argued that the failure to include such language caused the statute to fall short of meeting the minimum requirements of the federal statute. In rejecting this argument the Supreme Judicial Court held that as long as the state procedures fully and effectively achieve the results sought through minimization the absence of express language would not render the statute invalid. The court cited Mass. Gen. Laws Ann. ch. 272, §99.F(2)(b) (1976) (designation of specific listening periods), §99.F(2)(d) (particular description in the authorization order of communications to be intercepted), and §99.M(c) (monitor returning warrant must describe conversations overheard but not recorded) as indicating that the state procedures demonstrated a high regard for privacy interests and that reasonable efforts would be made to avoid unnecessary intrusions. The Massachusetts court thus emphasized the importance of minimization while rejecting the attribution of any talismanic significance to the use of the term. Federal precedents played a part in this decision; the court cited United States v. Manfredi, 488 F.2d 588, 598 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974), as holding that the absence of an express minimization directive in an order does not necessarily render the order invalid. By analogy, the court held that a similar absence of minimization language in a statute would not render the statute invalid if minimization purposes are otherwise met.

(to find out whether telephone service was about to be discontinued), calls to travel agencies and airlines (to keep track of the movements of what was described as an international heroin ring), calls to a bank to procure money (because money was needed to buy narcotics), and calls to persons who were not identified (because one purpose of the tap was to develop the extent and identity of the conspiracy).¹⁰ No totally reliable formula exists for identifying calls that are not subject to interception. Clearly, conversations between known conspirators about the conspiracy should be intercepted. Conversations about the conspiracy between a conspirator and an unidentified party are nearly always subject to interception. Just as clearly, conversations between two known innocent parties about an innocent subject should not be intercepted. Between these two extremes, however, lies a gray area which must be determined anew in each case. The following discussion should help to make this determination easier.

B. The Permissible Scope of Interception

¶6 Because the monitors never know exactly what they are about to hear until they hear it, their efforts at minimization are usually not completely successful. Interception of a single irrelevant portion of a conversation, however, is

¹⁰ United States v. Falcone, 364 F. Supp. 877, 882 (D.N.J. 1973), aff'd, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

usually not grounds for suppression. The standard applied is a rule of reason. The monitors must make a reasonable effort to "minimize out" the greatest possible number of irrelevant conversations.¹¹ Each case is evaluated on its own facts, using the perspective of the agent on the spot. A court may thus find that a reasonable effort in one case could be completely unreasonable in another.¹² The reasonableness of the minimization effort is judged by using up to six variables. Which of these variables applies will depend on the circumstances of each case.

1. Objective of the investigation: When the aim of the electronic surveillance is to explore a complex, far-flung conspiracy, the courts generally will find a wider range of calls to be relevant and allow the monitors a wider margin of error.¹³ When the objective is more modest, such as conviction of a known individual, the courts enforce minimization much more literally.¹⁴

2. Location of the telephone: When the telephone is located in a known criminal headquarters, the courts allow interception of almost any conversation.¹⁵

¹¹ See United States v. Armocida, 515 F.2d 29, 42-43 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976); United States v. Bynum, 360 F. Supp. 400, 409-10 (S.D. N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974). But see United States v. Scott, 516 F.2d 751, 756 (D.C. Cir. 1975) (holding that agents need not make any minimization effort at all as long as one-hundred percent interception is ultimately found to be reasonable under the circumstances).

¹² See United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

¹³ See, e.g., United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

¹⁴ See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

¹⁵ See, e.g., United States v. James, 494 F.2d 1007, 1021-23 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975).

When the telephone is in a family residence or public place, however, the monitors must expect that a high percentage of the calls will not be relevant, and the courts allow a smaller margin of error. 16

3. Nature of the criminal enterprise: Where the subject-matter of the conspiracy is complex, such as in many large narcotics cases, the courts allow a greater margin of error. 17 Where the subject is simpler, such as in a low-level gambling case, the courts allow fewer improper interceptions. 18

4. Use of code: When the suspects use code or guarded and ambiguous language, the courts allow a wider margin of error. 19

5. Length of time surveillance has run: The monitors and supervising attorney are expected to try to work out any codes and improve their screening plans, so that minimization results should improve over the duration of the tap. Interception of nearly all communications might, therefore, be permissible at the beginning of a complex wiretap, but the supervising attorney must thereafter try to devise a set of screening rules to guide the monitors in their minimization efforts. 20

¹⁶See, e.g., United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

¹⁷See, e.g., United States v. Quintana, 508 F.2d 867, 873 (7th Cir. 1975); United States v. Scott, 516 F.2d 751, 753-54 (D.C. Cir. 1975).

¹⁸See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

¹⁹See, e.g., United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

²⁰See, e.g., United States v. Falcone, 364 F. Supp. 877, 880-81 (D.N.J. 1973). See also, United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976) (limiting of tap to nine and one-half days sufficient minimization; supervising attorney showed good faith in instructing monitors in a screening method).

6. Judicial supervision: If the authorizing judge plays an active role in the ongoing surveillance, later courts ruling on the minimization question usually give special deference to the original judge's conclusions. 21 The prosecutor who secures the judge's approval of an ongoing minimization plan has a powerful defense at a subsequent suppression hearing.

¶7 When the defendant moves to suppress for failure to minimize, therefore, the intercepted materials are judged on a case-by-case basis. The minimization effort must have been reasonable under the circumstances at the time of interception. The best defense at the hearing is usually to call the monitoring agents and elicit from them a point-by-point explanation of the minimization plan, in impressive detail.

¶8 In a complicated investigation the supervising attorney or law enforcement supervisor typically should visit the interception site (plant) on a regular basis. On these visits, he should discuss the tap's output with the monitors, helping them distinguish calls that are pertinent from ones that are not. He should review the plant reports daily and try to discern certain categories of calls that can be immediately minimized out. When he finds such a category--such as calls by the children from a family-dwelling telephone--he should have signs posted at the interception site instructing the monitors to shut off on all such calls. These instructions should constantly be re-evaluated and revised throughout the duration of the tap. Regular written reports to the

²¹See, e.g., United States v. Bynum, 360 F. Supp. 414-15 (S.D.N.Y. 1973).

judge on the progress of the investigation and the relative success of minimization are also helpful. The judge may even be invited to observe the interception station in operation. Each step helps show diligent application of the minimization rule; the more concrete steps to point to, the easier it will be to defeat a defense motion for suppression.

C. Privileges and Immunities

¶19 The supervising attorney must carefully ensure that the monitors minimize out calls protected by the lawyer-client privilege. Any call to a lawyer is privileged (and therefore not subject to interception) when the lawyer is acting in his professional, advisory capacity.²² Calls concerning ongoing criminal activity are not privileged, but a call requesting advice concerning past criminal activity is privileged.²³ The lawyer may not claim the privilege to shield his incriminating statements, for the privilege is for the client's benefit only.²⁴ Where the lawyer is a conspirator, his incriminating calls may be intercepted. Any calls

²²Id. at 417.

²³See generally 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence, (McNaughton rev. 1961) §§2290, 2291, 2298, 2310, 2321, 2326; Note, "Government Interceptions of Attorney-Client Communications," 49 N.Y.U. L. Rev. 87 (1974).

²⁴United States v. King, 335 F. Supp. 523, 545-46 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974).

giving legitimate advice to a client must be screened out, however, even if the client volunteers highly incriminating information about past criminal activity. Under no circumstances may a call between an indicted person and his lawyer be intercepted; mere interception of such a call may result in a mistrial.²⁵ Unless the lawyer is a conspirator, the most prudent course is to instruct the monitors not to intercept any conversation involving a lawyer.

¶10 Use of a police informant to entice an indicted person into making incriminating statements over a wiretapped line is prohibited by the Supreme Court's holding in Massiah v. United States.²⁶ It is unclear how far this holding might be extended to protect conversations involving indicted persons. Unless there is a compelling reason to intercept such a conversation, therefore, the most prudent policy is to minimize out persons under indictment.

¶11 In one case, husband and wife defendants contended that conversations between them were protected by the marital privilege.²⁷ The Seventh Circuit disagreed

²⁵ See, e.g., Coplon v. United States, 191 F.2d 749, 757, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952). Interception of a conversation between an indicted person and his lawyer that concerned inconsequential events might not offer grounds for a mistrial. Such a conversation would doubtless be irrelevant, and should as a matter of course be minimized out.

²⁶ 377 U.S. 201 (1964).

²⁷ United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974).

and applied the privilege only to conversations that were truly private and non-criminal. Any incriminating husband-wife conversations were properly intercepted, the court ruled. This interpretation adds nothing to the basic minimization rule, since private, non-criminal conversations should be minimized out even in the absence of a privilege.

D. Techniques

¶12 There are three ways to minimize: extrinsic, intrinsic, and a combination of the two. Extrinsic minimization means using methods not based on the content of individual calls. These include visual surveillance of the telephone to determine when the suspect is making a call,²⁸ and limiting interception to certain periods of the day.²⁹ Extrinsic minimization can be highly effective if visual surveillance is feasible and the suspects are identified. It is also useful when the suspect uses the telephone at a set time each day, or only uses it during specific hours. If neither condition obtains, extrinsic methods will be almost useless. New Jersey has adopted extrinsic minimization by statute.³⁰

²⁸ See, e.g., Katz v. United States, 389 U.S. 347, 354 n. 14 (1967).

²⁹ See, e.g., State v. Dye, 60 N.J. 518, 527, 291 A.2d 825, 829, cert. denied, 409 U.S. 1090 (1972).

³⁰ N.J. Stat. Ann. §2A:156A-12(f) (as amended, New Jersey Statutes §2A:156A-12(f) [1976]). Amended to add the extrinsic minimization rule.

¶13 Intrinsic minimization bases its screening method on the content of each call as it is intercepted. The monitor listens to the first 30 seconds or so, and if it is nonpertinent he discontinues interception. If the call is one that could become pertinent, the monitor may sample the call at regular intervals to ensure that neither the subject matter nor the parties have changed.³¹ If the conversation becomes pertinent, the monitor resumes continuous interception.

¶14 In order for intrinsic minimization to work properly it is essential that all interception be by simultaneous recording and overhearing. If the agent overhears without recording, he has no solid proof of what he heard. Such a procedure is also expressly discouraged in the federal and New York statutes.³² If the agent records without overhearing, he is intercepting without minimizing and so leaves the surveillance vulnerable to motions for suppression.³³

³¹ Sampling is necessary to thwart wary criminals who slip a short, incriminating segment into a long, chatty personal call. See a classic example of this stratagem in United States v. King, 335 F. Supp. 523, 541 (S.D. Cal. 1971).

³² 18 U.S.C. §2518(8)(a) (1970); N.Y. Crim. Pro. Law §700.35(3) (McKinney 1971). Commonwealth v. Vitello, Mass., 327 N.E.2d 819, 842 (1975) does not specify a favored means of minimization, but the discussion of how the statute requires minimization without any express language seems to suggest that a combination of extrinsic and intrinsic minimization should be used.

³³ People v. Castania, 73 Misc.2d 166, 172, 340 N.Y.S. 2d 829, 835 (Moore County Ct. 1973).

¶15 The intrinsic method is usually the most effective, and is accordingly the rule in New York and federal courts.³⁴ In some cases this method may be further refined by adding extrinsic techniques. If the telephone is a pay phone on the street, for instance, one agent can maintain visual surveillance, informing the interception site when the suspect enters the booth. If the monitors then apply intrinsic minimization, the results are likely to be irreproachably legal, and there would be no risk of suppression.

II. Amendment

¶16 The authorization order sets out the names of the persons, if known, whose communications are to be intercepted, and specifies the crime that is being investigated.³⁵ Quite frequently, the intercepted communications provide evidence of a crime not mentioned

³⁴ See, e.g., United States v. Askins, 351 F. Supp. 408, 415 (D. Md. 1972). But see a recent development in the Chavez case, United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976). The court approved a kind of extrinsic minimization, holding that a tap limited to nine and one-half days was sufficiently minimized despite the interception of all calls except those between attorney-client and priest-penitent. The court cited approvingly the supervising attorney's instructions to the monitors regarding the importance of minimization. The difficulty of establishing a pattern of innocent/culpable calls appeared to the court as justification for the failure to use intrinsic minimization.

³⁵ 18 U.S.C. §§2518(4)(a), (c) (1970); N.Y. Crim. Pro. Law §§700.30(2), (4) (McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c) (as amended, New Jersey Statutes §2A:156A-9(c) [1976]). See also Mass. Gen. Laws Ann. ch. 272, §99.F(2) (1976).

in the order (a "new crime"), or incriminate a person not named in the order (a "new person"). While the tap is in progress the supervising attorney or law enforcement supervisor must constantly watch for new crimes or new persons, for in either event he may have to move swiftly to amend the authorization order. The statutory provisions are disarmingly simple, but the practical problems are subtle and confusing. Note, too, that interceptions of conversations relating to new crimes may be used in different ways. Different uses have different limitations. Disclosure for "law enforcement" purposes or use as the basis of application for search warrants or wiretaps may be made without a retroactive amendment of the original order.³⁶ Disclosure or use as evidence at trial or before a grand jury requires that a retroactive amendment be sought as soon as practicable.

A. New Crime

¶17 Use of intercepted communications that provide evidence of a new crime is specifically permissible under the federal, New York, and New Jersey statutes. The federal statute allows use of "communications relating to offenses other than those specified in

³⁶ See United States v. Vento, 19 Crim. L. Rptr. 2102 (3d Cir. March 16, 1976) (failure of agents to obtain a disclosure order for narcotics information overheard on a fencing tap before using it to obtain another tap held not to require suppression).

the order of authorization."³⁷ The New York and New Jersey statutes similarly allow use of intercepted communications which were not otherwise sought.³⁸ As noted above, in both statutes such a communication may be used in evidence before a grand jury or at trial only when, upon subsequent application, a judge finds that the communication was lawfully intercepted. This application to the judge must, under all three statutes, be made "as soon as practicable."³⁹

¶18 This set of requirements, in effect, establishes a procedure for use of conversations that were not the object of the investigation but were found in "plain view." This procedure flows from the common law exception to the strict warrant requirements of the Fourth Amendment. At common law, if a search warrant specifies that a gun is to be seized and the searching officer finds heroin, the heroin is admissible in evidence if it was found inadvertently in a lawful search for guns.⁴⁰ The heroin

³⁷ 18 U.S.C. §2517(5) (1970).

³⁸ N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971); N.J. Stat. Ann. §2A:156A-18 (West 1971).

³⁹ Id. Throughout these materials this statutory procedure is referred to as a "special application." The term "amendment" refers to a different concept and process. A special application requests retrospective permission to use a conversation that has already been intercepted. An amendment alters the wording of the order prospectively to permit future interception of some kind of conversation, in effect a new order. Most courts have unfortunately used the term "amendment" to refer to both concepts and so have confused the two.

⁴⁰ Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

is, however, inadmissible if the officers had expected to find it from the beginning but had not applied for a warrant covering it.⁴¹ The heroin is also inadmissible if found in a place where the officers could not possibly have been searching for guns (e.g., inside a slim sealed envelope).⁴²

¶19 These hornbook principles constitute the background against which the interpretation of the wiretap statute should go forward. The central question is whether the new material intercepted relates to a "new crime." This question, moreover, takes on tortuous complexity in joint state-federal investigations. In such investigations, the authorization order, the offense being investigated, and the offense finally charged may be either state or federal in origin or they may overlap. When is a retroactive amendment needed in such a situation? Unfortunately the courts have not resolved this issue. In Moore v. United States,⁴³ the District of Columbia Circuit interpreted a provision in the District of Columbia Code identical to 18 U.S.C. §2517(5). In that case, evidence which was obtained from wiretaps authorized for the investigation of D.C. gambling

⁴¹People v. Spinelli, 35 N.Y.2d 77, 80-81, 315 N.E.2d 792, 794, 358 N.Y.S.2d 793, 746-47 (1974).

⁴²In such a case, the search would have gone further than authorized by the warrant. The heroin could only have been found during the unauthorized search, and so is suppressible as a direct "fruit" of a violation of the Fourth Amendment.

⁴³513 F.2d 485, 500-03 (D.C. Cir. 1975).

offenses was disclosed to federal agents and used as the basis for prosecution of federal gambling offenses involving additional essential elements. The defendant contended that judicial approval was required to use the wiretap results as evidence in the federal prosecution. The Court of Appeals rejected this contention, holding that it did not "believe that there was any interception 'relating . . . to offenses other than those specified in the order of authorization' within the meaning of the D.C. wiretap law."⁴⁴ The court held that since the intercepted conversation did relate to the specified D.C. gambling offenses, it was immaterial that they also "constituted evidence of federal offenses."⁴⁵

¶20 The Seventh Circuit, in United States v. Brodson,⁴⁶ however, took a different position regarding a case in which there was even less disparity in authorized crime and intercepted evidence than in Moore. There, the government was authorized to investigate the operation of an illegal gambling business in violation of 18 U.S.C. §1955. The defendant was finally charged with the transmission of wagers and wagering information in violation of 18 U.S.C. §1084. The government's application section 2517(5) came eight months after the indictment was returned by the grand jury that considered the

⁴⁴ Id. at 501.

⁴⁵ Id. at 503.

⁴⁶ 528 F.2d 214 (7th Cir. 1975).

intercepted conversations. The Court of Appeals held that the application was untimely. The court's decision rests on two grounds; first, it ruled that the two offenses were separate and distinct, despite a certain overlapping. Second, and most important, it held that the government's assumption that the offenses were identical should have been tested by a neutral judge through an amendment proceeding. In fact, it is questionable that an amendment need have been obtained at all since the evidence overheard relates to the crime specified.

¶21 The Second Circuit recently followed Brodson. In United States v. Marion,⁴⁷ the court held that subsequent judicial approval was required by section 2517(5) before communications intercepted pursuant to state court authorized wiretaps could be used in federal grand jury and criminal proceedings. In this case, a wiretap was used in the investigation of, inter alia, the state crime of illegal possession of a dangerous weapon. The order was never renewed, extended, or amended, but the intercepted communication was used to question Marion before a grand jury about possible violation of 18 U.S.C. §§371, 922, which concern the transportation and transfer of an unregistered firearm through interstate commerce. The court held that the federal offense was separate and distinct from the

⁴⁷ Docket No. 75-1408 (2d Cir. May 7, 1976).

alleged state offense, which formed the basis of the original wiretap order, and that it thus fell within section 2517(5), citing Brodson.⁴⁸ Again, it is doubtful that an amendment was needed.

¶22 The law on this issue remains in doubt. Brodson and Marion may point to a trend but Moore and Justice Anderson's dissent in Marion show that other opinions persist. The prosecutor should, however, understand that he may face a "new crime" issue even if the underlying transaction falls within the original order. Prompt application for amendment may be the safest course to follow until the split in the circuits is resolved.

¶23 A single conversation providing evidence of a new crime (a "new conversation") is easily handled. If the supervising attorney or officer is certain that the conversation will never be used in evidence in any

⁴⁸ Judge Anderson dissented strongly to this holding. He cited Moore in opposition and argued that two earlier Second Circuit cases, United States v. Grant, 462 F.2d 28 (2d Cir. 1972) and United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973) demanded a more flexible reading of section 2517(5). Chief Judge Kaufmann, for the majority, distinguished these two cases from Marion. He argued that Grant did not hold that a state crime and a federal crime were, for purposes of section 2517(5), so closely related as to eliminate the need for subsequent judicial approval. According to Judge Anderson, in Tortorello the Second Circuit merely held that the requirement of subsequent approval was satisfied by the procedures observed (amendment by reference to affidavits on an extension). In light of the plain view background of section 2517, Anderson had the better of the argument, but Kaufmann had the votes.

grand jury or at any trial, he may disregard it.⁴⁹ If he wants to preserve his ability to use the conversation at any trial, however, he must follow the statutory procedure. As soon as practicable (that is, usually immediately) he must make a special application to any judge of competent jurisdiction. The application should show simply that the conversation was in plain view--that it was intercepted inadvertently while the surveillance was being lawfully conducted.

¶24 When the judge signs the application the prosecutor has satisfied the conditions for later use of the conversation in evidence. The decision is reviewable, however, for the defendant may always move to suppress the conversation later on any of several grounds.⁵⁰

¶25 The most common error in the use of this procedure

⁴⁹This is because the statutes mandate an application to the judge as a precondition only to use of the specific new conversations in evidence. If the application is not made, those particular conversations cannot be used in evidence, but the rest of the wiretap evidence is unaffected. When the supervising attorney wishes to use the new conversation in evidence, he must make his application to the judge "as soon as practicable." Tardy prosecutors have made the applications on the eve of trial; see, e.g., United States v. Cox, 449 F.2d 679 (10th Cir. 1973), cert. denied, 406 U.S. 984 (1974); United States v. Denisio, 360 F. Supp. 715, 719 (D.Md. 1973).

⁵⁰He may, for instance, allege that the application was not timely. He might also argue that the surveillance was not properly minimized and that the conversation would not have been overheard under a valid minimization procedure. Finally, he might argue that the monitors knew the conversation was going to occur, and so did not intercept it inadvertently. This last argument is discussed in detail infra.

is delay in applying to the judge. Although most courts so far have declined to suppress when the application was not made "as soon as practicable,"⁵¹ any delay at all invites a motion to suppress. It is most prudent, therefore, to make the application to the judge on the same day as the interception, if possible, and certainly within 24 to 48 hours. This procedure will be burdensome if a number of new conversations show up at regular intervals, but an application to the judge will be necessary for each one.

¶26 The problems begin to arise when one considers a real-life wiretap. Many conversations are ambiguous; their relationship to a new crime may not become clear until long afterward. Other conversations may provide evidence of two crimes, one of which is specified in the authorization order and one of which is not. The supervising attorney's or officer's duties in these situations are not entirely clear. Much depends on the particular sequence of events. If the agent overhears conversations pertaining to a new crime on the first day of a lengthy wiretap an amendment should be secured immediately. If the tap is short term, the new conversation ambiguous, and the judge informally kept aware of any new developments, the government may be able to wait until the time of applying for an extension to request an amendment. The

⁵¹ See, e.g., United States v. Denisio, 360 F. Supp. 715 (D.Md. 1973); People v. Ruffino, 62 Misc.2d 653, 309 N.Y.S.2d 805 (Sup. Ct. Queens County 1970).

safest course, however, is to apply for an amendment as soon as the conversation appears to pertain to a new crime.

¶27 The most serious problem by far arises due to the interception of unanticipated conversations, as the investigation branches out to encompass the new crime. At a certain point, the monitors begin to expect to hear such conversations and include them in their search. Where probable cause to believe they will occur exists, interception is thus no longer inadvertent and the conversations are not in plain view. In short, the monitors are now searching for communications not specified in the order. This violates the Fourth Amendment's requirement of particularity. The order must therefore be amended to include the new crime.⁵²

¶28 This amendment differs completely from the special application to the judge described in the statute. The special application retrospectively legitimizes use of an already intercepted conversation. The amendment opens up the scope of the order prospectively to permit future interception of the new conversations. Because this prospective amendment is actually an addition to the authorization order, it must be supported by the usual showings of probable cause and must satisfy all the statutory requirements for an application. The

⁵² See, e.g., People v. DiLorenzo, 69 Misc. 2d 645, 652, 330 N.Y.S.2d 720, 727 (Rockland County Ct. 1971).

statutes nowhere mention this procedure for a prospective amendment, but it is clearly a constitutional requirement where the supervising attorney or officer seeks to continue intercepting new conversations.⁵³

¶29 For example, the monitors may intercept a new conversation halfway through a gambling wiretap. The supervising attorney dutifully makes a special application for use and the judge signs it. The conversation was cryptic and not easily decipherable although it probably referred to an incipient robbery of some sort. The investigators may suspect that a robbery is being planned, and guess that more of these conversations will occur, but cannot show it under a probable cause standard. Now the investigators are in a dilemma. Further conversations are arguably not in plain view, because they are expected. If they are thus "otherwise sought" in the language of the New York statute, the judge might not sign the special applications. But because the first conversation was so cryptic the investigators cannot establish probable cause based on it alone, and so cannot obtain a prospective amendment either.

¶30 The prosecution faced this dilemma in People v. DiStefano.⁵⁴ Eleven days after the first cryptic

⁵³Id. Note, however, that if surveillance terminates upon interception of a new crime, there is no need for a prospective amendment. All that is required is a special application for the one new conversation already intercepted. People v. Ruffino, 62 Misc.2d 653, 659, 309 N.Y.S.2d 805, 811 (Sup. Ct. Queens County 1970).

⁵⁴People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976).

conversation the monitors intercepted four similar, detailed calls in a single day. The investigators had not obtained a prospective amendment in the interim because the first conversation did not supply probable cause. The defendants argued for suppression of the second group of conversations, and the New York Appellate Division agreed, reasoning that the conversations were expected, and so were "otherwise sought."⁵⁵

¶31 The Court of Appeals reversed, but did so without laying down guidelines for how to deal with this ambiguous situation. The court ruled:

[The inadvertence] requirement is intended to protect citizens against anticipated discoveries, such as occurred in Spinelli,^[56] where, knowing the location of certain tangible evidence and with ample time to obtain a warrant, enforcement officers intruded into the privacy of the accused without obtaining a prior judicial determination of probable cause to enter upon the premises. Here, in contrast, neither the [first] nor the [second] conversations could have been foreseen and, thus, were not proscribed anticipated discoveries. While it may be true that after [the first conversation] the authorities knew of defendant and his plans, nevertheless, on the basis of the [first] conversation alone, the authorities lacked probable cause to seek amendment of the warrant to include [the new crimes] Indeed, the police had no grounds upon which they could reasonably have asserted that defendant would use Jimmy's Lounge telephone again. We conclude, therefore, that the [second] conversations were inadvertantly overheard and, thus, were discovered in "plain view." 57

⁵⁵ 45 App. Div. 2d 56, 60-61, 356 N.Y.S.2d 316, 320-21 (1st Dept. 1974).

⁵⁶ People v. Spinelli, 35 N.Y.2d 77, 315 N.E.2d 792, 358 N.Y.S.2d 743 (1974).

⁵⁷ People v. DiStefano, 38 N.Y.2d 640, 649, 345 N.E.2d 548, 553, 382 N.Y.S.2d 5, 10 (1976).

¶32 In most cases this holding will solve the problem by defining the first new conversations as being overheard inadvertently and thus "found" in plain view. The supervising attorney or officer should thus make special applications for use of each new conversation, until he decides that he has accumulated probable cause. At this point he should immediately submit an application for an amendment of the wiretap in the usual form, supported by affidavits and a showing of probable cause, opening up the original order to include the new crime. Thereafter the new conversations will be properly intercepted under the amended order, and no further special applications are necessary.

B. New Person

¶33 There appears to be no constitutional requirement that the authorization order name the persons whose communications are to be intercepted.⁵⁸ The federal and New York statutes therefore require only specification of persons "if known."⁵⁹ The interception of communications

⁵⁸ See Comment supra note 1a at 137-38, for a discussion of this point.

⁵⁹ 18 U.S.C. §2518(b)(iv) (1970); N.Y. Crim. Pro. Law §700.30(2) (McKinney 1971). N.J. Stat. Ann. §2A:156A-12 (as amended, New Jersey Statutes §2A:156A-12 [1976]) also requires specifications of persons "if known." Cf. Mass. Gen. Laws Ann. ch. 272, §99.F(2)(b) (1976) which requires a particular description of the individual whose communications will be intercepted, and a statement of facts indicating that those communications will constitute evidence of a designated offense.

by persons not named in the order thus does not raise a constitutional question. The only problem is whether the statute requires the supervising attorney or officer to make a special application for use or to amend the order to add new names.

¶34 Under federal law, so far, the answer is clearly "no." Unless the authorization order specifically restricts interception to certain persons, the monitors are free to intercept and use relevant conversations involving anyone.⁶⁰ The federal special application procedure applies to "offenses other than those specified in the order," but makes no mention of persons not named in the order.⁶¹

¶35 The state of New York law on this point is somewhat less clear. New York requires a special application for use when the monitors intercept a communication "which was not otherwise sought."⁶² The New York Court of Appeals has ruled that "[w]here the communication intercepted involves the crime specified in the warrant, the named suspect, and an unknown outside party, . . . the communication is 'sought' and no amendment is required Thus, the legislative intent was to require amendments where

⁶⁰ See United States v. Cox, 449 F.2d 679, 686-87 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972); United States v. Ianelli, 339 F. Supp. 171, 177 (W.D. Pa. 1972); United States v. LaGorga, 336 F. Supp. 190, 192-93 (W.D.Pa. 1971).

⁶¹ 18 U.S.C. §2517(5) (1970).

⁶² N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971).

different crimes are disclosed."⁶³

¶36 The last sentence of this quotation indicates that the court probably would never require a special application or amendment of the warrant for a conversation involving a new person. Note, however, that the precise holding applies only to a conversation involving the named crime, the named person, and an unidentified third party. The court did not spell out what to do when the third party is identified but unnamed, or when the conversation is between two unnamed persons about the named crime. Special applications should not be required in these situations, but there are as yet no New York cases so holding.

¶37 The New York picture is somewhat complicated by the Second Circuit's interpretation of New York law in United States v. Capra.⁶⁴ The order in that case authorized interception of "communications of Joseph DellaValle with co-conspirators."⁶⁵ The monitors inadvertently confused DellaValle's voice with that of one DellaCava, but failed to amend the warrant to include DellaCava's name until 17 days after they realized their error. Because the order restricted

⁶³ People v. Gnozzo, 31 N.Y.2d 134, 143-44, 286 N.E.2d 706, 710, 335 N.Y.S.2d 257, 263 (1972), cert. denied, 410 U.S. 943 (1973) (emphasis added).

⁶⁴ 501 F.2d 267 (2d Cir. 1924), cert. denied, 420 U.S. 990 (1975).

⁶⁵ Id. at 273 (emphasis added).

interception to calls of DellaValle "with" co-conspirators, the Second Circuit ruled that the monitors had no authority to intercept calls of DellaCava during the 17 day period preceding the amendment. The court therefore ordered suppression of these calls.⁶⁶

Presumably this entire problem could have been avoided if the original order had authorized interception of "communications of DellaValle and others as yet unknown."⁶⁷

¶38 In New York, then, the rule is probably that amendment of the order prior to a renewal to add a name of a newly identified conspirator is unnecessary unless the language of the order specifically precludes interception of the new person.

III. Sealing

¶39 Once electronic surveillance ends, the government must present the tapes to the issuing judge "immediately upon the expiration of the period of the order," so that they may be "sealed under his directions."⁶⁸ The presence of the seal, "or a satisfactory explanation for the absence thereof," is a prerequisite to the use of the tapes in evidence.⁶⁹ Applications and orders must also

⁶⁶ Id. at 276-77.

⁶⁷ United States v. Kahn, 415 U.S. 143 (1974). An authorization order covering "persons as yet unknown" was approved in United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972), cert. denied, 417 U.S. 917 (1974).

⁶⁸ 18 U.S.C. §2518(8)(a) (1970).

⁶⁹ Id.

be "sealed by the judge."⁷⁰

¶40 Delays in sealing have been permitted in several cases.⁷¹ The Third Circuit has ruled, moreover, that improper sealing procedures may not result in suppression because the sealing process cannot affect the legality of the original interception.⁷²

¶41 The New York State Court of Appeals has reached a contrary conclusion in two cases dealing with the sealing requirement. Where the monitoring agents completely failed to seal the tapes, the court held ten intercepted conversations to have been improperly admitted into evidence.⁷³ In a more recent case,⁷⁴ it was emphasized that section 2518(8) would be strictly construed so that conversations and evidence should be

⁷⁰ Id. Although the judge should personally seal the tapes and documents, one court declined to suppress when the tapes were sealed by an agent out of the judge's presence. United States v. Cantor, 470 F.2d 890, 892-93 (3d Cir. 1972).

⁷¹ United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir. 1975) (delay of 14 days permitted); United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (delay of 13 days permitted); People v. Blanda, 80 Misc.2d 79, 362 N.Y.S.2d 735 (Sup. Ct. Monroe County 1974) (delay of two days permitted). See also Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 849-50 (1975).

⁷² United States v. Falcone, 505 F.2d 478, 483-84 (3d Cir. 1974).

⁷³ People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974).

⁷⁴ People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976).

suppressed, when, in preparation for trial, officers unseal tapes in the absence of a judicial order.

IV. Inventories

A. In General

¶42 After surveillance is over and the tapes sealed, the issuing judge must order service of an "inventory" on the persons named in the surveillance order. The inventory is a notice that must include the fact that the surveillance order was issued, the date it was issued, the period for which interception was authorized, and a statement of whether or not the individual's conversations were intercepted. Inventories are probably also required for any person whose name was added to the order by an amendment. The issuing judge may, in his discretion, order inventories for additional persons not named in the order. The inventory must be served within 90 days after termination of the tap, but any judge of competent jurisdiction may, upon an ex parte showing of good cause, postpone service of any inventory.⁷⁵

⁷⁵The federal inventory section is 18 U.S.C. §2518(8)(d) (1970). In New York it is N.Y. Crim. Pro. Law §700.50 (3), (4) (McKinney 1971). The New Jersey inventory section is N.J. Stat. Ann. §2A:156A-16 (1971). Mass. Gen. Laws Ann. ch. 272, §99.L (1976) requires service of an attested copy of the warrant on the person whose communications were intercepted prior to the execution of the warrant or within 30 days after termination with continuous secrecy limited to three years. The Supreme Judicial Court of Massachusetts ruled in Commonwealth v. Vitello, Mass., 327 N.E. 2d 819, 844 (1975) that this procedure provided adequate access to the information prescribed by 18 U.S.C. §2518(8)(d) and that the secrecy requirements of §99.L were in fact more stringent than those imposed by §2518(8)(d).

¶43 Although the statute instructs the judge to order service, the burden in fact falls upon the prosecutor to see that it is done. Noncompliance with the letter of the law has in some cases resulted in suppression of the wiretap evidence, so the prosecutor may not relax his attention to this detail once the tap is complete and the tapes have been sealed.

¶44 A preliminary issue is whether defendants have a constitutional right to post-wiretap notice. The early inventory cases ignored this possibility, but language from a Supreme Court opinion seems to make notice a constitutional necessity.⁷⁶ A recent Ninth Circuit case, moreover, has held squarely that the Constitution does require post-wiretap notice.⁷⁷ The notice will be sufficient under the Constitution if "the individual has been afforded a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception."⁷⁸ Note, however, that while the Constitution demands only a certain attention to due process, the statutes require the notice to be in a particular form and within particular time limits. An inventory served one day too late might therefore violate the applicable statute without violating the Constitution.

⁷⁶Berger v. New York, 388 U.S. 41, 60 (1967).

⁷⁷United States v. Chun, 503 F.2d 533, 536-37 (9th Cir. 1974).

⁷⁸Id. at 538.

B. Problems with the Service of Inventories

1. Lengthy Postponements

¶45 In some cases defendants have requested suppression on the ground that the judge unjustifiably exercised his discretion to repeatedly postpone the deadline for serving the inventory.⁷⁹ So far, however, the appellate courts have refused to find an abuse of discretion and have agreed that the delay was justified.⁸⁰ The reason for lengthy delays most frequently cited is that an ongoing investigation necessitates continued secrecy.

¶46 Excessive postponement for no good cause, however, might well warrant a court to find an abuse of discretion and order suppression. The Third Circuit in United States v. Cafero⁸¹ warned that judges "should exercise great care" in granting extensions beyond the 90-day period.⁸²

2. Late Service

¶47 Frequently the inventory is served beyond the 90-day limit or the eventual limit established by judicial

⁷⁹ See, e.g., United States v. Manfredi, 488 F.2d 588, 601 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

⁸⁰ See, e.g., United States v. Cafero, 473 F.2d 489, 500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); United States v. Curreri, 363 F. Supp. 430, 436 (D.Md. 1973); United States v. Lawson, 334 F. Supp. 612, 616 (E.D.Pa. 1971).

⁸¹ 473 F.2d 489 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

⁸² Id. at 500.

postponements. This clearly violates the statute, but unless the defendant is prejudiced it probably does not violate the Constitution.

¶48 All the cases on late service so far have declined to suppress, but on the whole the reasoning has been weak. The early cases simply called the inventory a ministerial duty that could not affect substantial rights.⁸³ A recent Ninth Circuit case found, however, that the inventory satisfies a constitutional requirement, and gave the problem a more complete analysis. The court in United States v. Chun⁸⁴ applied an analysis developed by the United States Supreme Court in a pair of cases dealing with a suppression remedy.⁸⁵ When dealing with a suppression problem, the Supreme Court ruled, one should ask two questions. First, does the statutory section violated "directly and substantially"⁸⁶ implement the legislative scheme to prevent abuse of wiretaps? If not, then suppression is never an appropriate remedy. The Chun court ruled that the inventory provisions are a

⁸³ See, e.g., United States v. Cafero, 473 F.2d 489, 499-500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); United States v. Lawson, 334 F. Supp. 612, 616 (E.D.Pa. 1971). Note that special problems arise with respect to wiretaps. The traditional search is not done covertly, and is usually preceded by notice to the occupant of the premises. Inventory notice, in contrast, is the first time a wiretap target learns of the search and so is much more important.

⁸⁴ 503 F.2d 533 (9th Cir. 1974).

⁸⁵ United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974).

⁸⁶ United States v. Giordano, 416 U.S. at 527.

central safeguard.⁸⁷ This answer renders suppression possible and leads to the second question. Has the purpose of the section been satisfied despite the violation?⁸⁸ In case of late service, the answer is usually "yes." Even though the inventory was late, it was served and so fulfilled the purpose of the statute by giving actual notice. Suppression is therefore usually inappropriate. If notice is substantially late, and the defendant can show prejudice, then the statutory purpose has not been fulfilled, and suppression would be appropriate.

3. No Service

¶49 When no inventories at all are served, the defendant has received no actual notice, and the statutory purpose

⁸⁷ 503 F.2d at 542.

⁸⁸ United States v. Chavez, 416 U.S. at 574-75. See also United States v. Civella, 19 Crim. L. Rptr. 2136 (8th Cir. April 16, 1976). Two persons named in a court order to receive inventories were not served within the 90-day statutory period. The period of delay was short. The court found that the government did not deliberately ignore the notice provision and that the defendants did not demonstrate any prejudice arising from the delay. The court thus ruled that the government had substantially complied with the statute and that its essential purposes were met. The court found no such substantial compliance, however, with respect to two other defendants who had never been named in an inventory order and who did not receive notice of the interception until their indictments, nearly two years after the termination of the wiretap. The court found that there had been no effort to comply with section 2818(8)(d) and that the wiretap evidence pertaining to those defendants should have been suppressed. Civella thus suggests that a good faith effort to comply with the statute will compensate for minor delays, but that the absence of such effort may lead to suppression when the violation is substantial.

has not been met. Suppression will follow unless the government can show that the defendant had actual notice from some other source.⁸⁹ Actual notice, even from a source other than the formal inventory, satisfies the statutory purpose and should prevent suppression.⁹⁰

¶50 No formal inventories were ever served in Chun. The Ninth Circuit remanded to the district court to determine whether the defendants had actual notice.⁹¹ The district court found that they did, but not within the 90-day limit, and so ordered suppression.⁹² The conclusion of the district court seems plainly wrong. Actual notice is a substitute for an inventory. If the inventory is late, the evidence is not suppressed unless the defendant has been prejudiced. The district court should not have suppressed in Chun because of late actual notice without a showing of prejudice, yet the court found explicitly that the defendants had not been prejudiced.⁹³ The lesson is nevertheless clear: inventories should be served and on time.

⁸⁹ See United States v. Wolk, 466 F.2d 1143, 1144 (8th Cir. 1972).

⁹⁰ Id. at 445-46.

⁹¹ 503 F.2d at 536, 542.

⁹² 386 F. Supp. 91, 85 (D.Hawaii 1974).

⁹³ Id. at 94.

4. Deliberate Failure to Serve

¶51 In two cases that arose from the same New York wiretap, the courts considered the problem of an authorization order that purported to waive the inventory requirement completely.⁹⁴ The two courts disagreed over whether to suppress the wiretap evidence when the defendants in fact were never served. The problem is probably moot, since no other judges are likely to add a clause waiving the statute, and any prosecutor can easily overcome any objection by serving a timely inventory despite the wording of the order.

5. Persons Not Named in the Order

¶52 Under the federal and New York statutes inventories are mandatory only as to persons named in the authorization order.⁹⁵ Until recently this provision has been upheld as constitutional and has barred motions for suppression on the ground of lack of notice when made by persons not

⁹⁴ United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972); People v. Hueston, 34 N.Y.2d 116, 312 N.E.2d 462, 356 N.Y.S.2d 272 (1974), cert. denied, 421 U.S. 947 (1975).

⁹⁵ 18 U.S.C. §2518(8)(d) (1970); N.Y. Crim. Pro. Law §700.50(3) (McKinney 1971). See also N.J. Stat. Ann. §2A:156A-16 (1971) (same rule); Mass. Gen. Laws Ann. ch. 272, §99.L(1) (1976) requires an attested copy of the warrant to be served upon a person whose communications are to be intercepted. Section 99.L(2) allows postponement of that service in "exigent circumstances" until thirty days after the expiration of the warrant or a renewal. Service thus appears mandatory only with respect to persons named in the warrant.

named in the order.⁹⁶

¶53 The Ninth Circuit's opinion in Chun raises the possibility that all prospective defendants may have a constitutional right to notice, regardless of whether they are named in the order. Chun held that the government must furnish the judge with accurate information on who was intercepted and who is to be indicted, so that the judge may exercise his discretion in an informed manner.⁹⁷ The prosecutor must revise and update this information in order to keep the judge correctly informed.

¶54 The opinion also raises the possibility that a future case will hold notice mandatory for all defendants, regardless of whether they were named in the order.⁹⁸ The safest and easiest practice for prosecutors in the interim is obviously to give all possible defendants an inventory notice. If the decision to indict is made after the 90-day limit, and the person was not named in the order and did not receive an inventory, he should simply be served as soon as possible.

⁹⁶ See, e.g., United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Curreri, 363 F. Supp. 430, 435 (D.Md. 1973). The government may not evade the notice requirement by purposely omitting names from the authorization order. United States v. Bernstein, 509 F.2d 996, 1003-04 (4th Cir. 1975), cert. pending.

⁹⁷ 503 F.2d at 540. Accord, United States v. Donovan, 513 F.2d 337, 342-43 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

⁹⁸ 503 F.2d at 537.

Electronic Surveillance: Execution of the Order:

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

- ¶4, Note 8: Correction: Id. at §700.15(2).
- ¶4, Note 9: Correction: Mass. Gen. Ann. ch. 272, §99.F(2) (f);. . .and §99.M(e).
- ¶6, Note 11: Correction: United States v. Armocida, 515 F.2d 29, 42-3 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1976).
- ¶6, Note 20: Correction: See also United States v. Chavez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 96 S.Ct. 2237 (1976). (Also at: ¶15, Note 34).
- ¶6, Note 20: See also United States v. Abascal, No. 75-1093 (9th Cir. March 1977) (interception of all calls during twelve day wiretap was not a failure to minimize; tap was of short duration, suspects used guarded language, identities of suspects were uncertain, and object of investigation was a large scale drug ring).
- ¶10, Note 26: But see United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 97 S.Ct. 796 (1977). Agents intercepted communications between a government informer and defendant who was under indictment and represented by counsel in an unrelated state prosecution. The court held that wiretap evidence was admissible in the later federal prosecution which resulted from the wiretap. The court stated that Massiah applied only where, in the absence of counsel, statements are

deliberately elicited from a defendant in connection with a crime for which he has already been indicted.

¶12, Note 30: The New Jersey statute now requires that interception of communications be minimized . . . by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by [the wiretap] order.

Id.

¶13A: In United States v. Hinton, 543 F.2d 1002 (2d Cir. (1976), cert. denied, 97 S.Ct. 493 (1976), 97 S.Ct. 796 (1977), the Second Circuit held that monitoring all calls in whole or in part does not itself show a failure to minimize. Overhearing and recording ceased as soon as a call was determined to be personal in nature and only spot checks were later made to insure that the conversation did not turn to narcotics. To determine whether a call was nonpertinent, monitors listened to the first five minutes of each conversation. The court thought that a five minute ascertainment period on each call was rather long, but found no failure to minimize. The suspects used code language and the government, by having a minimization plan in effect, showed a good faith effort to minimize.

¶14, Note 33: See also People v. Brenes, 53 App. Div.2d 78, 385 N.Y.S.2d 530 (1st Dep't 1976) (wiretap evidence was suppressed where all calls over designated phones were intercepted

and recorded; although agents turned down volume on earphones when nonpertinent calls were intercepted, tape recorder was never turned off during twenty day tap).

¶14A: In United States v. Daly, 535 F.2d 434 (8th Cir. 1976), the Eighth Circuit held that section 2518(8)(c) did not require that agents simultaneously record when they make spot checks of innocent conversations. The defendant had shown no prejudice from the failure to record spot checks. Where one agent who monitored ten percent of the total number of calls listened to all conversations but recorded only those which were incriminating, the court held that the deviation was de minimis. The authorizing judge required and received 5 day reports of results and minimization procedures. The court noted that informal judicial supervision was strong support for a showing of good faith minimization efforts.

¶16, Note 36: Correction: United States v. Vento, 533 F.2d 838 (3d Cir. 1976).

¶16, Note 36: Several recent cases show the broad scope of law enforcement or investigative use of wiretap evidence. Such use does not require a retroactive amendment under 18 U.S.C. §2517(5). See, e.g., United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976) (District of Columbia officials need not get judicial authorization to use information from federal wiretap to get new local tap, even though such use of information derived from taps governed by D.C. wiretap

statute (D.C. Code §548(b) (1973)) requires judicial approval); United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), cert. denied, 97 S.Ct. 814 (1977) (where information supplied to state officers who searched car was derived from federal wiretap, the items seized were admissible in federal prosecution even though the wiretap would not have been valid under more restrictive state law; California state officers were "investigative or law enforcement officers" within the meaning of sections 2510(7) and 2517(1), (2) of the federal wiretap law); Fleming v. United States, 547 F.2d 872 (5th Cir. 1977) (FBI disclosure to the IRS of information obtained from wiretap authorized for investigation of gambling offense is a legitimate law enforcement use of wiretap evidence, even where the IRS wants to base civil or criminal tax suit on the information).

¶19, Note 45: Correction: Id. at 502.

¶21, Note 47: Correction: 535 F.2d 697 (2d Cir. 1976).

¶21A: The Eighth Circuit recently took a more lenient position with regard to the new crime issue than did the courts in Brodson or Marion. In United States v. Daly, 535 F.2d 434 (8th Cir. 1976), the court ruled that a wiretap order which explicitly permitted investigation of racketeering activities affecting interstate commerce (18 U.S.C. §§1962, 1963) could also be used to investigate mail fraud schemes under 18 U.S.C. §1341. The reason given was that a related federal racketeering provision, 18 U.S.C. §1961(1)(B),

specifically refers to the mail fraud statute. The mail fraud scheme involved sending bogus bills to major oil companies.

¶21B: The wiretap in Daly was also used to gather evidence of defendant's involvement in an insurance fraud scheme. Authorization to investigate insurance fraud was also not expressly granted in the wiretap order, nor was an amendment sought to include insurance fraud. Without seeking a disclosure order (under 18 U.S.C. §2517(5)) the government introduced wiretap evidence relating to insurance fraud in a grand jury proceeding and an indictment was returned charging Daly with that offense. Daly made no objection to the introduction of this evidence and the issue was not preserved for appeal. In dicta, the court stated that even if the issue had been preserved, the indictment would have been sustained. Since it was proper to use the wiretap (without a prospective amendment) to investigate mail fraud, it was also proper to use it to investigate insurance fraud because use of the mail was an essential part of the insurance fraud scheme. Since the government discovered three instances of such fraud, the scheme was a "pattern of racketeering" under 18 U.S.C. §1961(5). Thus insurance fraud fell within the scope of the offenses specified in the original wiretap order.

¶21C: In Daly, the Eighth Circuit found that certain offenses were implicitly within the scope of the original wiretap

order. How far a court will go to find offenses implicitly authorized is not clear. Daly did not address the central question posed by Moore and Brodson: If investigation of an offense is not authorized (expressly or implicitly) in a wiretap order, is an amendment or special application required to use wiretap evidence in prosecutions of that offense where such evidence was also relevant to crimes that were authorized?

¶23, Note 49: Correction: United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

¶33, Note 59: Correction: 18 U.S.C. §2518(1)(b)(iv) (1970);

¶37, Note 64: Correction: 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975).

¶40, Note 71: Correction: United States v. Poeta, 455 F.2d 117, 122 (2d Cir. 1971),

¶40, Note 72: Correction: United States v. Falcone, 505 F.2d 478, 483-4 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

¶41A: Courts have not treated sealing requirements consistently in recent cases and this area of wiretap law is still in flux. Some courts continue to require strict adherence to provisions under section 2518(8)(a). The Second Circuit held that unexplained delays in sealing ranging from eight to twelve months required suppression of wiretap evidence. United States v. Gigante, 538 F.2d 502 (2d Cir. 1976). See also People

v. Saccia, ___ App. Div.2d ___, 390 N.Y.S.2d 743 (4th Dep't. 1977). That a district judge eventually signed a sealing order did not end further inquiry into the adequacy of the sealing and custody of the tapes. The purpose of the sealing requirement was to insure that no subsequent alteration of the tapes can occur. The court declared that a satisfactory explanation is required not only for failure to seal the tapes, but for failure to seal them immediately upon expiration of the wiretap order. The court suggested that, although section 2518(8)(a) does not require it, the issuing judge should sign a formal court order directing sealing and custody of the tapes and should maintain a record of that proceeding. But see United States v. Caruso, 415 F.Supp. 847 (S.D.N.Y. 1976) (delays of 24 and 42 days in sealing state wiretap tapes arising from police effort to ready tapes for sealing and make duplicates was justified and did not warrant suppression of wiretap evidence; state officials sought and gained no tactical advantage or investigative benefits and there was no indication of any tampering). But see United States v. Ricco, 421 F. Supp. 401 (S.D.N.Y. 1976) (unexplained sealing delay of 12 days in wiretap under New York law required suppression).

¶41B: Failure to comply with sealing requirements may affect investigative or law enforcement use of information derived from wiretap. For example, where information

derived from inadequately sealed tapes in one wiretap is used to establish probable cause for a second wiretap, defendants may be able to challenge the admissibility of evidence obtained through the second tap. United States v. Ricco, 421 F.Supp. 401 (S.D.N.Y. 1976). Most courts so far have rejected this view. The D.C. Circuit held that failure to properly seal tapes as required by section 2518(8)(a) does not affect further investigative use of the tapes. United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976). In a recent case, United States v. Fury, No. 76-1506 (2d Cir. April 1977) (interpreting N.Y. Crim. Proc. Law §700.50(1), (2) (McKinney 1971)), the Second Circuit dealt with this same issue with regard to sealing provisions under the New York wiretap law. The court ruled that failure to seal adequately under New York law does not bar disclosure of the contents of wiretap tapes for investigative purposes or to establish probable cause for additional warrants. Failure to meet sealing requirements in the first wiretap did not render interception under that tap illegal. Thus the evidence from the second tap (based on the first) was not tainted, i.e., derived from a primary illegality.

¶41C: In Fury, the court dealt with another sealing requirement issue. Federal and New York law requires that tapes be sealed immediately upon the expiration of an eavesdropping warrant (state law) or upon expiration of the period of the wiretap order, or extensions thereof

(federal law). 18 U.S.C. §2518(8)(a) (1970); N.Y. Crim. Proc. Law §700.50(2) (McKinney 1971). State officials had obtained two thirty day extensions of the original order. The court held that under federal or New York law sealing is proper where all the tapes were sealed at the end of the continuing period of the wiretap. The government need not seal tapes upon expiration of the period of the original order and again after each extension. The court suggested that it would be more in keeping with the purpose of the sealing requirements to seal tapes at the end of the original period and again after extensions.

¶41D: In United States v. Abraham, 541 F.2d 624 (6th Cir. 1976), the Sixth Circuit dealt with two sealing requirement issues: (1) Whether section 2518(8)(a) requires that tapes be sealed by the judge or in his presence; (2) What constitutes minimum standards for sealing and custody. Government attorneys promptly advised the district judge that the tapes of intercepted conversations were available for his inspection at the time the motion was made for an order directing sealing of the tapes. Without requiring that the tapes be brought to him or viewing them at the FBI office, the judge ordered that the tapes be sealed and placed in the custody of the FBI within the personal control of an FBI agent. The drawers of the file cabinet containing the tapes were sealed with masking tape and red tape marked "evidence". Access to the room where the

cabinet was located was limited. The court found that sealing requirements were met. The court also set down minimum standards to govern sealing and custody in future cases:

1. The tape recordings from each authorization shall be placed in one or more cartons and securely closed with evidence tape or a similar adhesive tape. Each carton shall be clearly identified with a separate letter designation. The tape on each carton shall be initialed by the attorney who obtains the sealing order and the number of reels of tape in each carton shall be shown. The date of the order shall be placed on the tape.
2. The custodian shall maintain a separate inventory of recordings delivered to him under each court order. This inventory will show by letter designation and date each carton of recordings delivered to him and the number of separate reels of tape contained in each carton.
3. The sealed cartons of recordings shall be stored in a limited access area under the control of the court-designated custodian. This shall be a separate room used exclusively for the storage of such recordings or, if a separate room is not available, a secure space under control of the custodian and designated by the court. A log shall be maintained showing the name of each person entering the storage area together with the time of entering and leaving.
4. Within the limited storage area the cartons containing recordings shall be kept in locked metal file cabinets or similar locked metal containers.
5. The recordings so stored shall only be taken from the locked containers and removed from the restricted storage area pursuant to court order. When an order is issued for such removal, the custodian shall produce the sealed cartons and inventories of the contents of each in the court room or chambers of the judge issuing the order.

Id. at 628-29.

¶42: Further, mere service of a post-authorization inventory does not give the party served the right to jeopardize the secrecy of on-going investigations or grand jury

proceedings by filing a motion for disclosure under section 2518(8)(d) to gain access to transcripts of recorded conversations. Application of United States Authorizing Interception of Wire Communications, 413 F. Supp. 1321 (E.D. Penn. 1976).

¶44, Note 77: But see United States v. Donovan, 97 S.Ct. 658 (1977) (discussed infra).

¶44, Note 78: See also United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976) (interpreting provisions of D.C. wiretap law (D.C. Code §23-550 1973) corresponding to section 2518 (8)(d): notice provision requires no more than a reasonable effort to reach those whose communications have been intercepted; if service is made within time limits, sending a registered letter to the address where telephone was registered in defendant's name was sufficient inventory notice).

¶48, Note 88: Correction: United States v. Chavez, 416 U.S. 562, at 574-5 (1974). See also, United States v. Civella, 533 F.2d 1395 (8th Cir. 1976).

¶48, Note 88: Correction: no effort to comply with section 2518(8)(d) and . . .

¶50, Note 92: Correction: 386 F. Supp. 91, 95-6 (D. Hawaii 1974).

¶53, Note 97: Correction: Accord, United States v. Donovan, 513 F.2d 337, 342-43 (6th Cir. 1975), cert. granted, 421 U.S. 907 (1976), rev'd, 97 S.Ct. 658 (1977).

¶54A: A recent Supreme Court case, United States v. Donovan, 97 S.Ct. 658 (1977), dealt with the inventory-notice provision in the federal wiretap statute, section 2518 (8)(d). The government inadvertently failed to include two defendants' names in a list (submitted to the issuing judge) or persons whose communications were intercepted. These defendants were not served with inventory notice. They eventually received actual notice and were not prejudiced by the delay. The two sought to have the wiretap evidence suppressed. The government view was that inventory notice was not mandatory since the defendants were not named in the original wiretap order. This was correct. The government then argued that since inventory notice was a matter of discretion for the district judge, there was no need to submit the names of persons overheard but not named in the order. If the judge wanted more information he could ask for it.

¶54B: The Supreme Court rejected this view and held that section 2518(8)(d) requires the government to submit either (a) a complete list of all identifiable persons whose communications were intercepted, or (b) a breakdown by category (prospective defendant, innocent party, etc.) of all such persons. Donovan, 97 S.Ct. at 669-70. The Department of Justice practice of providing only the names of persons with respect to whom there was a reasonable possibility of indictment was not sufficient.

¶54C: The Court then considered the question whether the wiretap statute required suppression for failure to include the defendants in the submitted list or serve them with inventory notice. The Court held that suppression was not appropriate. Id. at 674. The inadvertent government omissions did not make the interception of defendants' communications retroactively unlawful. Applying the test laid down in Giordano and Chavez (discussed at ¶48 supra) the Court found that section 2518(8)(d) was not intended by Congress to play a substantial role in limiting the abuse of wiretapping.

¶54D: The Court did suggest, however, that suppression might be required where :

- (1) failure to submit names or delay in serving notice prejudiced defendants
- (2) government failure to name or serve persons was intentional, or
- (3) agents knew before interception that no inventory would be served on defendants. Id. at 673-74, n.26.

¶54E: Several circuits have recently followed and applied Donovan. In United States v. Landmesser, No. 76-1540 (6th Cir. April 1977), the defendant was not served within the ninety day period under section 2518(8)(d) because of a government error regarding his address. He did not receive actual notice until seventy-five days before trial. The Sixth Circuit held that suppression was not required. The district court had ordered service within the ninety day period and defendant had not shown prejudice due to the delay. In United States v. DiGirolomo, 550 F.2d 464 (8th Cir. 1977), the Eighth Circuit ruled that

suppression was not proper unless the government omissions were intentional or prejudiced the defendant. The Second Circuit reached the same result in United States v. Fury, No. 76-1506 (2d Cir. April 1977), holding that where the defendant eventually received actual notice, the burden was on him to show that he was prejudiced.

¶54F. Donovan also dealt with section 2518(1)(b)(iv) which requires that applications for wiretaps and orders authorizing them identify the person, if known, committing the offense and whose communications are to be intercepted. The Court ruled that this requires identification of all persons (if known) where there is probable cause to believe that the person is committing the offense under investigation, and the person's communications will be intercepted over the target phones. Failure to comply would not warrant suppression unless intentional. See also United States v. Jackson, 549 F.2d 517 (8th Cir. 1977); United States v. Costanza, 549 F.2d 1126 (8th Cir. 1977).

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ES: SUPPRESSION

Electronic Surveillance: Suppression for Non-Compliance
with Statute

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Introduction

¶1 The purpose of these materials is to provide a brief outline of cases in which federal and state law enforcement authorities failed in some fashion to comply with statutory requirements for electronic surveillance, and where the evidence resulting from the surveillance was suppressed. The case summaries are organized according to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act, though not all of the statute's requirements have led to mistakes and the suppression of evidence. The hope is that by providing this catalogue of mistakes repetition can be avoided.

I. Who may obtain surveillance warrants

A. What officer must apply for the warrant

¶2 United States v. Giordano, 416 U.S. 505 (1974).

The defendant moved to suppress evidence obtained under a wiretap order on the grounds that the application was, in fact, approved by the Attorney General's Executive Assistant, although the application for the order named an "Assistant Attorney General specially designated by the Attorney General" as the applicant. The Executive Assistant placed the Assistant Attorney General's signature on the application; neither the Attorney General nor any Assistant Attorney General personally reviewed the application. The Supreme Court affirmed the district court's suppression of the evidence.

¶3 But see United States v. Chavez, 416 U.S. 562 (1974), the companion case to Giordano. The application for a wiretap order recited approval by a specially designated Assistant Attorney General but, in fact, was approved by the Attorney General himself. The Court held that approval by the proper official was the statutory requirement and that this requirement was met. The improper recital of authorization on the application was a clerical matter and did not affect the propriety of the order. Every violation of Title III, in short, does not automatically require suppression of evidence.

B. Application by an acting federal officer

¶4 United States v. Swanson, 399 F. Supp. 441 (D.

Nev. 1975).

An Acting Assistant Attorney General approved an application for a warrant before he was confirmed by the Senate. The court held that he did not have the authority to make an application and suppressed the evidence. But see United States v. Guzek, 527 F.2d 552, 559-60 (8th Cir. 1975) (upholding a wiretap application made by a specially designated assistant more than thirty days after the Acting Attorney General took office; the court found that the Acting Attorney General held office pursuant to 28 U.S.C. §508(b) [1970], and was thus not subject to the thirty-day limitation of 5 U.S.C. §3348 [1970]).

C. Restrictions on state officers

1. What officer must apply for the warrant

¶5 Application of Olander, 213 Kan. 282, 515 P.2d 1211 (1973).

The state statute authorized "the attorney general, an assistant attorney general or a county attorney" to apply for a surveillance order. The court suppressed evidence obtained under an order applied for by an assistant county attorney. Similarly, State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); contra, People v. Nahas, 9 Ill. App.3d 570, 575-76, 292 N.E.2d 466, 468-70 (Ill. App. Ct. 1973); State v. Angel, 261 So.2d 198 (Fla. Dist. Ct. of App.), aff'd, 270 So.2d 715 (Fla. 1972).

2. Delegation in case of vacancy

¶6 State v. Cocuzza, 123 N.J. Super. 14, 21, 301 A.2d 204

208 (Essex County Crim. Ct. 1973).

Delegation of authority to make applications was not proper even though authorized by the chief prosecutor, where the chief prosecutor was not actually absent or disabled.

II. Contents of the application for surveillance

A. Enumerated crimes

1. Federal crimes

2. State crimes

3. Limitation to crimes punishable by imprisonment for more than one year

¶7 People v. Amsden, 82 Misc.2d 91, 368 N.Y.S.2d 433 (Sup. Ct. Erie County 1975).

The defendant moved to suppress evidence obtained pursuant to warrants issued only for the crime of promoting gambling in the second degree, a misdemeanor, not punishable by imprisonment for more than one year. The court held that the "imprisonment for more than one year" clause modifies all of 18 U.S.C. §2516(2)(1970) and suppressed the evidence.

¶8 Contra, United States v. Carubia, 377 F. Supp. 1099, 1104-05 (E.D. N.Y. 1974); People v. Nicoletti, 84 Misc.2d 385, 390-93, 375 N.Y.S.2d 720, 726-28 (Niagara County Ct. 1975); S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968).

B. Particularity as to conversations sought

C. Particularity as to place

D. Particularity as to persons

1. Failure to identify known parties

¶9 United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), cert. pending.

Where government agents had probable cause to believe that the defendant would be overheard on a tapped phone, the failure to identify him in applications for extensions required the court to suppress evidence obtained as a result of interceptions otherwise authorized by the order of extension.

¶10 United States v. Moore, 513 F.2d 485, 495-98 (D.C. Cir. 1975).

The court reversed the conviction and suppressed evidence from the surveillance and its illegal fruits where the defendant was not named in the surveillance order. The defendant was known to the government and there was probable cause that he was committing the specified crimes and that his conversations would be overheard.

¶11 Similarly, United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976). Contra, United States v. Civella, 19 Crim. L. Rptr. 2136 (8th Cir. Apr. 16, 1976); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. pending; United States v. Kilgore, 518 F.2d 496, 499 (5th Cir.), reh. en banc denied, 524 F.2d 957 (5th Cir. 1975), cert. pending; United States v. Chiarizio, 388 F. Supp. 858 (D. Conn.), aff'd, 525 F.2d

289 (2d Cir. 1975); People v. Palozzi, 44 App. Div.2d 224, 227, 353 N.Y.S.2d 987, 989 (4th Dept. 1974).

E. Inadequacy of investigative alternatives

¶12 United States v. Curreri, 388 F. Supp. 607 (D. Md. 1974).

The court suppressed evidence obtained as a result of electronic surveillance because the application for the warrant did not state reasons why other investigative techniques failed, would fail, or would be too dangerous.

¶13 United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975).

The application for an order authorizing a wiretap in a gambling case included statements by the investigating officers that other methods of investigation would not work, based on their "knowledge and experience." The court suppressed the evidence from the wiretaps, holding that the application must include a "full and complete statement of underlying circumstances."

¶14 Contra, United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4058 (May 19, 1976).

F. Period of time surveillance to be authorized

G. Prior applications

¶15 United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).

The defendant, charged with gambling violations,

moved to suppress evidence obtained pursuant to a surveillance warrant. The court granted the motion on the grounds that the application for the warrant failed to indicate that the defendant was previously the subject of a wiretap in an unrelated narcotics investigation. But see United States v. Kilgore, supra ¶11, at 500.

III. Contents of the surveillance order

A. Determination of probable cause

1. Taint of evidence from prior illegal wiretaps

¶16 United States v. Houlton, 525 F.2d 943 (5th Cir. 1976).

The court ordered suppression of evidence and reversal of the convictions of the defendants because of prior evidence received from illegal state wiretaps. The court found that the evidence used in the federal prosecution was tainted by the illegal state evidence.

¶17 State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975).

The Supreme Court of Kansas ordered suppression of wiretap evidence made under a valid statute because of taint from wiretaps made under the previous Kansas statute, which did not comply with Title III requirements.

¶18 Contra, United States v. McHale, 495 F.2d 15, 17 (7th Cir. 1974), where a wiretap was upheld because there were sufficient untainted sources in the application.

¶19 See also United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4070 (June 2, 1976), where evidence obtained by Canadian authorities in compliance with Canadian law, though not

in a manner which would have complied with United States constitutional or statutory requirements, was admissible in federal court. Title III was irrelevant where interception was not in this country.

B. Directives limiting the scope of the surveillance

1. Identification of speakers

2. Duration and termination directives

a. Failure to include a directive requiring termination upon attainment of the objective of the order

¶20 People v. Pieri, 69 Misc.2d 1085, 332 N.Y.S.2d 786 (Erie County Ct. 1972), aff'd, 41 App. Div.2d 1031, 346 N.Y.S.2d 213 (4th Dept. 1973).

A warrant permitted surveillance to continue for thirty days regardless of whether or not incriminating evidence was obtained. The warrant was held to be invalid on constitutional and statutory grounds and the evidence was suppressed.

¶21 Similarly, Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); State v. Siegel, 266 Md. 256, 272-74, 292 A.2d 86, 95-96 (1972). But see United States v. Poeta, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972); United States v. Baynes, 400 F. Supp. 285, 300-10 (E.D. Pa.), aff'd mem., 517 F.2d 1399 (3d Cir. 1975); People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574 (Montgomery County Ct. 1970); People v. Palozzi, 44 App. Div.2d 224, 227, 353 N.Y.S.2d 987, 990 (4th Dept. 1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); State v. Christy, 112 N.J. Super. 48,

270 A.2d 306 (Essex County Crim. Ct. 1970).

b. Failure to date the order

¶22 United States v. Lamonge, 458 F.2d 197 (6th Cir.),
cert. denied, 409 U.S. 863 (1972).

Wiretap evidence was suppressed because of the absence of a date of issuance on the amending order, making the duration of the wiretap unlimited.

3. Minimization directives

C. Signature of the court

¶23 United States v. Ceraso, 355 F. Supp. 126 (M.D. Pa. 1973).

The court ordered suppression of evidence where the judge failed to sign the warrant.

IV. Execution of the surveillance order

A. Who may execute surveillance orders

¶24 People v. Lossinno, 38 N.Y.2d 316, 379 N.Y.S.2d 77 (1975), rev'g, 47 App. Div.2d 534, 363 N.Y.S.2d 834 (2d Dept. 1975). A motion to suppress failed where the order permitted the district attorney to designate any "person" to execute the warrant; the court construed "person" to mean "law enforcement officer," and further identification was not necessary.

B. Avoidance of excessive surveillance

1. Failure to minimize intercepted conversations

¶25 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 92, 94-126 (1975).

a. Failure to make any attempt to minimize

¶26 United States v. George, 465 F.2d 772 (6th Cir. 1972).

Evidence from all conversations was suppressed where government agents failed to comply with the limitations contained in the order authorizing the interception.

b. Failure to minimize despite a good faith effort

¶27 United States v. LaGorga, 336 F. Supp. 190, 195-97 (W.D. Pa. 1971).

Where agents attempted to minimize the interceptions, but did record conversations which were unrelated to the objectives of the warrant, the court ordered suppression of only those conversations which were irrelevant, refusing to issue a blanket suppression order.

¶28 But see United States v. Armocida, 515 F.2d 29, 42-46 (3d Cir. 1975), cert. denied, ____ U.S. ____ (1976), where the court, while denying a motion to suppress, formulated a three-factor test for reviewing minimization efforts:

- (1) the nature and scope of the criminal enterprise under investigation;

- (2) the government's reasonable expectation as to the character of and the parties to the conversations;
- (3) the degree of judicial supervision by the authorizing judge.

See also United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976), cert. denied, 19 Crim. L. Rptr. 4072 (June 2, 1976).

2. Interception of privileged communications

C. Amending the surveillance order

¶29 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25, at 126-39.

1. Failure to amend retrospectively for crimes not specifically designated but related to designated offenses and therefore legally intercepted

a. Federal crimes and federal orders

¶30 United States v. Brodson, 528 F.2d 214 (7th Cir. 1975).

The court affirmed the dismissal of an indictment where the gambling evidence supporting the indictment was obtained by a wiretap authorized for violations of a separate gambling statute. The government delayed until eight months after the indictment, until just prior to the trial, before applying under 18 U.S.C. §2517(5)(1970) for authorization to use the contents of the communications intercepted concerning criminal activities not specified in the original order. The court found that the government's application was not made "as soon as practicable."

¶31 See also United States v. Campagnuolo, ___ F. Supp. ___ (S.D. Fla. Dec. 31, 1975). Contra, United States v. Moore, 513 F.2d 485, 500-03 (D.C. Cir. 1975).

b. Federal crimes and state orders

¶32 United States v. Marion, ___ F.2d ___ (2d Cir. May 7, 1976), rehearing application pending.

Conversations intercepted and used as evidence in federal grand jury and criminal proceedings, where the interception was by state court order specifying analogous but separate and distinct state offenses, were suppressed and the federal convictions reversed because the federal government failed to obtain judicial approval for the use of the conversations under 18 U.S.C. §2517(5) (1970). Title III provisions control their state counterparts unless the state provisions are more restrictive. The opinion notes that where an order is extended or renewed by subsequent court order, the review by the issuing judge is sufficient to satisfy section 2517(5), provided there is some indication that additional offenses, federal or state, might be involved.

¶33 But see United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Tortorello, 480 F.2d 764, 781-83 (2d Cir.), cert. denied, 414 U.S. 866 (1973). See also United States v. Vento, 19 Crim. L. Rptr. 2102 (3d Cir. March 16, 1976) (no authorization is needed to use wiretap evidence to secure another wiretap).

2. Failure to amend in a prompt fashion for unrelated crimes

¶34 United States v. Brodson, supra ¶30; United States v. Marion, supra ¶32; United States v. Campagnuolo, supra ¶31.

¶35 Cf. People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976); but see People v. Ruffino, 62 Misc.2d 653, 309 N.Y.S.2d 805 (Sup. Ct. Queens County 1970). See also United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

3. Failure to amend prospectively

a. Persons

¶36 United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975).

The wiretap warrant authorized interception of conversations of one party "with" conspirators, the police continued to intercept conversations of the defendant after his identity became known to them, delaying seventeen days before amending the warrant. The court suppressed all conversations of the defendant intercepted during that period, calling the interception a warrantless surveillance in violation of Title III.

¶37 See also United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), cert. pending; United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

¶38 But see United States v. Kahn, 415 U.S. 143 (1974), where the warrant authorized interception of communications of the husband and "others as yet unknown." The Court denied a motion to suppress conversations between the wife and a third party, finding that since the government did not have probable cause to suspect the wife of complicity in the specified crimes at the time the application was made, she fell into the category of persons "as yet unknown."

¶39 See also People v. DiStefano, supra ¶35, at 648-50, 345 N.E.2d at 553, 382 N.Y.S.2d at 10, where the police intercepted one conversation of the defendant, but failed to amend the subsequent application for an extension to include the defendant or the crimes for which he was eventually indicted. The court refused to suppress the conversations, holding that after the first conversation the police lacked probable cause to amend the warrant to name the defendant, or to include the crimes for which he was charged, or even to assert that he would use the tapped telephone again.

b. Crimes

¶40 People v. DiLorenzo, 69 Misc.2d 645, 330 N.Y.S.2d 720 (Rockland County Ct. 1971).

The court ordered suppression of conversations relating to a crime not specified in the surveillance warrant because the state officers failed immediately to amend the warrant to include the crime. The court did allow conversations of the defendant, who was not identified

in the original warrant, which related to the specified crimes to be admitted in evidence. Subsequent authorization for use of these conversations was obtained, though at the same time as the authorization for the conversations relating to the new crime which were suppressed.

¶41 Contra, United States v. Denisio, 360 F. Supp. 715, 720 (D. Md. 1973).

D. Extension of the surveillance period

E. Termination of the surveillance

V. Post-surveillance requirements

A. Delivery, sealing, and storage of applications, orders, and recordings

¶42 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25, at 139-41.

¶43 People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976).

The Court of Appeals ordered suppression of recordings and all evidence derived from interceptions, where the prosecution unsealed them shortly before trial without judicial approval or supervision. Unsealing them for the purposes of the trial was not seen as a satisfactory excuse for explaining the absence of the seal.

¶44 People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974).

Suppression of recordings was ordered where the police failed to present them to the issuing judge for sealing

upon expiration of the warrant. The defendant needed only to show that the recordings were unsealed, and did not need to show evidence of actual tampering.

Contra, United States v. Cantor, 470 F.2d 890, 892-93 (3d Cir. 1972).

B. Delivery of notice of the surveillance

¶45 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25 at 141-54.

¶46 United States v. Chun, 386 F. Supp. 91 (D. Hawaii 1974).

Individuals who were unnamed at the time their conversations were intercepted moved to suppress the evidence obtained. The court held that because this interception was not brought to the attention of the issuing judge and because inventory notice was not served within the ninety days allowed by section 2518(8)(d) the evidence should be suppressed.

¶47 Similarly, United States v. Donovan, supra ¶37; United States v. Eastman, 326 F. Supp. 1038 (M.D. Pa. 1971), aff'd, 465 F.2d 1057 (3d Cir. 1972); State v. Berjah, 266 So.2d 696 (Fla. Dist. Ct. of App. 1972). See also United States v. Civella, 19 Crim. L. Rptr. 2136, 2137 (9th Cir. April 16, 1976), where the court suppressed wiretap evidence related to two defendants who never received inventory notice, while permitting such evidence to be admitted against defendants who received inventory notice five and thirteen days respectively after the expiration of the ninety-day period allowed by section 2518(8)(d).

¶48 But see United States v. LaGorga, 336 F. Supp. 190,
194 (W.D. Pa. 1971); People v. Hueston, 34 N.Y.2d 116,
312 N.E.2d 462, 356 N.Y.S.2d 272 (1974), cert. denied,
421 U.S. 947 (1975); State v. Rowman, ___ N.H. ___, 352
A.2d 737 (1976).

Electronic Surveillance:

Suppression for Non-Compliance with Statute:

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶3: Add at end:

Under Giordano and Chavez suppression is proper only if there is a failure to satisfy statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device.

Giordano, 416 U.S. at 527.

¶8A: Particularity as to place:

Calhoun v. State, 20 Crim. L. Rptr. 2418, (Md. Ct. Spec. App. Jan. 3, 1977).

The court suppressed evidence from a wiretap where the application for the order merely incorporated prior affidavits concerning other locations. Probable cause must be established for each particular place.

¶9: Omit and substitute:

United States v. Donovan, 97 S.Ct. 658 (1977).

The government must identify all individuals where there is probable cause to believe that they are engaged in the activity under investigation and that their conversations will be intercepted. But inadvertent failure to name such an individual is not grounds for automatic suppression. The court, applying the Giordano test, held that failure to identify a known party in the application did not make the wiretap illegal under 18 U.S.C. §2518(10)(a). The decision is limited to the facts of the case and the court left

open the question of knowing omission of identification or failure to provide the mandatory inventory notice.

¶10: Replace previous with:

Similarly, United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (1976); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. dismissed, 423 U.S. 1008 (1975); United States v. Kilgore, 518 F.2d 496 (5th Cir.), reh. en banc denied, 524 F.2d 957 (5th Cir. 1975), cert. denied 425 U.S. 950 (1976); United States v. Chiarizio, 388 F.Supp. 858 (D. Conn.) aff'd, 525 F.2d 289 (2d Cir. 1975); People v. Palozzi, 44 App. Div.2d 224, 227, 353 N.Y.S2d 987, 989 (4th Dept. 1974). Contra, United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), cert. denied, 45 U.S.L.W. 3416 (1976); United States v. Moore, 513 F.2d 485, 495-98 (D.C. Cir. 1975).

¶11: Replace previous with:

All decisions on this issue made prior to the Supreme Court's decision in Donovan should be read in light of that decision which seems to require intentional omission or substantial prejudice for suppression.

¶12: Add at end: See also Calhoun v. State, 20 Crim. L. Rptr.

2418 (Md. Ct. Spec. App. Jan. 3, 1977).

¶13: Add at end: But see United States v. Matya, 20 Crim.

L. Rptr. 2074 (8th Cir. Sept. 9, 1976) (The government does not have to exhaust or explain away all other possible investigating

techniques in an application for an order.).

- ¶14: Correction: United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).
- ¶16: Add at end: But see United States v. Caruso, 415 F. Supp. 847 (S.D.N.Y. 1976).
- ¶17: Correction: State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 44 U.S.L.W. 3738 (1976).
- ¶19: Correction: United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976).
- ¶21: Correction: State v. Christie
- ¶24: Correction: People v. Lossinno, 38 N.Y.2d 316, 342 N.E.2d 556, 379 N.Y.S.2d 777 (1975).
- ¶28: Correction: United States v. Armocida, 515 F.2d 29, 42-46 (3rd Cir. 1975), cert. denied, 423 U.S. 858 (1976), United States v. Chavez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 426 U.S. 911 (1976).
- ¶33: Correction: United States v. Vento, 533 F.2d 838 (3rd Cir. 1976).
- ¶37: Replace previous with:
Even though the Supreme Court has not directly considered this issue, the holding of Capra is of questionable validity in light of United States v. Donovan, supra, ¶9.
- ¶46: Replace previous with:
United States v. Chun, 503 F.2d 533 (1974).

Post-tap identification of every party intercepted is not required. But, in order for the judge to give discretionary notice, the government is required to give a description of the general classes of intercepted parties. This holding was cited with approval by the Supreme Court in United States v. Donovan, 97 S.Ct. 658 (1977).

¶46A: Add:

United States v. Donovan, 97 S.Ct. 658 (1977),

Failure to inform so as to enable the judge to give discretionary inventory notice is not grounds for automatic suppression. The court seems to require prejudice, or intentional omission, or knowingly preventing service of notice for suppression.

¶47: Replace previous with:

Similarly, United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (1976). (The court suppressed wiretap evidence related to two defendants who never received inventory notice, while permitting such evidence to be admitted against defendants who received inventory notice five and thirteen days respectively after the expiration of the ninety day period allowed by section 2518 (8)(d); United States v. Principie, 531 F.2d 1132 (2d Cir. 1976) (requiring a showing of prejudice by defendant for suppression for failure to give notice); United States v. DiGirllomo, 20 Crim. L. Rptr. 2516(8th Cir. March 1, 1972) (Court

remand for determination on question of prejudice under Donovan). Contra, (Note: All decisions made before Donovan should be viewed in light of that decision.), United States v. Eastman, 326 F.Supp. 1038 (M.D. Pa. 1971), aff'd, 465 F.2d 1057 (3rd Cir. 1972); State v. Berjah, 266 So.2d 696 (Fla. Dist. Ct. of App. 1972).

¶48: Correction: State v. Rowman, 116 N.H. 41, 352 A.2d 737 (1976).

Cite checked and shephardized through April, 1977.

Crim. L. Rptr. examined through issue dated April 16, 1977.

Sample Procedures for Electronic Surveillance

Introduction

The following materials exemplify the electronic surveillance procedures followed by three leading agencies. They were originally collected in the Staff Studies and Surveys of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976). Prosecutors planning to develop electronic surveillance programs in their jurisdictions may find these samples adaptable to their own needs.

I. New York County (Manhattan)

Rackets Bureau Manual¹ Electronic Eavesdropping

While "[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement," . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices The Fourth Amendment does not make the "precincts of the home or office . . . sanctuaries where the law can never reach," . . . but it does proscribe a constitutional standard that must be met before official invasion is permissible.

Berger v. New York, 388 US 41, 63-64

STATUTES

The New York Eavesdropping Law is contained in Article 700 of the Criminal Procedure Law. *Read it.* That Article is based upon, and derives its authority from Title III of the Federal Omnibus Crime Control and Safe Streets Acts of 1968 (18 USC Ch. 119, Sections 2510 to 2520); and thus, any Order which authorizes the interception of oral or telephonic communications must conform in all respects to both statutes. By statute [CPL §700.05(4)], an intercepted communication is defined as a conversation or discussion, whether oral or telephonic, which is intentionally overheard or recorded by "instrument, device or equipment" without the consent of any party thereto.

Communications which are intercepted without proper authorization are inadmissible as evidence, may not be used as investigative leads, and subject the eavesdropper to both Federal and state criminal sanctions.

Eavesdropping warrants may be issued only upon probable cause to believe that evidence of a crime designated in Section 700.05(8), which is being, has been, or will be, committed by a particularly described individual, will be obtained through eavesdropping at the subject facilities and/or premises and that "normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ." (Section 700.45)

The designated crimes include only felonies dangerous to life, limb or property and the offenses of drug dealing, gambling, bribery, and conspiracy to commit any of the foregoing. (Ch. 119 Section 2516[2])

Authorization to eavesdrop is limited to the period necessary to achieve the evidence desired, but in no event may it exceed thirty days. Renewals are permitted (see below).

¹National Wiretap Commission Staff Studies and Surveys, 311-20 (1976).

DECISION TO MAKE APPLICATION

The only individuals who have the authority to apply for an Eavesdropping Order in the State of New York under Article 700, are the Attorney General and the District Attorneys "who are authorized by law to prosecute or participate in the prosecution of the particular designated offense which is the subject of the application." This authority is non-delegable, except in the actual absence of the District Attorney, and must be exercised by him alone.

The Congress has made the following finding on the basis of its own investigations and studies. "Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." (Chapter 119, §301)

But eavesdropping is an extraordinary means of investigation. The decision to employ it must be based, not only upon an evaluation of the legal criteria, but upon the importance of the investigation, the seriousness of the criminal activity, the danger that the subjects pose to the community, and the investigative leads to be achieved.

It should be noted at this point, that in the application the Assistant must set forth a factual basis for showing that conventional means of investigation, have not, or could not succeed in obtaining the evidence required for successful prosecution.

Prior to the time the Assistant decides to draft an application for an eavesdropping warrant with its supporting affidavits, he must give full consideration to these factors and articulate his assessment of each in an addendum to the investigative plan section of the Rackets Bureau Investigation Memorandum.

DRAFTING THE APPLICATION

The Assistant should prepare the Orders, applications and supporting affidavits in writing.

The Order must comply with the provisions of §700.30. In addition, the Order should contain a direction prohibiting the Telephone Company from divulging the existence of the Order to its subscribers. This directive was added after the Office was advised that without it, the New York Telephone Company would follow a policy of truthfully answering subscribers who made inquiry as to whether their telephones were being subjected to electronic surveillance. (see Appendix A)

The application, which is made by the District Attorney, is based upon supporting affidavits of the Assistant District Attorney conducting the investigation, and of other persons (usually police officers) who have personal knowledge of the facts constituting the requisite probable cause.

The application and its incorporated affidavits must comply with the provisions of Section 700.20 (see Appendices B & C)

In drafting an application, the Assistant should keep in mind that in order to use the intercepted conversations as evidence, the Order and its supporting affidavits must be turned over to the defendant prior to trial. Thus, any information which is confidential and which is not required in order to make out probable cause (e.g., the name of an informant) should be made known to the Court outside the application with notice in the application that this was done. However, if an informant has supplied part of the probable cause, his reliability and the basis of his information must be established in the affidavits.

Every paragraph in the affidavits should be consecutively numbered.

THE APPLICATION

After all drafts have been completed, they must be submitted for approval at least forty-eight hours prior to the proposed issuance date of the Order, to the following before submission to the District Attorney:

1. The Appeals Bureau—The Appeals Bureau Chief has designated two or three Assistants to review all applications for eavesdropping Orders. Their role is to analyze the form and content of the Affidavits for legal sufficiency. All questions that the supervising Assistant District Attorney has in his own mind regarding the legal basis of the application should be thoroughly researched prior to the Appeals Bureau review, in order to facilitate the conference. The supervising Assistant is an attorney, and should not rely on the Appeals Bureau Assistant to make the legal decisions.

2. Bureau Chief—Prior to the drafting of the application, suitable notice should have been given to the Bureau Chief in the form of an investigative memorandum and oral discussion. At this point, he must make a determination based upon the final draft, the Appeals Bureau's analysis, and manpower availability whether or not to approve the application as it stands.

The District Attorney must review the proposed application and be given the opportunity to question the supervising Assistant, and/or any of the police officers who supplied the probable cause. If he approves, he must subscribe and swear to the original and a copy of the application.

An Eavesdropping Warrant may be issued by a Justice of an appellate division of the Judicial Department in which the eavesdropping warrant is to be executed, or any Justice of the Supreme Court of the Judicial District in which the Warrant is to be executed, or any County Court Judge of the County in which the warrant is to be executed.

The supervising Assistant District Attorney must personally appear before the Justice with the application and must make available to the Justice any police officer who supplied probable cause if so requested. The Justice may question the Assistant or officer under oath, and if he does, must record or summarize the testimony. If the Justice issues the Order, he is to sign the original and copy of the Order, keep the copy of the Order and original of the application and supporting papers, and deliver the original Order and copy of the supporting papers to the Assistant.

EXECUTION

After the Justice has acted upon the application, whether or not the Order was issued, the ADA should receive an Order number from the Investigation Bureau. At the same time, the top half of the reporting form is to be filled out with the information requested (see Appendix D). If the Order has been issued, and information regarding the locations of pairs and cables is required from the telephone company in order to execute the warrant, a copy of the Order (without the supporting affidavits and application) should be sent by hand to the security office of the Company. Usually that will be done by the officer who is assigned the installation.

Prior to the execution of the Order, the ADA must arrange a meeting with the team of police officers assigned to the investigation. At that time, the ADA is to provide the officers with a copy of the Order and supporting affidavits and a copy of the following regulations regarding the execution of eavesdropping Orders:

4

EXECUTION OF ELECTRONIC EAVESDROPPING ORDERS
OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

"... a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown high regard for the right for privacy and have done all they reasonable could to avoid unnecessary intrusion."

U.S. v. Tortorello

INTRODUCTION

Before conducting any electronic surveillance read the authorizing Order and Supporting Affidavits especially noting the designated crimes and subjects.

The goal is to execute the Order, recording those conversations which are designated, and minimizing the interception of non-relevant or privileged communications.

No machine is to be left unattended on automatic. "Minimization" requires the police officer to determine whether or not each conversation is relevant and subject to interception.

Anytime a conversation or *any part thereof* is monitored it is to be recorded. If the machine has a separate monitor switch, such switch is not to be activated unless the machine is recording. However, if the machine malfunctions, or a tape has just run out, monitoring is permissible, while the situation is being remedied.

PROCEDURE

Listen to the beginning of each conversation only so long as is necessary to determine the parties thereto and the subjects thereof.

1. If the parties and subjects are covered by the Order, continue to listen and record as long the conversation remains pertinent.

2. If either the parties or subjects are not covered by the Order, turn off the machine. Check periodically by activating the monitor and record switches to determine if the parties or subjects have changed and fall within category No. 1 above. Note the length of time occurring between the periodic checks, and the time of each check.

3. If the conversation does not fall within category No. 1, but it is apparent at the outset that a crime is being discussed, record the conversation insofar as it is pertinent to said crime. Immediately notify the supervising ADA of the conversation for instructions.

Generally, the Order will authorize the interception of conversations of certain named persons, as well as the agents, co-conspirators, and accomplices. If a named person is a participant in the conversation, the statements of the other participants may be intercepted if pertinent to the investigation specified in the Order.

In determining the relevancy of the conversation, the executing officers may take into account the coded, guarded and cryptic manner in which persons engaged in criminal activity often converse. It is therefore imperative that the officers be familiar with the background of the investigation and the conversations already intercepted in order to properly evaluate the meaning of the language used by the subjects.

Conversations between a husband and wife, doctor and patient, attorney and client, and an individual and member of the clergy are privileged and are not to be intercepted and recorded. Such conversations lose the privileged status when the participants are co-conspirators in the criminal activity which is the subject of the conversation, but such decision must be made by the supervising ADA.

DAILY PLANT REPORT

Abstracts of each conversation are to be made at the time of interception and are to be included in the DPR (see Appendices H&I). If the conversation was not entirely recorded, an appropriate notation should be made as to why not (e.g., non-pertinent, privileged). Where the exact words used by the participants are important, that portion of the conversation should be transcribed verbatim. The original of the DPR should be delivered to the supervising ADA at the beginning of the following day.

OBSERVATION REPORTS

Electronic surveillance is used as the last resort in any investigation. Conventional means of investigation are preferred and in any event should be used in conjunction with court ordered electronic surveillance. Whenever meaningful observations are feasible, they should be made and should be recorded on OR's, the originals of which should be submitted with the DPR's.

REELS

The intercepted conversations are to be recorded on pre-numbered Investigation Bureau reels. After each reel has been completed, it is to be rerecorded, and the original is to be returned to the Investigation Bureau vault. *Under no circumstances* should any portion of any tape be erased.

Each officer is to read the Order, affidavits and regulations. Since the Order incorporates the supporting affidavits, it is absolutely essential that each officer read the affidavits and pay particular notice to the designated crimes, subjects and described conversations. Thereafter, the Assistant District Attorney should satisfy himself that the Order and regulations are understood by the officers and they have no doubts as to the scope of the Order and the proper manner of execution.

The supervising officer should then designate a member of his team to pick up the pre-numbered Investigation Bureau reels and DPR forms which are to be used on the plant. Each reel is signed out to the officer and when returned is checked back in by an investigator. Tapes are kept in the locked technical room vault of the Investigation Bureau.

SUPERVISORY FUNCTION OF ADA

It is the duty of the ADA to supervise Court-ordered eavesdropping. This duty is statutory and non-delegable—police officers are not attorneys—it is the ADA's job to make legal decisions and to constantly monitor the performance of the police.

1. Read the Daily Plant Report each day—if there are any questions as to relevancy, question the officers immediately as to their theory of interception, and if incorrect, instruct them to alter their manner of execution.

2. Spot-check the tapes—listen to important conversations, compare them to the abstracts set forth in DPR. Also listen to the extent that non-pertinent conversations were recorded. Determine if the recording and abstracting are being done correctly.

3. Visit the plant—Although Assistants are not police officers and do not participate in "field work" proper supervision should include one or two inspections of the plant. At that time, the manner in which the conversations are being intercepted and recorded can be scrutinized first hand.

AMENDMENTS

During the proper execution of an eavesdropping Order, evidence of other crimes may be discovered. A conversation between the subjects concerning a designated crime might turn to a discussion of another non-specified offense; or, even prior to a determination of the identities of the parties, it may be clear that the conversation concerns the commission of a crime unrelated to the investigation. Section 700.65(4) of the Criminal Procedure Law provides that such evidence may be used provided the Order is amended to include the contents of the conversations. The amendment authorizing the use or interception of conversations involving other crimes or individuals should be applied for, as soon as practicable, which, in most cases, will be prior to the terminal date of the Order. The affidavit in support of the application should incorporate the Original Order and should set forth the circumstances under which the conversations were intercepted, the substance of those conversations, the identities of the parties, and any reasons for believing that similar conversations concerning the new crimes or individuals will occur over the subject telephone or in the subject premises in the future.

DECISION TO TERMINATE OR RENEW

The CPL authorizes eavesdropping only so long as it is necessary to accomplish the desired ends, which could not be accomplished by conventional means of investigation. Eavesdropping is not a legal method of gathering intelligence once sufficient evidence for full prosecution has been obtained. The ADA has an obligation to direct termination of eavesdropping at that point, whether or not the terminal date of the Order has been reached. If, however, the evidence sought has not been obtained by the terminal date, Section 700.40 provides for an Order of Extension. Both the Application and the Order must conform to the requirements of the Original. In addition, the affidavit in support of the Application "must contain a statement setting forth the results . . . obtained . . . or a reasonable explanation of the failure to obtain such results." In making the decision whether or not to renew, the Assistant must make a critical evaluation of the practical chances of obtaining evidence which had not been obtained during the previous period of authorization.

At the time that the application for an Order of Extension is made to the issuing Justice, the Daily Plant Reports should separately be presented for the Court's inspection as a progress report of the type referred to in CPL §700.50(1). If the Justice desires, this should be done at shorter intervals.

TERMINATION

A. Any device installed to intercept and record must be removed or permanently inactivated.

B. Reels

CPL §700.50(2) provides that the original recordings must be sealed by the issuing Justice immediately after the eavesdropping terminates. If the regulations set forth above have been followed, the original reels should have been rerecorded and maintained in the Technical Room Vault. They are preliminarily sealed by masking tape, which is then stamped or signed by the Justice who issues the sealing order (see Appendix E). The tapes are then to be returned to the Vault. Each time a tape, sealed or unsealed, leaves or is returned to the Vault, a notation to that effect is made on the sign out card. Any time it is necessary to open a sealed tape, it must be done pursuant to Court Order. The Assistant District Attorney should draft an Affidavit in support of that Order stating the need for use of the original. At the conclusion of that use, the tape must be revealed in the same manner as was done originally.

C. Notice

Upon the expiration of the Order, prepare a notice of eavesdropping in conformity with Section 700.50(3), (see Appendix F). Such notice "must be personally served upon the parties named in the warrant and such other parties to the intercepted communications as the Justice may determine . . ." Such notice must be served within ninety (90) days. If serving it upon the parties at that time would be detrimental to the investigation, the Justice may order a postponement. The Assistant should prepare an affidavit setting forth the exigent circumstances in support of the Order of Postponement prior to the expiration of the ninety (90) day period. (See Appendix G)

In addition to the parties named in the Order, notice should be served upon parties who are potential defendants, potential grand jury witnesses, or individuals who may be adversely affected by the interception.

D. Completion of Reports

At the bottom of each cover page of the DPR's, there are spaces for the number of intercepted calls, the number of incriminating calls, and the number of persons intercepted who had not previously been intercepted. Those spaces should be filled in on a daily basis. At the expiration of the Order, the daily figures should be totalled and the Eavesdrop Reports completed

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

EAVESDROPPING WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ----- located in ----- County, City and State of New York, and the interception of certain oral communications occurring at said premises.

It appearing from the affidavits of -----, District Attorney of the County of New York, -----, Assistant District Attorney of the County of New York and Police Officer -----, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part hereof, that there are reasonable grounds to believe that evidence of the crimes of -----, -----, ----- and Conspiracy to commit said crimes may be obtained by intercepting certain wire communications transmitted over the above-captioned telephone line and instrument and by intercepting certain oral communications occurring at the above-captioned premises, and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is hereby

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney, is hereby authorized to intercept and record the telephonic communications of the persons described in the supporting affidavits herein, their co-conspirators and agents as described and delineated in paragraph ----- of the herein incorporated affidavit of [The ADA], transmitted over the above-captioned telephone line and instrument; and it is further

ORDERED, that the District Attorney of the County of New York or any police officer in the City of New York acting under the direction and control of said District Attorney is hereby authorized to intercept and record the oral communications as described and delineated in paragraph --- of the herein incorporated affidavit of [The ADA], of the persons described in the supporting affidavits herein, their co-conspirators and agents, as such communications occur at the above-captioned premises, and it is further

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under his direction and supervision is hereby authorized to make secret entry into the above-captioned premises to install and maintain the eavesdropping devices required to execute this warrant, and it is further

ORDERED, that nothing herein contained shall be construed as authorizing the District Attorney or his agents to overhear or intercept any communication which appears privileged or unrelated to the aforementioned crimes, and that this Order shall be executed in a manner designed to minimize the interception of non-relevant and privileged conversations, and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this Order nor the existence of electronic eavesdropping over the above-captioned telephone line and instrument to any person including but not limited to the subscriber of the above-captioned telephone instrument whether or not the said subscribers request that the said telephone instrument be checked of the existence of said electronic eavesdropping equipment, and it is further

ORDERED, that this eavesdropping warrant shall be executed immediately and shall be effective the --- day of --- and its authorization shall continue until the evidence described in paragraph --- of the aforementioned affidavit of [The ADA] shall have been obtained, [and said authorization shall not automatically terminate when the communications described in said paragraph --- have been first obtained], but in no event shall said authorization exceed (---) days from its effective date, to wit, the --- day of ---.

Dated: New York, New York

Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

APPLICATION FOR
EAVESDROPPING
WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number --- located in ---, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

[The D.A.], being duly sworn, deposes and says:

I am the District Attorney of the County of New York, State of New York, and as such, make this application for an eavesdropping warrant authorizing the interception of certain wire and oral communications.

I have read the annexed affidavits of Assistant District Attorney --- and Police Officer ---, which are incorporated herein and made a part of this application.

Based upon the facts set forth in said affidavits, I respectfully submit to the Court that there are reasonable grounds to believe that essential evidence of crimes may be obtained by the interception of the oral and wire communications described in paragraph --- and paragraph --- of Mr. ---'s affidavit.

Based upon said affidavits, it is my opinion that there are no practical alternative means of acquiring comparable evidence or information. I believe the nature of the criminal activity involved is of sufficient public importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that an Eavesdropping Warrant in the form annexed be issued.

Sworn to before me this
--- day of ---

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT IN
SUPPORT OF
AN APPLICATION
FOR EAVESDROPPING
WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number --- located in ---, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

[The ADA], being duly sworn, deposes and says:

1. I am an Assistant District Attorney in the Office of [The D.A.], District Attorney for New York County, assigned to the Rackets Bureau, one of the principal functions of which is the investigation and prosecution of cases involving organized criminal activity.

2. In this capacity, I am conducting an investigation into (nature of criminal conduct) conducted by (subjects) through the use of the above-captioned telephones and premises, in violation of Article --- of the New York State Penal Law, specifically those provisions entitled --- and Conspiracy to commit those crimes.

3. This affidavit is submitted in support of District Attorney ---'s application for a Eavesdropping Warrant.

[The next set of paragraphs are to contain a full and complete statement of the facts constituting probable cause, including:

(I.) Probable cause to believe that a particular designated offense has been, is being, or is about to be committed.

(II.) Probable cause to believe that the facilities from which or the place where, the communications are to be intercepted are being used, or are about to be used in connection with the commission of such designated offense.

(III.) A particular description of the nature and location of the facilities from which, or the place where the communication is to be intercepted.

(IV.) The identity of the persons, or descriptions thereof, who are the subjects of the Order.

In addition, the goals of the investigation, the period of time necessary to achieve such goals and the reasons therefore should be set forth in detail.

The office records must be checked to determine whether or not the subjects of this Order or any of the premises, were involved in previous applications. If so, a full statement of facts concerning such applications, and the results of those applications must be set forth.]

For purposes of this sample, it will be assumed that the above is contained in paragraphs 4-13.

14. For the following reasons, conventional means of investigation could not succeed in achieving the desired goals of this investigation. [set forth reasons supported by factual detail]

15. Based on the above, I believe that the criminal activities referred to in paragraph 2 are being engaged in by ----- [at the above-captioned premises] [using the above-captioned telephone] and that evidence essential to successful prosecution can be established only by Court authorized electronic-eavesdropping as described herein.

16. Wherefore, I respectfully request that an Order in the form annexed, entitled Eavesdropping Warrant, be issued by this Court.

17. Said Warrant is specifically limited to the telephonic conversations of ----- and -----, their agents and co-conspirators, (some of whom are as yet unknown), as they occur over the above-captioned telephone concerning (nature of criminal activity). Said conversations can be expected to involve (describe anticipated conversation).

18. Said Warrant is further limited to the oral conversations of ----- and -----, their agents and co-conspirators, (some of whom are as yet unknown) as they occur in the above-captioned premises concerning (nature of criminal activity). Said conversations can be expected to involve (describe anticipated conversation).

19. I am in possession of no information which would indicate

that any of the conversations to be intercepted may be expected to come within any privilege under any applicable rule of law. The Eavesdropping Warrant will be executed in such a manner as to minimize the possibility of intercepting privileged or non-pertinent conversations. No conversations which appear privileged or unrelated to this investigation will be intercepted.

20. All appropriate investigating techniques will be used in conjunction with information obtained from the intercepted conversations and all leads will be followed with the purpose of insuring the successful prosecution of the conspirators.

21. The conversations to be intercepted will be recorded under my supervision on tapes which will be safeguarded and kept at all times in the custody of the Bureau of Investigation of the New York County District Attorney's Office, will be protected from editing or other alteration and will be used solely and appropriately in the lawful investigation and prosecution of the crimes referred to in paragraph 2 supra.

[22. In view of the continuing nature of the criminal activity described herein, it is further requested that should this Order be granted, its authorization for interception not automatically terminate when conversations of the type described in paragraph ----- have been first obtained. For the reasons set forth above, it is my opinion that evidence sufficient to properly prosecute the appropriate persons committing the crimes referred to in paragraph 2 supra, can be obtained only by the interception of several conversations.] In no event, however, should said Order authorize interception for more than ----- days.

23. No previous application for the same or similar relief has been made.

Sworn to before me this
----- day of -----

APPLICATION NO.:

TO: DIRECTOR, ATTENTION OPERATIONS BRANCH, D.I.S.
ADMINISTRATIVE OFFICE OF U.S. COURTS, SUPREME COURT BLDG, WASHINGTON, D.C. 20544

**REPORT OF APPLICATION &/OR ORDER
AUTHORIZING INTERCEPTION
OF COMMUNICATION**

JUDGE'S
NAME

COURT

ADDRESS

PERSON MAKING
THIS REPORT

SOURCE
OF
APPLI-
CATION

A. THE OFFICIAL MAKING APPLICATION		B. OFFICIAL AUTHORIZING APPLICATION SHOW "SAME" IF SAME AS "A"	
PERSON AGENCY	NAME		
	TITLE		
	NAME		
	ADDRESS		

OFFENSES

DURATION
OF
INTERCEPT

PLACE

APPLICATION				ORDER OR EXTENSION		
OFFENSES SPECIFIED				DENIED	GRANTED	GRANTED WITH THESE CHANGES
Type of Intercept <input type="checkbox"/> Phone Wiretap <input type="checkbox"/> Other (Specify) <input type="checkbox"/> Microphone/Eavesdrop						
DATE OF APPLICATION						DATE OF ORDER
PERIOD ORIGINALLY REQUESTED				<input type="checkbox"/>	<input type="checkbox"/>	
LENGTH OF EXTENSIONS REQUESTED	1st			<input type="checkbox"/>	<input type="checkbox"/>	
	2nd			<input type="checkbox"/>	<input type="checkbox"/>	
	3rd			<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/> SINGLE FAMILY DWELLING <input type="checkbox"/> MULTIPLE DWELLING <input type="checkbox"/> OTHER (Specify) _____ <input type="checkbox"/> APARTMENT <input type="checkbox"/> BUSINESS LOCATION (Specify) _____						

COMMENTS

DATE OF
REPORT

SIGNATURE

FORM 2

TO DIRECTOR, ATTENTION OPERATIONS BRANCH, D.I.S.
ADMINISTRATIVE OFFICE OF U.S. COURTS, SUPREME COURT BLDG, WASHINGTON, D.C. 20544

APPLICATION NO.

REPORT OF POLICE & COURT ACTION RESULTING FROM INTERCEPTED COMMUNICATIONS

COURT
AUTHOR-
IZING THE
INTERCEPTS

NAME OF JUDGE

COURT

ADDRESS

PERSON MAKING THIS REPORT
AND WHO AUTHORIZED THE INTERCEPTION APPLICATION

NAME & AGENCY OF PERSON MAKING AP-
PLICATION FOR INTERCEPTION
(IF DIFFERENT FROM: →)

NAME

TITLE

AGENCY

ADDRESS

APPLICATION

OFFENSES SPECIFIED

ORDER OR EXTENSION

DENIED GRANTED

GRANTED WITH THESE CHANGES

Type of ☐ Phone Wiretap ☐ Other (Specify)
Intercept ☐ Microphone/Eavesdrop

DATE OF
APPLICATIONDATE OF
ORDER

PERIOD ORIGINALLY
REQUESTED

LENGTH
OF
EXTENSIONS
REQUESTED

☐ SINGLE FAMILY
DWELLING
☐ APARTMENT

☐ MULTIPLE DWELLING☐ BUSINESS LOCATION (Specify)☐ OTHER (Specify)

DESCRIP- TION OF INTER- CEPTS	TYPE OF INTERCEPTION	NUMBER OF DAYS IN ACTUAL USE	AVERAGE FREQUENCY OF INTERCEPT	PERSONS WHOSE COMMUNICA- TIONS WERE INTERCEPTED	NUMBER OF COMMUNICA- TIONS INTERCEPTED	INCRIMINATING COMMUNICA- TIONS INTERCEPTED

COST	NATURE AND QUANTITY OF MANPOWER USED	Manpower Cost	TOTAL COST
	NATURE OF OTHER RESOURCES	Resource Cost	

RESULTS	NUMBER OF ACTIONS RESULTING FROM INTERCEPTIONS					NUMBER OF PERSONS CONVICTED BY TYPE OF OFFENSE
	NUMBER OF PERSONS ARRESTED BY TYPE OF OFFENSE	TRIALS COMPLETED	MOTIONS TO SUPPRESS			
			MADE	GRANTED	DENIED	

AN ASSESSMENT OF THE IMPORTANCE OF THE INTERCEPTIONS IN OBTAINING SUCH CONVICTIONS

DATE OF
REPORT

SIGNATURE

Page__ of__

REPORTED FOR 1973

INSTRUCTIONS

1. Indicate any additional activity which occurred during calendar year 1974 as a result of intercept orders, reported for the year of the accompanying excerpts of the Wiretap Report;
2. If there was no additional activity, enter "none" in each column 3 through 7;
3. Motions to suppress intercepts should be shown with "denied" or "granted" in column 6;
4. DO NOT REPORT ANY COSTS, ARRESTS, TRIALS, MOTIONS, OR CONVICTIONS, PREVIOUSLY REPORTED either on your original Form 2 or on a previous supplementary report, Form 3;
5. Please use the reporting number shown in the Wiretap Report for the above year.

[illegible]

JURISDICTION

DATE _____

ZIP _____

Mr. James A. McCafferty
Chief, Operations Branch,
Division of Information Systems
Area Code 202, 393-1640, Ext. 383

MAIL TO: Director - Attention Operations Branch
D.I.S. - Administrative Office of
the United States Courts
Supreme Court Building,
Washington, D.C. 20544

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ORDER

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number _____, located in _____, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

[No.] reels of magnetic recording tape bearing New York County District Attorney's Office Investigation Bureau numbers _____, having been made available to me this day by New York County Assistant District Attorney _____ and New York City Police Officer _____ and said reels having been sealed under my direction, it is hereby

ORDERED, that said [No.] reels of magnetic recording tape be kept in the locked Technical Room Vault of the New York County District Attorney's Office under seal and that said seal shall not be broken unless so ordered by a Justice of the Supreme Court of the State of New York.

Justice of the Supreme Court

Dated: New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NOTICE

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number _____, located in _____, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

PLEASE TAKE NOTICE that on _____, the Honorable _____, Justice of the Supreme Court, issued an Eavesdropping Warrant [which he duly amended and renewed], authorizing the District Attorney of the County of New York to intercept and record certain conversations, as captioned above, transmitted from (date effective) through (terminal date), and that pursuant to said Eavesdropping Warrant certain of said conversations were in fact intercepted and recorded.

Yours, etc.

District Attorney, New York City

By: _____

Assistant District Attorney

Dated: New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ORDER POSTPONING
NOTICE

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number _____, located in _____, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

It appearing from the affidavit of _____, Assistant District Attorney of the County of New York, that there is sufficient cause to believe giving notice on or before _____ pursuant to Section 700.50(3) of the Criminal Procedure Law would seriously hamper an investigation into the crimes of _____ it is hereby

ORDERED, that such notice, be postponed for a period of _____ days, to wit, until _____.

Dated: New York, New York

Justice of the Supreme Court

II. Office of the Special Narcotics Prosecutor, New York City Sample Instructions Given to Police Officer Monitoring Plant²

The following instructions have been prepared by members of the Special Narcotics Courts to assist you in executing the eavesdropping warrant and in monitoring the conversations overheard and intercepted.

All the work and effort put into getting the eavesdropping warrant, along with all the results which might be obtained, will have been wasted unless the police officers monitoring the conversations carefully follow the instructions prepared.

I. LISTENING AND RECORDING

The law makes no distinction between "listening" to a conversation and "recording" a conversation. When you remove property pursuant to a search warrant, that is called a seizure. When you *overhear* or *record* a conversation pursuant to an eavesdropping warrant, that also is called a seizure, but in our case we are seizing "conversations" rather than property.

Thus RULE ONE states that where the instructions below indicate that you must turn off the machine, stop recording, stop monitoring, stop listening, etc. STOP LISTENING to the conversation and TURN OFF the tape recorder.

2. Just as a search warrant permits or authorizes a "limited" search for "specified property", an eavesdropping or wiretap warrant authorizes you to "intercept OR record telephonic communications of [name omitted], with co-conspirators, accomplices, agents, deliverers, suppliers, and customers, over the above described telephone pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs."

RULE TWO—you can only intercept (meaning listen or record) conversations where our named subject is a party.

RULE THREE—you can only intercept conversations where [name omitted] is a party and where the subject of the conversation is NARCOTICS.

Thus you are authorized to listen to conversations over the captioned telephone instrument ONLY when [name omitted] is on the telephone. It is our opinion, that you may listen to the initial part of a conversation, but once you ascertain that our subject is not on the telephone, you MUST shut off the recorder and stop listening (Exception: see paragraph 7).

The phrase "co-conspirators, accomplices, agents, suppliers, deliverers, and customers" does NOT give us authority to listen to any and all conversations, of any and all persons, which occur over the telephone. What it does authorize, in our opinion, is the interception of conversations between our named subjects and other individuals IF THOSE CONVERSATIONS PERTAIN TO NARCOTICS.

Except as noted in paragraphs 6 and 7, if our named subject is not a participant in the conversation, YOU MUST TURN THE MACHINE OFF. STOP LISTENING. STOP RECORDING.

²Id. at 356-57.

3. PRIVILEGED COMMUNICATIONS

The eavesdropping warrant specifically states that we are not permitted to intercept any communications of [name omitted] "which are otherwise privileged." We may not listen to any conversation which would fall under any legal privilege: between attorney and client, between doctor and patient, between husband and wife, and between clergyman and parishoner.

ATTORNEY-CLIENT—consider this an absolute rule: Never knowingly listen to or record a conversation between a subject and his attorney. At present we are unaware of any such existing relationship, but if one is established notify me immediately, and post the name and number of the attorney at the plant so we do not intercept such calls.

PARISHIONER-CLERGYMAN—same as above.

DOCTOR-PATIENT—any conversations a patient has with a doctor relative to diagnosis, symptoms, treatment, or any other aspect of physical, mental or emotional disorder is privileged. If a conversation between a doctor and patient is not about a professional relationship, it is not privileged. However, as a general rule, do not listen to any conversations between a subject and a doctor.

HUSBAND-WIFE—In general, the same rules apply to conversations between a subject and his wife as with his attorney or his clergyman or his doctor. However, experience has demonstrated that a subject may utilize his wife to take messages from narcotic co-conspirators, etc., or to call, or to dial narcotic co-conspirators. Therefore, a limited degree of spot monitoring (see paragraph 7) may be maintained if subject calls wife.

4. OTHER CONVERSATIONS

Even if a conversation between our subject and another does not fall within an area privileged by law, that does not mean that you have the right to listen to or record the entire conversation; we are permitted to listen to and record **ONLY** those conversations **PERTAINING TO NARCOTICS**.

Because of the cryptic, guarded, coded nature of our subject's narcotic conversations, it may be necessary to listen to conversations which in fact do not relate to narcotics at all. In our opinion, the Courts will not suppress pertinent conversations simply because some non-pertinent conversations have been intercepted.

The standard which the Courts are likely to apply, in determining whether there was an overly broad listening to non-pertinent conversations, is simply: *Did the monitoring officers make a good faith effort to comply with the restrictions in the eavesdropping warrant?*

Keep in mind that each of you might be required to explain from the witness stand why a particular conversation was intercepted. Make a good-faith effort to comply with the central purpose of the warrant: the interception of conversations pertaining to narcotics.

5. SUBJECT NOT PARTY TO CONVERSATION

As a general rule, if neither the person who makes a phone call nor the person who receives the call is our named subject, that conversation is beyond the scope of our warrant and must not be listened to or recorded.

However, in executing the warrant we have the right to insure that our named subject does not get on the phone immediately after the initial part of the conversation.

Therefore, in our opinion, it is permissible to listen to a conversation which does not involve any named subject for a brief period of time, to ascertain whether our named subject is about to get on the phone. If our subject does not get on the phone within the first 15-30 seconds, you must stop listening and turn off the machine. Thereafter, you may do no more than *spot-monitor* the conversation (see paragraph 7).

6. OTHER CRIMES-OTHER SUBJECTS

We do not have authorization to overhear evidence of the commission or planning of other crimes, such as murder, etc. Conversations must be monitored with our sole legal purpose in mind: interception of conversations of our subject with others pertaining to NARCOTICS.

If while you are permissibly monitoring a narcotic conversation, the subject switches the topic of conversation to other crimes such as murder or robbery you are permitted to continue intercepting evidence of the "other crimes" but I must be notified **IMMEDIATELY** in order to seek the proper amendment to our eavesdropping warrant.

When spot-monitoring (see paragraph 7) a conversation where neither party is a named subject or when otherwise permissibly monitoring conversations, you overhear a **NEW** subject discussing drugs (possibly subject's wife) you are allowed to continue to overhear and to record such conversation but I must be notified *as soon as possible*, in order to amend the eavesdropping warrant to include the **NEW** subject.

One of our stated and authorized purposes in conducting this investigation is to *identify* our subjects "co-conspirators, accomplices, agents, suppliers, deliverers, and customers," in narcotics traffic. As soon as any such individual has been identified, I should be notified immediately.

If we know the name or nickname of a given "co-conspirator," etc. we can seek authority to add him to the named subjects whose conversations may be overheard.

Even if we do not have a name, if the same person's voice is heard discussing narcotics with our subject on several occasions, we can seek authority to add him to the order, for example as "JOHN DOE No. 1, who had telephonic conversations with SUBJECT No. 1 on June 21, 1972, at approximately 3 p.m.; and with subject No. 2 on June 24, at approximately 8:30 p.m."

7. SPOT-MONITORING

References have been made in paragraphs 2, 3, 5, and 6 to "spot-monitoring."

Assuming a conversation does not, during the initial 15-30 seconds fall within the category specified in the warrant, the recording and listening devices must be turned off.

However, it is possible that some time after this initial period, our subject might get on the phone. To guard against missing such a conversation, *spot-monitoring* is required. Every thirty to sixty seconds or so, turn the recording and listening devices back on; listen for a few seconds. If during those few seconds evidence of our subject discussing narcotics is intercepted, keep listening; if not, turn off the machine. Stop listening. Continue to spot-monitor as the circumstances indicate. Spot-monitoring means recording as well as listening.

You may spot-monitor a conversation between our subject and others when originally the interception was non-narcotic. You're spot-monitoring to ascertain if the nature of the conversation has switched to narcotics.

8. USE OF LISTENING AND RECORDING DEVICES

Whenever possible, anything that is recorded should be listened to. This rule should be followed while spot-monitoring as well as while hearing and recording full conversations.

Under no circumstances is the recording equipment to be left on "automatic" when the plant is not being manned. If the plant is not manned, the equipment must be turned off.

If there are any questions concerning any instructions or if you have questions while monitoring or if any emergency develops, I can be contacted at the Special Narcotics Courts. Sergeant Frank Trefer has my home telephone number if that becomes necessary.

GOOD LUCK.

ROBERT P. LA RUSSO
ASSISTANT DISTRICT ATTORNEY

III. New JerseyInstructions and Forms for Electronic Surveillance³CRIMINAL INVESTIGATION SECTIONELECTRONIC SURVEILLANCE REQUESTUNIT:

DETECTIVE MAKING APPLICATION - (List individual detective affiant in Application)

CRIME: (List specific crime for which the order is sought)

SUBJECT: (Identify person involved and briefly outline his criminal history and significance if involved in organize crime)

PLANT LOCATION: (Identify specific telephone to be monitored, location of place and anticipated investigative telephone lines needed)

CO-OPERATING POLICE AGENCIES: (Identify any outside enforcement agency having access to wire information or plant location and any agency to whom disclosure must be authorized by court order)

MANPOWER COMMITMENT: (Outline anticipated State Police manpower needs and units from which same will be acquired)

³Id. at 127-69.

GOALS OF SURVEILLANCE REQUESTED:

- a. Significance of crime:
- b. What impact will this order have upon any specific criminal element. i.e., are we seeking an individual bookmaker or inroads into a far reaching organized group.
- c. What do you have to achieve with this surveillance.

DURATION OF SURVEILLANCE REQUESTED:

WIRE ORDER NUMBER: _____

CRIMINAL INVESTIGATION SECTION
ELECTRONIC SURVEILLANCE REQUEST

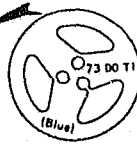
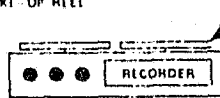
W.O. # _____

BUREAU/TROOP	APPROVED	DISAPPROVED	DATE
INVESTIGATIONS OFFICER			
INTELLIGENCE			
OCU			

UNITDETECTIVECRIMETARGET AND ADDRESSTELEPHONE TO BE INTERCEPTED AND LISTINGINVESTIGATION TO DATEGOAL OF OPERATIONANTICIPATED MANPOWER
ANTICIPATED LENGTH
 OF OPERATION

/s/ _____

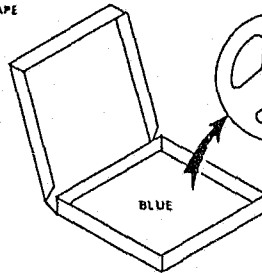
TAKI-UP REEL



Only job and tape number
No Initials Time Date

OFFICIAL ELECTRONIC SURVEILLANCE TAPE HANDLING PROCEDURE

NEW TAPE



Cut off sticky end

73 00 T1

One foot from end Dull side
Job number - Tape number
Initials only
No Time Date On/Off Weather, etc.

REMOVAL



Wind forward only

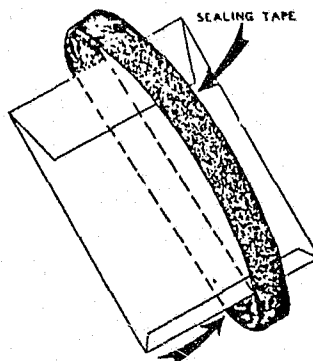
One foot from end.
Dull side
No Time - Date - On/Off -
Weather, etc.

Nothing on box

Nothing on box

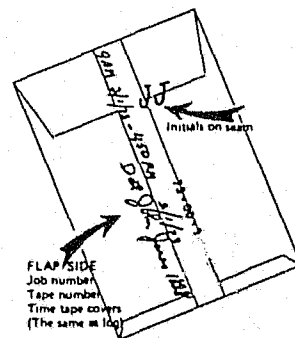
ENVELOPE
(9 x 9)

SEALING ENVELOPE



SEALING TAPE

Start on back
Go completely around
Overlap slightly



FLAP SIDE
Job number
Tape number
Time tape covers
(The same as 100)

To Headquarters within 48 hours
24 hours last reel

TAPE ISSUED

DATE	7" BLUE	5" BLUE	7" CLEAR	5" CLEAR	OTHER	TAPE RETURNED

TAPE PROCESSED - EVIDENCE

DATE	TAPE #	PROCESSED BY	PICK-UP BY	DATE	TAPE #	PROCESSED BY	PICK-UP BY
	T-1				T-33		
	T-2				T-34		
	T-3				T-35		
	T-4				T-36		
	T-5				T-37		
	T-6				T-38		
	T-7				T-39		
	T-8				T-40		
	T-9				T-41		
	T-10				T-42		
	T-11				T-43		
	T-12				T-44		
	T-13				T-45		
	T-14				T-46		
	T-15				T-47		
	T-16				T-48		
	T-17				T-49		
	T-18				T-50		
	T-19				T-51		
	T-20				T-52		
	T-21				T-53		
	T-22				T-54		
	T-23				T-55		
	T-24				T-56		
	T-25				T-57		
	T-26				T-58		
	T-27				T-59		
	T-28				T-60		
	T-29				T-61		
	T-30				T-62		
	T-31				T-63		
	T-32				T-64		

NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE
INSTALLATION EVALUATION

INSTALLATION NO. _____ UNIT _____ APPLICANT _____
CRIME _____ ORDER DATE _____

	AM												PM												
	12	1	2	3	4	5	6	7	8	9	10	11	12	1	2	3	4	5	6	7	8	9	10	11	12
1																									
2																									
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LEGEND: $\frac{1}{2}$ Indicates the legal hours and dates of the Installation
~~1~~ INDICATES NO MONITORING PERMITTED
 O Indicates monitoring was conducted but no pertinent conv.
 1,2,3,4,5 etc. indicates the number of pert. conv. during that hr

NOTE: — EVALUATE FOR REDUCTION OF MONITORING TIME

RETURN
CHP

UNDERGROUND CABLE NUMBER _____ PAIR _____

[illegible]

AERIAL CABLE NUMBER _____ PAIR _____

[illegible]

APPLYING AGENCY _____	JOB NUMBER _____
APPLICATION MADE BY _____	
SLAVE () _____	HARDWARE () _____
ROTARY () _____	TOUCH TONE () _____

TELEPHONE # _____	<u>COURT ORDER</u>
SUBSCRIBER'S NAME _____	JUDGE _____
ADDRESS _____	DATE ISSUED _____
_____	DURATION () DAYS BETWEEN _____
CRIME _____	RESTRICTIONS _____
-----	TAPE # 1 BEGAN-DATE _____ TIME _____
EQUIPMENT USED _____	MONITORING ENDS-DATE _____ TIME _____
_____	SEALED BY & DATE _____
_____	RENEWALS _____
_____	1. JUDGE _____
_____	DATE ISSUED _____
_____	DURATION _____
_____	2. JUDGE _____
_____	DATE ISSUED _____
_____	DURATION _____

METHOD OF INSTALLATION _____	INSTALL. BY _____
_____	INSTALL. DATE _____
_____	INSTALL. MANHOURS TOTAL _____
_____	-----
_____	(DATE) SERVICE CALLS (PROBLEMS) _____
_____	_____
-----	_____
PLANT LOCATION _____	_____
& PHONE # _____	_____
_____	-----
_____	REMOVED BY & DATE _____
_____	REMOVAL MANHOURS _____
SLAVE # _____	ENTIRE JOB MANHOURS _____
PLANT # _____	_____
INVEST.# _____	_____



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF STATE POLICE

COLONEL D B KELLY
SUPERINTENDENT

POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625
(609) 882-2000

October 13, 1970

OPERATIONS ORDER)

NUMBER

270)

RE: S. O. P. 194, 500

ELECTRONIC SURVEILLANCE UNIT

I. PURPOSE:

- A. To establish guidelines and to achieve uniformity in the procedures for the administration, application and implementation of electronic surveillance court orders.

II. MECHANICS:

- A. The Head of the Intelligence Bureau shall cooperate with Division personnel who are attempting to acquire a court order to implement an electronic surveillance device.
- B. The Bureau Head shall establish and maintain liaison with the Organized Crime Unit in order to cover the legality of all operations involving electronic surveillance.
- C. The Head of the Intelligence Bureau shall maintain files on the following:
 - 1. All applications for the issuance of electronic eavesdropping court orders.
 - 2. All applications for the issuance of wiretapping warrants.
 - 3. All Court Orders issued for the implementation of electronic surveillance.
 - 4. The approvals of the Attorney General for Court Orders to implement electronic surveillance.

5. All emergency requests for court approval of electronic surveillance use.
 6. All other Court documents, such as inventories, orders to postpone service of inventory, sealing orders, etc.
- D. All requests for use of electronic surveillance will be made in the manner prescribed.
- E. The Electronic Surveillance Unit will utilize State Police specialists and technicians for the installation and maintenance of equipment necessary to implement Court Orders.
- F. Attached to this order are addendums covering:
1. Application procedures for Electronic Surveillance Court Orders. (Addendum #1)
 2. Electronic Surveillance Emergency Procedures (Addendum #2)
 3. Operation procedures for Electronic Surveillance Plants (Addendum #3)
 4. Electronic Surveillance Log (Form 465) and continuation page (Form 466) (Addendum #4)
 5. Electronic Surveillance Final Plant Report (Form 467) (Addendum #5)
 6. Court Results (Addendum #6)

BY ORDER OF THE SUPERINTENDENT



E. Olaff
Major
Deputy Superintendent



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF STATE POLICE

COLONEL D B KELLY
SUPERINTENDENT

POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625
(609) 882-2000

February 4, 1971

OPER. INST. TO: Commanders, Troops A, B, C, D and E; All
Stations; Section Supervisors, Bureau Chiefs and
Units, Division Headquarters.

SUBJECT : Requests made to the Electronic Surveillance
Unit.

1. All requests made to the Electronic Surveillance Unit for the installation of "consent" electronic eavesdropping or wire-tapping equipment shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.
2. All requests made to the Electronic Surveillance Unit for the use of electronic equipment, e. g. tape recorders, radios, receivers, etc. or the drawing of supplies, e. g. tapes, batteries, cassettes, etc. shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.
3. All requests made to the Electronic Surveillance Unit for copies of tapes, other than those which result from Court authorized wiretaps or bugs shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.
4. This Operations Instruction shall be attached to and made a part of O. O. 270.

BY ORDER OF THE SUPERINTENDENT

E. Olaff
E. Olaff, Major
Deputy Superintendent

October 13, 1970
Addendum #1

APPLICATION FOR ELECTRONIC SURVEILLANCE COURT ORDERS

- I. Members of this Division who have reason to believe they have probable cause to utilize the "New Jersey Wiretapping and Electronic Surveillance Control Act" shall be guided by the following procedures.
- A. Wiretapping or electronic eavesdropping (bugging) may be used during the investigation of the following crimes:
1. Murder
 2. Kidnapping
 3. Extortion
 4. Narcotic Traffic
 5. Gambling
 6. Bribery
 7. Loan Sharking
 8. Arson
 9. Burglary
 10. Forgery
 11. Embezzlement
 12. Escape
 13. Receiving Stolen Property
 14. Larceny punishable by imprisonment for more than one year.
 15. Alteration of Motor Vehicle Identification Numbers.

-2- October 13, 1970
Addendum #1

16. Conspiracy to commit any of the foregoing offenses.

- B. When an investigator has reason to believe that during the investigation into any of the preceding crimes, he has probable cause for the interception of oral communication by wiretapping or electronic eavesdropping (bugging), through his troop commander or Bureau supervisor, he shall:
1. Contact the supervisor of the Intelligence Bureau who will when necessary, consult a member of the Organized Crime Unit to determine the applicant's legal eligibility.
 2. The following factors must be available:
 - a. The identity of the particular person, if known, committing the offense and whose communications are to be intercepted.
 - b. The details of the particular crime that has been, is being, or is about to be committed.
 - c. If the communication is to be intercepted by wiretapping or by electronic eavesdropping (bugging).
 - d. The particular location of the telephone to be tapped or the room to be bugged and facts or informant information in-

dicating that incriminating conversations will take place over the phone to be tapped or in the room to be bugged.

- e. The length of time (with a maximum of thirty (30) days) for which the electronic surveillance Court Order will be in effect. (If the investigator cannot estimate the length of time that will be needed, the Organized Crime Unit will assist in determining the duration of the Court Order.)
 - f. The facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or appear likely to fail or are too dangerous to employ.
 - g. The facts concerning any known prior application for wiretapping or electronic eavesdropping of the same facilities, places or persons as in the current investigation.
- C. From the information supplied to the supervisor of the Intelligence Bureau, a determination will be made regarding the sufficiency of the probable cause. When probable cause is deemed sufficient, the applicant, in cooperation with an attorney

from the Organized Crime Unit, will draft an affidavit of application in quadruplicate, routing of four copies shall be:

1. Original - The judge authorizing the interception
2. First carbon copy - Electronic Surveillance Unit
3. Second carbon copy - Organized Crime Unit
4. Third carbon copy - The applicant.

D. After the application is drafted, the personal approval of the Attorney General shall be obtained in writing in quadruplicate. One copy shall be attached to each copy of the affidavit of application.

E. After the approval of the application is obtained from the Attorney General, the investigator, and when necessary, a lawyer from the Organized Crime Unit shall then apply for an order from a judge of the Superior Court who has been designated by the Supreme Court to receive electronic surveillance applications. The order shall be prepared in five copies. Routing of the copies shall be:

1. Original - Judge authorizing interception
2. First and Second Copies - Electronic Surveillance Unit.
3. Third Copy - Organized Crime Unit

4. Fourth Copy - Shall be kept by the applicant at the plant during operation.
- F. At least one copy of each document routed to the Electronic Surveillance Unit for Master File must carry the actual signatures of the officials applying and authorizing such documents.
- G. If the nature of the investigation is such that the authorization should not automatically terminate when the desired type of communication has been first obtained, the original application must contain a particular statement of facts establishing probable cause to believe that additional communications of the same type will continue to occur after the first communication.
- H. The original Court Order will require that the electronic surveillance begin and "as soon as practicable." In no event may any order authorize interception for more than thirty (30) days.

II. Renewal Procedures:

- A. The statute permits an indefinite number of extensions or renewals of the original order, each for a period of not more than thirty (30) days, if additional procedures are complied with.
- B. An application for a renewal must be made basically in the same manner as the original application.

The renewal application will incorporate by reference the various allegations and fact statements of the original application. In addition, the application for renewal must contain a statement of facts showing the results obtained from the electronic surveillance so far, or a reasonable explanation of the failure to obtain results.

- C. It will be necessary if a renewal is desired without interrupting the electronic surveillance to obtain the renewal order prior to the expiration of the original order.
- D. It is vital that the investigative unit contact the Organized Crime Unit through the Intelligence Bureau at least five (5) days, excluding weekends and holidays, prior to the expiration of the Court Order in order to process an application for renewal.
- E. Upon each renewal, distribution of court documents shall be the same as with an original application and order.

OCTOBER 13, 1970
ADDENDUM #2

ELECTRONIC SURVEILLANCE EMERGENCY PROCEDURE

- I. The statute provides for a highly restrictive procedure for the emergency installation of wiretaps and electronic eavesdropping in circumstances where "IMMEDIATE INTERCEPTION" is required "before an application for an order could with due diligence" be submitted to a judge.
- II. Emergency application requires all the procedural steps as with a written application and order to be covered. Approval by the Intelligence Bureau Head, consultation when necessary with the Organized Crime Unit, the personal authorization of the Attorney General for the emergency installation.
- III. An "informal application" then must be made orally to a judge. The Court must determine from this oral application that legal grounds exist upon which a formal order could be issued pursuant to the statute. In addition, the court must find that "an emergency situation exists with respect to the investigation of conspiratorial activities of organized crime," related to one of the specific offenses in connection with which an order normally could be issued. The statute has failed to define the phrase "conspiratorial activities of organized crime."

- IV. If the court makes the required findings, it may grant verbal approval for the use of electronic surveillance without a written order, conditioned upon the filing, within 48 hours, of a formal written application in accordance with normal procedures. If the written order is granted, it is retroactive to the time of the verbal approval given by the court.
- V. The statute provides that an emergency installation "shall immediately terminate when the communication sought is obtained or when an application for an order is denied."
- VI. It should be noted that if emergency verbal approval is granted by a judge and the installation made, and if the formal written application is denied, notice and an inventory must be provided to the subject in accordance with the normal statutory procedures.
- VII. In view of the requirements of this procedure, it is imperative that the following be adhered to:
- A. Any conversations monitored during the 48 hour emergency period must remain strictly confidential and not disseminated except to:
1. Prevent the commission of a crime
 2. Apprehend a fleeing felon
 3. Recover stolen property, contraband or evidence of a crime where the movement of the property

is expected before formal application can be made.

- B. No transcripts shall be made of tapes made during the emergency portion.
- C. Any duplicate tapes made during the emergency portion of this operation must be turned over to the court when an application in writing is denied.
- D. Any conversation monitored under the emergency provisions of the law where an application made is denied shall not be used or disclosed in any legal proceedings except in a civil action brought by an aggrieved person.
- E. Before dissemination of information obtained during the emergency portion of this act is made, the monitor shall communicate with a lawyer from the Organized Crime Unit to determine if such information can be disseminated.

VIII. The reporting procedure outlined in Addendums 4, 5 and 6 shall be followed except for the following:

- A. No reports shall be forwarded to any Unit or Station until after the written application for the Court Order has been approved.
- B. In the event that the formal order for court approval is denied, all reports and copies prepared during the initial operation shall be forwarded to the Electronic Surveillance Unit for destruction.

OCTOBER 13, 1970
ADDENDUM #3

OPERATION OF AN ELECTRONIC SURVEILLANCE PLANT

- I. Upon receipt from the applicant of the prescribed number of copies of Court Documents authorizing a wiretap or the use of electronic eavesdropping, the Electronic Surveillance Unit shall open a master file for the installation and shall assign a "JOB NUMBER". This "JOB NUMBER" consists of the last two digits of the year, plus the number of the installation for that year.

EXAMPLE: The first application approved in 1969 will be 69-1 and the second 69-2, etc.

- II. The electronic Surveillance Unit shall, if necessary, furnish one copy of the Court Order to the appropriate telephone company and obtain the necessary pair and cable information and whatever assistance effectively is required to execute the order.
- III. The Electronic Surveillance Unit, with whatever assistance is required from the applicant, will locate the plant (monitoring location). The Unit shall complete the installation of all necessary equipment to execute the Court Order.
- IV. During the operation of the plant, the Electronic Surveillance Unit shall provide whatever assistance, instruction, maintenance and service of equipment that is

deemed necessary.

- V. The plant, or the monitoring location, shall be manned by members of the investigative unit, station or troop responsible for the investigation. One man shall be placed in charge of the operation and he shall be responsible for monitoring the plant, plant security and whatever outside investigation is required under the circumstances.
- VI. If the results of the electronic surveillance are to be admissible in Court proceedings, it is vital that the original tapes, herein referred to as "OFFICIAL TAPES", be handled in accordance with the following procedures:
 - A. "OFFICIAL TAPES" will be issued by the Electronic Surveillance Unit to the person designated responsible for the plant operation.
 - 1. "OFFICIAL TAPE" Reels shall be transparent blue in color.
 - 2. Only "OFFICIAL TAPES" shall be used in any installation.
 - 3. Unused "OFFICIAL TAPE" shall be returned at completion of an operation.
 - B. When an "OFFICIAL TAPE" is placed on a recorder, the take-up reel will be numbered using an indelible felt black pen with the plant number followed by the

letter "T" and the number of the reel of tape used in the operation.

EXAMPLE: If the plant number is 69-1, the first reel of tape used will be marked 69-1-T1 and the next reel will be marked 69-1-T2, etc.

- C. The actual tape will also be marked with a black indelible felt pen approximately one foot in from the end on the dull side of the recording tape. Immediately after the tape identification number the monitoring officer will place his initials. This shall be done at the beginning and end of each tape.
- D. When a tape is completed or must be removed from the recorder, the tape shall be immediately wound forward on the take-up reel which bears the tape number.
- E. The "OFFICIAL TAPE" must never be left unattended. At the close of the days operation, if the plant is not in a continual 24 hour operation, any tape that has been used to record intercepted communications will be removed from the recorder onto the take-up reel and sealed.
- F. To seal an "OFFICIAL TAPE" it shall be placed in it's original cardboard container, both the container and reel shall then be placed in a supplied envelope. A piece of transparent sealing tape shall

be placed around the entire envelope. (Do not moisten adhesive on envelope's flap) Along the tape, on the flap side of the envelope, shall be written the tape number, the date and the time the tape covers, the identification and signature of the person responsible for that tape's sealing. The sealers initials shall also be written on the seam on the large flap so that the envelopes cannot be opened without separating the initials. The sealing must be accomplished in such a manner so as to completely prohibit entry into the envelope without being detected.

- G. If the envelope must be opened to allow for re-viewing or copying the tape, the original seal shall be broken (cut) at the envelope flap to permit entry. The date and the name of the person breaking the seal shall be written on the original seal. The resealing procedure shall be the same as with an original tape, using the same envelope. The new seal shall be placed along side of the original and still attached seal. No unsealed "OFFICIAL TAPE" shall leave the possession of the person who has removed it from its envelope.
- H. All "OFFICIAL TAPES" will be returned to the Electronic Surveillance Unit within 24 hours after the

final day of plant operation. Care should be taken not to mutilate the envelope or seal during transportation.

- I. A copy of all tapes will be made by the Electronic Surveillance Unit when the log indicates any pertinent incriminating conversation is recorded, as outlined in Addendum #4, and returned to the plant supervisor. The security and custody of these copies of the "OFFICIAL TAPES" shall be the responsibility of the plant supervisor. They will be kept until the completion of any resulting trials and then returned to the Electronic Surveillance Unit for magnetic erasing and reused for copy work. NOTE: No Transcripts will be made using the "OFFICIAL TAPE".
- VII. The statute required that "IMMEDIATELY" after the termination of the electronic surveillance, all tapes must be returned to the court and sealed by the judge. Once this is done, it will not be possible to unseal a tape for the purpose of reviewing or copying or making a transcript without obtaining an additional court order. It is therefore important that tapes be copied as soon as possible after the interception of pertinent data.
- VIII. Immediately upon the termination of an installation, the Electronic Surveillance Unit shall make arrangements to return the tapes to the Court for the purpose of sealing.
- IX. The reports designated in Addendum #4, #5, and #6 shall be made by the investigator responsible for the plant operation or someone expressly designated by him to complete these reports.

OCTOBER 13, 1970
ADDENDUM #4

ELECTRONIC SURVEILLANCE LOG FORM 465 AND CONTINUATION

PAGE FORM 466

I. PURPOSE OF THE LOG

The Electronic Surveillance Log, SP Form 465, and the Continuation Page, SP Form 466, shall be used to maintain a chronological record of surveillance plant operations.

II. MECHANICS

- A. The Electronic Surveillance Log, SP Form 465 shall be submitted with each reel of "OFFICIAL TAPE".
 - 1. The Log will cover one reel.
 - 2. No one Log shall cover more than a 24 hour period.
- B. The Log together with the tape shall be forwarded to the Electronic Surveillance Unit within 48 hours of its being recorded.
- C. When additional space is necessary to complete the log, use the Continuation Page, SP Form 466.
- D. Uniform abbreviations appear at the bottom of the Log and are to be used when relevant.
- E. This report shall be prepared in four copies.
- F. Routing of the four copies shall be as follows:
 - 1. Original - to the Electronic Surveillance Unit and placed in master file.
 - 2. First copy - to the Electronic Surveillance Unit to be forwarded to the Organized Crime Unit.
 - 3. Second copy - Station/unit copy.
 - 4. Third copy - Prosecutor's copy, to be maintained in the station/unit case file pending court action.

III. INSTRUCTIONS FOR PREPARATION OF THE ELECTRONIC SURVEILLANCE LOG, SP FORM 465, AND CONTINUATION PAGE, SP FORM 466.

A. The numbers on the Electronic Surveillance Log, SP Form 465, and the Continuation Page, SP Form 466, have been inserted to simplify filling out the report. They correspond with the numbers and titles in this guide.

1. STATION/UNIT - Enter the name of State Police/Unit maintaining the log.
2. CODE - Enter the Station/Unit code designation. (Refer to Station-Troop Code, Addendum #9, O. O. 227, Investigation Reporting Procedures)
3. PLANT NUMBER - Enter the number assigned to the plant operation. (This number will be received from the Electronic Surveillance Unit on obtaining a court order.)
4. DIVISION CASE NUMBER - Insert Division Case Number. (This number will be a combination of the Station code number and the Station case number.)

Example: A02691 will be the Division case number of the first investigation report from Absecon Station for the calendar year 1959.
5. TAPE NUMBER - Enter the number of the reel of tape used during the period covered by the log.
6. DATE AND TIME LOG STARTED - Enter the date and time the tape is placed on machine.
7. DATE AND TIME LOG ENDS - Enter the date and time the tape ended or the operation ceased.
8. TOTAL HOURS - Enter the total number of hours of all personnel used in the plant operation during the time covered by the log.
9. TIME IN - In this column, insert the time of all incoming calls. If the plant is an eavesdropping operation, also enter the time any person enters the room being bugged.

10. TIME OUT - In this column, enter the time of all out-going calls. If the plant is an eavesdropping operation, also enter the time any person leaves the room being bugged.
11. DETAILS - This space is used for all information pertinent to the operation and a brief text of monitored conversation.
 - a. The first entry will record the time the reel was placed on the machine, the number of the reel that is to receive the monitored conversation, the person making the log and who assisted in plant operation. The first entry will also denote that the plant is opening for the day or is a continual operation.

Example: The plant was opened at 9:00 A.M. with tape number 69-1-T1 placed on the recorder. The index was set at (000). In this case the entry would read:

9:00 A.M. Plant opened. Official Tape 69-1-T1 placed on machine by Det. Brown. Index set at (000). Assisted in plant operation by Dets. M. Black and J. White.

Example continued: If the plant was in continual operation and an official reel was removed and another placed on machine the entry would read:

9:00 A.M. Continual Operation. Official tape 69-1-T2 placed on machine by Det. Brown...etc.

- b. Relief of monitoring personnel will be recorded in this space.

Example: Det. B. Brown was the original monitor on the plant shift. He and his assistants were relieved by Det. J. Jones and crew at 11:55 A.M. with tape reel 69-1-T2 on the recorder at index setting (60). In this case no further entries are made on that page of the log. A new "Continuation Page" will be headed:

-4-

ADDENDUM #4

11:55 A.M. Det. J. Jones relieving Det. B. Brown, Tape 69-1-T2 on index (60). Dets. Black and White relieved by Green and Blue.

- c. Outgoing Calls. If the Electronic Surveillance Unit has provided some means of immediately retrieving the outgoing called number - place that number in the details column.

Example: 123-4567 ()

(Explanation) - The parenthesis are provided for the insertion of the name of that phone numbers subscriber which can be inserted later.)

Under certain circumstances the called number cannot be immediately obtained but can be at a later time using the recorded dial pulses or touch tones. In this case, number each out going call placing a "D/" or "TT/" to indicate if it was a dialed call or a touch tone call.

Example:

D/#1 () ()

Text of call

D/#2 () ()

TT/#3 () ()

TT/#4 () ()

Explanation: The "D" indicates it was an outgoing dialed call and the "TT" indicates it was an outgoing touch tone call. The first parenthesis is provided for the insertion of the phone number at a later time - the second for the subscriber.

The Electronic Surveillance Unit will later assist in the retrieval of the numbers.

- d. Incoming calls - Uniform abbreviations appearing at the bottom of the log will be used where relevant.

Example: During a plant operation, an unidentified male answers the phone and speaks with an unidentified female. The conversation concerns the purchase of a desk for the caller's office. Therefore, this conversation is not pertinent to the investigation in progress or related to another crime. In this case, the entry would read:

U.M. () to U.F. () re purchase of desk. (25) N/P

Explanation: The parenthesis are provided for insertion of the names of those involved should they be identified later in the investigation. The parenthesized number is the index number.

- e. The last entry on the log will be the time the reel ends. The last entry will also denote if the plant is continuing operation or is closing for the day.

Example: The tape reel in use was 69-1-T2. The reel had run out (or was about to), and a new reel of tape was to be placed on machine to continue operation. In this case the entry would read:

6:00 P.M. Det. Brown removes and seals tape 69-1-T2 and places 69-1-T3 on machine.

Example continued: If the plant was closing for the day:

6:00 P.M. Det. Brown removes and seals tape 69-1-T2. Plant Closed.

12. DATE - Appears on Continuation Page only. Place date of last entry covered on that page of the Log.
13. NAME - Signature of the monitor for that page of the Log.

-6-

ADDENDUM #4

14. BADGE NUMBER - Monitor's, if applicable.
15. PAGE ___ OF ___ PAGES. (Self-explanatory)
16. NUMBER OF CONVERSATIONS - TOTAL. Total number of conversations intercepted and covered by this single log.
17. NUMBER OF CONVERSATIONS - INCRIMINATING. Number of incriminating conversations covered by this single log.

**NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE LOG**

(1) STATION/UNIT		(2) CODE		(3) PLANT NUMBER		(4) DIVISION CASE NUMBER	
(5) TAPE NUMBER		(6) DATE & TIME LOG STARTED		(7) DATE & TIME LOG ENDS		(8) TOTAL HOURS (OF ALL PLANT PERSONNEL)	
(9) TIME IN	(10) TIME OUT	(11) DETAILS					
ABBREVIATIONS: UM - UNIDENTIFIED MALE UF - UNIDENTIFIED FEMALE D/# - DIAL CALL NP - CONVERSATION NOT PERTINENT NA - NO ANSWER TR - TRANSCRIBE TT/# - TOUCH TONE							
(13) NAME		(14) BADGE NO.		(15) PAGE ____ OF ____ PAGES		NUMBER OF CONVERSATIONS (16) TOTAL	
						(17) INCRIMINATING	

NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE LOG
CONTINUATION PAGE

(1) STATION/UNIT		(3) PLANT NUMBER	(4) DIVISION CASE NUMBER	(5) TAPE NUMBER
(9) TIME IN	(10) TIME OUT	(11) DETAILS		
<p>ABBREVIATIONS: UM - UNIDENTIFIED MALE UF - UNIDENTIFIED FEMALE D/* - DIAL CALL</p> <p>NP - CONVERSATION NOT PERTINENT NA - NO ANSWER TR - TRANSCRIBE TT/* - TOUCH TONE</p>				
(12) DATE	(13) NAME	(14) BADGE NO.	(15) PAGE	
		OF PAGES		

OCTOBER 13, 1970
ADDENDUM #5

ELECTRONIC SURVEILLANCE FINAL PLANT REPORT FORM 467

I. PURPOSE OF THE REPORT

- A. The Electronic Surveillance Final Plant Report, SP Form 467, summarizes a completed surveillance operation. In effect, the report is a compilation of certain information recorded in the Electronic Surveillance Logs. This data will permit reporting to State and Federal Government as required by law.
- B. Conduct of the investigation will be reported according to Operation Orders covering the Investigation Reporting System. (S.O.P. 195,000)
 - 1. In the event that no investigation report has been made prior to the implementation of an electronic surveillance court order, this report shall be made within 48 hours of the installation of any electronic surveillance equipment.
 - 2. Supplementary Investigation Reports will be submitted as required.

II. MECHANICS

- A. The Electronic Surveillance Final Plant Report, SP Form 467, shall be submitted following the completion of any electronic surveillance operation by the person in charge.
- B. This report shall be prepared in three copies.
- C. Routing of the three copies shall be as follows:
 - 1. Original and first copy - Original copy to the Electronic Surveillance Unit master file via channels and the first copy will be furnished to the Organized Crime Unit.
 - 2. Second copy - Station/Unit copy, case file.

III. INSTRUCTIONS FOR PREPARATION OF THE ELECTRONIC SURVEILLANCE FINAL PLANT REPORT FORM 467

- A. The numbers on the Electronic Surveillance Final Plant Report, SP Form 467, have been inserted to

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ADDENDUM #5

simplify filling out the report. They correspond with the numbers and titles in this guide.

1. STATION/UNIT - Type the name of the State Police Station/Unit reporting the investigation.
2. CODE - Enter Station/Unit code designation.
3. PLANT NUMBER - Enter the number assigned to the plant operation. (This number was assigned by the Electronic Surveillance Unit on receiving the Court Order.)
4. DIVISION CASE NUMBER - Type Division Case Number. (This number will be a combination of the Station Code Number and the Station Case Number.)

5. PERSON AUTHORIZING INTERCEPTS

NAME OF JUDGE-ADDRESS. The name and court address of the judge who signs the court order.

NAME & ADDRESS OF PERSON AUTHORIZING INTERCEPTION APPLICATION.

EXAMPLE: A. G. Geo. F. Kugler, Trenton.
Act. A. G. Wm. Smith, Trenton.

6. CRIME SPECIFIED - Enter the crime under investigation at the time of application for the court order.
7. PERIOD ORIGINALLY REQUESTED - The number of days permitted to intercept by the order.
- DATE OF APPLICATION - Date application was signed by court.
- DATE OF ORDER - Date order was signed by court.
8. LENGTH OF EXTENSIONS 1st, 2nd, 3rd - The number of days permitted by the respective extension.
- DATE OF APPLICATION & DATE OF ORDER - Dates renewal application and renewal order were signed by the court.
9. TYPE OF INTERCEPTION - Type "X" in the space indicating whether the surveillance was phone wiretap, microphone/eavesdrop or other - specify what other.

10. LOCATION OF THE INTERCEPTIONS - Type "x"
at the location where the monitored conversation took place.

Residence - One family dwelling
Multiple - Two, three or four family dwelling
Apartment - More than four family dwelling
Business Location (Specify) Example: New Car
Dealer - Office, Hardware Store - counter,
Restaurant - cashier, Used Car Dealer -
garage, etc.
Other (Specify) - Car, train, bus, park, beach,
street, etc.
11. DURATION BETWEEN - Date plant officially
opened, month - type number, day of month,
year - type last two digits, "and" date plant
was "terminated" using same date indications.
12. NUMBER OF DAYS IN ACTUAL USE - Enter number
of days plant was operated.
13. NUMBER OF PERSONS WHOSE COMMUNICATIONS WERE
INTERCEPTED - Probably the most important
figure on whole report. Attempt to be as
accurate as possible. Count total number of
people whose conversations were heard.
Example: In a bookmaking operation, the book-
maker is one and each of his customers are
counted once, no matter how many times they
call in.
14. NUMBER OF COMMUNICATIONS INTERCEPTED - Total
number of conversations entire operation.
15. NUMBER OF INCRIMINATING COMMUNICATIONS INTER-
CEPTED - Total number of incriminating con-
versations of entire operation.
16. AVERAGE FREQUENCY OF INTERCEPT (Per Day) -
Divide the number of days in actual use (12)
into communications intercepted (14) for daily
average. This figure might help in arriving
at a reasonable estimate for number of persons
whose communications were intercepted (13).
17. NATURE & QUANTITY OF MANPOWER USED - Man Hours -
Type in respective block man hours for each
category - only which apply.

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ADDENDUM #5

18. RESOURCE COST - Type in respective block costs of plant rental, telephone service (if known), tape used, number of reels, other (specify).
19. ARRESTS, NAMES & ADDRESSES - List all those persons whose arrests were responsible (immaterial to what degree) due to some monitored conversation resulting from this particular plant.

State & Federal Law requires each of these persons be given a notice of inventory (Advisement of intercepted communications) within ninety (90) days of the orders termination.

20. DOES NAME APPEAR ON OTHER FINAL PLANT REPORT - Type "yes" or "no" for each arrested person.
21. OTHER RELATED INSTALLATIONS - Type number of other related plants which contributed to investigation. (steps)
22. REPORTING DATE - Self-explanatory
23. NAME AND BADGE NUMBER - Self-explanatory

NEW JERSEY STATE POLICE

ELECTRONIC SURVEILLANCE
FINAL PLANT REPORT

(1) Station/Unit		(2) Code	(3) Plant number		(4) Division case number		
(5) Person Authorizing the Intercepts	Name and address of Judge		Application Order or Extension				
	Name and address of person authorizing interception application		(6) Crime specified				
			(7) Period originally requested		Date of application	Date of order	
			(8) LENGTH OF EXTENSIONS REQUESTED	1st	2nd	3rd	
(9) Type of interceptions <input type="checkbox"/> Wire tap <input type="checkbox"/> Microphone / eavesdrop <input type="checkbox"/> Other (specify)							
(10) Location of interception <input type="checkbox"/> Resident <input type="checkbox"/> Apartment <input type="checkbox"/> Multiple dwelling <input type="checkbox"/> Business location <input type="checkbox"/> Other (specify)							
(11) Description of Intercepts	Duration			(12) Number of days in actual use	Number of		(16) Average frequency of intercepts per day
	Between and	Month	Day		Year	(13) Persons whose communications were intercepted	
NATURE OF RESOURCES							
(17) Manhours - Monitoring		Installation		Transcribing		Other	
RESOURCE COST							
(18) Plant rent		Telephone service		Tapes used		No. of reels	
						Other (specify)	
ACTION RESULTING FROM INTERCEPTED COMMUNICATIONS							
(19) Arrests				(20) Does name appear on any other final report			
NAMES AND ADDRESSES				Yes No			
(21) Other related installations				(22) Reporting date		(23) Name and badge number	

OCTOBER 13, 1970
ADDENDUM #6

COURT RESULTS

The Final Plant Report, while it provides a good portion of the data required to be reported to State and Federal Government as required by law, fails to supply subsequent resulting court action. This information must be supplied yearly as a supplemental report to previous actions. The Final Plant Report completes the applicants obligations as far as required Electronic Surveillance Reports and fails to fill this void.

However, it is still necessary to extract certain resulting court action from the State Police Investigation Reporting System. The "Final Arrest Report" carries the court results, trials, and convictions, necessary to meet statutory requirements.

In order that this information may reach the Electronic Surveillance Unit whose responsibility it is to prepare these statistics, the following shall be accomplished:

To Operations Order #228 Investigation Reporting System - Addendum #1 Instructions for Preparation of Arrest - Section 68 "Narrative" the following shall be added:

"if the arrest is the result of evidence gathered through a court authorized electronic surveillance, type "Elec. Sur." in the upper right hand corner of this report below the perforation."

The Bureau of Internal Records, shall forward a photostatic copy of a Final Arrest Report, carrying this identification, to the Electronic Surveillance Unit.

JUNE 29, 1971
ADDENDUM #7

ELECTRONIC SURVEILLANCE MONITORING

- I. Monitoring shall take place only so long as it is required to establish the elements of the offense and the identity of all persons involved.
- II. Hours stipulated in the court order for monitoring shall not be exceeded. There shall be self-imposed restrictions on the hours of monitoring in an effort to minimize or eliminate interception of non-pertinent conversation.
Monitoring hours shall be regularly reviewed by the monitors and their supervisors to achieve that objective.
- III. During the period specified in Paragraph #1 monitoring shall take place every day permitted by court order with the following exceptions:
 - A. When it is learned that incriminating conversation is not likely to be intercepted during a given period of time, e.g. principal suspect on vacation or out of town.
 - B. Where in the judgment of the investigators the elements of the offense have been established and the perpetrators identified, but some investigative consideration necessitates recommencing monitoring

at a later date, e.g. preparation for a raid.

- C. Where monitoring an electronic surveillance installation is one phase of a broader investigation and it is necessary to suspend monitoring during an interim period to conduct other forms of investigation in preparation for further monitoring.

IV. If monitoring of an electronic surveillance installation is to be suspended for a period of time the following procedure will be followed:

- A. The unit leader monitoring the installation will contact the Electronic Surveillance Unit supervisor on the last date of operation and advise him that monitoring will be suspended temporarily.
- B. A log will be prepared and forwarded for each day of suspended operation. This log will list reason for suspension and be signed by the Plant and Unit Supervisors.
- C. Prior to resuming monitoring the Unit Supervisor will contact the Electronic Surveillance Unit supervisor or his representative and advise him of the intention to resume monitoring.
- D. Logs and tapes will be forwarded in the prescribed manner.

Electronic Surveillance: Issues at Trial

Outline

Summary-----	¶1
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Summary

¶1 The admissibility of tape recordings, after constitutional and statutory objections are met, is an evidentiary issue. A foundation must be laid that the device works, the operator was competent, and that the recording is authentic. A showing of compliance with statutory sealing requirements must also be made. Before a recording can be introduced, the parties speaking must be identified and it must be shown that the recording is complete. Evidentiary use of tape recordings include direct evidence, impeachment, and witness recollection refreshment. Techniques of presenting tape recordings include the use of ear phones, public address systems, and transcripts.

I. Introduction

¶2 The great weight of authority sanctions the use of sound recordings obtained through electronic surveillance¹ where the matters recorded are competent and relevant,^{1a}

¹ As used in [these materials] the term electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation.

See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

^{1a} Only evidence which is competent and relevant is admissible. J. Wigmore, Evidence §§9-12 (3d ed. 1940). See also Fed. R. Evid. 401-03. For discussion of issues concerning sound recordings, see generally Annot., "Admissibility in Evidence of Sound Recording as Affected by Hearing and Best Evidence Rules," 58 A.L.R.3d 598 (1974); Annot., "Omission or Inaudibility of Portions of Sound Recordings as Affecting Its Admissibility in Evidence," 57 A.L.R.3d 746 (1974); Annot., "Admissibility, in Criminal Prosecutions, of Evidence Secured by Mechanical or Electronic Eavesdropping Devices," 97 A.L.R.2d 1283 (1964); Annot., "Identification of Accused by Voice," 70 A.L.R.2d 995 (1960); Annot., "Admissibility of Sound Recording as Evidence in Federal Criminal Trial," 10 L.Ed.2d 1169 (1964). See also ABA Standards for Criminal Justice: Electronic Surveillance (approved draft 1971); ABA Standards for Criminal Justice: Discovery and Procedures before Trial (approved draft 1970); Zuckerman and Lyons, "Strategy and Tactics in the Prosecution and Defense of Complex Wire-Interception Cases," Commission Studies: National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 25-59 (1976) (hereinafter cited Commission Studies).

and the recordings were made in compliance with the various wiretap statutes.² Sound recordings may prove to be an invaluable aid to the court and the jury. In fact, a sound recording may be more satisfactory and persuasive evidence than written and signed documents or oral testimony of witnesses, who must rely solely upon their memories.³ Sound recordings are used for a variety of purposes. In the majority of instances, they are used as independent evidence of the fact in question,⁴ but they may also be

²The 24 jurisdictions which have enacted wiretap statutes and their respective statutes are: 18 U.S.C. §§2510-2520 (1968); Ariz. Rev. Stat. Ann. §§13-1051 to -1061 (Supp. 1973); Colo. Rev. Stat. Ann. §§16-15-101 to -104, 18-9-301 to -310 (1973); Conn. Gen. Stat. Ann. §§53a-187 to -189, 54-41a to -41s (Supp. 1975); Del. Code Ann. tit. 11, §§1335-36 (1974); D.C. Code Ann. §§23-541 to -556 (1973); Fla. State Ann. §§934.01 - .10 (Supp. 1975); Ga. Code Ann. §§26-3001 to -3010 (1972); Kan. Stat. Ann. §§22-2514 to -2519 (1974); Md. Cts. & Jud. Pro. Code Ann. §§10-401 to -408 (1974); Mass. Gen. Laws Ann. ch. 272 §99 (Supp. 1975); Minn. Stat. Ann. §§626A.01 to -.23 (Supp. 1975); Neb. Rev. Stat. §§86-701 to -707 (1971); Nev. Rev. Stat. §§179.410 to .515, 200.610 to .690 (1973); N.H. Rev. Stat. Ann. §§570-A:1 to -A:11 (1974); N.J. Stat. Ann. §§2A:156A-1 to -26 (1971); N.M. Stat. Ann. §§40A-12-1.1 to -1.10 (Supp. 1973); N.Y. Crim. Pro. Law §§700.05 to .70 (McKinney 1971), N.Y. Penal Law §§250.00 to .20 (McKinney 1967); Ore. Rev. Stat. §§141.720 to .990 (1974); R.I. Gen. Laws Ann. §§12-5.1-1 to -16 (Supp. 1974); S.D. Compiled Laws Ann. §23-13A-1 to -11 (Supp. 1974); Va. Code Ann. §§19.1-89.1 to -89.10 (Supp. 1975); Wash. Rev. Code Ann. §§9.73.030 to .100 (Supp. 1974); Wis. Stat. Ann. §§968.27 to .33 (Supp. 1975).

³See discussion in text, infra at ¶6.

⁴See, e.g., Zamloch v. United States, 193 F.2d 889 (9th Cir.), cert. denied, 343 U.S. 934 (1952) (conspiracy); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (treason); United States v. Schanerman, 150 F.2d 940 (3d Cir. 1945) (bribery).

used to corroborate other evidence,⁵ to impeach the credibility of a witness,⁶ or to refresh the memory of a witness.⁷ Before a sound recording may be used, however, a proper foundation must be laid.⁸ The usual procedure followed in determining the admissibility of a sound recording is having the trial judge listen to the recording out of the presence of the jury and rule on its admissibility as a matter of law.⁹

II. Objections to the Tape Recording as a Whole

¶3 The rule against hearsay is often invoked when a tape recording is offered into evidence. The ability to cross-examine to determine the weight to be given to a particular piece of evidence is a characteristic feature of Anglo-Saxon trial advocacy. The objection is sometimes made that a tape recording cannot be cross-examined or that its contents are hearsay. Neither objection is sound without

⁵Kilpatrick v. Kilpatrick, 123 Conn. 218, 225, 193 A. 765, 768 (1937) (conversation testified to was simultaneously recorded); People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (2d Dept. 1950) (complaining witness in rape testified to conversation with defendant which had been recorded at her end of the line).

⁶See discussion in text, infra at ¶38.

⁷See discussion in text, infra at ¶39.

⁸See discussion in text, infra at ¶7.

⁹Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962).

a careful examination of the facts, for while the tape cannot be cross-examined, its operator may be, and the rule against hearsay itself is fraught with exceptions and qualifications.¹⁰ Hearsay objections may, for example, be defeated by,

1. the co-conspirator rule;
2. the admissions exception;
3. the declaration against interest exception; and
4. the good hearsay rule.

Where a conspiracy is involved,¹¹ statements of co-conspirators which incriminate the defendant are admissible.¹² These statements, however, must be made during the course of the conspiracy;¹³ they also must be made in the furtherance of the conspiracy.¹⁴ Any other statements do not fall within the exception.

¹⁰ See generally J. Wigmore, Evidence §§669, 1420-27 (Chadbourn rev. 1970).

¹¹ In instances where a wiretap is being employed, one of the charges for which the defendants are indicted is usually conspiracy.

¹² Fed. R. Evid. 801(d)(2)(E) defines such statements as non-hearsay. N.J. Rules of Evidence, Rule 63(9)(b) make such statements an exception to the hearsay rule.

¹³ Logan v. United States, 144 U.S. 263, 309 (1892); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972) (must be so connected as to be considered a part of the conspiracy). See also Note, "Developments in the Law of Conspiracy," 72 Harv. L. Rev. 920, 983-86 (1959).

¹⁴ Comm. v. McDermott, 255 Mass. 575, 152 N.E. 704 (1926); People v. Ryan, 263 N.Y. 298, 305, 189 N.E. 225, 227 (1934).

¶4 If the recorded statement was made by the defendant, it is an admission, and it can be used against him.¹⁵ If the recorded statement was made by another party, i.e., a mere witness, it may also be admissible as a declaration against interest. This is a limited exception to the hearsay rule. The statements must be harmful to the speaker's pecuniary or penal interest. In most instances, the speaker must also be unavailable to testify.¹⁶

¶5 The purpose of the rule against hearsay is to prevent the admission of unreliable or untrustworthy evidence. But where the evidence offered is both trustworthy and reliable and there is a need to receive the evidence, the need for the rule disappears. There has been a trend in recent years to accept this argument.¹⁷ The new Federal Rules of Evidence have, in part, adopted this position.¹⁸ This position should also be adopted when a

¹⁵Fed. R. Evid. 801(d)(2)(A) defines an admission as non-hearsay. At common law, it is a well recognized exception to the rule against hearsay.

¹⁶See Fed. R. Evid. 804(b)(3).

¹⁷See Dallas County v. Commercial Union Assurance Co., 268 F.2d 388, 396 (5th Cir. 1961) (newspaper in library); United States v. Iaconetti, 18 Crim. L. Rptr. 2419 (E.D. N.Y. Jan. 8, 1976) (evidence more probative than anything else and it deals with an important matter); United States v. Barbat, 284 F. Supp. 404 (E.D. N.Y. 1968) (cites Dallas County for non-mechanical application of rule against hearsay); Hew v. Aruda, 51 Hawaii 451, 462 P.2d 476 (Sup. Ct. 1969) (businessman's statements to an attorney); Woll v. Dugas, 104 N.J. Super. 586, 250 A.2d 775 (App. Div. 1969) (dicta).

¹⁸See Fed. R. Evid. 803(24), 804(b)(5) which allow the use of hearsay evidence that is as reliable as the other listed exceptions.

hearsay objection is made to the offer of a tape recording as evidence. Where the tapes can be shown to be accurate and authentic and there is a need to receive them, they should be admitted.¹⁹

¶6 Challenges to the admissions of a tape recording may also be made on the best evidence rule. It is clear, however, that the tape recording is the best evidence of a conversation; the testimony of a witness to the conversation is only secondary.²⁰ A tape recording, if authentic, is clearly more accurate than the memory of a witness.²¹

¹⁹In wiretap cases, the need to receive the material is great. Without it, convictions of the higher echelon of the criminal order cannot be obtained, because they are generally not otherwise connected with the criminal conduct.

The admission of tapes does not, however, solve all hearsay problems. Where there is hearsay within hearsay, there must be an exception for each to allow them to be admitted. Fed. R. Evid. 805. See also Palmer v. Hoffman, 318 U.S. 109 (1943); Kelly v. Wasserman, 5 N.Y.2d 425, 158 N.E.2d 241, 185 N.Y.S.2d 538 (1959); Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

²⁰United States v. Jacobs, 451 F.2d 530, 542 (5th Cir.), cert. denied, 405 U.S. 1049 (1971) (recollection of witness a year or more after conversation occurred questioned); Lindsey v. United States, 332 F.2d 688, 691 (9th Cir. 1964) (recording more accurate); United States v. Klosterman, 147 F. Supp. 843, 849 (E.D. Pa.), rev. on other grounds, 248 F.2d 191 (3d Cir. 1957) (recording apt to be more accurate and complete); State v. Dye, 60 N.J. 518, 529, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972) (defendant has the right to use original tapes for purposes of cross-examination or to replay them for the jury); People v. Feld, 305 N.Y. 322, 329, 113 N.E.2d 440, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953) (tapes offered because of severe attack upon witness's credibility); People v. Mitchell, 40 App. Div.2d 117, 118, 338 N.Y.S.2d 313, 315 (3d Dept. 1972) (generally admissible).

²¹Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956).

In fact, a defendant may be better protected by a tape recording, which includes the entire conversation, than by the testimony of a mere witness, who is likely to recall only the most crucial and incriminating parts of a conversation.²²

III. Laying the Foundation

¶7 Before a tape recording may be admitted into evidence, a foundation must be laid. The government must show that

1. the recording device was capable of taping the conversation now offered as evidence;
2. the operator was competent to operate the device;
3. the recording is authentic, without changes, additions, or deletions;
4. the recording was preserved in a manner that is shown to the court;
5. the speakers are identified; and
6. the conversation elicited was made voluntarily, in good faith, and without inducement.²³

²²United States v. Klosterman, supra note 20.

²³See, e.g., United States v. McKeever, 169 F. Supp. 426, 430 (S.D. N.Y. 1958) (defendant wished to offer tapes of conversations with the alleged victim of extortion made after the indictment to prove a prior inconsistent statement); United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (quoting McKeever); State v. Driver, 38 N.J. 255, 287, 183 A.2d 655, 672 (1972) (foundation similar to McKeever established where recording is offered to corroborate a confession).

The precise elements of the foundation are discretionary with the judge. Brandow v. United States, 268 F.2d 559 (9th Cir. 1959). He must determine if the foundation established is such that a jury could find that the tapes are connected to the defendant. Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 961, reh. denied, 377 U.S. 1010 (1964). But the location of the tap need not be revealed. State v. Travis, 133 N.J. Super. 326, 332, 336 A.2d 489 (App. Div. 1975).

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These facts must be shown in order to prove that the recording accurately demonstrates what it purports to demonstrate.²⁴

A. Credibility of Device

¶8 Before any evidence obtained through the use of scientific or technical devices may be introduced into evidence, it must be shown that the device has a basis in the laws of nature, i.e., that it works. When the device is first used, this entails lengthy expert testimony. Eventually, this burden may be avoided, and the court may take judicial notice of facts which are common knowledge. But a court may take judicial notice only where the fact is one of common knowledge in the locality of the court and is by its nature indisputable²⁵ or where there is general scientific acceptance of the device as a reliable means of ascertaining the truth.²⁶ The Second Circuit, in United States v. Sansone,²⁷ took judicial notice of the general public's familiarity with the use of tape recorders and admitted the tape recording being

²⁴ See, e.g., 3 J. Wigmore, Evidence, §790 (Chadbourn rev. 1970).

²⁵ Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919).

²⁶ State v. Cary, 90 N.J. Super. 323, 239 A.2d 680, aff'd, 56 N.J. 16, 264 A.2d 209 (1970).

²⁷ 231 F.2d 887, 890 (2d Cir.), cert. denied, 351 U.S. 987 (1956) (defendant's conversation with informer overheard by a concealed transmitter and recorded by portable recording set two hundred feet away).

offered.²⁸ Taking judicial notice is a matter within the judge's discretion. If the judge resists, proof is required.

¶9 Once there has been a showing that the device can work, it must then be shown that the particular device used did work. Usually this is done through the testimony of the person who operated the device. This task is made simpler if

1. a test of the device is made before there is any transmission, recording, etc.; or
2. a test is made after the interception to ensure that the device was working.²⁹

²⁸Id. at 890.

We think that the general public, in this day of car telephones, home recording instruments, and amateur transmitting and receiving equipment, is sufficiently aware of the effectiveness and the weaknesses of these mechanical devices so that the party advancing the evidence need not lay an elaborate foundation of expert testimony in order to be admitted.

²⁹United States v. McMillan, 508 F.2d 101, 104-05 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (tapes played back immediately after recording to ensure that recorder was operating); United States v. Sansone, 231 F.2d 887, 890 (2d Cir.), cert. denied, 351 U.S. 987 (1956) (test made prior to recording); United States v. McKeever, 169 F. Supp. 426, 430-31 (S.D. N.Y. 1958) (testimony that recording device was capable of receiving from a distance and recording conversations); State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972) (agents tested device by placing a phone call to the tapped phone, a pay phone in a liquor store, and conversing briefly with the person who answered; test was recorded and tape itself could later be used to corroborate agent's testimony); People v. Vellella, 28 Misc.2d 578, 580-82, 216 N.Y.S.2d 488, 490-91 (Ct. of Gen. Sess. N.Y. City 1961) (explicit testimony by persons who installed and operated recorder).

The operator may then testify to the results of these tests and satisfy the requirement.

B. Competency of Operator

¶10 The person who operates the recording device must be competent.³⁰ There is no licensing requirement to operate a recording device,³¹ but if the agent has any special training or experience qualifying him to operate the device, he should include it in his testimony.³² If the agent lacks training or experience, however, he must present evidence of his competence.³³

C. Authenticity of Recording

¶11 While the requisite foundation for tape recordings may vary at times, the element of authenticity is universally recognized as required. The agents who conducted the wiretaps must testify that the tape recorder accurately recorded what was said in the original

³⁰United States v. McKeever, supra note 23 at 430. See also Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956) (agent testified to the operation of the recording device, his method of operating it, and the accuracy of the recording).

³¹Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962) (failure to have license if one were required would not render the evidence inadmissible).

³²State v. Dye, supra note 29 at 527, 291 A.2d at 835.

³³United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); State v. Driver, 38 N.J. 255, 287, 183 A.2d 655, 672 (1962).

conversation overheard by the monitors.³⁴ A party or a witness to the conversation may also testify that the tape accurately recorded the conversation he heard.

¶12 Accuracy includes a showing that no changes, additions, or deletions were made. This requirement, in a large part, serves to prevent falsification of the tape recording.³⁵ The potential for abuse with skillful editorial manipulation can be great.³⁶ The manipulation can, at times, be undetectable, but the presence of unusual or unexpected sounds or the absence of expected sounds may be an indication of falsification.³⁷ If a challenge

³⁴United States v. Starks, 515 F.2d 112, 122 (3d Cir. 1975) (proof of accuracy must be clear and convincing); United States v. Stubbs, 428 F.2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 993 (1971) (no abuse of discretion where judge found tape to be on the whole accurate and complete).

³⁵People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1958).

³⁶Id. See generally Weiss and Hecker, "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," Commission Studies 216-40 (1976).

³⁷Signs suggestive of falsification are:

1. gaps;
2. transients (abrupt sounds of short duration);
3. fades (reduction in strength of sound);
4. equipment sounds;
5. extraneous voices; and
6. information inconsistencies.

Weiss and Hecker, supra note 36 at 216, 220-21. These signs may be innocuous, the product of environmental conditions, instrument malfunctions, or improper recording technique. Id. at 222. But they may also be the sign of purposeful falsification by means of:

based upon suspect sounds is made, the burden of proving the accuracy will be upon the government. It may be possible to prove that the tapes have not been erased, spliced, or altered in any way, but the task will, in all likelihood, be expensive and arduous since it requires expert scientific examination and testimony.³⁸ It is not unusual, however, for the accuracy of the tapes to be stipulated by the defendant after constitutional and other objections are overcome.³⁹

D. Preservation of Recording

¶13 Integrity is related to authenticity. The integrity of the tapes may be shown with proof that

1. the sealing requirements, if any, have been fulfilled; and
 2. the chain of custody prevented access to the tapes by any unauthorized parties.
-

37 (continued)

1. deletion;
2. obscuration (making part of recording unintelligible);
3. transformation (changing or rearranging portions to alter meaning); or
4. synthesis (generation of an entirely artificial recording).

Id. at 223-24.

³⁸ People v. Feld, 305 N.Y. 322, 113 N.E.2d 440, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953) (expert called by defense to testify that the tapes were not altered).

³⁹ See, e.g., United States v. James, 494 F.2d 1107 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

¶14 The purpose of the sealing requirements⁴⁰ is to ensure the integrity of the tapes and to preserve the confidentiality of sensitive information.⁴¹ A delay in sealing or sealing by someone other than the judge is excusable error if a satisfactory explanation can be made for the failure, a showing is made that the requirements were substantially complied with, and if no showing is made that the defendant was prejudiced.⁴² But if there is no explanation, the tape

⁴⁰18 U.S.C. §2518(8) (a) (1968) provides:

. . . Immediately upon the expiration of the period of the order or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

See also N.J. Stat. Ann. 2A:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.50 (McKinney 1971). The Massachusetts statute, Mass. Gen. Laws Ann. ch. 272, §99(M) and (N) (Supp. 1975) does not explicitly require sealing. The integrity requirement can be satisfied through proof of custody. *Commonwealth v. Vitello*, ___ Mass. ___, 327 N.E.2d 819, 844 (1975).

⁴¹*United States v. Cantor*, 479 F.2d 890, 893 (3d Cir. 1972) (section 2518(8) designed to ensure orders and applications are treated confidentially).

⁴²*Id.* at 893 (although appropriate for judge to seal, agent permitted to seal; judge's sealing would not add to confidentiality); *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (due to mistaken impression that issuing judge had to seal, there was a thirteen day delay); *People v. Blanda*, 80 Misc.2d 79, 362 N.Y.S.2d 735 (Monroe County Ct. 1974) (delay from Friday to the following Monday excusable).

recordings are not admissible.⁴³

¶15 A chain of custody must also be shown. The purpose is to both ensure integrity and to provide an additional check upon the possibility of falsification.⁴⁴ The custodial care of the tape recordings must at all times be reasonable.⁴⁵ Once the tapes are sealed, custody is to be wherever the court directs. Often this is with the law enforcement agencies because their facilities are, by and large, better equipped for safekeeping.⁴⁶ The same standard of care applies to the custody of the tapes

⁴³People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1974) (explanation offered that judge knew of storage arrangements and the tapes were needed for transcription and analysis was inadequate explanation for lack of seal when measured against the potential for abuse through skillful editorial manipulation which may be undetectable or detectable only with expensive expert analysis). See also People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976) (tapes previously sealed were unsealed two or three days prior to trial for purposes of the trial without judicial supervision; even without claim of alteration, such a procedure is prohibited; failure to comply with sealing requirements renders the evidence inadmissible).

⁴⁴See discussion in text supra at ¶11. Sealing itself helps to establish claim of custody. People v. Nicoletti supra note 43 at 253, 313 N.E.2d at 338, 356 N.Y.S.2d at 858. See also United States v. Fuller, 441 F.2d 755, 762 (4th Cir.), cert. denied, 404 U.S. 829 (1971) (where tape made by defendants was seized by government agents, they had to establish a chain of custody from the time of seizure to the time of trial).

⁴⁵People v. Blanda, 80 Misc.2d 79, 86, 362 N.Y.S.2d 736, 744 (Monroe County Ct. 1974) (reasonable standards include labeling, initialing, cataloging, and safekeeping).

⁴⁶Congress recognized this possibility. S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968) states:

during the investigation and prior to sealing even though this time period is not dealt with in the various wiretap statutes.⁴⁷

E. Identification of Speakers

¶16 The identity of the speakers on a recording is essential. Ultimately, it is a fact question to be decided by the jury.⁴⁸ Voice identification is usually a relatively simple task, but the government may be forced to present extensive evidence of voice identification if the defense offers evidence to show that the defendant's voice is not on the

46 (continued)

Most law enforcement agency's facilities for safekeeping will be superior to the court's and the agency normally should be ordered to retain custody, but the intent of the provision is that the records should be considered confidential court records.

See also 18 U.S.C. §2518(8)(a) and (b)(1968); N.J. Stat. Ann. 2a:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.55(2) (McKinney 1971). Mass. Gen. Laws Ann. ch. 272, §99(N)(1) (Supp. 1975) requires storage in a place to which only the judge or court personnel have access. Cf. United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972) (tapes kept by agent); State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972) (tapes kept in prosecutor's office).

⁴⁷ People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974) (tapes stored in agent's footlocker unreasonable); People v. Blanda, 80 Misc.2d 79, 83-86, 362 N.Y.S.2d 735, 741-44 (Monroe County Ct. 1972) (tapes kept in detective's safe to which no one else had combination and in officer's locker to which he had only key found to be reasonable custody).

⁴⁸ United States v. Whitaker, 372 F. Supp. 154, 163 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974) (without opinion), cert. denied, 419 U.S. 1113 (1975).

tape.⁴⁹ Further, voice identification must be particularized; connection of the voices on a tape recording to a group of defendants as a whole is not sufficient.⁵⁰

Identification can be made by:

1. circumstantial "clues" on the tapes themselves which identify the speaker;
2. testimony of anyone familiar with the voice;
3. expert testimony based upon spectrogram (voice) analysis; and
4. permitting the jury to compare for itself the voice on the tape with the voice of the defendant or an exemplar of his voice.⁵¹

Where several possible methods of identification are available⁵² they should all be used, particularly if the

⁴⁹ There are few examples in the cases of a defendant attacking the prosecution's identification, usually because either the defendant identifies himself on the tape, there is other evidence of whose voice it is, or he concedes that the voice is his own. Usually, too, the defendant recognizes that there is no constitutional objection to taking a voice exemplar. United States v. Dionisio, 410 U.S. 1 (1972).

⁵⁰ People v. Abelson, 309 N.Y. 643, 649, 132 N.E.2d 994, 886 (1956) (conviction reversed and a new trial ordered where agent whose testimony was not based upon personal familiarity identified voices as belonging to a group of defendants rather than one particular defendant).

⁵¹ A fifth, but not really viable, method of voice identification appears in People v. Lubow, 29 N.Y.2d 58, 272 N.E.2d 331, 323 N.Y.S.2d 829 (1971). There, no evidence of voice identification was offered by the prosecution. Instead, the judges (there was no jury) were given transcripts of the tapes to use as aids in listening to the tapes. The transcripts were not admitted into evidence. These transcripts identified the speakers by name. The defense counsel made no objection. Id. at 68, 272 N.E.2d at 336, 323 N.Y.S.2d at 835.

⁵² Most tapes will contain some circumstantial evidence identifying the speaker as the defendant. Moreover, the agent monitoring the wiretap often will become familiar with the defendant's voice either through pre-wiretap investigation or post-wiretap questioning.

defendant challenges the identification.⁵³

¶17 Generally, the most effective means of voice identification is through the use of circumstantial evidence.⁵⁴

The most direct source of evidence is, of course, those tape recordings in which the parties to the conversations identify themselves by name.⁵⁵ The tapes may also reveal a planned course of action. Where the plan is later carried out by the defendants, this is circumstantial evidence

⁵³United States v. Cox, 449 F.2d 679, 689 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972) (circumstantial and agent); Chapman v. United States, 271 F.2d 593 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960) (officer taping conversation testified to identity on tape and own familiarity); United States v. Moia, 251 F.2d 255 (2d Cir. 1958) (voice identification and eyewitness identification); United States v. Sample, 378 F. Supp. 44, 51-54 (E.D. Pa. 1974) (spectrogram and eyewitness); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973) (agent plus circumstantial). See generally, Zuckerman and Lyons, supra note 1a at 45-46.

⁵⁴Carbo v. United States, 314 F.2d 718, 738 (9th Cir. 1963), cert. denied, 377 U.S. 961, reh. denied, 377 U.S. 1010 (1964) (conversation recorded by two independent means); State v. Molinaro, 117 N.J. Super, 276, 291, 284 A.2d 385, 393 (Essex County Ct. 1971), rev. on other grounds, 122 N.J. Super. 181, 199 A.2d Div. 1973) (non-criminal conversation circumstantial evidence tending to establish identity).

⁵⁵United States v. Cox, 449 F.2d 679, 689 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972) (voice on tape said "this is Maurice"; defendant was Maurice LaNear; phone also registered to defendant); Palos v. United States, 416 F.2d 438, 440 (5th Cir.), cert. denied, 397 U.S. 980 (1969) (government informant dialed number registered to defendant, asked "Palitos?", and received response "yes, this is he."); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973) (voice of defendant identified by references to "Frank" on tape of conversations overheard on wiretap of defendant's phone).

identifying the defendants as the speakers.⁵⁶ The defendant's voice may also be identified by evidence linking him to placing a phone call at the time the monitors were activated.⁵⁷ In each instance, however, the identification evidence must be linked to the defendant, and where the connection is not readily apparent, testimony should be given explaining the connection.

¶18 Voice identification may also be by opinion testimony which is based upon hearing the voice at any time under circumstance connecting it with the alleged speaker.⁵⁸ Such testimony may be given by a witness who was acquainted with the speaker,⁵⁹ a government agent, including one who

⁵⁶United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974), cert. denied, 419 U.S. 916 (1975) (plan enacted by speakers); United States v. Bonanno, 487 F.2d 654, 659 (2d Cir. 1973) (substance of communication may be sufficient to form a prima facie case); United States v. Alper, 449 F.2d 1223, 1229 (3d Cir. 1971), cert. denied, 405 U.S. 988 (1972) (Similarity of content of calls known to have been made to other parties).

⁵⁷United States v. Moia, 251 F.2d 255, 257 (2d Cir. 1958) (testimony that defendant entered phone booth to answer incoming call); State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972) (defendant walked toward phone which was out of sight in liquor store before each call came over monitor).

⁵⁸Fed. R. Evid. 901(b) (5).

⁵⁹United States v. Whitaker, 372 F. Supp. 154, 162 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974) (without opinion), cert. denied, 419 U.S. 1113 (1975) (identification by woman who knew defendant); State v. Vanderhave, 47 N.J. Super. 483, 488, 136 A.2d 296, 299 (App. Div. 1957), aff'd sub nom., State v. Giordina, 27 N.J. 313, 142 A.2d 609 (1958) (identification by switchboard operator who overheard conversation).

conducted the wiretap,⁶⁰ or a party to the tapped conversation who consented to the wiretap.⁶¹ Familiarity with the voice may be acquired before⁶² or after⁶³ the wiretap. Familiarity with the voice may be acquired differently from the way in which the voice was recorded. Any difference,

⁶⁰Chapman v. United States, 271 F.2d 593, 595 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960) (testimony by agents of conversations with defendants which were recorded); Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956) (agent who used minifon to record conversations identified speakers); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973) (testimony by agents corroborated by circumstantial evidence).

⁶¹People v. Brannaka, 46 App. Div.2d 929, 361 N.Y.S.2d 434 (3d Dept. 1974).

⁶²United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974) (identification by agent who had conducted surveillance of suspects in restaurant and bar for at least seventy hours); United States v. Sansone, 231 F.2d 887 (2d Cir.), cert. denied, 351 U.S. 887 (1956) (one prior conversation with defendant); Commonwealth v. Murphy, 356 Mass. 604, 611, 254 N.E.2d 895, 900 (1970) (phone conversation); People v. Dinan, 15 App. Div.2d 786, 787, 224 N.Y.S.2d 624, 627 (2d Dept.), aff'd, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, cert. denied, 371 U.S. 877 (1962) (remoteness of personal conversations between identifying witness and defendant and voice identification goes only to weight). But see State v. Malaspina, 120 N.J. Super. 26, 30, 293 A.2d 224, 226 (App. Div.), cert. denied, 62 N.J. 75, 299 A.2d 73 (1972) (identification resting purely on ability to recognize defendant's voice from memory unsatisfactory from state's standpoint; proof by content).

⁶³United States v. Cox, 449 F.2d 679, 689-90 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972) (voice identified to police as defendant's); United States v. Moia, 251 F.2d 255 (2d Cir. 1958) (agent's identification based upon a single conversation subsequent to twelve taped conversations); People v. Strollo, 191 N.Y. 42, 61, 83 N.E. 573, 580 (1903) (testimony of phone conversation with man who was subsequently recognized to be defendant was weak, but not incompetent).

however, between the circumstances surrounding the basis of the witness's familiarity with a person's voice and the transmission of the voice which the witness is identifying will detract from the weight to be given to the evidence.⁶⁴

¶19 At times, an attempt may be made to show voice identification through spectographic analysis.⁶⁵ For the analysis to be admissible, the government must show that it has a scientific basis in the laws of nature. The standard to be applied is whether there is general acceptance of the use of the device in the scientific community.⁶⁶ Most of the early cases excluded such analysis because the technique had not been adequately tested under field conditions.⁶⁷ But after extensive

⁶⁴United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), cert. denied, 417 U.S. 944 (1974) (observations from physical surveillance admissible although nominal); United States v. Whitaker, 372 F. Supp. 154, 165 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974) (without opinion), cert. denied, 419 U.S. 1113 (1975) (face to face conversation).

⁶⁵See Kamine, "Voiceprint Technique: Its Structure and Reliability," 6 San Diego L. Rev. 213 (1969); Romig, "Review of the Experiments Involving Voiceprint Identification," 16 J. Forensic Sci. 183 (1971); Comment, "The Admissibility of Voiceprint Evidence," 14 San Diego L. Rev. 129 (1969); Comment, "The Evidentiary Value of Spectrographic Voice Identification," 63 J. Crim. L. C. and P. S. 343 (1972). See also Annot., "Admissibility and Weight of Voiceprint or Sound Spectrograph Evidence," 49 A.L.R. 3d 915 (1973).

⁶⁶United States v. Stifel, 433 F.2d 431, 437 (6th Cir. 1970), cert. denied, 401 U.S. 994 (1971); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); Commonwealth v. Vitalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

⁶⁷See, e.g., People v. King, 266 Cal. App.2d 437, 72 Cal. Rptr. 478 (1968); State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (App. Div.), aff'd per curiam, 56 N.J. 16, 264 A.2d 437 (1968).

experiments⁶⁸ there seems to be a trend favoring admissibility.⁶⁹ Mere admissibility does not, however, determine the weight to be given to the evidence. If the spectrographic analysis is the only evidence offered to show voice identification, it may be subject to strict scrutiny.⁷⁰ At the present time, spectrographic analysis may best be employed as a means of corroborating other identification evidence.⁷¹

¶20 The jury may also be allowed to decide from their own impressions whose voice is on the tape. The jury can compare the voices on the tapes with the voices of the parties if they testify.⁷² In addition, the jury may also compare the voices on the tape with a voice exemplar

⁶⁸See Tosi, "Michigan State University Voice Identification Project," Voice Identification Research 35, 57-58 (L.E.A.A. 1972) (incorrect identification at 6%; suggests refinements to reduce error to 2%).

⁶⁹United States v. Baller, 519 F.2d 463, 466 (4th Cir. 1975); United States v. Franks, 511 F.2d 25, 33 (6th Cir.), cert. denied, 422 U.S. 1048 (1975) (admitted after 25 page inquiry into qualifications and reliability); United States v. Sample, 378 F. Supp. 44, 53 (E.D. Pa. 1974) (admitted only to corroborate other evidence); Commonwealth v. Lykus, ___ Mass. ___, 327 N.E.2d 671 (1975) (lengthy and comprehensive voir dire); State v. Anreatta, 61 N.J. 544, 549-51, 296 A.2d 641, 645-47 (1972) (mandates voir dire). But see United States v. Addison, 498 F.2d 741, 743-45 (D.C. Cir. 1974).

⁷⁰Commonwealth v. Lykus, supra note 69, 327 N.E.2d at 679.

⁷¹United States v. Sample, supra note 69 at 51-54.

⁷²People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (2d Dept. 1950) (jury instructed to compare after defendant testified).

of the defendant.⁷³ If an exemplar is used, however, it must be made under substantially similar circumstances to those of the recording with which it is to be compared.⁷⁴

F. Identification of Conversation

¶21 The particular conversation may be identified by showing:

1. the monitor's logs;
2. evidence derived from a pen register, number recorder, or technowriters; or
3. telephone records.

A monitor's log should include:

1. a notation of whether calls were incoming or outgoing;
2. the time of each call;
3. the phone numbers called;
4. a synopsis of the content of each call;
5. the numerical reading on the tape;
6. a designation of pertinent or non-pertinent; and

⁷³ Requiring a defendant to submit to a voice exemplar is not an intrusion upon his constitutional rights. United States v. Dionisio, 410 U.S. 1 (1973) (not testimonial). But the prosecution may be required to show admissibility before requiring an exemplar. State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967). See also Annot., "Requiring Suspect or Defendant in Criminal Case to Demonstrate Voice for Purposes of Identification," 24 A.L.R.3d 1261 (1969).

⁷⁴ United States v. Whitaker, 372 F. Supp. 154, 165 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975) (different recording machines at different distances does not invalidate voice exemplar).

7. the time monitoring began and ended each day.⁷⁵

¶22 A pen register can be used to show that a call was made and to where it was made. The use of a pen register is authorized by Title III.⁷⁶ The foundation required for its introduction is within the court's discretion.⁷⁷ Phone company records may be used to corroborate the accuracy of the pen register by showing that the numbers shown by the device are registered under the names of the suspects,⁷⁸ and that the calls were made at the time the calls were monitored.⁷⁹ The weight to be given to this evidence is, of course, a matter for the jury.

¶23 Phone company records may also be used to identify a conversation. The records can show what calls were made

⁷⁵State v. Molinaro, 117 N.J. Super. 276, 281, 284 A.2d 385, 388 (Essex County Ct. 1971), reversed on other grounds, 122 N.J. Super. 181, 299 A.2d 750 (App. Div. 1973). This is not required by the various wiretap statutes. But without such a record, it is extremely unlikely that the requisite minimization can be shown. A prosecutor should make certain these records are kept in antitipation of a criminal prosecution.

⁷⁶See, e.g., S. Rep. No. 1097, 90th Cong. 2d Sess. 90 (1968).

⁷⁷United States v. Ianelli, 477 F.2d 999, 1002 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975).

⁷⁸United States v. Kohne, 358 F. Supp. 1053, 1054 (W.D. Pa.), aff'd, 495 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973).

⁷⁹United States v. Whitaker, 372 F. Supp. 154, 167 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975).

from one phone.⁸⁰ The admissibility of business records is governed by statute.⁸¹ In general, the government must show that the records are made in the regular course of business, that it is the regular course of business to make such records, and that the particular records were made in the regular course of business.⁸² Once admitted, the weight to be given these records is a fact question for the jury.⁸³

IV. Presentation of the Tapes

¶24 Structuring the evidentiary presentation in a wiretapping case is crucial. The particular culpability of each defendant must be clearly shown. This requires a great deal of planning and preparation, especially if there is a large volume of intercepted communications.⁸⁴ These problems must be anticipated before trial. If they are not, a successful prosecution is not likely.

⁸⁰United States v. Fuller, 441 F.2d 755, 758 (4th Cir.), cert. denied, 409 U.S. 829 (1971) (phone records subpoenaed to show 259 calls made in six months between phone booth under surveillance and residence).

⁸¹Fed. R. Evid. 803(6) (1975); N.J. Rules of Evid. 63 (13) (West 1971); N.Y. C.P.L.R. 4518(a) (McKinney 1963).

⁸²United States v. Whitaker, supra note 79.

⁸³United States v. Gallo, 123 F.2d 229, 231 (2d Cir. 1941) (although the phone records are admissible, the weight to be given them may be slight as the identity of the caller is unknown).

⁸⁴See generally Zuckerman and Lyones, supra note 1a at 25.

A. Problems of Audibility

¶25 The admissibility of a tape recording is always within the sound discretion of the court.⁸⁵ The tape recordings often contain inaudible portions due to mechanical failures, background noises, or inadequate recording technique. A question often presented for the judge's determination is whether the inaudible portions are so substantial so as to render the recording as a whole untrustworthy.⁸⁶ The accepted procedure is for the judge to listen to the tapes out of the presence of the jury and to base his decision

⁸⁵United States v. Hodges, 480 F.2d 229, 234 (10th Cir. 1973) (inaudibility due to microphone leads connected under agent's clothing coming in contact with or rubbing against clothing); United States v. Frazier, 479 F.2d 983, 985 (2d Cir. 1973) (judge requested a transcript to aid in his determining whether inaudible portions would give a misleading impression to the jury); United States v. Avila, 443 F.2d 792, 795-96 (5th Cir.), cert. denied, 404 U.S. 944 (1971); United States v. Weiser, 428 F.2d 932, 937 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Cooper, 365 F.2d 246, 249 (6th Cir. 1966), cert. denied, 385 U.S. 1030 (1967); Monroe v. United States, 234 F.2d 49, 55 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956); State v. Dye, 60 N.J. 518, 530, 291 A.2d 825, 831, cert. denied, 409 U.S. 1090 (1972); People v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962); People v. Lubow, 29 N.Y.2d 58, 66, 323 N.Y.S.2d 829, 836, 272 N.E.2d 331, 336 (1971); People v. Gucciardo, 77 Misc. 2d 1049, 1050 (Kings County Ct. 1974) (audibility a preliminary question of fact).

⁸⁶Monroe v. United States, supra note 85 at 54-55:

No all-embracing rule on admissibility should flow from partial inaudibility or incompleteness. The Court of Appeals for the Third Circuit, in United States v. Schannerman, 150 F.2d 941, 944, has said that partial inaudibility is no more valid reason for excluding recorded conversations than the failure of a personal witness to overhear all of a conversation should exclude his testimony as to these parts he did hear. Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible.

upon this inspection.⁸⁷ Although substantial portions of the tape may be inaudible, it can be admitted into evidence⁸⁸ if the jury would not be forced to speculate as to the content of the inaudible portions.⁸⁹ A factor often given great weight in determining audibility and intelligi-

(Footnote 86, continued)

See also Gorin v. United States, 313 F.2d 641, 652 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965) (audible portions are not without evidentiary value and the inaudible portion is not so substantial that it renders the tapes more misleading than helpful); Cape v. United States, 283 F.2d 430, 435 (9th Cir. 1960) (test is whether the thread of conversation, though thin in places, has been broken).

⁸⁷ United States v. Chiarizio, 525 F.2d 289, 293 (2d Cir. 1975) (where materials available for one year but objection is made only one day before trial, defendant waives right to object; does not condone non-compliance with in camera); United States v. Bryant, 480 F.2d 785, 789 (2d Cir. 1973) (proper procedure is for out of court determination, but failure to do so does not require reversal); United States v. Kaufer, 387 F.2d 17, 19 (2d Cir. 1967) (trial judge determined out of court that tapes were sufficiently audible); Gorin v. United States, 313 F.2d 641, 652 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965) (recordings played in presence of counsel but not in presence of jury); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 675 (1962) (judge to determine if recording is sufficiently audible, intelligible, not obviously fragmented and whether editing of prejudicial material is required).

⁸⁸ United States v. Frazier, 479 F.2d 983, 985 (2d Cir. 1973) (admissible with 75% inaudible); United States v. Cooper, 365 F.2d 246, 249 (6th Cir. 1966), cert. denied, 385 U.S. 1030 (in general distinctly audible); United States v. Hall, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812 (1965) (admissible with 25% inaudible); State v. Seefelt, 51 N.J. 472, 487, 242 A.2d 322, 330 (1968) (clear and uninterrupted despite background noise).

⁸⁹ United States v. Skillman, 442 F.2d 542, 552 (8th Cir.), cert. denied, 404 U.S. 833 (1971) (as tape was admitted not for content but for impeachment, there would be no speculation); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962) (garbled and full of static and foreign sounds); People v. Sacchitella, 31 App. Div.2d 180, 181, 295 N.Y.S.2d 880, 882 (1st Dept. 1968) (thoroughly and completely inaudible).

bility is the ability of the court reporter to make a transcript of the tape.⁹⁰

B. Efforts to Mitigate the Effects of Inaudibility

¶26 Courts have attempted to find a way of overcoming the problem of inaudibility. In the past, they have:

1. used headphones;
2. made re-recordings; and
3. used transcripts.

¶27 Often, a tape recording may be difficult to hear and understand because of background noise in the courtroom. This problem is sometimes aggravated by the large size of the courtroom and the poor quality of the equipment. To alleviate these problems, judges have permitted the jury to listen to the tapes with headphones.⁹¹ The objection has been raised to this procedure that it denies the defendant his constitutional right to the public trial. This problem may be overcome by anticipating the objection and employing other means to ensure a public trial. In

⁹⁰United States v. Carlson, 423 F.2d 431, 440 (9th Cir.), cert. denied, 400 U.S. 847 (1970) (although government conceded partial inaudibility, court reporter was able to transcribe a substantial part of tape); People v. Lubow, 29 N.Y.2d 58, 68, 272 N.E.2d 331, 336, 323 N.Y.S.2d 829, 836 (1971) (stenographer who had not heard tape before was able to transcribe most of it).

⁹¹United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973) (headphones used after jury could not understand when tape was played in courtroom and the jury room); D'Aquino v. United States, 192 F.2d 338, 365 (9th Cir. 1951) (phonograph records used for voice identification); Gillars v. United States, 182 F.2d 962, 977 (D.C. Cir. 1950) (common sense approach to objection; no attempted secrecy); United States v. Kohne, 358 F. Supp. 1053, 1063 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973) (records are exhibits which are not passed around to spectators in courtroom).

D'Aquino v. United States,⁹² forty sets of earphones were installed, allowing the testimony to be heard by the judge, jury, clerk, reporter, counsel, defendant, and press.⁹³ In Gillars v. United States,⁹⁴ spectators were also given the opportunity to hear by having the court supply extra headphones.⁹⁵ In United States v. Kohne,⁹⁶ a public address system was employed in conjunction with the headphones.⁹⁷

¶28 The wiretap statutes recommend that a duplicate or work copy of a tape recording be made.⁹⁸ The sealing requirements of the wiretap statutes practically necessitate this procedure.⁹⁹ The work copies may be used to

1. maximize volume by recording on a larger tape;¹⁰⁰

⁹²192 F.2d 338 (9th Cir. 1951).

⁹³Id. at 365.

⁹⁴182 F.2d 962 (D.C. Cir. 1950).

⁹⁵Id. at 977.

⁹⁶358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973).

⁹⁷358 F. Supp. at 1063.

⁹⁸18 U.S.C. §2518(8)(a)(1968); Mass. Gen. Laws Ann. ch. 272, §99(N)(1)(Supp. 1975); N.J. Stat. Ann. §2A:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.55(2) (McKinney 1971).

⁹⁹People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (work copy not made; original used; sealing requirements violated).

¹⁰⁰United States v. Riccobene, 320 F. Supp. 196, 203 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (where copy was identical with substitution solely for listening convenience of the jury, court found no infirmity with procedure).

2. filter out background noises on the tape;¹⁰¹
3. preserve the original during preliminary proceedings;¹⁰²
or
4. edit to include only relevant conversations.¹⁰³

An inherent problem, however, is the inability to distinguish the duplicate from the original.¹⁰⁴ For the duplicate copy to be admissible, there must be a substantial showing of

¹⁰¹Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968) (the existence of a significant degree of background noise might interfere with the jury's understanding the substance of the conversation; reliable method existed of removing the interference by making a copy while running the tape through a suppression device; copy was admitted as an accurate reflection of the conversation); United States v. Knohl, 379 F.2d 400 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (filtering without determining if low pitched voices were lost); United States v. Madda, 345 F.2d 400, 403 (7th Cir. 1965) (testimony that entire conversation was re-recorded, that the material was identical on both tapes, that no sounds were dubbed, that the copy was more audible than the original, and that it accurately reflected the original before the copy was admitted).

¹⁰²379 F.2d at 440-41.

¹⁰³United States v. Whitaker, 272 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (2d Cir. 1974), cert. denied, 419 U.S. 1113 (1975) (summary tapes were played where agents testified to their accuracy); State v. Dye, 60 N.J. 518, 532, 291 A.2d 825, 832, cert. denied, 409 U.S. 1090 (1972) (procedure saved court 102-1/2 hours of tedious and unnecessary listening; no prejudice; copies of all work tapes given to defendant). See also supra ¶14.

¹⁰⁴United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975).

accuracy.¹⁰⁵ This showing may not be required if the defense will stipulate to its accuracy.¹⁰⁶ The defense counsel must be given an opportunity to compare the copy with the original,¹⁰⁷ but failure on his part to make a comparison will preclude his objections to its admission.¹⁰⁸

¶29 Objections are often made to the admission of a duplicate based upon the best evidence rule. The best evidence rule is founded upon a concern for accuracy.¹⁰⁹

¹⁰⁵Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., United States v. Marshall, 390 U.S. 1005 (1968) (not necessary to establish physical defect first); Knohl v. United States, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (testimony by keeper of tapes, prosecuting attorney, and FBI agents); United States v. Madda, 345 F.2d 400, 403 (7th Cir. 1965) (extensive testimony by agent); United States v. Whitaker, 373 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975) (notes in log pertaining to accuracy).

¹⁰⁶Johns v. United States, 323 F.2d 421 (5th Cir. 1963) (no objection may be made where the defense counsel openly conceded accuracy of re-recording).

¹⁰⁷United States v. Riccobene, 320 F. Supp. 196, 202 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (government offered to permit defense counsel to listen to both copies and original to insure that they were identical); State v. Breunig, 122 N.J. Super. 319, 329-32, 300 A.2d 346, 351-52 (App. Div. 1973) (synopsis tapes given to protect privacy of innocent third parties).

¹⁰⁸State v. Dye, 60 N.J. 518, 532, 291 A.2d 825, 832 (1972) (where tapes given to defendant five months before trial any question of accuracy should be settled by request before trial).

¹⁰⁹See 4 J. Wigmore, Evidence §§1173-75 (Chadbourn rev. 1970). See also Fed. R. Evid. 1002 (requires original) and 1003 (permitting duplicates unless there is a genuine question of the authenticity of the original).

Where there is the requisite showing of accuracy, the best evidence rule will not be barred the admission of the duplicate.¹¹⁰

¶30 A tape transcript is usually made. It serves

1. as an aid in trial preparation;¹¹¹
2. as a listening aid;¹¹²
3. to identify speakers for the jury;¹¹³
4. to aid appellate courts where an appeal is taken;¹¹⁴

¹¹⁰Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968) (ease of analysis, intelligibility, and mechanical convenience factors in justifying duplicate); United States v. Knohl, 379 F.2d 427, 441 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (where witness took tape and lost it, court found proper foundation had been laid for admission of duplicate); United States v. Riccobene, 320 F. Supp. 196, 203 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (where transfer was from small cassette to tape to improve hearing, court noted procedure of playing original was for jury convenience). See also supra ¶14; Annot., "Admissibility in Evidence of Sound Recording as Affected by Hearsay and Best Evidence Rules," 58 A.L.R.3d 598 (1974).

¹¹¹Zuckerman and Lyons, supra note 1a at 25.

¹¹²United States v. Bryant, 480 F.2d 785, 791 (2d Cir. 1973) (where transcripts inaccurate, judge's cautionary instruction to rely upon what is heard and not what is written satisfactory); United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972) (jury instructed to use tape only to identify speakers and not for its content although transcripts were admitted into evidence); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953) (recognized as assistance to understanding).

¹¹³See discussion in text, infra at ¶33.

¹¹⁴People v. Colombo, 24 App. Div.2d 505, 506, 261 N.Y.S.2d 836, 838 (2d Dept. 1965) (without a transcript, court found it impossible to review the conviction although it was sent the tape recordings).

5. to avoid the necessity of repetitive playing.¹¹⁵

The transcripts, regardless of whether they are introduced into evidence or not, must be shown to be accurate,¹¹⁶ usually by the person who prepared the transcripts.¹¹⁷ The parties may also stipulate to its accuracy after comparison with the tape.¹¹⁸ A failure to present any evidence of accuracy may be reversible error.¹¹⁹

¶31 Occasionally a written transcript is objected to as violative of the hearsay rule. In Duggan v. State¹²⁰ and

¹¹⁵United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972) (where repetitive playing to gain comprehension would unduly prolong and possibly prejudice the government's case because of overemphasis, transcripts were used as a listening aid).

¹¹⁶United States v. Bryant, 480 F.2d 785, 790-91 (2d Cir. 1973) (agent testified as to accuracy); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1043, 1057 (1968) (testimony of accuracy unchallenged); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953).

¹¹⁷United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Bryant, 480 F.2d 485, 490-91 (2d Cir. 1973); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 398 U.S. 1043, 1057 (1968); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953).

¹¹⁸United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972) (only where there was a difference between transcript and tape were both used); United States v. Koska, 442 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971) (proper limiting instructions despite stipulation).

¹¹⁹People v. O'Keefe, 280 App. Div. 546, 557-58, 115 N.Y.S. 2d 740, 744-45 (3d Dept. 1952), aff'd, 306 N.Y. 619, 116 N.E.2d 80 (1953), cert. denied, 347 U.S. 989 (1954). But see United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (foundation required only where accuracy is challenged).

¹²⁰189 So.2d 890 (Fla. 1966).

Bonicelli v. State,¹²¹ the courts found that the rule was violated because the court reporters who made the transcripts were not present when the recording was made and that the transcript was therefore pure hearsay. Consequently, it was inadmissible. These are the only reported cases on the point. Neither seems well taken. Instead, the issue should be seen as a best evidence question.

¶32 More often the transcript is objected to as violation of the best evidence rule. Where there is no contention that the transcript is inaccurate or there is a showing of accuracy, the tapes are generally admitted into evidence.¹²² Nevertheless, the matter within the court's discretion.¹²³ The courts have usually required both the tapes and the transcripts to be admitted into evidence if the transcripts are to be in evidence at all.¹²⁴ The courts, however, will still generally limit the use of the transcripts, directing

¹²¹339 P.2d 1063 (Colo. 1959).

¹²²United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972) (in camera inspection); United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971) (court had both tapes and transcript); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1043, 1057 (1968) (testimony on transcript accurate).

¹²³People v. Mitchell, 40 App. Div.2d 117, 121, 338 N.Y.S. 2d 313, 317 (3d Dept. 1972) (tape was best evidence; within court's discretion to exclude transcripts).

¹²⁴United States v. Carson, supra note 122 at 437; Lindsey v. United States, 332 F.2d 388, 691 (9th Cir. 1964); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953) (best evidence is already before the court in the form of the original recording and the transcripts are intended merely to assist the court and jury).

the jury to rely upon what is heard on the tapes, not on what is read.¹²⁵ But where the tapes have been lost through no fault of the prosecution, the tapes may be admitted into evidence if a proper foundation of accuracy is made.¹²⁶

¶33 The general rule is that transcripts are not to be used by the jury during deliberation.¹²⁷ But the Second Circuit does not follow this rule; the decision is left to the discretion of the judge.¹²⁸

¹²⁵United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (jury must be instructed to rely upon what is heard and not what is written); United States v. Bryant, 480 F.2d 785, 791 (2d Cir. 1973) (disregard transcript if recording does not conform); United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 1049 (1972) (limit to voice identification); United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973) (visual aid); United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972) (other methods unduly prejudicial); People v. Lubow, 29 N.Y.2d 58, 68, 272 N.E.2d 331, 336, 323 N.Y.S.2d 829, 835-36 (1971) (used to identify voice but not admitted into evidence).

¹²⁶United States v. Maxwell, supra note 122 at 443. See also United States v. Knoch, 379 F.2d 427, 441 (2d Cir.), cert. denied, 389 U.S. 973 (1967).

¹²⁷United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Carlson, 423 F.2d 431, 440 (9th Cir.), cert. denied, 400 U.S. 847 (1970); United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972).

¹²⁸United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972), United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

C. Voice Identification

¶34 While the tapes are being played, it is necessary for the various voices speaking to be identified. The means chosen is within the discretion of the court.¹²⁹ Most trial courts are now using transcripts to identify the voices.¹³⁰ The possibility of overemphasis and prejudice is outweighed by the inconvenience and confusion caused by stopping the tape to identify each speaker.¹³¹ Care must be taken in the preparation of these transcripts so that they accurately designate the speakers and correctly transcribe the conversation.¹³²

D. Completeness

¶35 The prosecution must present the entire picture of a crime to obtain a conviction. This necessitates judicious use of the tape recordings. The timing of the presentation must be carefully planned to allow for corroborative testimony which develops the surrounding circumstances.

¹²⁹United States v. Hall, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812 (1965).

¹³⁰Id. at 853. See also United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972) (jury surrendered transcripts after tapes played); Fountain v. United States, 384 F.2d 624, 632 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968) (use limited to voice identification); Chavira Gonzales v. United States, 314 F.2d 750, 752 (9th Cir. 1963) (reporter's transcript used to refresh jury's memory).

¹³¹United States v. Hall, supra note 129, at 853.

¹³²United States v. Fountain, supra note 130, at 632 (preparer personally familiar with voices of each party to the conversation).

Similarly, what is presented by the tapes will often have to be corroborated to obtain a conviction.¹³³

¶136 Often, the tape recording will include the use of a code or slang that the jury is not able to understand. To present a clear picture of the crime, the meaning of the code or slang must be explained to the jury. An expert witness must be qualified and testify as to the meaning of the code or slang. This will usually be an agent with experience in the field.¹³⁴ Failure to do so may be ground for reversal.¹³⁵ It may also be possible to accompany the expert's testimony with a chart defining the code or slang to act as a visual aid to the jury.

¶137 The tapes may also contain irrelevant, obscene, or prejudicial material. The court may instruct the jury to

¹³³People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 887 (1956) (where phone conversation revealed plan for betting on horse races and sporting events, it must be shown that the horses actually ran or the sports events held on the dates mentioned).

¹³⁴United States v. Lawson, 347 F. Supp. 144, 149 (E.D. Pa. 1972) (because of his experience as a narcotics investigator, agent was allowed to testify as to the meaning of certain words and expressions). See also United States v. Avila, 443 F.2d 792 (5th Cir.), cert. denied, 417 U.S. 944 (1974) (translation of foreign language allowed).

¹³⁵People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 887 (1956) (where government failed to qualify expert witness to explain jargon, the conviction was reversed due to possibility of jury speculation).

disregard this material.¹³⁶ Without this instruction, the playing of the tapes may be reversible error.¹³⁷ The prosecution may also aid in this by examining the possible jurors for possible prejudice because of the use of this type of material.¹³⁸ The materials may also be edited.¹³⁹ Editing, though, does present the problem of creating jury speculation.

V. Alternative Uses

¶38 A witness's memory may fail him on the witness stand. Unless the witness can recall the events in question, he cannot testify. Often, a tape recording may help the witness remember. Anything may be used to refresh a

¹³⁶ Chapman v. United States, 271 F.2d 593, 595 (5th Cir. 1959), cert. denied, 362 U.S. 938 (1960) (caution to jury to reject anything not said in presence of defendant); State v. Malaspina, 120 N.J. Super. 26, 30, 293 A.2d 224 (App. Div. 1972) (telephone conversation relating to criminal charge pending in another case); People v. Mitchell, 40 App. Div.2d 117, 118, 338 N.Y.S.2d 313, 315 (3d Dept. 1972) (political gossip). The judge may also have the tapes selectively played. United States v. Howard, 504 F.2d 1281, 1287 (8th Cir. 1974) (not prejudicial).

¹³⁷ United States v. Gocke, 507 F.2d 820, 823 (8th Cir.), cert. denied, 429 U.S. 974 (1974) ("before I was in penitentiary" and use of profanity included on tapes; judge gave limiting instruction; comments of brief and passing nature inadvertently made constitute harmless error); United States v. Cianchetti, 315 F.2d 584, 590 (2d Cir. 1963) (references to defendant as thief, racketeer, and loafer on the tape; no clear limiting instruction given; prejudicial error).

¹³⁸ United States v. Whitaker, 372 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974) (without opinion), cert. denied, 419 U.S. 1113 (1975) (inquiry on voir dire).

¹³⁹ See discussion in text, supra ¶15.

memory if it in fact revives the witness's recollection.¹⁴⁰
The materials may even be illegally obtained.¹⁴¹ These
can be used because they are not admitted into evidence.
The only evidence which is admitted is the testimony of
the witness after his memory has been refreshed.¹⁴² It is
clear, then, that no foundation need be established. But
the defense counsel does have a right to inspect the tapes
before they are used to refresh the witness's memory to
enable him to properly cross-examine the witness to
establish whether the witness did in fact remember.¹⁴³

¹⁴⁰United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. denied, 329 U.S. 805 (1947).

¹⁴¹United States v. Baratta, 397 F.2d 215, 221-22 (2d Cir.), cert. denied, 393 U.S. 939 (1968) (statements used were obtained without Miranda warnings).

¹⁴²157 F.2d at 967. See also Gaines v. United States, 349 F.2d 190, 192 (D.C. Cir. 1965) (permitting jury to hear statements used to refresh memory was error because it could cause the jury to consider their content as evidence notwithstanding instruction to the contrary). An opponent, though, may allow it to come into evidence, but only after a proper foundation is established. Fed. R. Evid. 612.

¹⁴³Lemmon v. United States, 20 F.2d 190, 193 (8th Cir. 1927); Morris v. United States, 149 F. 123, 126 (5th Cir. 1906); State v. Hunt, 25 N.J. 514, 523-31, 138 A.2d 1, 5-10 (1958); People v. Gezzo, 307 N.Y. 385, 394, 121 N.E.2d 380, 384 (1954); People v. Woodrow, 18 App. Div. 1050, 238 N.Y.S.2d 555 (4th Dept. 1963) (mem.). See also 3 J. Wigmore, Evidence §762 (Chadbourn re. 1970). But see United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940) (no iron-clad rule; right to inspect within sound discretion of judge; no error where grand jury testimony used was not shown to either witness or counsel but inspected by judge); Commonwealth v. Greenberg, 339 Mass. 557, 581, 160 N.E.2d 181, 196 (1959) (inspection only after witness sees document).

The proper procedure would seem to be to have the witness and the defense counsel listen to the tapes out of the court's hearing and to then question the witness as to his memory of those conversations.¹⁴⁴

¶39 The use of the tapes to refresh a witness's memory is often a prelude to impeaching the witness with his prior inconsistent statements. Where the tape recordings are the product of an unlawful surveillance or otherwise inadmissible, this can be an important use. It is well settled that although the government cannot make affirmative use of illegally obtained evidence, a defendant cannot use the illegality as a shield against contradiction of his own patently false testimony.¹⁴⁵ A defendant is allowed

¹⁴⁴ But see New Mexico Savings and Loan Ass'n v. United States Fidelity and Guarantee Co., 454 F.2d 328, 336-37 (10th Cir. 1972) (although proper to have witness refresh memory out of hearing of jury, failure to do so is not reversible error).

¹⁴⁵ Walder v. United States, 347 U.S. 62, 64 (1954). See also Harris v. New York, 401 U.S. 422, 425 (1971) (inadmissible statement, due to failure to give Miranda warnings, may be used to impeach a witness if its trustworthiness satisfies legal standards). An argument has been made that the enactment of Title III changed this rule. This argument was rejected in United States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973). The legislative history clearly provides otherwise:

It [section 2515] largely reflects the existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter. [citation omitted]. There is, however, no intention to change the attenuation rule. [citations omitted]. Nor generally to press the scope of the suppression role [sic] beyond present search and seizure law. See Walder v. United States, 347 U.S. 62 (1954).

to deny complicity in the crimes for which he is on trial, but when he goes beyond a mere denial, the government is allowed to protect the integrity of the trial from his affirmative resort to perjurious testimony.¹⁴⁶ The government may then impeach the witness through the use of his prior inconsistent statements found on the recordings. But before the recording may be used, a foundation to assure its accuracy and authenticity must be shown.¹⁴⁷ If the same showing required before a recording may be admitted into evidence as part of the government's case in chief is not also required before the same recording is used for impeachment, the evils which the requirement sought to avoid, i.e., prevention of injudicious editing, will again emerge. Once the foundation is laid and the recordings are admitted, the tapes may not, in general, be offered to prove the truth of the statements recorded; they may be only used to impeach the credibility of the witness, i.e., to show that he is not worth believing.¹⁴⁸

¹⁴⁶United States v. Bell, 506 F.2d 207, 213 (D.C. Cir. 1974)(follows Walder); United States v. Caron, 474 F.2d 506 (5th Cir. 1973)(recording of telephone conversations); Commonwealth v. Harris, 363 Mass. 888, 303 N.E.2d 115 (1973)(statements made to police); State v. San Vito, 129 N.J. Super. 185, 322 A.2d 509 (App. Div. 1974)(proof of facts of arrest); People v. Fiore, 34 N.Y.2d 81, 312 N.E.2d 174, 356 N.Y.S.2d 38 (1974)(statements inconsistent with refusal to waive immunity).

¹⁴⁷United States v. McKeever, 169 F. Supp. 426, 431 (S.D. N.Y. 1958)(impeachment by tape recording of prior inconsistent statements).

¹⁴⁸United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975), cert. denied, 18 Crim. L. Rptr. 4164 (U.S. Feb. 25, 1976). But see Fed. R. Evid. 801(d)(1)(A)(1975)(prior inconsistent statement as substantive evidence).

Electronic Surveillance: Issues at Trial: Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶2, Note 2: Correction: Ore. Rev. Stat. §§133.73 to .727
(1975);

Va. Code Ann. §§19.2-66 to -70 (1976)

¶5, Note 17: Correction: Dallas County v. Commercial
Union Assurance Co., 286 F.2d 388,396 (5th
Cir. 1961); United States v. Iaconetti, 406
F. Supp. 554 (E.D. N.Y. 1976), cert. denied,
45 U.S.L.W. 3463, reh. denied, 45 U.S.L.W.
3587 (Jan. 1, 1977); United States v. Barbati,
284 F. Supp. 409 (E.D. N.Y. 1968).

¶6, Note 20: Correction: United States v. Jacobs, 451 F.2d 530,
542 (5th Cir. 1971), cert. denied, 405 U.S.
955, reh. denied, 405 U.S. 1049 (1972).

¶7, Note 23: Correction: United States v. McKeever, 169
F. Supp. 426, 430 (S.D. N.Y. 1958), rev. on
other grounds, 271 F.2d 669 (2d Cir. 1959).

¶12, Note 39: Correction: United States v. James, 494 F.2d
1007 (D.C. Cir.), cert. denied sub nom.
Tantillo v. United States 419 U.S. 1020 (1974).

¶14, Note 40: Before "See also":

The Sixth Circuit has established the following as the minimum requirements for the sealing and custody of tape recordings:

1. recordings shall be placed in cartons, sealed with tape, identified by letter designation and initialed by the attorney who obtains the sealing order;
2. the custodian shall maintain separate inventory under each court order;
3. cartons shall be stored in a limited access area, used exclusively for storage of such recordings and a log of persons entering shall be kept;
4. cartons shall be locked in metal file cabinets and;
5. recordings so stored shall only be removed pursuant to a court order.

United States v. Abraham, 541 F.2d 624 (6th Cir. 1976).

¶14, Note 41: Correction: United States v. Cantor, 470
F.2d 890, 893 (3rd Cir. 1972).

¶14, Note 43a: Compare United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975) (where trial court found that integrity of tapes is pure, delay in sealing not sufficient reason to suppress even though no satisfactory explanation given for delay) with United States v. Gigante, 538 F.2d 502 (2d. Cir. 1976) (without satisfactory explanation for failure to seal "immediately," tapes not admissible even though no evidence of alteration).

¶16, Note 47a: See generally Shumkler, "Voice Identification in Criminal Cases under Article IX of the Federal Rules of Evidence," 49 Temp. L. Q. 867-79 (1976).

¶16, Note 49: Correction: United States v. Dionisio,
410 U.S. 1 (1973)

¶16, Note 50: Correction: People v. Abelson, . . .
132 N.E.2d 884, 886 (1956)

¶16, Note 53: Correction: United States v. Kohne, . . .
affd, 485 F.2d 682, aff'd, 487 F.2d 1395
(3rd Cir. 1973), cert. denied, 417 U.S. 918
(1974) (Also at: ¶17, Note 55; ¶18, Note 60;
¶22, Note 78; ¶27, Note 91; ¶32, Note 125)

¶17, Note 54: Correction: Carbo v. United States, . . .
cert. denied, 377 U.S. 953 . . . ; State v.
Molinaro, . . . rev. on other grounds, 122
N.J. Super. 181, 299 A.2d 750 (App. Div. 1973).

¶19, Note 66: Correction: Commonwealth v. Fatalo

¶19, Note 69: Correction: State v. Anreatta, 61 N.J. 544,
549-51, 296 A.2d 644, 646-48 (1972).

Following United States v. Addison: United States v. McDaniel,
538 F.2d 408 (D.C. Cir. 1976) (still inadmissible in circuit;
bound to follow Addison until clear showing of reliability and
scientific acceptance or en banc reconsideration of Addison);
Commonwealth v. Topa, 21 Crim. L. Rptr. 2014 (Pa. Sup. Ct.
Feb. 28, 1977) (spectrograph not yet generally accepted by
scientific community; error to admit voiceprint identification).

¶25, Note 85: Correction: State v. Driver

¶28, Note 101: Correction: United States v. Knohl, 379 F.2d
427 (2d Cir.), . . .

¶23, Note 103: United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 45 U.S.L.W.

3463 (Jan. 1, 1977) (composite tape within Court's discretion to admit; grouped to facilitate identification; not barred by 18 U.S.C. 2518 (8)(a)).

¶29: Correction: Where there is the requisite showing of accuracy, the best evidence rule will not bar the admission of the duplicate.

¶30, Note 112: Correction: United States v. Jacobs . . . (jury instructed to use transcript only to identify speakers . . .)

¶30, Note 118: Correction: United States v. Koska, 443 F.2d 1167, 1169 (2d. Cir.) . . .

¶30, Note 118 a: If no "stipulated" transcript can be developed, the jury may be given:

1. a transcript containing both versions;
2. two transcripts, the reasons for the disputed portions and an instruction to determine which, if either, is accurate;

or

3. the opportunity to hear the disputed tape twice, once with each transcript.

U.S. v. Onori, 535 F.2d 938 (5th Cir. 1976).

¶31, Note 121: Correction: 339 P.2d 1063 (Okla. 1959).

¶32: Correction: Where there is no contention that the transcript is inaccurate or there is a

showing of accuracy, the transcripts are
generally admitted into evidence

But where the tapes have been lost through
no fault of the prosecution, the transcripts
may be admitted. . . .

¶32, Note 124: Correction: Lindsey v. United States, 332 F.2d
688, 691 (9th Cir. 1964).

¶38, Note 143: Correction: Lennon v. United States, 20 F.2d
490, 493 (8th Cir. 1927); People v. Woodrow,
18 App. Div. 2d 1050

¶39, Note 145: Correction: Harris v. New York, 401 U.S.
222, 225 (1971)

¶39, Note 146: Correction: Commonwealth v. Harris, 364 Mass.
236

¶39, Note 148: Correction: United States v. Pandilidis, . . .
cert. denied, 424 U.S. 933 (1976).

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Organized Crime and
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Cornell Institute on Organized Crime

1977 Summer Seminar Program

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ACQUISITION 13

Techniques in the Investigation and
Prosecution of Organized Crime:

Manuals of Law and Procedure

G. Robert Blakey
Ronald Goldstock

August 1977
Ithaca, New York

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PREFACE

These materials are the product of the combined efforts of students at the Cornell Law School, working under the supervision of the Cornell Institute on Organized Crime. The following students participated in research, writing, and editing:

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August 1977

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The Lawyer's Role in Corruption Proceedings

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The Lawyer's Role in Corruption Proceedings

SUMMARY

¶1 A person who consults a legal advisor may generally prevent compelled disclosure of his communications; this privilege is designed to promote the client's freedom to consult candidly with his lawyer. It also serves to insulate from effective investigation corrupt politicians who engage attorneys as go-betweens in cases of bribery and extortion.

¶2 The "crime or fraud" exception to the attorney-client privilege exempts from its protection communications in contemplation of a future or continuing wrong. But evidence must first be adduced to support an allegation of wrongful purpose to trigger the exception. Courts are not agreed as to the nature of the proof (extrinsic or otherwise) and the degree of proof (prima facie showings or less) requisite to bring into play the exception. The appropriate standard would be a light burden on the government to demonstrate a likelihood of wrongful purpose, followed by in camera confidential disclosure to the judge for a determination based on content.

¶3 When the prosecution possesses recorded conversations obtained by authorized surveillance, courts review the tapes to ascertain (1) interception of privileged communications, or (2) intrusions violating the 6th Amendment right to effective counsel. Courts have not applied uniform remedies for interception of protected communications; the appropriate remedy is: (1) dismissal for gross governmental misconduct or interception of enduringly prejudicial communications (sup-

pressing evidence at a new trial would not remove the prejudice); (2) a new trial where suppression of tainted evidence will obviate the prejudice; (3) none if the intrusion is harmless.

¶4 Courts are sufficiently inconsistent in these areas so that proposed modifications may be encouraged through cogently briefed arguments.

¶5 The basic remedy for a prosecutor faced with a multiple representation situation is a motion to disqualify. The trial court has authority to disqualify an attorney based on the court's inherent power to supervise the attorneys practicing before it. The standard by which the motion is judged is a balancing test weighing the interests of the state against those of the attorney and client. A number of interests have been considered, but of primary importance are the individual's right to counsel and the state's interest in an effective criminal justice system. At a minimum, a decision on these important rights cannot be made without a full hearing on the motion accompanied by affidavits.

I. PUBLIC CORRUPTION AND THE ATTORNEY-CLIENT PRIVILEGE

A. Introduction

¶6 Wigmore gives the following succinct statement of the definition and operation of the attorney-client privilege:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at

his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.¹

¶7 As an obstacle to compelling disclosure of communications between individuals, the privilege frustrates the prosecution of corrupt public officials in bribery and extortion cases when an attorney, in the guise of a professional relationship, is used as go-between for the principal parties to the corrupt arrangement. The "crime or fraud" exception to the privilege, however, exempts from the privilege's protection those communications made in furtherance of the commission of a future or continuing wrong. But the exception's operation is not self-executing, and substantial issues exist concerning the proof necessary to establish the exception's applicability that alone enables a court to compel disclosure.

B. History of the Attorney-Client Privilege²

¶8 The attorney-client privilege is the oldest of the privileges protecting confidential communications,³ dating back to the 16th century. That century saw the advent of witness testimony⁴ and the compulsion of that testimony.⁵

¹8 J. Wigmore, Evidence §2292 (McNaughton rev. 1961).

²For the history of the privilege generally, see 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961), C. McCormick, Evidence §87 (2d 1972).

³I.e., attorney-client, husband-wife, juror-juror, informer-government, physician-patient, priest-penitent; the last two were denied at common law, see 8 J. Wigmore, Evidence §2285 (McNaughton rev. 1961).

⁴5 J. Wigmore, Evidence §1364 (Chadbourn rev. 1974).

⁵8 J. Wigmore, Evidence §2190 (McNaughton rev. 1961).

It thus provided the earliest occasion for such a privilege to develop. In the trials of the 16th and 17th centuries, the test and policy supporting assertions of privilege for confidential communications (not restricted to attorney-client) were the obligations of honor between gentlemen not to disclose that which was spoken in confidence.⁶ The "point of honour" basis for the privilege (with the subjective test for its assertion) was put to rest in the Duchess of Kingston's Case in 1776.⁷ A new theory, which today stands as the justification for the attorney-client privilege, saved this confidential relationship from the loss of protection occasioned by the abandonment of the "point of honour" rationale: the need to insure the client's freedom from apprehension in consulting candidly with his attorney.⁸

⁶Countess of Shrewsbury's Case, 12 Coke 94 (1613), Bulstrode v. Letchmere, Freem. ch. 5 (1676).

⁷20 How. St. Tr. 586; a friend of the Duchess, who stood trial for bigamy, was compelled to testify as to whether the Duchess had ever spoken of her first marriage.

⁸Wigmore, speaking of privileged communications generally, cites "four fundamental conditions . . . recognized as necessary to the establishment of a privilege against the disclosure of communications:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

¶9 The "modern" theory was adopted by American courts; in 1833 it was explained by Chief Judge Shaw of the Supreme Judicial Court of Massachusetts:

This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.⁹

This is the unquestioned policy upon which the privilege now rests.¹⁰

(footnote continued)

8 J. Wigmore, Evidence §2285 (McNaughton rev. 1961). It is clear that these conditions are satisfied in the case of an attorney and client consulting in the context of a professional relationship. It would also seem that, given the rejection of certain privileges at common law (see Note 3, supra), these are better viewed as necessary rather than sufficient conditions for judicial recognition of a privilege.

⁹Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833).

¹⁰150 years ago Jeremy Bentham attacked vehemently the now-accepted policy supporting the privilege in Rationale of Judicial Evidence (1827). Bentham suggested that without the privilege:

a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present [p. 473] To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging

(footnote continues)

¶10 In 1950, in United States v. United Shoe Machinery Corp.,¹¹
Judge Wyzanski formulated perhaps the most elegant and
complete statement of the privilege:

(footnote 10 continued)

in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? [p. 475]
[T]o the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage that this should appear; as it naturally would if the lawyer were subjected to examination [477] The benefit which would arise from the abolition of the [attorney-client privilege] would consist . . . in the higher tone of morality which would be introduced into the profession [since the privilege] plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the lawmakers, an innocent, if not a virtuous practice The professional lawyer would be a minister of justice, not an abettor of crime . . . [p.479].

Page references to 7 The Works of Jeremy Bentham (Bowring ed. 1842).

Bentham's argument in brief is that impeding a guilty man's search for legal advice is no impediment to justice, and abolition of the privilege serves no similar obstacle to the innocent man's legal consultations, as he has no incriminating communications to disclose. Wigmore meets Bentham's challenge with his suggestions that (1) in civil cases the distinction between guilt and innocence is often unclear, and no concrete ascertainment of moral right or wrong is possible; (2) even in clearer cases there are often elements of wrong on each side and elements of right on each side--each side fears disclosure. In these two situations even the party with a good cause may abstain from seeking judicial relief. (3) In this country, abolition of the privilege could be tantamount to discarding the privilege against self-incrimination. (4) Bentham's assumption that the privilege fosters a false defense assumes also an "unprincipled" bar, and (5) the "treachery" concomitant to disclosing another's confidences would drive honorable persons from the profession and "create an unhealthy moral state in the practitioner." 8 J. Wigmore, Evidence §2291 (McNaughton rev. 1961).

¹¹89 F. Supp. 357 (D. Mass. 1950).

The [attorney-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹²

¶11 The client, United Shoe, claimed the privilege to prevent the introduction into evidence of nearly 800 documents each of which fell into one of the following categories: (1) a communication with outside counsel, (2) a communication with United Shoe's in-house legal department, (3) a communication with United Shoe's patent department, or (4) working papers prepared by persons in the patent department.¹³ Documents in the first two categories were protected where the attorneys were giving legal advice rather than acting as business advisers or corporate officers; the privilege was generally disallowed for communications with United Shoe's patent department and that department's working papers because many patent personnel were not member of any bar, or not licensed to practice in Massachusetts,

¹²Id. at 358.

¹³Id. at 359.

so their relationship to the corporation was not that of attorney and client.¹⁴

¹⁴Id. at 359-61. United Shoe is also the leading case recongizing the availability of the privilege to corporations and its specific application to in-house counsel. The continuing area of uncertainty concerns the non-legal corporate personnel whose communications with the corporation's attorneys may be privileged. Two tests have been developed by federal courts which prescribe different classes of employees whose communications may receive protection. The "control group" test protects only those communications from an employee who is:

in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

The "Harper & Row" test was formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348, reh. den., 401 U.S. 950 (1971):

We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

423 F.2d at 491-92. Student commentary has suggested that the broader Harper & Row test fails to reflect the purpose of the privilege (encouraging full and open disclosure to one's attorney) because information about the activities of lower-level employees which would be collected regardless of the availability of the privilege becomes privileged. Note, "Attorney-Client Privilege for Corporate Clients: The Control Group Test," 84 Harv. L. Rev. 424, 432-33 (1970).

(footnote continues)

¶12 In a recent case, Fisher v. United States,¹⁵ the Supreme Court held that the attorney-client privilege, "protects only those disclosures--necessary to obtain informed legal advice--which might not have been made absent the privilege."¹⁶ Fisher involved accountants' work sheets which were turned over to the taxpayers' attorneys by their clients. The IRS subsequently summoned the attorneys to produce the documents. The attorneys refused, claiming their client's Fifth Amendment privilege along with the attorney client privilege. The Court held that since the documents were not privileged when in the client's possession, they were not privileged when in the attorney's possession.¹⁷

¶13 As noted by Judge Wyzanski, the privilege does not attach to communications made within "the presence of strangers."¹⁸ The proponent of the privilege must establish

(footnote 14 continued)

The Supreme Court affirmed Harper & Row by an equally divided court; no mandatory precedential value outside of the Seventh Circuit was thereby established. Rule 503 of the Supreme Court's proposed Rules of Evidence apparently stated the control group test, 56 F.R.D. 183, 230-61 (1973); however, the House and Senate replaced the Court's 13 specific rules relating to privilege with one general rule (see note 82, infra) which is silent on this issue, and the Court has yet to decide the test appropriate for corporations.

¹⁵425 U.S. 391 (1976).

¹⁶Id. at 403.

¹⁷Id. at 404.

¹⁸89 F. Supp. at 358.

that the circumstances under which the communication was made suggest an intention of confidentiality.¹⁹ The client's knowledge of the presence of third parties who may hear (or read) a communication who are not relevantly related to the transaction suggests a lack of confidentiality.²⁰ Cases are split on the applicability of the privilege when the client was unaware of third parties or eavesdroppers; the outcome often depends on whether the client has taken precautions reasonable to achieve secrecy.²¹

¶14 There are circumstances in which the attorney-client privilege is available in spite of communication to third parties. When several defendants are under joint indictment and the defendants and their attorneys confer and exchange information, the communications are privileged.²² In Continental Oil Company v. United States,²³ the Ninth Circuit extended this exception to include communications exchanged

¹⁹C. McCormick, Evidence §90 (2d 1972).

²⁰8 J. Wigmore, Evidence §2311 (McNaughton rev. 1961) see Note, "Privilege as Affected by the Presence of Third Parties," 36 Mich. L. Rev. 641 (1938).

²¹Van Horn v. Commonwealth, 239 Ky. 833, 40 S.W.2d 372 (1931), Schwartz v. Wenger, 267 Minn. 40, 124 N.W.2d 489 (1963). See C. McCormick, Evidence §91 note 79 (2d 1972).

²²Chahoon v. Commonwealth, 62 V. (21 Gratt) 822 (1871); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942).

²³330 F.2d 347 (9th Cir. 1964)

prior to indictment. In Hunydee v. United States,²⁴ the Ninth Circuit narrowly interpreted the rule in Continental to be:

that where two or more persons who are subject to possible indictment in connection with the same transaction make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.²⁵

¶15 Communications may also be privileged if they are a "link" in a communication from an attorney to a client. In United States v. Seale,²⁶ the Seventh Circuit held that the wiretapping of a conversation between a representative of the defendant and a representative of his attorney was a sufficiently "direct intrusion" to give the defendant standing to complain that his Sixth Amendment right to counsel had been violated.²⁷

¶16 The attorney-client privilege is waived if the client makes a partial disclosure of the privileged matter, even though the witness is ignorant of the privilege.²⁸ Waiver does not occur until the witness has disclosed privileged

²⁴355 F.2d 183 (9th Cir. 1965).

²⁵Id. at 185.

²⁶461 F.2d 345 (7th Cir. 1972).

²⁷Id. at 364.

²⁸National Lawyers Guild, Representing Witnesses Before Federal Grand Juries, §15.4 (1976).

information without asserting the privilege.²⁹ Only the client can waive the privilege. After there is a waiver, neither the client nor the attorney may subsequently invoke the privilege.³⁰

C. The Work-Product Doctrine Distinction

¶17 It is necessary to distinguish the attorney-client privilege from the "work product doctrine," formulated in the leading case of Hickman v. Taylor.³¹ The Court addressed:

the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen.³²

The Court observed that such material was not protected by the attorney-client privilege, since the privilege does not extend to information secured by an attorney from a witness in anticipation of litigation, nor to memoranda prepared by counsel for his own use in preparing for litigation, nor to ". . . writings which reflect an attorney's

²⁹United States v. Jacobs, 322 F. Supp. 1299, 1303 (C.D. Cal. 1971).

³⁰See Magida v. Continental Can Co., 12 F.R.D. 74 3(S.D.N.Y. 1951). Cf. Steen v. First National Bank, 298 F. 26 (8th Cir. 1924). It was recognized that "silence during testimony disclosing the privileged confidential communication, or any substantial part of it, waives the privilege." Id. at 41.

³¹329 U.S. 495 (1947).

³²Id. at 497.

mental impressions, conclusions, opinions or legal theories."³³

¶18 The Court recognized that a certain degree of privacy was essential to the proper preparation of a client's case. Incident to such preparation would be the assimilation of much information in various unrecorded and recorded forms. The Court held all subject to the limited protection public policy demands to insure orderly case preparation, but indicated the circumstances under which such information is discoverable:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are not longer available or can be reached only with difficulty.³⁴

The Court further held that an attorney could not be compelled to repeat or write out what witnesses have told him, due to dangers of inaccuracy and untrustworthiness.

¶19 The work product doctrine will not be considered further as it is analytically distinct from the attorney-client privilege and it is not likely to arise in corruption cases, since it applies only to research conducted with an

³³Id. at 508.

³⁴Id. at 511.

eye toward litigation.³⁵ Nevertheless, the salient distinctions between the privilege and the work product doctrine are:

- (1) the attorney-client privilege is asserted (or waived) by the client, whereas the work product doctrine may be claimed only by the attorney;
- (2) the attorney-client privilege provides an absolute bar to disclosure whereas the protection afforded by the work product doctrine may be overcome upon a showing of good cause.³⁶

D. The Crime or Fraud Exception³⁷

¶20 It is firmly established that the privilege does not apply to situations in which the client consults a lawyer to obtain advice for the perpetration of some criminal, fraudulent or tortious enterprise. This exception has, of course, no application to consultations in aid of a client's defense for past misconduct, of which the client may well be guilty, and where the client may well in fact

³⁵But see In re Grand Jury Proceedings, (Duffy) 473 F.2d 840 (8th Cir. 1973) (The work product doctrine was found applicable to grand jury proceedings).

³⁶Voluminous federal and state case law construing the extent of protection the doctrine provides is analyzed at 35 A.L.R.3d 412 (1971). See also United States v. Mitchell, 372 F.Supp. 1239, 1245-46 (1973).

³⁷For the history and operation of this exception generally see 8 J. Wigmore, Evidence §2298 (McNaughton rev. 1961), C. McCormick, Evidence §95 (2d 1972), Gardner, "The Crime or Fraud Exception to the Attorney Client Privilege," 47 A.B.A.J. 708 (1961).

admit his guilt to his attorney.³⁸ But, it is obvious that communications regarding a planned criminal or fraudulent endeavor do not fall within the proper scope of the professional relationship which the privilege is designed to protect, since, in Judge Wyzanski's words, the attorney is not, ". . . in connection with this communication . . . acting as a lawyer . . .".³⁹

¶21 It is the client's and not the attorney's state of mind which determines whether or not the purpose motivating the communications was unlawful; hence, the lawyer may be acting in good faith and unaware of the wrongful plan he is facilitating, but if the client's evil design be shown, he cannot claim the privilege.⁴⁰

¶22 The expectation's rationale was articulated in the leading English case of Regina v. Cox in 1884:

In order that the rule may apply, there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no

³⁸ Clark v. State, 261 S.W.2d 339 (Tex. Cir.), cert. denied, 346 U.S. 855 (1953), State ex rel. Sowers v. Olwell, 64 Wash2d 828, 394 P.2d 681, (1964); Annot., 16 A.L.R.3d 1029 (1964).

³⁹ 89 F. Supp. at 358; Judge Wyzanski's formulation later explicitly excludes communications in furtherance of a crime or tort. Wigmore's broad definition, set out in the Introduction above, also limits protected communications to those seeking legal advice "from a professional legal adviser in his capacity as such. . . ."

⁴⁰ In re Selser, 15 N.J. 393, 105 A.2d 335 (1954), noted in 24 Fordham L. Rev. 290 (1955), 30 N.Y.U. L. Rev. 1251 (1955).

confidence, for the state of facts which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.⁴¹

¶23 Wigmore, arguing his view of the scope of the exception, reasoned that although the attorney need not be a participant in the client's wrongful design, the client must be seeking advice for a knowingly wrongful purpose that need not, however, reach the level of either a crime or a civil wrong involving moral turpitude.⁴² The older cases construed the exception very narrowly, restricting its application to wrongs involving moral turpitude or criminal violations that were malum in se, not merely malum prohibitum.²⁶ Any planned crime or civil fraud is now sufficient to trigger the exception.⁴⁴

¶24 The judge, in compelling disclosure and thereby denying an assertion of the privilege, need not have made a conclusive factual finding of criminal or wrongful intent, although just what lesser standard is applicable is not clear. Mere pleading of wrongful conduct is insufficient. The Supreme

⁴¹ 14 Q.B. Div. (1884).

⁴² 8 J. Wigmore, Evidence §2298 (McNaughton rev. 1961).

⁴³ Bank of Utica v. Mersereau, 3 Barb. Ch. 528 (1848), Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889).

⁴⁴ In Alexander v. United States, 138 U.S. 353 (1891), the Court held that a communication made in furtherance of a crime was privileged in a trial other than one for the crime contemplated in the communication. This distinction impressed Wigmore as groundless, 8 J. Wigmore, Evidence §2298, n.1 (McNaughton rev. 1961), has been rejected by the 7th Circuit, In re Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956), and has not generally been followed, Gardner, "The Crime or Fraud Exception to the Attorney-Client Privilege," 47 A.B.A.J. 708, 709 (1961).

Court in 1933 held that "[t]here must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in."⁴⁵ In 1953, the Fifth Circuit held that evidence must have been adduced to "give color" to the charge or wrongful purpose.⁴⁶ The courts have not clarified these

[M]ere 'color' seems to be less than proof of all the 'links in the chain' essential to make out a prima facie case. Furthermore, there are many cases which actually require fewer than all of the elements of the prima facie case to find that the presumption of privilege has been rebutted. These decisions can only be explained as the result of a misunderstanding of the rule requiring proof of a prima facie case, a relaxation of the strict requirements of that rule, or a rule apparently being followed in some jurisdictions to the effect that 'color' of crime or wrong only is required to dispel the presumption (or inference) of privilege.

* * *

. . . . It is sometimes difficult to tell whether a particular court is following a relaxed rule of prima facie proof, or the 'color' requirement only, or is not itself clear on the proof requirements.⁴⁷

¶25 When a court is determining the applicability of the exception, attention must be paid to both the nature and

⁴⁵Clark v. United States, 289 U.S. 1, 14 (1933).

⁴⁶Pollock v. United States, 202 F.2d 281 (5th Cir.), cert. denied, 345 U.S. 993 (1953). The Court in Clark (per Cardozo) had actually referred to both the "color" and "prima facie" standards in terms that left doubts as to which is the controlling standard and what the difference between them might be; the Court stated that "[t]o drive the privilege away, there must be 'something to give color to the charge; there must be prima facie evidence that it has some foundation in fact.'" 289 U.S. at 15.

⁴⁷Gardner, "The Crime or Fraud Exception to the Attorney-Client Privileges," 47 A.B.A.J. 708, 712, n.78 (1961).

degree of proof required, in addition to the dilemma involved in amassing the proof without destroying the privilege in the process. It is argued that the trial judge's determination may not be dependent upon the very evidence for which the privilege is asserted, as the protections enjoyed, "would suffer as greatly from forced public revelations to a judge as from like revelations to a jury."⁴⁸ The dilemma arises in that often the best--or only--evidence which would demonstrate the wrongful intent supporting a communication is the content of the communication itself.⁴⁹ Wigmore suggested a solution that would rest on a burden of proof ruling:

Where there is some evidence of crime or fraud apart from the communications with the attorney, and there have been transactions with him, let the burden be on the attorney to satisfy the court (apart from the jury) that the transaction has to his best belief not been wrongful, before the claim of privilege is allowed.⁵⁰ [Emphasis in original].

¶26 One commentator has noted that this formula would likely always require the attorney to disclose the communication to meet his newfound burden, and he has suggested that if a light rule of proof is adopted to negate the presumption of protected consultations, disclosure should "be first made

⁴⁸ Maguire & Epstein, "Rules of Evidence in Preliminary Controversies as to Admissibility," 36 Yale L.J. 1101 (1927).

⁴⁹ See Note, "The Future Crime or Tort Exception to Communications Privileges," 77 Harv. L. Rev. 730, 736-39 (1964).

⁵⁰ J. Wigmore, Evidence §2299, p. 578 (McNaughton rev. 1961).

to the court in chambers and in confidence" in order for the court to make its determination.⁵¹

¶27 The Uniform Rules of Evidence provide that:

[The attorney-client privilege] shall not extend . . . to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding [of wrongful purpose].⁵²

This appears to codify the prima facie evidence standard arguably adopted by the Supreme Court in Clark v. United States.⁵³ A minority of the cases have enforced a strict requirement that only extrinsic evidence may be used to establish the exception's availability; a majority have permitted some degree of probing into the purpose and circumstances of the communications.⁵⁴

⁵¹Gardner, supra note 47, at 712.

⁵²Uniform Rule of Evidence 26(2). The A.L.I. Model Code of Evidence (Rule 212) follows the same approach; the exception applies:

if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort.

⁵³See text accompanying note 45, supra.

⁵⁴ In the United States it appears to be common court practice for an attorney . . . to be compelled to describe in general terms the nature of his particular dealings with the person claiming the privilege, in order to apply such distinctions as that between consultation as an attorney and consultation as a business adviser or friend.

Note, supra note 49, at 737, citing Record, pp. 340-45, 362-64, Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Record, vol. 2, pp. 1032-33, Robinson v. United States, 144 F.2d 392 (6th Cir. 1944).

¶28 Since the law strives to balance encouragement of lawyer-client confidentiality against wrongful use of the privilege, it seems sensible that in jurisdictions adhering to the Uniform Rules--extrinsic evidence approach, the burden on the opponent of the privilege should be rather light, as establishing a prima facie case (or lending "color" to the charge) may be extraordinarily difficult. A more substantial burden would be appropriate where some degree of "fishing" by inquiry is permitted in addition to extrinsic evidence.⁵⁵

¶29 The danger of maintaining an unreasonably stringent burden of proof in cases involving merely extrinsic evidence is exemplified by the 1948 decision of SEC v. Harrison.⁵⁶ The defendant was charged with maintaining a collusive lawsuit in order to avoid certain underwriting obligations. The SEC introduced evidence indicating his desire to avoid his obligations together with evidence of communications between the opposing counsel for the allegedly collusive parties. The court refused to apply the exception in this case because a collusive and wrongful purpose was not the only "reasonable" inference these facts could support.

⁵⁵Note, supra note 49, at 739-40. In any event, in camera inspection by the judge is recommended whenever disclosures are compelled, whether in ascertaining the privilege's applicability or upon establishing an exception, to prevent public disclosure of contemporaneous, yet protected communications.

⁵⁶80 F. Supp. 226 (D.D.C.1948).

Commentary has suggested that more reasonable scope could be given to the exception if, in cases such as Harrison, "a prima facie case could be based on the most reasonable inference rather than the only reasonable inference from extrinsic evidence."⁵⁷

E. Sixth Amendment Guarantee of Right to Effective Counsel⁵⁸

¶30 The Sixth Amendment to the Constitution of the United States guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Not surprisingly, the right to "effective" counsel that this amendment has been held to insure restricts governmental interception of attorney-client consultations.⁵⁹ This prosecutorial limitation creates special obstacles in political corruption trials.

¶31 The variables that a court should reasonably weigh in determining the impropriety or unconstitutionality of government interception of a defendant's consultations with counsel are (1) the intentional nature of the interception and (2) its harmful effect on the defendant's trial strategy.⁶⁰

⁵⁷Note, supra note 49, at 740.

⁵⁸See generally Note, "Government Interceptions of Attorney-Client Communications," 49 N.Y.U.L. Rev. 87 (1974).

⁵⁹Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952).

⁶⁰See Weatherford v. Bursey, 20 Crim. L. Rptr. 3059 (February 22, 1977), infra ¶34.

The decisions have not carefully delineated the appropriate guidelines nor the appropriate remedies for their infraction.

¶32 In 1951, the D.C. Circuit was the first court to consider interception of attorney-client consultations in a non-custodial situation, in which the special problems of incarceration, prison security and a necessary restriction on a defendant's mobility were absent.⁶¹ In Coplon v. United States⁶² the court held that if the defendant's allegations that her telephone conversations were monitored by the F.B.I. before and during her trial were sustained, her conviction would be set aside and a new trial ordered. The court, after observing that "[n]one of [the evidence introduced to convict her] could have been the result of intercepted telephone conversations,"⁶³ nonetheless held that the intrusion constitutes a denial of private consultation with counsel which negates the effective aid of counsel, violating the Sixth Amendment right,⁶⁴ and warranting a new trial.

⁶¹Note, supra note 58, at 91-92. For discussions of surveillance of prisoners, see Giannelli and Gilligan, "Prison Searches and Seizures, 'Locking' the Fourth Amendment Out of Correctional Facilities," 62 Va. L. Rev. 1045, 1076-89 (1976); Annot., 57 A.L.R.3d 172 (1974). For surveillance not restricted to custodial situations, see Tinsley, Ineffective Assistance of Counsel, 5 Am. Jur. Proof Facts 2d 267 (1975); Annot., 5 A.L.R.3d 1360 (1966) (dated, but otherwise complete).

⁶²191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952).

⁶³Id. at 757.

⁶⁴Id.

¶33 In the 25 years since the Coplon decision, the circumstances that will support an allegation of denial of the Sixth Amendment right to counsel have not been settled. In a string of three per curiam decisions in 1966, the Supreme Court granted new trials upon proof of electronically intercepted consultations with counsel. In none of those cases did the Court concern itself with the prejudicial nature of the interception.⁶⁵ At the same time, the Court rejected Jimmy Hoffa's claim of the Sixth Amendment violation in his trial for attempting to bribe a juror in an earlier prosecution.⁶⁶ Hoffa's statements had been overheard and

⁶⁵Black v. United States, 385 U.S. 26 (1966) (per curiam); Schipani v. United States, 385 U.S. 372 (1966) (per curiam); O'Brien v. United States, 386 U.S. 345 (1967) (per curiam).

In Black, F.B.I. agents had bugged defendant's hotel room in a matter unrelated to the instant case but had intercepted conversations with his attorney in preparation for this case, notes from which were forwarded to the Tax Division attorneys for their use in preparation of defendant's prosecution; the Solicitor General informed the Court that "Tax Division attorneys found nothing in the F.B.I. reports or memoranda which they considered relevant to the tax evasion case." 385 U.S. at 28. The Court ordered a new trial, citing as "complicating factors" the facts that (1) neither judge, defendant nor counsel had known of the interceptions prior to appeal and (2) not even the prosecutors were aware that attorney-client communications were involved.

In Schipani and O'Brien the Court recited neither facts nor reasons for its dispositions, although in Schipani the Solicitor General had conceded that tainted evidence had been introduced at trial. Justice Harlan, in his dissents in Black and O'Brien opposed vacating convictions in favor of hearings "for sorting out the eavesdropping issue because until it is determined that such occurrence vitiated the original conviction no basis for a retrial exists." 385 U.S. at 31; 386 U.S. at 347. In O'Brien Justice Harlan labeled the pivotal interception "a peripheral, totally insignificant, and uncommunicated eavesdropping." 386 U.S. at 347.

⁶⁶Hoffa v. United States, 385 U.S. 293 (1966).

relayed to the prosecution by an alleged government agent in the first trial. The Court, citing the D.C. Circuit's earlier decisions in Coplon and a subsequent case,⁶⁷ noted that the right to counsel may be violated by "a surreptitious invasion by a government agent into the legal camp of the defense" but also observed that those cases involved "government intrusion of the grossest kind."⁶⁸ Moreover, the Court reasoned that the remedy for such infractions is that fashioned by the D.C. Circuit--a new trial, to remedy the infirmities which the interception creates for "the trial at which it occurred."⁶⁹ Since the governmental improprieties alleged by Hoffa related to an earlier trial which resulted in a hung jury and not to the bribery trial from which this appeal was taken, the Court found this not to be a case involving intrusions upon defense consultations sufficiently egregious to prohibit the second trial.⁷⁰ (The D.C. Circuit

⁶⁷Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953).

⁶⁸385 U.S. at 306.

⁶⁹Id. at 307.

⁷⁰The Court held that although the alleged intrusion might have supported a reversal of the earlier trial had it resulted in a conviction, the evidence thereby obtained and introduced at the second trial did not constitute Wong Sun "fruit;" id. at 308, so there was no "exploitation of a Sixth Amendment violation, id. at 309.

The Court also rejected Hoffa's claim that the 6th Amendment right was violated by the admission of statements, via the government agent, which Hoffa made after "the Government had sufficient ground for taking [him] into custody and charging him with [jury tampering]." Id. at 309. The Court indicated that the Massiah v. United States, 377 U.S. 201 (1964), doctrine did not amount to a "constitutional right to be arrested" once the government has amassed the minimum evidence necessary to establish probable cause, which may be insufficient in itself to convict. 385 U.S. at 310.

had previously entertained the possibility of interceptions so prejudicial to the defense as to guarantee the unfairness of subsequent trials.)⁷¹

¶34 In Weatherford v. Bursey,⁷² the Supreme Court explained and clarified, to some extent its position concerning governmental intrusions into the attorney-client privilege. In that case, a state undercover agent, Weatherford, at the invitation of the defendant, Bursey, and his attorney, and solely to protect his cover, attended two attorney-client strategy conferences. The undercover agent was a prosecution witness at the trial, but did not reveal the information he may have obtained at these conferences either to his superiors or at trial. The defendant was convicted and subsequently brought a Section 1983 action alleging he had been deprived of both the effective assistance of counsel under the Sixth and Fourteenth Amendments and a fair trial under the Due Process Clause.

¶35 The district court found against Bursey in all respects. The Court of Appeals for the Fourth Circuit reversed and remanded,⁷³ holding that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."⁷⁴ The court of appeals

⁷¹Caldwell v. United States, 205 F.2d 879, 881-82, note 11 (1953).

⁷²20 Crim. L. Rptr. 3059 (February 22, 1977).

⁷³528 F.2d 483 (4th Cir. 1975).

⁷⁴Id. at 486.

also concluded that Bursey was denied due process of law by the concealment of the undercover agent's identity until the trial and by the agent's statement that he would not be a witness.

¶36 The Supreme Court reversed, with Justices Marshall and Brennan dissenting, holding that Bursey's Sixth Amendment right to counsel was not violated because there was:

no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford.⁷⁵

The Court also ruled that the Due Process Clause does not require the revelation before trial of undercover agents or witnesses who may testify unfavorably to the defense.⁷⁶

¶37 The Court interpreted O'Brien and Black to mean that:

when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.⁷⁷

The Court went on to interpret Hoffa as not holding "that the Sixth Amendment right to counsel subsumes a right to be free from intrusion by informers into counsel-client consultations."⁷⁸ Consequently, the prejudicial nature of the intrusion must be shown before a new trial will be

⁷⁵20 Crim. L. Rptr. at 3063.

⁷⁶Id.

⁷⁷Id. at 3061.

⁷⁸Id.

granted or a conviction reversed. The court implied that there may be a greater chance of prejudice when the intrusion involves electronic surveillance rather than third parties by stating:

[A] fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring these communications through electronic eavesdropping, because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings.⁷⁹

¶38 The rule to be gleaned from these decisions, particularly *Weatherford v. Bursey*, is that attacking a conviction upon a showing of intrusion is insufficient to vacate the conviction especially when the information obtained is useless to the prosecution and harmless to the defense. The accepted remedy to prejudicial intrusion appears to be a new trial in all but the most heinously prejudicial circumstances.⁸⁰

⁷⁹Id. at 3062 note 4.

⁸⁰The State of Washington has been the first and staunchest jurisdiction to embrace the unwelcome remedy of dismissal of the case for governmental intrusion into attorney-client consultations. In *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963), the defendant's discussions with his attorney (which took place in a conference room in the county jail) were electronically transmitted to the sheriff. The court rejected the view ". . . that the granting of a new trial is an adequate remedy for the deprivation of the right to counsel where eavesdropping has occurred." 62 Wash.2d at 376. Rejecting the approach that eavesdropping warrants a new trial whereas eavesdropping plus continuing prejudice would alone warrant a dismissal, the court found ". . . no way to isolate the prejudice resulting from an eavesdropping activity, such as this." Id. at 377. Moreover, the court found it an insufficient detriment to prosecutorial misconduct that a case may have to be tried twice. Id.

(footnote continued)

On July 12, 1976, Judge Winner of the U.S. District Court for Colorado found the Washington Court's reasoning compelling, and, in a case in which drug enforcement agents eavesdropped on the defendant's consultations with the public defender, dismissed the case since he could frame no order which " . . . will protect defendant against prejudice resulting from the reprehensible violation of her Sixth Amendment rights by Drug Enforcement Administration agents [who are agents of the prosecuting party.]" United States v. Orman, 417 F. Supp. 1126, 1138 (D. Colo. 1976). Judge Winner rejected even the condition of most previous district and appeals court decisions (see United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975)) that intercepted information must have been divulged to the prosecutor before or during trial for the conviction to fall. 417 F. Supp. at 1136.

Two months later the 6th Circuit addressed similar issues in a refreshingly animate case involving once again a government informant (paid). United States v. Valencia, 541 F.2d 618 (1976). Nine defendants were charged with conspiracy to import cocaine, including an attorney whose secretary was the informant who had shown government agents some of the attorney's files and on occasion provided them with photocopies of files. On these grounds the district judge dismissed the case against the attorney and three other defendants, finding that the informant's help had enabled the government to indict them. Id. at 620. Remaining defendants were tried and convicted; on appeal one complained of an intrusion into his attorney-client relationship, the others maintained that this intrusion improperly tainted their prosecutions. Id., at 621. The Court of Appeals endorsed the trial judge's dismissals above, and held that since one convicted defendant did enjoy a legitimate attorney-client relationship, a hearing must be held on remand to determine if the government obtained prejudicial information from that intrusion. If so, the indictment must be dismissed or the case retried as the situation may require. The other defendants were to be accorded the same relief, to discourage procedures which generate tainted evidence. Id. at 622. At 623:

¶39 Lower courts are still struggling with the appropriate presumptions and burdens pertaining to prejudice as well as the sufficiency of the new trial remedy.⁸¹ The law is still sufficiently unsettled such that cogently briefed arguments will not likely be rebuffed by mechanical appeals to precedent.

¶40 It would seem that the options fairly open to the courts might be the following. In cases involving gross prosecutorial misconduct, i.e., the blatant monitoring of attorney-client communications in situations clearly likely to reveal

[N]o necessary inference of prejudice with respect to appellants can be made on the basis of government's intrusion into the privileged relationship between attorney and client. The more recent authority indicates that there must be a showing of prejudice as well as a showing of an intrusion into the privileged relationship, United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Mosca, 475 F.2d 1052 (2d Cir.), cert. denied, 412 U.S. 948, (1973); South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973); People v. Poblner, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637 (1973), although cases from the District of Columbia Circuit have indicated that a showing of a gross intrusion into the attorney-client relationship is sufficient to warrant a reversal of conviction and award of a new trial without a showing of prejudice. [Citing Coplon and Caldwell]

See also United States v. Lemonakis, 485 F.2d 941 (D. D.C. 1973), cert. denied, 415 U.S. 989 (1974); Klein v. Smith, 21 Crim. L. Rptr. 2184, (2d Cir. May 3, 1977) (a defendant accused of murder whose codefendant agreed to testify against him, but did not tell the defendant or the lawyer who jointly represented them about this, was not denied effective assistance of counsel. Citing Weatherford v. Bursey).

⁸¹See preceding note.

a defendant's disclosures and his attorney's strategy prior to trial--an otherwise privileged communication--cases should be dismissed and convictions vacated without re-trial.

Admittedly, this exceeds the exclusionary policies of Fourth Amendment violations.⁸² The courts, particularly the federal courts in the exercise of their supervisory authority over federal prosecutions,⁸³ might well, however, take a more strict approach when prosecutors--officers of the court--are involved.⁸⁴

¶41 In cases involving less abusive intrusions, the courts may well inquire into the prejudicial nature of the information received, granting new trials when tainted evidence is introduced and keenly assessing the enduringly prejudicial effect of improperly received communications. The advantages to be secured from knowledge of a defendant's statements and discussions are not limited to evidentiary value at trial. Defense strategy and psychology, matters that never get to a jury but nonetheless will be relevant to subsequent trials, can be permanently impaired by simple disclosure to a prosecutor.

⁸² See Mapp v. Ohio, 367 U.S. 643 (1961).

⁸³ See United States v. Valencia, 541 F.2d 618 (6th Cir. 1976).

⁸⁴ This mechanical remedy would apply to a very narrow range of cases, probably only those in which the government deliberately intercepted attorney-client consultations when little motivation other than the desire to obtain pre-trial communications could be inferred.

¶42 The Supreme Court has not been particularly impressed with the prejudice a defendant may suffer when the prosecution obtains his statements that are neither admissible for their content nor exploitable as leads in the development of a case;⁸⁵ it is quite likely, therefore, that this Court's interpretation of enduringly prejudicial evidence would be quite limited.

F. Public Corruption: Bribery and Extortion⁸⁶

¶43 The constitutional and common law reverence for the near inviolability of attorney-client relations seriously frustrates prosecutions for bribery and extortion against public officials, where corrupt public officials shrewdly restrict their direct transactions and communications to lawyers who serve as conduits for the illegal scheme. Assertion of the privilege by the official prevents the

⁸⁵ See Kastigar v. United States, 406 U.S. 441 (1972), and particularly Mr. Justice Marshall's dissent at 406 U.S. 467. In Kastigar the Court upheld the constitutionality of 18 U.S.C. §6002, authorizing the granting of use (as opposed to the broader transactional) immunity for compelled testimony.

⁸⁶ Bribery may be defined generally as the voluntary giving or offering to, or the acceptance by, any public officer or official, of any sum of money, present or thing of value, to influence such officer or official in the performance of any official duty required of him, or to incline him to act contrary to known rules of honesty and integrity.

11 C.J.S., Bribery §2 (1938). A statute which defines bribery excludes the operation of the common law definition. State ex rel. Grady v. Coleman, 133 Fla. 400, 183 So. 25 (1938).

(footnote continued)

'Extortion' means the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. At common law, and under statutes declaratory thereof, 'extortion' is a crime committed by an officer who, under cover of office, unlawfully takes any money or thing of value not due him, or more than is due, or before it is due; but under other statutes it includes any obtaining of property from another through a wrongful use of force or fear.

35 C.J.S., Extortion §1 (1960).

The traditional definitions of bribery and extortion have rendered the crimes mutually exclusive,

. . . the essence of the one being the voluntary giving of something of value to influence the performance of official duty, the evidence of the other being duress,

United States v. Kubacki, 237 F. Supp. 638, 641 (E.D. Pa. 1965), and hence bribery was often asserted as a defense to the charge of extortion. The Hobbs Act, 18 U.S.C. §1951 (1970), provides that:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

. . . .

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

This Act has been interpreted to permit prosecution by the federal government of local politicians for the extortion of funds from local businessmen, without evidence of duress. United States v. Staszczuk, 502 F.2d 875 (7th Cir. 1974). For the use of this Act in prosecuting local corruption, and its apparent blurring of the common law distinction between bribery and extortion, see Note, "Federal Prosecution of Local Political Corruption: A New Approach," 29 U. of Miami L. Rev. 390 (1975).

attorney's testimony absent a showing that the crime or fraud exception applies, and the courts' distaste for interception of attorney-client communications often prevents the gathering of evidence that would suffice either to establish the exception or prove the crime.

¶44 Concern for the embarrassing anomaly that these rules both enable the normal citizen to repose unfettered confidence in his attorney and insulate corrupt officials is not novel to the profession. Forty-five years ago, in his address to the Annual Dinner of the American Law Institute, former Judge Samuel Seabury of the Court of Appeals of New York dedicated the bulk of his presentation to the peculiar (and related) problems of successful prosecution of organized crime and governmental corruption cases. In particular, Judge Seabury addressed the barriers formed by the privilege against self-incrimination and the attorney-client privilege.⁸⁷ Judge Seabury recommended discarding the need to establish

⁸⁷In his discussion of the attorney-client privilege, Judge Seabury stated the following:

It is, of course, a time-honored and useful rule that in private cases communications between attorney and client should be regarded as privileged. I should not like to see this privilege weakened or impaired in private cases. It is, however, true that the profession should be the first to insist that such changes in the privilege should be made as to prevent its being used as an excuse for the failure to disclose facts in relation to the bribery of public officials. Experience has shown, and the investigations of municipal governments have revealed, that the safest way to bribe a public official is to do it under the cover of the professional relationship. When inquiry into the matter is made, the professional relationship is invoked as a reason why the facts should

(footnote continued)

not be disclosed. In consequence, we have a group of politically influential lawyers who are retained not for the exercise of legal knowledge or skill, but for their political influence, that is, to act as political brokers in public contracts and governmental favors. The fact that nominally these men are lawyers permits them to invoke the professional relationship or privilege as a reason why they should not be compelled to disclose the facts. It has, therefore, become common for those desirous of bribing public officials to limit their own relations or acts to the so-called 'lawyer' who may urge as privileged any communication made to him. It is, of course, quite true that the law as it now is will not apply the privilege where the lawyer is a co-conspirator with his client. The difficulty lies in the fact the so-called 'lawyer' cannot be compelled to disclose the circumstances until the conspiracy itself is fairly well established. The test should depend not upon whether the dealings have been with public officials or in relation to public affairs. The invoking of the legal privilege in such cases as those to which I have referred is itself a reflection upon the legal profession as a whole, which it should, in my judgment, exert itself to make impossible.

There is a public necessity for the continuance of the rule which regards communications between private clients and their attorneys as privileged, but there is no public reason which can justify this privilege being extended so as to make impossible the proof of bribery which attorneys commit on behalf of their clients. In all dealings with public officials, or political organizations or their leaders in relation to public concessions, public contracts or favors, there should be no privilege against the disclosure of the full facts. The adoption of such a rule would do much to relieve the profession from the odium which inevitably attaches to it where those seeking public favors have acted through attorneys who receive large sums--often in cash--and refuse to explain any of the facts on the ground of the privilege incident to the professional relationship. In truth, in such cases it is neither a legal nor a professional relationship. The attorney is merely the corrupt go-between who acts for the business man who wants a governmental favor and is willing to get it by bribery, and the public official or political boss who is willing to sell it to him provided he may act through one who cannot be compelled to testify to the fact.

wrongful intent, thereby bringing the crime or fraud exception into play, and he was in favor of an abolition of the privilege for public officials acting within areas touching public matters or their official capacities.⁸⁸

¶45 Five years later the American Bar Association's Committee on the Improvement of the Law of Evidence, in recommending that the Association's Section on Criminal Law study the subject, endorsed Judge Seabury's proposal and further suggested that the new exemption from the privilege might be larger, including not only public officials but also organized crime personnel involved in "'rackets' and 'gangsterism,' . . . a certain type of lawyer has usually been found among those syndicates."⁸⁹

¶46 A more recent commentator, James A. Gardner, has opposed the abolition of the privilege for public officials:

to deny the privilege her, if the attorney-client relationship exists in actuality, would tend to undermine the privilege in other areas where the claim to recognition is more compelling.⁹⁰

[T]he professional privilege itself may be so modified that it cannot be used as a cover by which so-called 'lawyers' may commit the crime of bribery under circumstances which not only facilitate the bribery but make its disclosure almost impossible.

18 A.B.A.J. 371, 372 (1932).

⁸⁸ Although Judge Seabury did not discuss the mode of modification of the privilege, obviously such a radical alteration as the exclusion of a traditionally protected class would have to be statutory, and not judicial.

⁸⁹ Reproduced at 8 J. Wigmore, Evidence §2299, pp. 579-80 (McNaughton rev. 1961).

⁹⁰ Gardner, supra note 47, at 712.

Gardner did not indicate what these areas might be, nor present an argument that the detriment occasioned by the loss of the privilege would outweigh the benefit of lost protection for corrupt conduct.⁹¹ He did, however, support the proposal that "in all cases involving 'organized criminal syndicates' the privilege should be abolished:"

Adequate protection would be afforded in the rule requiring that sufficient evidence to color to the charge of the existence of conspiracy should be offered, and the attorney should be connected with the conspiracy by the same quantum of proof (when an attorney is involved). The court should not be required to make a specific finding of conspiracy, but only a finding that sufficient evidence has been adduced to give color to the charge. This rule would . . . strike a legitimate⁹² blow at organized crime and its mouthpieces

¶47 The problems Gardner's suggestion poses ring of throwing out the baby and retaining the bathwater. Since he does not elaborate beyond the above on these proposals involving corrupt officials and organized crime figures, we are left to speculation on matters of detail.

¶48 Two oversights are prominent in reviewing his analysis. First, the requisite proof in giving "color to the charge of the existence of conspiracy" presumably relates to establishing the defendant's membership in an "organized

⁹¹In a footnote (Id. note 69) Gardner suggests that in addition to the "crime or tort" exception one can additionally assert that the corrupt official-attorney consultation is without the privilege's protection as "the advice was sought for a non-legal purpose;" however, the problems of proof appear identical regardless of the exception urged. Moreover, Wigmore has observed that the privilege should be narrowly construed, as its "benefits are all indirect and speculative; its obstruction is plain and concrete."
8 J. Wigmore, Evidence §2291 (McNaughton rev. 1961).

⁹²Id. at 712.

crime syndicate," as opposed to his participation in the unlawful conspiracy involved in the case, since (1) garden variety conspiracies would serve to trigger the crime or fraud exception anyway, and (2) the avowed purpose of the novel theory is to abolish the privilege where organized crime is present. But the burdens of proof and due process problems in establishing one's syndicate membership would be formidable. Similar problems have been encountered in adjudication of "dangerous special offender" status in the federal courts.⁹³ One can only assume that courts would be even more cautious in adjudicating one's status in a proceeding designed to facilitate the finding of guilt, as opposed to the traditionally less formal inquiries permitted at sentencing.

¶49 Second, although Gardner is reluctant to abolish the privilege wholesale for public officials since they presumably engage in communications worthy of confidentiality, he does not so respect the "racketeer's" legitimate consultations. Indeed, the organizers behind organized crime--those whom the prosecutors are most interested in convicting--are generally (though perhaps nominally) engaged in legitimate enterprises as well, and they may be even more likely to use the same counsel for legitimate and corrupt affairs than public officials are to use one lawyer for both personal and public/corrupt business.

⁹³18 U.S.C. §3575. See United States v. Duardi, 492 F.2d 1361 (8th Cir. 1974).

¶150 Judge Seabury's proposal regarding public officials sought to deny them the privilege only for public business,⁹⁴ yet no such limiting design is to protect the professional criminal in his less odious dealings. Perhaps this may be overstating the breadth of Gardner's denial of the privilege in such cases, but it is difficult to distinguish any narrower construction from the current state of the law, where the crime or tort exception applies on a communication-by-communication basis when a wrongful conspiracy is fairly well established.

¶151 The reports do not abound in cases involving public officials' assertions of the privilege when charged with corruption. Moreover, those cases in which an attorney volunteered information about which an incriminated "client" later complained do not reveal the problems inherent when the attorney, too, is silent.⁹⁵ Indeed, if

⁹⁴ See note 87, supra.

⁹⁵ In State v. Faulkner, 175 Mo. 546, 75 S.W. 116 (1903), the defendant was one of a group of members of the municipal assembly who had combined to control legislation and exact payments for passage of bills favorable to pecunious interest groups. He was convicted of perjury for denying knowledge of a particular scheme whereby \$75,000.00 was to be paid by a grateful corporation subsequent to the assembly's passage of a particular bill. A fellow assemblyman-attorney testified that the defendant had approached him to solicit his aid in procuring the "overdue" sums; the defendant objected to this testimony, claiming a violation of the attorney-client privilege. He argued that any crime he might have committed had already been completed. The court noted that the crime or fraud exception applies even though the attorney himself is "wholly without blame," and further noted that it was "entirely plain that Lehman was not consulting Reiss for the purpose of defending him against

one is able to secure the attorney's cooperation in the investigation, either through testimony or a body tap,⁹⁶ obstacles are greatly diminished. The prosecutor will often possess more initial information concerning the attorney's participation in a bribery, extortion or kickback scheme than he will concerning the public official, since as the go-between it will be the attorney's involvement to which the victim of extortion or bribery can attest directly. The attorney's cooperation may, therefore, be exacted in return for prosecutorial consideration.⁹⁷ To the extent that prosecutorial ethics and duty to the bar permit, the benefits of establishing the attorney as an innocent participant are non-trivial.⁹⁸ His willingness to cooperate

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a pending or anticipated prosecution for the bribery disclosed" and therefore not a matter of legitimate professional employment. "[T]he proposition . . . to aid in obtaining the promised bribe . . . was no less iniquitous and degrading . . . than if his aid had been sought in the first instance." 175 Mo. at 596-98, 75 S.W. at 131-33.

⁹⁶ Privilege matters aside, when one party consents to a body tap, recorded tapes of conversations are admissible. Lopez v. United States, 373 U.S. 427 (1963). See also United States v. Merriitts, 527 F.2d 713 (7th Cir. 1975), United States v. Leighton, 386 F.2d 822 (2d Cir. 1967).

⁹⁷ The methods by which the government may confront a co-conspirator to induce his cooperation in putting together a corruption case are not unlimited. See the court's disapproval of tactics used in U.S. v. Ryan, 548 F.2d 782, 788-89 (9th Cir. 1976), cert. denied, 97 S. Ct. 354 (1976).

⁹⁸ It should be remembered that the crime or tort exception to the privilege applies if the client's intentions are wrongful, regardless of the attorney's good faith. See text accompanying note 40, supra, and State v. Faulkner, note 95, supra.

if he can come out "clean" will be increased, as disbarment for such felonious activity is likely.⁹⁹ His credibility before the jury is increased; and in jurisdictions requiring corroboration of accomplice testimony, his "innocent" testimony escapes the need for corroboration.

¶52 Of course, assuming the absence of a cooperative attorney, the need for electronic surveillance is paramount. Since an attorney is involved, the possibility of intruding upon protected consultations is great, particularly if it is the attorney's--and not the corrupt official's--office or telephone which is monitored. In State v. Morhouse,¹⁰⁰ the Chairman of the N.Y. State Republican Committee appealed his conviction for bribery and taking unlawful fees (by virtue of aiding and abetting the illicit procurement of a restaurant's liquor license from the Chairman of the N.Y. State Liquor Authority) in part on the basis of an interference with his Sixth Amendment right to the effective assistance of counsel through electronic monitoring of his office and telephone conversations.¹⁰¹ Surveillance

⁹⁹See Note, "Disbarment in the Federal Courts," 85 Yale L.J. 975-89 (1976).

¹⁰⁰21 N.Y.2d 66, 233 N.E.2d 705, 286 N.Y.S.2d 657 (1967).

¹⁰¹For a history of the investigation and judicially warranted surveillance see A.B.A. Project on Minimum Standards for Criminal Justice, pp. 53-58 (1971). For the unconstitutionality of the wiretap statute involved, see Berger v. New York, 388 U.S. 41 (1967) (the Court of Appeals of New York held that Berger was not to be given retroactive application to the instant case, 21 N.Y.2d at 77).

of Morhouse's office was maintained subsequent to the prosecution's focus on Morhouse as a suspect and the prosecutor's knowledge that Morhouse conferred with his attorney at this office.¹⁰² The case was remanded for a full hearing on the legality of the electronic surveillance. The Court of Appeals later affirmed the trial court's unreported decision confirming the propriety of the monitoring involved.¹⁰³ In People v. Poblner,¹⁰⁴ the New York Court of Appeals held:

It must be shown that the interception undermined the right to counsel and that the interference could not be cured by holding a new trial. In other words, it must appear to warrant dismissal, as distinguished from the limited sanction of exclusion of evidence, that the prosecution could or would necessarily avail itself of the illegal evidence directly or indirectly by way of strategy, or tactics, which it could not have but for the unlawful wiretap.¹⁰⁵

¹⁰²Id. at 78.

¹⁰³27 N.Y.2d 896, 265 N.E.2d 777, 317 N.Y.S.2d 367 (1970).

¹⁰⁴32 N.Y.2d 356, 298 N.E.2d 637, 345 N.Y.S.2d 482 (1973), cert. denied, 416 U.S. 905 (1974).

¹⁰⁵Id. at 365.

For a near-model approach to electronic surveillance in delicate cases, see United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y., 1973), aff'd, 485 F.2d 490 (2d Cir. 1973), cert. denied, 423 U.S. 952 (1975). Bynum was engaged in a large-scale narcotics trade "with the affirmative aid, counsel and protection of local and federal law enforcement officers, agents and their supervisors." Id. at 404. Attorneys were advising Bynum on how best to conduct the conspiracy. Defendant's telephone was tapped; the prosecutor submitted written reports to the authorizing judge at intervals of five days or less, and when preparation of a written report was delayed the judge was informed

G. Conclusion and Recommendations

¶53 In political corruption cases in which a public official

(footnote continued)

by telephone. Reports included the number and nature of apparently privileged intercepted calls. The judge, who was called by defendants to testify at a hearing concerning the legality of the surveillance, indicated that "he was aware of the minimization requirement but recognized the problems inherent in this particular case. . . .the conspirators 'were so far flung and it involved so many that it was very difficult to say that "You can't listen to certain parties"... I wanted to make sure that [the listening agents] were aware of the minimization rule, and... the attorney-client relationship.'" Id. The court held that great weight should be accorded to the determinations of the supervising judge "who faced the problems of the interception contemporaneously with its execution." Id. at 415. The court noted that the privilege does not apply to discussions of contemplated illegal activities, Id. at 417, that a review of the calls revealed much that is "prima facie criminally suspect," and finally that "a defendant is not entitled to perfection in the censorship of what is available to be overheard on the tap; he is entitled to a fair effort from the government agents at not overhearing what is irrelevant to the search." Id., at 419.

Finally, in United States v. Stern, 511 F.2d 1364 (2d Cir. 1975), the Second Circuit reversed the suppression of alleged attorney-client recorded conversations. The defendant was charged, inter alia, with violating the Racketeer Influenced Corrupt Organizations Act (18 U.S.C. §§1962(c), (d)) for conspiring to demand and accept payments from employers. In this instance the attorney himself recorded the consultation with the defendant (prior to indictment) in order to prove, if necessary, his lack of connection with certain of the the defendant's dealings. "The conversation itself is the most convincing evidence that it occurred not in an attorney-client context, but in the context of two men under investigation trying to protect themselves from any nuances of corruption that might spill over from one investigation to the other." Id. at 1366. (The defendant was being audited, and the attorney already indicted, for tax violations).

It appears clear that if recorded conversations exist judges will listen to them to determine whether communications are of a privileged nature.

has insulated himself from his victims or fellow conspirators by engaging an attorney as go-between for consummation of the illegal scheme, the Sixth Amendment and the attorney-client privilege serve to frustrate the prosecutor's gathering and introduction of evidence. The protections afforded have gone beyond that necessary to guard the interests supporting the doctrines; a more rational and just framework can be achieved by (a) prosecutorial diligence and care in electronic surveillance and argument to judges, and (b) statute. The Sixth Amendment, unlike the privilege, is of constitutional dimension, and therefore the freedom with which the courts modify its interpretation is limited. A corruption case need seldom involve intrusion upon the defendant's (public official's) right to counsel in a criminal proceeding since most officials are not under indictment for other offenses and will not be consulting concerning matters protected by the Amendment.¹⁰⁶ Since the Supreme Court does

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For problems and standards concerning electronic surveillance generally, see Report of the National Commission for the Review of Federal and State Laws Relating to Wire-tapping and Electronic Surveillance (Wash., 1976); for a survey of surveillance under state laws see that Commission's Staff Studies and Surveys (Wash., 1976).

¹⁰⁶This is less likely to be true of a syndicate briber, who may well be a veteran of multiple investigations or pending indictments. Surveillance of attorney-client communications in such a situation would be a more delicate task.

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not require prosecutors to cease an investigation and seek an indictment once evidence tending to establish probable cause to indict is amassed,¹⁰⁷ surveillance may continue to establish proof sufficient for a conviction. A review of the tapes themselves will generally indicate the Amendment's inapplicability.

¶54 The privilege is of broader scope than the Amendment. In addition to encompassing communications regarding "assistance in some legal proceeding," it includes solicitations of "an opinion on law . . . legal services" (Wyzanski's definition) which an official may regularly seek in the ordinary exercise of his functions.

¶55 As a practical matter, if documents or conversations have been volunteered by the attorney, or if the government possesses tapes incident to a lawful surveillance, courts will review them for their content and determine whether the amendment or privilege has been violated.¹⁰⁸

¶56 When an attorney's testimony is essential and the attorney-client privilege is invoked, courts should apply a standard that requires but a light burden of proof to be overcome by the prosecution in order to establish some probability of criminal design sufficient to trigger the exception to the privilege and compel in camera disclosure to the judge. Such a standard and proceeding should be

¹⁰⁷ See Hoffa v. United States, supra note 70.

¹⁰⁸ See State v. Faulkner, supra note 95; United States v. Stern, supra note 105.

advanced, since it reduces abuse of the privilege while protecting against public disclosure of legitimately confidential communications.¹⁰⁹

¶57 In requests for bug and wiretap authorization, the judge should be encouraged to delineate clearly the minimization standards and he should be frequently informed of the nature and content of intercepted conversations. At taint hearings, it should be pressed that the authorizing judge's determinations should be accorded great weight.¹¹⁰ When interceptions of attorney-client communications are inevitable, a supervising prosecutor should be involved in operating the monitoring device to facilitate deletion of privileged communications.

¶58 A rational doctrine should be presented to the courts for remedying actual intrusions into protected or privileged conversations. A per se rule of dismissal is not sensible, although prosecutors ought to admit the appropriateness of that remedy for gross governmental misconduct or irreparable interceptions. New trials should be ordered only upon a showing of prejudice at the earlier trial.¹¹¹ Only with such standards can the use of electronic surveillance, essential to corruption investigations and necessarily tending toward

¹⁰⁹Of course, a grant of immunity to the lawyer cannot defeat the client's assertion of the privilege since it is the client's privilege. See 8 Wigmore §2321 (McNaughton rev. 1961).

¹¹⁰See United States v. Bynum, supra note 105.

¹¹¹See notes 63-85 and accompanying text, supra.

intrusion into protected areas, prove effective.

¶59 A statute abolishing the availability of the attorney-client privilege to public officials might well be useful. But the political realities of securing passage of such a statute are not encouraging. Prosecutors are well advised to concentrate on judicial modification of privilege rules concerning burdens, in camera disclosure and remedies. Such a statute may be most easily introduced at the federal level, as Congress has been more experimental with criminal legislation in the organized crime realm than have the states.¹¹²

¹¹²Article V of the proposed Rules of Evidence for the United States District Courts and Magistrates contained 13 rules dealing with privilege prescribed by the Supreme Court. 56 F.R.D. 183, 230-261 (1973). Rule 503 dealt specifically with the attorney-client privilege. The House and Senate, however, replaced the 13 specific rules relating to privilege with one general rule:

Article V. Privileges.

Rule 501, General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common laws as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

¶60 Legitimately privileged communications would not necessarily become unprivileged at insufficient gain.¹¹³ The statute could be written to apply only to criminal prosecutions of public officials for crimes associated with their abuse of office. Such a statute would not impinge upon "other areas where the claim to recognition is more compelling."¹¹⁴

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"Federal privilege law... will always apply in federal criminal cases, generally apply in federal question cases, sometimes apply in diversity cases, and usually apply in cases of conflict." Weinstein & Berger, Commentary on the Rules of Evidence for the U.S. Courts and Magistrates, ¶501[02] at 501-20 (1975). Rule 501 was intended to leave federal law undisturbed for federal courts to develop on a case-by-case basis. 120 Cong. Rec. H 12, 253 (daily ed., Dec. 18, 1974). On this point, see Lewis v. U.S., 517 F.2d 236 (9th Cir. 1975).

¹¹³ See Note, supra note 47, at 712.

¹¹⁴ Id.

II. DISQUALIFICATION OF ATTORNEYS: MULTIPLE REPRESENTATION

A. Introduction

¶61 The basic problem of prosecutors in the multiple representation situation has been succinctly stated by Earl J. Silbert, U.S. attorney for the District of Columbia:

Too often, we have seen a lawyer known to represent Mr. Big in narcotics come down to represent one of this lieutenants who has been arrested. The result: the chances of the lieutenant deciding in his interest to cooperate and turn state's evidence against Mr. Big are eliminated. Too often, in cases involving business corporations or labor unions, one lawyer represents targets of the investigation and witnesses, multiple representation, which in our view fosters obstruction of justice, criminally preventing prosecutors from penetrating to the top of organized criminal conspiracies.

Some lawyers are simply oblivious to the legal and ethical problems of multiple representation. A few, aware of the problems, deliberately ignore them for monetary reasons. Others, also aware of the problems, reject what appears to them to be the efforts of prosecutors to dictate whom they can represent.¹¹⁵

It is conceivable that a reminder to the offending attorney of the conflicts of interest created by his multiple representation, or an opinion from the A.B.A. may produce desired changes in some situations.¹¹⁶ Nevertheless, the

¹¹⁵Federal Bar Association Luncheon, Sept. 15, 1976, pp. 9-10.

¹¹⁶H. Drinker, Legal Ethics, 106 (1953). Attorneys should not voluntarily put themselves in positions where the conditions of their compensation may interfere with the full discharge of their duty to their clients. See also ABA Standards Relating to the Prosecution Function and the Defense Function, The Defense Function §3.5 (Approved Draft, 1971).

basic tactic for a prosecutor faced with the multiple representation situation is a motion to disqualify the offending attorney.¹¹⁷

¶62 The authority to disqualify an attorney comes from the inherent power of the trial judge to supervise the attorneys practicing before him.¹¹⁸ The order of the trial judge is a matter of discretion based on all the facts and circumstances, and is reversible only as an abuse of discretion.¹¹⁹ There are relevant statutes in some jurisdictions (e.g. Virginia), and the Code of Professional Responsibility is a standard everywhere (incorporated either by reference or through the court rules). In practice, the actual standards for disqualification vary considerably among jurisdictions, but basically rest on a balancing test weighing:

- (1) the right of individuals to counsel of their choice;

- (2) the right of individuals to freely associate in order to obtain counsel; and

- (3) the right of attorney to practice his profession;

as compared to:

¹¹⁷In In re Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975) (the disqualification attempt took the form of opposition to the admission of an attorney to practice before the District Court).

¹¹⁸Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), aff'd, 352 A.2d 11, cert. denied, 423 U.S. 1083 (1976).

¹¹⁹In re Gopman, 531 F.2d 262 (5th Cir. 1976).

- (1) the right of the state to effectively investigate and prosecute criminal activity;
- (2) the interest of the state in maintaining the integrity of its courts and the legal profession; and
- (3) the obligation of the state to protect the constitutional rights of individuals.

Courts have tended not to define explicitly the weight given to each factor,¹²⁰ but rather have either lumped all the considerations together, or focused almost exclusively on one factor. The issues dealt with most frequently are discussed below.

B. Right to Counsel

¶63 The right to counsel is guaranteed by the Sixth Amendment, but:

Although the right to counsel is absolute, there is not absolute right to particular counsel.¹²¹ Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of justice.¹²²

In Pirillo v. Takiff,¹²³ twelve policemen under grand jury

¹²⁰Pirillo v. Takiff, supra note 118, gives the most complete analysis of the problem. See also, S. Remsberg, "Ethics, Judicial Power, and the Sixth Amendment: Pirillo v. Takiff," 37 U. Pitt. Law Rev. 577 (1976).

¹²¹United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970).

¹²²Id. at 1214.

¹²³Supra, note 118.

investigation for bribery were represented by one lawyer who was paid by the Fraternal Order of Policemen (F.O.P.) thereby creating potential conflicts of interest among the witnesses, and between the witnesses and the F.O.P.¹²⁴ The court required each witness to obtain separate counsel not related to the F.O.P.¹²⁵ As explained by a lower appellate court following the Pirillo decision,

The Court concluded that the value of a witness' right to counsel of his choice was minimal when chosen counsel was inherently unable to commit himself to act in the best interests of his client.¹²⁶

The court also emphasized that the infringement of the right to counsel was the minimum necessary to protect important state interests in these circumstances.¹²⁷

¶64 Those courts that have denied a motion for disqualification because of violation of the right to counsel have most frequently based their decision on a finding of lack of evidence sufficient to warrant denial of such important

¹²⁴The conflict from representing multiple witnesses is basically that it may be in one witness's interest to turn State's evidence, but the attorney would be unable to advise him or bargain for him without prejudicing his other client(s). The conflict with respect to payment by the F.O.P. while representing witnesses is that it divides the attorney's loyalties (or at least gives the appearance of such impropriety) insofar as the interests of the witness(es) and the F.O.P. diverge. Here this second conflict was particularly apparent because the F.O.P. had actively opposed the investigation cooperation with which well might have been in a witness' best interest.

¹²⁵Pirillo v. Takiff, supra note 118, at 905-906.

¹²⁶In re January 1974 Special Investigating Grand Jury, 361 A.2d 325, 328 (Pa. Super. 1976).

¹²⁷Pirillo v. Takiff, supra note 118, at 905-906.

rights.¹²⁸ These cases raise questions of procedural requirements discussed below,¹²⁹ and also frequently deal with the issue of the individual's right to waive conflict-free counsel.¹³⁰

¶65 In Glasser v. United States,¹³¹ the Supreme Court enunciated the right to assistance of counsel free from conflicts of interest. Various lower courts have found that right to be waivable.¹³² In United States v. Garcia,¹³³ the question of waiver was given thorough consideration.

¹²⁸In re Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); In re Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975).

¹²⁹See ¶¶73-76.

¹³⁰See, e.g., In re Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); and United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). Both discussed below.

¹³¹315 U.S. 60 (1942).

¹³²In re Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); and In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976), among others. (Relying primarily on Faretta v. California, 422 U.S. 806 (1975), which recognized the individual's right to direct his own defense. Faretta quotes Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942):

When the administration of the criminal law... is as hedged about it as it is by Constitutional safeguards for the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards... is to imprison a man in his safeguard and call it the Constitution.

¹³³517 F.2d 272 (5th Cir. 1975).

The court held that the district court's decision to disqualify, because of the need to protect defendants from conflicts of interest, was premature in that evidence had not been taken as to whether or not they would choose to waive the right to counsel without conflicts. The court (relying on Johnson v. Zerbst¹³⁴ and Brady v. United States¹³⁵) then stated:

Individuals are free to waive the constitutional protections otherwise afforded them, regardless of their motivation, as long as the waiver is voluntary, knowing and intelligent.¹³⁶

The court then elaborated on the required procedure:

The trial court should actively participate in the waiver decision. The Supreme Court recognized the need for affirmative judicial involvement in the waiver process in Von Moltke v. Gillies, 332 U.S. 708, 723-24, 168 S.Ct. 316, 92 L.Ed. 309, 320-21 (1948) . . . [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstance in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

¹³⁴ 304 U.S. 458 (1938).

¹³⁵ 397 U.S. 742 (1970).

¹³⁶ 517 F.2d at 276-277.

In accordance with the foregoing principles, we instruct the district court to follow a procedure akin to that promulgated in F.R.Crim. P. 11 whereby the defendant's voluntariness and knowledge of the consequences of a guilty plea will be manifest on the face of the record Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discuss [sic] the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.¹³⁷

¶66 Although waiver completely negates the state interest in protecting an individual's right to conflicts-free counsel, the other state interests can still outweigh the competing rights so that disqualification can be granted.¹³⁸

C. Freedom to Associate to Retain Counsel

¶67 This right, derived from the First Amendment, is cited primarily with reference to United Mine Workers v. Illinois State Bar Association¹³⁹ and N.A.A.C.P. v. Button.¹⁴⁰ The

¹³⁷ Id. at 277-278.

¹³⁸ In Pirillo, the Court found it unnecessary to decide whether there had been effective waiver. In his fundamental work, Legal Ethics (1953), Drinker, then Chairman of the A.B.A. Ethics Committee, cited numerous A.B.A. opinions for the proposition that, in a conflicts situation, "Consent [is] unavailable where the public interest is involved." At 120. See also In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970); and Ahto v. Weaver, 39 N.J. 418, 189 A.2d 27 (1963).

¹³⁹ 389 U.S. 217 (1967) (The Bar Association's attempt to have prohibited as unauthorized practice of law the union practice of hiring an attorney to represent any member who had a Workman's Compensation claim was denied).

¹⁴⁰ 371 U.S. 415 (1963) (A Virginia law which would have prohibited the N.A.A.C.P. from referring individuals to particular attorneys and sometimes paying their legal fees was held unconstitutional as applied).

Pirillo court discusses both cases:

Both Button and United Mine Workers specifically addressed the issue of potential conflicts inherent in the selection of lawyers by an organization to represent individual defendants. The selection procedures discussed there were similar to the method by which the F.O.P. recommends and pays qualified attorneys to represent individual members of the Order. The United States Supreme Court recognized that a state may act pursuant to its broad power to regulate the practice of law to prevent a serious conflict of interest from arising in the legal representation of its citizens, but held that the record below, in each instance, failed to demonstrate that any actual danger existed or that the state regulation was sufficiently narrow to meet only the particular form of danger present. The primary objectionable feature of state regulation in the First Amendment area is vagueness and overbreadth which result in sweeping and improper application of a regulation. Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967); Smith v. Crumlish, 207 Pa. Super. Ct. 516, 218 A.2d 596 (1966). Thus, if regulations affecting First Amendment rights are no greater than necessary to eliminate the substantive evil and protect the substantial governmental interests and individual rights, then the regulation can be constitutionally tolerated. McMullen v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973).¹⁴¹

¶68 In practice, these cases have been cited for the two general propositions: (1) that the individual's right to associate for the purpose of obtaining counsel is protected by the First Amendment and is not to be lightly disregarded, and (2) that organizations are not prohibited from providing legal services for their members, but that a balancing test is employed to weigh whether the harm likely to result in particular cases outweighs the value of the right. The conclusion of the Pirillo court (quoted above) that proper

¹⁴¹Pirillo, supra note 118, at 901.

tailoring of the court's order could avoid most problems is probably a narrower construction of First Amendment requirements than other courts would hold. The court, in In re Investigation Before the April 1975 Grand Jury,¹⁴² on evidence similar to that available in Pirillo dismissed a motion to disqualify as premature because important rights of the defendants could not be infringed upon without a full record,¹⁴³ and until other alternatives had been exhausted.¹⁴⁴

D. Right to Practice Law

¶69 Like the freedom of association issue, this right has received substantial reference and minimal discussion in court opinions. The Pirillo court observed:

Unquestionably the right to pursue the occupation of one's choosing may not be curtailed without due process of law. The interest in a profession, being akin to a property right, may not be removed arbitrarily, Dent v. West Virginia, 129 U.S. 114 (1889); Moore v. Jameson, 451 Pa. at 308, 306 A.2d at 288.

The Pirillo court applied a balancing test, and as explained by the court in In re January 1974 Special Investigating Grand Jury, found that:

[A]n attorney's right to practice his profession was minimal when such practice at best operated on the margin of ethics.¹⁴⁶

¹⁴² 531 F.2d 600 (D.C. Cir. 1976).

¹⁴³ Id. at 607.

¹⁴⁴ Id. at 609. See also Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976).

¹⁴⁵ Supra note 118, at 900.

¹⁴⁶ 361 A.2d 325, 328 (Pa. Super. 1976).

E. Right to Investigate and Prosecute

¶70 There is no question as to the state's right to efficiently and effectively operate its criminal justice system and to move to disqualify an attorney whose multiple representation is impeding that function.¹⁴⁷ Since this right is evaluated by a balancing test, questions arise as to the degree of likelihood of harm and the degree of harm likely to result. It is difficult to generalize about courts' evaluations of these questions because they are so tied to the circumstances of individual cases that are often subtle and intricate. As extremes on the matter of likelihood of harm In re Special February, 1975 Grand Jury:

I am of the opinion that for the purposes of depriving a person of his choice of counsel, there must be actual conflict, not just the appearance of it,¹⁴⁸

contrasts with State v. Galati :

[T]he cause and effect impact upon the public consciousness is almost, perhaps quite, as important as the actual fact.¹⁴⁹

Most cases take a middle course allowing the court "to nip any potential conflict of interest in the bud,"¹⁵⁰

¹⁴⁷ See In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1012 (3d Cir. 1976).

¹⁴⁸ 406 F. Supp. 194 (N.D. Ill. 1975).

¹⁴⁹ 64 N.J. 572, 576, 319 A.2d 220, 223 (1974).

¹⁵⁰ Tucker v. Shaw, 378 F.2d 304, 307 (2d Cir. 1967) cited in In re Gopman, 531 F.2d 262 (5th Cir. 1976).

but requiring more than mere hypotheticals and unsubstantiated allegations.¹⁵¹ The degree of harm is of particular importance with respect to the procedural alternatives discussed below.¹⁵²

F. The Integrity of the Legal System

¶71 It is unquestioned that the general supervisory power of the court to protect its integrity includes the power to disqualify an attorney with conflicts of interest. Representation in situations like U.S. Attorney Silbert's example has resulted in suspension,¹⁵³ and disbarment,¹⁵⁴ but the standards for acceptable conduct appear to be different in a disciplinary proceeding from those used when a client's right to counsel is at stake. In In re Abrams, a disciplinary proceeding to review an attorney's conduct of accepting payment from a numbers banker to represent those runners who got arrested, it was said that:

[I]t is no answer that Canon 6 of the Canons of Professional Ethics permits the representation of conflicting interests 'by express consent of all

¹⁵¹As stated in In re Grand Jury Empaneled January 21, 1975, 536 F.2d at 1013:

Thus confronted with hypotheticals and not evidence, with rhetoric and not fact, the District Court erred in stripping appellants of the counsel of their choice.

¹⁵²Infra, ¶¶74-76.

¹⁵³In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970).

¹⁵⁴In re Mogel, 18 App. Div.2d 203, 238 N.Y.S.2d 683 (1st Dept. 1963).

concerned given after a full disclosure of the facts,' or that Canon 38, restated in affirmative terms, would permit the acceptance of compensation from others with 'the knowledge and consent of his client after full disclosure.' Neither rule is relevant when the subject matter is crime and when the public interest in the disclosure of criminal activities might thereby be hindered. It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony.¹⁵⁵

¶72 The statement from In re Abrams that:

Appearances too are a matter of ethical concern, for the public has an interest in the repute of the legal profession,¹⁵⁶

has been quoted with approval in Pirillo, but explicitly rejected in February 1975 Grand Jury. Between these two outer limits probably lies the majority view; yet judging from the quantity and quality of the discussion that the integrity of the legal system receives in these opinions on disqualification, it would seem that it is not a matter of great weight.

G. State's Obligation to Protect Individual Rights

¶73 This matter has received a considerable amount of attention in the opinions in a variety of forms. The basic

¹⁵⁵56 N.J. 271, 276, 266 A.2d 275, 278 (1970).

¹⁵⁶56 N.J. at 277, 266 A.2d at 278. This statement is based on Code of Professional Responsibility, Canon 9: "A lawyer shall avoid even the appearance of professional impropriety."

application to the multiple representation situation is that if the state recognizes that conflicts of interest exist such that an individual's right to counsel is threatened, it is the state's duty to protect the individual.¹⁵⁷ To fulfill this duty, the state can act to disqualify the individual's attorney.¹⁵⁸ As discussed above with respect to Garcia, this obligation can be satisfied by the court's proper supervision of a competent waiver. It has also been held that a motion to disqualify on the grounds of protecting a defendant from being deprived of conflict-free counsel cannot be granted unless the defendant has had the opportunity to waive that right.¹⁵⁹

¶74 Courts have established various procedures to insure that individuals' rights will be safeguarded. In In re Special February, 1975 Grand Jury,¹⁶⁰ the court rejected a disqualification motion based on allegations in the motion papers and required affidavits as a minimum. In In re January 1974 Special Investigating Grand Jury,¹⁶¹ the court reversed a disqualification for lack of evidence because the disqualification was based only on an unrecorded in camera hearing and a single letter from counsel indicating the intent of his three clients to resist any immunity offers. The court said:

¹⁵⁷In re Gopman, 531 F.2d 262, 265-266 (5th Cir. 1976).

¹⁵⁸Id.

¹⁵⁹United States v. Arredo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

¹⁶⁰406 F. Supp. 194 (N.D. Ill. 1975).

¹⁶¹361 A.2d 325 (Pa. Super. 1976).

We do not imply that, in support of his petition to disqualify an attorney, it will be necessary for the special prosecutor to produce the witnesses whose testimony allegedly supports an inference that multiple representation will lead to contrived "stonewalling" of the grand jury and frustration of its purpose. It would be acceptable if, by affidavit attached to his petition, the special prosecutor set forth the substance of the testimony, the salient facts, supporting his petition for disqualification, without disclosing particular such as the names of witnesses who provided such testimony. The hearing on the petition could then be limited to whether the allegations are sufficient to justify the disqualification of the attorney in question. At least that procedure would assure the affected parties an opportunity for a meaningful hearing and an effective appeal.¹⁶²

¶75 The court in In re Investigation Before the April, 1975 Grand Jury,¹⁶³ required far more action on the part of the prosecutor before disqualification could be granted. The prosecutor was faced with a situation where one hundred workers represented by one attorney paid by the union were making blanket assertions of the right to silence. The prosecutor moved to disqualify and require separate counsel. He argued that: (1) the current management was denying workers adequate representation,¹⁶⁴ and (2) was impeding investigation by producing unwarranted assertions of the Fifth Amendment privilege, and by promoting "stonewalling." In reversing the district court's grant of the

¹⁶²Id. at 330.

¹⁶³531 F.2d 600 (D.C. Cir. 1976).

¹⁶⁴To avoid conflicts among the worker's individual interests, the attorney refused to consult with anyone individually.

motion, the court decried "what is strikingly absent from the record,"¹⁶⁵ explaining:

There is no testimony or other evidence in the record indicating which of the subpoenaed witnesses consider Mr. Rosen to be their personal legal representative; how the witnesses would characterize the nature of their attorney-client relationship with Mr. Rosen; whether they are personally aware of the potential conflicts of interest inherent in Mr. Rosen's multiple representation; whether given such conflicts of interest they would still prefer to be represented by Mr. Rosen rather than another attorney; and, finally, whether they would expect to continue to assert the privilege against self-incrimination even if, denied Mr. Rosen's services, they elected to dispose with counsel entirely or to retain separate and exclusive counsel.¹⁶⁶

The court then proceeded to tell the prosecutor how to go about getting the required information:

These problems with the record might have been avoided had the Government pursued the traditional method of dealing with witnesses who make 'blind, indiscriminate and legally unwarranted assertions' of the privilege against self-incrimination. The Government could have brought each witness before the District Court for a ruling with respect to whether the privilege was properly asserted

At a hearing determining the applicability of the privilege to particular questions asked by the grand jury, the District Court would certainly be free to inform itself about the Government's allegations of conflicts of interest and inadequate representation by inquiring whether the witness was represented by Mr. Rosen, whether the witness was aware of the limitation on Mr. Rosen's ability to negotiate immunity in exchange for testimony, whether given that limitation the witness would prefer counsel other than Mr. Rosen, and whether the witness proposed to continue to assert the privilege under all circumstances.¹⁶⁷

¹⁶⁵ 531 F.2d at 607.

¹⁶⁶ Id.

¹⁶⁷ Id. at 608.

¶76 The above procedure is essentially the same requirement of a formal hearing on a motion to disqualify for conflicts of interest as applied in other cases.¹⁶⁸ With respect to the stonewalling problem, however, though the court recognized the difficulty, it left the prosecution with the grant of immunity as its almost exclusive remedy in the situation:

It seems to us that the circumstances of this case present precisely the type of situation for which Congress intended to provide the Government with an effective tool for discovering the truth without risking violations of the Constitution in the delicate areas of freedom of association and representation by counsel of one's choice. As the Second Circuit has recently observed, '[t]he accommodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute.' United States v. Tramunti, 500 F.2d 1334, 1342, cert. denied, 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). Until accommodation in that manner has been demonstrated to be not feasible or contrary to the public interest, it is surely premature to seek it through disqualification of counsel.¹⁶⁹

¶77 The role of the immunity statute in the multiple representation situation is a recurring problem that has

¹⁶⁸ See, e.g., In re Grand Jury Empaneled January 21, 1975, note 132 *supra*; and United States v. Liddy, 348 F. Supp. 198 (D.C. D.C., 1972).

¹⁶⁹ In re Investigation Before April 1975 Grand Jury, 531 F.2d at 609. Perhaps the problem for the prosecutor of having to grant immunity blindly did not much trouble the court because the facts in this case show that the government would risk little by doing so. Because of the large number of witnesses and the unlikelihood of choosing to grant immunity to an individual who should have been a target, the possibility of frustrating the Grand Jury investigation was small. Presumably, this problem under different facts could be used to demonstrate that a grant of immunity was "not feasible or contrary to the public interest."

not yet been fully discussed in the opinions. The general factual context is one where lawyer (L) represents A and B and the prosecutor is able to get a grant of immunity for either A or B and thereby compel his testimony.¹⁷⁰ Conflicts arise at two stages. The first stage is when the prosecutor approaches L to negotiate immunity. In the normal situation where A and B have interests that are at least somewhat in conflict,¹⁷¹ it would be impossible for L to have served B's best interests while securing immunity for A.¹⁷² Second, once immunity has been granted to A and the case goes to trial, L is limited in his ability to cross-examine A because of A's right to prohibit L's use of information obtained through the attorney-client relationship.¹⁷³ Consequently, there is a virtually automatic conflict of interest inherent in every multiple representation situation where an immunity statute is available.

¹⁷⁰The federal statute under U.S.C. §§6002, 6003 provides the prosecutor with this option. Although immunity grants have been around for a long time, this general immunity statute was not enacted until 1970. The newness of the statute may explain the lack of clarity of its application in this context.

¹⁷¹As stated in Baker v. State, 202 S.2d 563, 566 (Fla. 1967):

Evidence, strategy, and defenses which benefit one co-defendant usually are detrimental to the other.

¹⁷²Even presuming that A and B have interests which are practically identical, A has been served to the exclusion of B.

¹⁷³This presumes what is probably the normal situation, that A has been granted immunity because he has damaging infor-

H. Conclusion

¶78 In summarizing the general multiple representation problem the Watergate Special Prosecution Force said:

In almost every investigation which centers on the criminal activity of one or more members of a hierarchical structure--whether a corporation, labor union, a Government agency, or a less formally organized group--the prosecutor is confronted with a witness who has been called to testify about his employers. Many times, the witness is represented by an attorney who also represents the employer and perhaps is compensated by him. Although the legal profession's Code of Professional Responsibility forbids a lawyer from representing conflicting or even potentially conflicting interests, lawyers and judges historically have been reluctant to enforce the Code's mandate strictly. They have taken the position that, so long as the witness understands that his attorney also represents the person or entity about which he will be asked to testify and that he has the right to a lawyer of his own choosing, he cannot be forced to retain new counsel.

No lay witness, however, can realistically be expected to appreciate all the legal and practical ramifications of his attorney's dual loyalties, and in many cases he will be precluded from giving adequate consideration to the possibility of cooperating with the Government by the fear that the fact of his cooperation will be revealed to his employer. A mere inquiry by the judge in open court concerning the witness' preference is not likely to elicit a truthful response. It is necessary, therefore, for the court to intervene more directly by making a factual determination as to the existence of the conflict of interest and then requiring the

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mation to disclose, and that A is called in B's trial to reveal that information. See United States v. Arredo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (disqualification reversed because defendant must be given the opportunity to waive the right to an attorney not limited in cross-examination by a prior attorney-client relationship) and the A.L.R. annotation "Propriety and Prejudicial Effect of Counsel's Representing Defendant in a Criminal Case Notwithstanding Counsel's Representation or Former Representation of Prosecution Witness," 27 A.L.R.3d 1431 (1969).

witness to retain, or appointing for him, counsel who has no such conflict. Although there will obviously be great reluctance to interfere with the individual's freedom to select his own attorney, the suggested course is the only one that can preserve the equally valid right of the Government to his full and truthful testimony.

Both the courts and the various bar groups should be alerted to the serious issues of professional responsibility arising out of the representation of multiple interests during grand jury investigations, and Government counsel should press on every justifiable occasion for a judicial ruling on the question of conflict of interest and, where a conflict is found, for the replacement of the attorney involved.¹⁷⁴

Prosecutors facing multiple representation issue would do well to draw to the court's attention these words.

¹⁷⁴Watergate Special Prosecution Force, Report 140-41 (1975).

A final reminder to prosecutors is worthy of mention because it is important to note that some of the same sorts of facts which argue for disqualification also apply to an individual's motion for a new trial. Thus, a prosecutor who chooses to ignore, or fails to notice, a defense attorney's multiple representation and succeeds in his prosecution may find that his efforts were largely wasted when the conviction is reversed because the defendant was denied his right to effective assistance of counsel. The standards for decision in this area are not very clear, varying from United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973), where:

[U]pon a showing of possible conflict of interest or prejudice, however remote, we will regard joint representation as Constitutionally defective.

To State v. Montgomery, 15 Md. App. 7, 288 A.2d 628 (1972), where a determined judge managed to explain away obvious conflicts. See also the A.L.R. annotation "Circumstances Giving Rise to Conflicts of Interest Between or Among Criminal Co-Defendants Precluding Representation by Same Counsel." 34 A.L.R.3d 470.

PUBLICITY AND THE RIGHT
TO A FAIR TRIAL

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SUMMARY

¶1 Pretrial prejudicial publicity is a common problem that plagues the modern judicial system. Zealous news coverage of the investigation and progress of a case may violate a defendant's right to a fair trial and cause the prosecution to lose its case. Failure to use procedural safeguards, such as change of venue, continuance, or the voir dire or sequestration of the jury to mitigate the effects of publicity, may be grounds for reversal.

¶2 Political corruption or public scandal defendants are unique in the little protection they receive from the courts. A public figure, especially subject to scrutiny by the press and broadcast media, may well be considered to have voluntarily assumed the risk of the publicity that accompanies his status. In public corruption cases, reversal on the ground of adverse publicity is, therefore, almost unknown.

¶3 Although the right to a fair trial is constitutionally insured, the issue of the right to an impartial grand jury has not yet been resolved. The majority of courts require a defendant, whether a public figure or not, to prove not only that the pre-indictment publicity was pervasive, but that it caused specific prejudice in the grand jurors. Nevertheless, a due process right to an unbiased grand jury may be developing.

¶4 For the present, pretrial publicity is seldom a ground for reversal of a conviction of a public figure, or for dismissal of an indictment. The courts and the legal profession, however, have shown a marked hostility to prosecution-inspired publicity. Although judicial disapproval usually takes the form of reprimand rather than reversal, government involvement in publicizing a pending case may in the future result in harsher remedies.

I. PUBLICITY AND CRIMINAL TRIALS

¶5 The problem of prejudicial publicity in criminal trials has captured the attention of American courts and commentators. The trials of Sacco and Vanzetti, Ethel and Julius Rosenberg, Bruno Hauptman, Jack Ruby, and William Calley demonstrate the popular furor that a notorious trial can arouse. Pretrial publicity may, however, jeopardize or violate a defendant's constitutionally guaranteed right to a fair trial unless certain tactics are used to minimize its adverse effects.

A. U.S. Supreme Court Cases

¶6 In four major cases between 1960 and 1966 the United States Supreme Court found that juries biased by pretrial publicity violated a defendant's constitutional right to a fair trial. The cases set forth a series of requirements for meeting constitutional standards of impartiality.

¶7 The first case, Irvin v. Dowd,¹ involved a defendant charged with six murders in Illinois. Pretrial publicity was massive and extremely unfavorable to the defendant. Eight of twelve jurors questioned admitted to a belief in his guilt, but were accepted after asserting that they could, nevertheless, render a fair judgment.

¹366 U.S. 717 (1960).

¶8 The Supreme Court reversed the conviction, holding that the finding of impartiality did not meet constitutional standards:

Two-thirds of the jurors had an opinion that petitioner was guilty No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but . . . where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.²

The court did not, however, require that an impartial jury be completely ignorant: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."³

¶9 In Rideau v. Louisiana,⁴ the defendant confessed to charges of armed robbery, kidnapping, and murder in an interview with the sheriff at the jail, which was televised nation-wide. His attorney moved for a change of venue, the motion was denied, and Rideau was convicted and sentenced to death on the murder charge.

¶10 The Supreme Court held that it was a denial of due process to refuse the request for a change of venue. The television spectacle of the interview, seen by three members of the convicting jury, pre-empted Rideau's trial; the

²Id. at 728.

³Id. at 723 (citations omitted).

⁴373 U.S. 723 (1962).

subsequent court proceeding was only a "hollow formality."⁵

¶11 In 1964 in Estes v. Texas,⁶ the Supreme Court held that Billy Sol Estes was denied due process when courtroom proceedings were televised over his objection. Before his trial there had been extensive publicity, and televising the proceedings was a violation of the defendant's fundamental right to a fair trial.

¶12 The final case in this series, Sheppard v. Maxwell,⁷ involved the trial of Dr. Sam Sheppard for the murder of his wife. The Court held that identifiable prejudice to the defendant need not be shown if the totality of circumstances raised the probability of prejudice. The jury had been exposed to considerable, pervasive publicity, and sequestered only for deliberation, during which time they were allowed to make unsupervised telephone calls. Further, the jury had access to the publicity, most of which dealt with incriminating matter that was not subsequently introduced at trial.

⁵ Id. at 726.

⁶ 381 U.S. 532 (1964). Although Estes conviction was reversed, the Court observed:

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers, and employees, and generally informing the citizenry of public events and occurrences, including court proceedings [Ma]ximum freedom must be allowed the press in carrying on this important function in a democratic society

Id. at 539.

⁷ 384 U.S. 333 (1966).

¶13 The Supreme Court decisions have encouraged routine motions objecting to petit juries on the basis of bias and prejudice; they have also provoked public and judicial scrutiny into the proper balance between liberty of the press and the right to a fair trial.⁸ The ultimate result has been a judicial system that is more careful in the establishment of procedures to insulate jurors from undue prejudicial publicity and protect the rights of the defendant.⁹

B. Statutory Provisions

¶14 The Federal Rules of Criminal Procedure set forth means of ameliorating potential prejudice stemming from pretrial publicity. The court, for example, may grant a change of venue to avoid prejudice generated by localized publicity,¹⁰

⁸See, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) (Nebraska Supreme Court gag order violated First Amendment); Beacon Journal Pub. Co. v. Kainrad, 19 Crim. L. Rep. 2296 (Ohio Sup. Ct., June 8, 1976) (quashing gag order); and State v. Allen, 21 Crim. L. Rep. 2177 (N.J. Sup. Ct., Apr. 22, 1977) (gag order struck down as "clearly illegal").

⁹See J. Bartlett, "Defendant's Right to an Unbiased Federal Grand Jury," 47 B.U.L. Rev. 551, 565-66 (1967) [hereinafter cited as Bartlett, "Defendant's Right"].

¹⁰See 18 U.S.C. Fed. R. Crim. P. 18 and 21.

Rule 18 provides:

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and witnesses.

Rule 21 provides:

delay the proceedings to allow publicity to abate,¹¹ or permit extensive voir dire to probe for possible influence on the court members by the publicity.¹² The court must take appropriate steps to ensure that jurors remain free of prejudicial influence during the trial¹³ by means of careful jury instruction or even sequestration.

10(continued)

The court upon motion of the defendant shall transfer the proceedings as to him to another district . . . if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

¹¹See 18 U.S.C. §3161 (8) (B) (1974):

The factors, among others, which a trial judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph are as follows:

(i) whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

¹²Fed. R. Crim. p.24 provides:

The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it thinks proper.

See also United States v. Perrotta, 553 F.2d 247 (1st Cir. 1977) requiring immediate examination of non-sequestered jurors after the appearance of prejudicial publicity during trial. Cf. Woodmansee v. Stoneman, 133 Vt. 449, 344 A.2d 26 (1975) (jurors need not be separately examined on voir dire), and Commonwealth v. Martinolich, 456 Pa. 136, 318 A.2d 680 (1974) (not error to refuse to exclude jurors already selected from courtroom during continuing voir dire examination).

¹³See Calley v. Calloway, 519 F.2d 184, 212 (5th Cir. 1975).

¶15 Similar statutory safeguards have been enacted in several states. They often provide for change of venue¹⁴ or for challenging venireman for cause.¹⁵ Six states¹⁶ make it mandatory for the magistrate, upon the request of the accused, to exclude the general public, including the press, from preliminary hearings. California law¹⁷ further provides for the sealing of grand jury testimony until after trial, if disclosure would prejudice the accused.

¹⁴See, e.g., Ala. Code Cr. P., tit. 15, §267 (1959); Cal. Penal Code §1033 (West 1971) (for superior courts only); Conn. Gen. Stat. Ann. §54-78 (West 1974); Mass. Gen. Laws Ann. §277-51 (West 1968) (for capital crimes only); N.Y. Civ. Prac. Law (McKinney's 1963). But see, e.g., People v. McCrary, 19 Crim. L. Rep. 2274 (Colo. Sup. Ct., May 17, 1976) denying motion for change of name because defendant had not demonstrated "massive, pervasive, and prejudicial publicity."

¹⁵The California statute is typical. It provides:

[N]o person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

Cal. Penal Code §1076 (West 1970).

¹⁶See Ariz. R. Cr. P. §9.3 (1973), Cal. Penal Code §868 (West 1970), Idaho Code Ann. §19-811 (1947), Mont. Rev. Codes Ann. §95-1202 (1968), Nev. Rev. Stat. §171, 204 (1967), Utah Code Ann. §77-15-13 (1973).

¹⁷See Cal. Penal Code §938.1(b) (West 1975):

Grand jury testimony shall not be open to the public until ten days after delivery to the defendant or his attorney. Thereafter it may be sealed until after trial by court order, by motion of any party or the court, where there is reasonable likelihood that disclosure would prejudice the defendant's right to a fair trial.

II. PUBLICITY AND POLITICAL CORRUPTION TRIALS

¶16 A political figure on trial, like a notorious criminal, excites the imagination of the press and public. But unlike the participants in sensational crimes, politicians on trial for corruption may well be considered to have assumed the risk of publicity by choosing public office.¹⁸ Procedural safeguards may dilute some of the adverse effects of publicity, but public officials must answer allegations of misconduct regardless of possible prejudice in the trial process.¹⁹

18 [T]he public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). The risk assumed here, of course, is that of publicity, and the right given up is that of suit like a private citizen for libel. Whether that risk includes waiver of fair trial on publicity grounds is open to question.

¹⁹See Note, "Prejudicial Publicity in Trials of Public Officials," 85 Yale L.J. 123, 130 (1975):

The essential circumstance governing the question of fairness in trials of public officials is that in our society such defendants are people who have chosen to put themselves and their conduct before the public. Exposure to extensive publicity has for years been an acknowledged fact of public life. It is a prerequisite of campaigning for office and a concomitant of holding it. Publicity cannot but follow upon allegations of misdeeds by public officials. Indeed, the press is widely believed to have an obligation to subject the conduct of public officials to close scrutiny. Even if society's decision to allow such a role to the press were ultimately misguided, it would still

¶17 The safeguards and standards for insuring a fair trial do not limit the freedom of the press to expose corruption in public affairs. As Mr. Justice Brennan noted in New York Times Co. v. Sullivan:

'In every state the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law' The right of free public discussion of the stewardship of public officials was thus, in [James] Madison's view, a fundamental principle of the American form of government.²⁰

A. Federal Cases

¶18 Lower federal courts have generally adhered to the standards set down in the four landmark Supreme Court cases for minimizing pretrial publicity. Nevertheless, except

19 (continued)

bear decisively on the question of fairness in trials of public officials. Unlike most other citizens, public officials can legitimately be said to have assumed the risk of publicity surrounding allegations of misconduct. In the circumstances, it can hardly be considered unfair to make them accountable for their actions in criminal trials (assuming procedural safeguards), even if the effects of publicity cannot be purged from the juror's minds.

Jeffrey A. Barist sees political corruption trials as presenting a constitutional paradox:

When the discussion of public affairs must necessarily involve publicity adverse to a criminal defendant, the impact of the reporting is not limited solely to the government, but also has effect on the accused's right to an impartial trial. The paradox is that a constitutional rule designed to protect the citizen's ultimate political responsibility has rebounded to deprive the citizen of an impartial trial.

"The First Amendment and Regulation of Prejudiced Publicity--An Analysis," 36 Fordham L. Rev. 425, 447-48 (1968).

²⁰376 U.S. 254, 275 (1963).

in the case of Delaney v. United States,²¹ no conviction of a public official has been overturned because adverse publicity denied the defendant a fair trial.

1. Delaney v. United States

¶19 Delaney, an agent for the Internal Revenue Service Massachusetts, was suspended and later removed from office by President Truman when a grand jury returned two indictments charging him with bribery²² and falsifying tax lien certificates.²³ After the indictment, but before the trial, the House Subcommittee on Administration of the Internal Revenue Laws of the Ways and Means Committee (the King Committee) began an investigation into irregularities within the Internal Revenue Service. Defendant's counsel and the Assistant Attorney General prosecuting the case protested, but the Committee insisted public interest overrode any possible prejudice to Delaney. Many witnesses at the King Committee hearings testified at Delaney's grand jury proceeding and later at his trial. Chairman King referred to the "shocking" and "deplorable" acts of Delaney, and to his "betrayal of trust."²⁴ The hearings received nationwide publicity. Delaney was convicted on both counts. The court of appeals reversed, vacating the judgment and

²¹199 F.2d 107 (1st Cir. 1952).

²²18 U.S.C. §202 (1968).

²³26 U.S.C. §4047(e)(8), now 26 U.S.C. §7214(a) (1958).

²⁴119 F.2d at 110.

remanding for a new trial. The reason given for the reversal was specifically because the government caused and stimulated the publicity: "This is not a case of pretrial publicity . . . dug up by the initiative and private enterprise of newspapers."²⁵

2. United States v. Addonizio

¶20 Delaney has been largely limited to its facts; no other major political corruption conviction since has been reversed on the ground of prejudicial publicity. For example, United States v. Addonizio,²⁶ like Delaney, involved massive pre-trial publicity. The defendant, Mayor Hugh Addonizio of Newark, N.J., charged with extortion, moved for a continuance which was denied. A change of venue, however, from Newark to Trenton, was granted. In choosing jurors, the judge followed the guidelines in the Reardon Report,²⁷ excluding those who had formed an opinion, discussed the case, or been "extensively exposed to pretrial publicity."²⁸ Of the panel ultimately selected, three had read nothing, six had read only headlines, and three had read articles "infrequently."²⁹ Many "professed a lack of interest in the case, since the

²⁵Id. at 113.

²⁶451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

²⁷ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Approved Draft, 1968) (Cited hereinafter as Reardon Report). See ¶22 of text, infra.

²⁸451 F.2d at 67.

²⁹Id.

. . . acts . . . had taken place in another part of the state."³⁰ Addonizio's conviction was upheld.

3. The Watergate cases

¶21 The investigation and trials of the popularly-named Watergate defendants³¹ became historical spectacles at the hands of the press and broadcast media. In three of the cases, United States v. Liddy, United States v. Chapin, and United States v. Haldeman,³² the Reardon standards³³ were used in questioning jurors for bias. In each case, the convictions have been upheld with only one dissent, by

³⁰Id. See also United States v. Mazzi, 390 F. Supp. 1098 (W.D. Pa.) cert. denied, 423 U.S. 1014 (1975), where the conviction of a state senator for violating the Hobbs Act was upheld because although the jurors had not been individually questioned about their exposure to pretrial publicity, the lower court had adequately adhered to Reardon Report standards; and United States v. Hall, 536 F.2d 313 (10th Cir.), cert. denied, 45 U.S.L.W. 3330 (1976), where a voir dire based on Reardon Report guidelines that resulted in seating eleven jurors who had heard news reports of the case, was held to be within the discretion of the trial court.

³¹See, e.g., Ehrlichman v. Sirica, 419 U.S. 1310 (1974), Burger, Circuit Justice; United States v. Haldeman, No. 75-1381 (D.C. Cir. Oct. 12, 1976); United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 45 U.S.L.W. 3572 (Feb. 22, 1977); United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975) p Mitchell v. Sirica, 502 F.2d 375 (D.C. Cir.), cert. denied, 418 U.S. 955 (1974); and United States v. Mitchell, 389 F. Supp. 917 (D. D.C. 1975), cert. denied, 45 U.S.L.W. 3651 (Mar. 29, 1977).

³²United States v. Liddy, 509 F.2d 425 (D.C. Cir. 1974); United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Haldeman, No. 75-1381 (D.C. Cir. Oct. 12, 1976).

³³See Reardon Report, supra note 27, and see ¶22 of text, infra.

If ever in the history of our country there was a criminal case which by law had to be transferred to another place for trial because of prejudicial publicity alone, this is that case

. . . .

In this case the principal defendants were dismissed from high office in a wave of publicity that led nearly two-thirds of the population of Washington, D.C., to believe they were guilty before trial. Moreover, eight of twelve ultimate jurors actually viewed portions of the television hearings from which the Senate perjury counts were brought (citations omitted). There was therefore the obvious possibility that these jurors in the case were actual witnesses to the, charged crime The adversary nature of those hearings may have created fixed impressions in the viewers, and turned them into partial partisans for one side or the other. They may have tended to side with Senator Ervin, as many did. The percentage of nearly two-thirds is the same in both Rideau and this case. In Rideau, the Supreme Court said that for the people exposed to the publicity, the publicity was the trial. 373 U.S. at 726. The same might be said of the Senate hearings as presented on television. (emphasis in the original).³⁵

The majority felt that this analogy was unpersuasive. There was no confession in Haldeman. In Rideau³⁶ the accused confessed without benefit of counsel; each of these men was accompanied and assisted by his attorney at the hearings. Further, the fact that Kenneth Parkinson, one of the original defendants, was acquitted at trial created a presumption that the jury was not biased.

³⁴No. 75-1381 (D.C. Cir. Oct. 12, 1976).

³⁵Id.

³⁶Rideau v. Louisiana, 373 U.S. 723 (1962). See ¶9 of text, supra.

B. Procedural Guidelines

1. The Reardon Report

¶22 Following the conviction of Jack Ruby for the killing of Lee Harvey Oswald, several sets of guidelines were drafted to deal with the problem of pretrial publicity. One of the most frequently cited authorities³⁷ is the American Bar Association Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press, known as the Reardon Report.³⁸ It includes a series of four recommendations relating to:

1) the conduct of attorneys (e.g., a lawyer shall not release any information that reasonably may interfere with a fair trial, including but not limited to prior criminal records, existence or contents of confessions, identity of witnesses, or the possibility of a guilty plea);

2) the conduct of law enforcement officers and judicial employees (e.g., the release of information dealing with the criminal record of the accused, the existence or contents of any statement or confession, the performance or results of any tests, the identity of witnesses, the possibility of a guilty plea, or in camera proceedings is prohibited);

³⁷See, e.g., United States v. Haldeman, ____ F.2d ____, No. 75-1381 (D.C. Cir. 1976); United States v. Liddy, 509 F.2d 425, 435 (D.C. Cir. 1974); United States v. Addonizio, 451 F.2d 49, 61 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972); United States v. Budzanoski, 462 F.2d 443, 454 (3d Cir. 1972), cert. denied, 409 U.S. 949 (1972); United States v. Mazzei, 390 F. Supp. 1098, 1109 (W.D. Pa. 1975), cert. denied, 423 U.S. 1014 (1975).

³⁸Supra note 27.

3) the conduct of judicial proceedings (e.g., when to close pretrial hearings to the public or to grant motions for continuance and/or change of venue, the standards to be adopted in choosing a jury, and the standards to be maintained to ensure a fair trial); and

4) the use of the contempt power.

2. The Medina Report

¶23 The final report of the Special Committee on Radio, Television, and the Administration of Justice of the New York City Bar Association, Freedom of the Press and Fair Trials, known as the Medina Report,³⁹ also sets forth guidelines for lawyers, police, and law enforcement agencies similar to those of the Reardon Report. The Medina Report, however, deals emphatically with the constitutionality of the judicial "gag order":⁴⁰

³⁹Special Comm. on Radio, Television, and the Administration of Justice of the Assn. of the Bar of the City of New York, Freedom of the Press and Fair Trial, 20, 32-35 (1967) [hereinafter Medina Report]. Members of the bar have a duty to refrain from disclosing:

any criminal record of the accused, any confession, any statement as to guilt, any identification of a witness, any comment upon evidence or a witness' credibility, disclosure of any matter excluded from evidence at trial.

.

Police and law enforcement agencies may release the defendants name, age, occupation, and mental states; the time, place, and manner of apprehension; the charge, information, or indictment; a general description of the crime; and the identity of the investigating and arresting officers. That is all.

⁴⁰Id. at 46.

[T]he judge has not power to order the news media not to publish, and he has no power to punish an editor or broadcaster for contempt for the disobedience of such an order [I]n the opinion of the Committee, during pretrial period, the news media are restrained only by their own voluntary act from publishing information independently discovered by private persons, and protected by the First Amendment.

3. Other guidelines

¶24 The Report on the "Free Press - Fair Trial Issue" by the Committee on the Operation of the Jury System⁴¹ of the Judicial Conference of the United States, makes similar recommendations affecting lawyers and their associates, court house personnel, and the conduct of judicial proceedings. The Department of Justice has also set forth its own policy regulations regarding the release of information.⁴² Finally, a special Massachusetts Bar-Press Committee has formulated a Guide for the Bar and News Media within the state.⁴³

⁴¹45 F.R.D. 391 (1968).

⁴²28 C.F.R. 50.2 (1976).

⁴³See Appendix D, Reardon Report, supra, note 27, at 262. Newspapers should avoid:

- (1) interviews with subpoenaed witnesses after indictment,
- (2) publication of the defendant's criminal record,
- (3) publication of confessions,
- (4) publication of evidence or testimony excluded or stricken,
- (5) publication of names of juveniles involved in juvenile proceedings,
- (6) publication of "leaks," implied either judge or jury or expressed, by the police or by counsel for either side.

¶25 Of all the guidelines, the Reardon Report is the most authoritative. The Department of Justice standards, however, are controlling on department personnel, and the Massachusetts guidelines and Medina Report have gained wide acceptance in Massachusetts and New York.

III. PRE-INDICTMENT PUBLICITY AND THE GRAND JURY

¶26 The grand jury, in purpose and function, is quite different from the petit jury.⁴⁴ As a result, courts treat the issue of impartiality at the grand jury stage and at the trial level differently. The grand jury is not limited to the passive role of the petit jury; it often proceeds on its own initiative.⁴⁵ Pre-indictment publicity, therefore, can be a benefit to the grand jury;

That [the grand jury] is induced to such action by newspaper reports forms a continuum with its historic function of ferreting out crime and corruption, and is in no way inconsistent with its duty to decide on and in accordance with the evidence adduced before it.⁴⁶

43 (continued)

Members of the Bar should avoid:

- (1) statements as to innocence or guilt,
- (2) out of court statements of what counsel expect to prove, who they expect to call as witnesses, or criticism or either judge or jury,
- (3) issuance of any statements, confessions, or admissions made by the defendant.

⁴⁴See United States v. Mandel, 415 F. Supp. 1033, 1062 (D. Md. 1976); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971); United States v. Nunan, 236 F.2d 576 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957).

⁴⁵See United States v. Nunan, 236 F.2d at 593.

⁴⁶Id.

¶27 The Supreme Court has never squarely held that a criminal defendant is entitled to be indicted by a grand jury whose members have not been prejudiced by pre-indictment publicity.⁴⁷ In its most significant exploration of the issue, the Court noted that while there may be a constitutional right to an unbiased grand jury, the Court would not "remotely intimate any view" on this issue.⁴⁸ Thus, the question remains open.

A. Attacking the Indictment: Procedure

¶28 Nevertheless, an indictment may be attacked on the ground that it was induced by the prejudicial impact of pre-indictment publicity on the grand jury.⁴⁹ The most common challenge is the motion to dismiss the indictment pursuant to, for example, Rule 6(b) of the Federal Rules of Criminal Procedure.⁵⁰ Several other motions, including

⁴⁷ See United States v. Roethe, 418 F. Supp. 1118, 1119 (E.D. Wis. 1976).

⁴⁸ Beck v. Washington, 369 U.S. 541, 546, rehearing denied, 370 U.S. 965 (1962).

⁴⁹ 8 Moore's Federal Practice ¶6.03(4) (2d ed. 1966).

⁵⁰ Fed. R. Crim. P. 6(b)(2) states in pertinent part:

Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deduction the number not legally qualified, concurred in finding the indictment.

an order to inspect the minutes of all proceedings before the grand jury,⁵¹ or to question or depose the members of the grand jury at an evidentiary hearing,⁵² may be made pursuant to Rule 6(e).⁵³ In one case, indicted defendants commenced a civil action against the United States attorney and his assistant for a preliminary and permanent injunction restraining further prosecution.⁵⁴

¶29 Challenges to grand jury indictments are, however, rarely successful. In 1972, for example, a United States District Court summarily denied the defendants' motion

⁵¹E.g., United States v. Roethe, 418 F. Supp. 1118 (E.D. Wis. 1976), United States v. Archer, 355 F. Supp. 981 (S.D.N.Y. 1972), rev'd on other grounds, 486 F.2d 670 (2d Cir. 1974); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y.), aff'd, 441 F.2d 114 (2d Cir. 1970) cert. denied, 403 U.S. 932 (1971); United States v. Baker, 262 F. Supp. 657 (D.D.C. 1966).

⁵²E.g., United States v. Archer, supra note 51; United States v. Bally Manufacturing Corp., 345 F. Supp. 410 (E.D.La. 1972); United States v. Sweig, supra note 51; Melville v. Morgenthau, 307 F. Supp. 738 (S.D.N.Y. 1969).

⁵³Fed. R. Crim. P. 6(3) pertains to secrecy of grand jury proceedings and disclosure.

Under Rule 6(b)(1), the defendant does have a theoretical right to challenge the array or individual jurors for lack of legal qualification before the oath is administered. However, since defendants have no right to know the names of those to be drawn or when the jury is to be impanelled, one might wonder how the draftsmen of the Rule expected this right to be exercised, and it is in fact, of no value.

Bartlett, "Defendant's Right," supra note 9.

⁵⁴See Melville v. Morgenthau, supra note 52. The court balanced the conveniences, the public interest, and the availability of an adequate remedy in the pending criminal case, and held that a preliminary injunction was not warranted.

requesting an evidentiary hearing and permission to examine members of the grand jury individually.⁵⁵ "This represents a blatant attempt," the court said, "at a fishing expedition as again movants have no specific or actual basis for such a request."⁵⁶

¶30 Motions requesting the inspection of grand jury minutes have also failed. Invariably, the courts have held that "no useful purpose would be served by allowing the defendant to inspect the grand jury minutes,"⁵⁷ or that the circumstances of the case did not "justify" or "warrant" the inspection of minutes.⁵⁸ One court has, however, noted the defendant's dilemma: "he wants the grand jury minutes to prove his claim [of prejudice], but he cannot see the minutes until he demonstrates a right to see them."⁵⁹ Nevertheless, the court

⁵⁵United States v. Bally Manufacturing Corp. 345 F. Supp. at 421.

⁵⁶Id. Similarly, the District Court for the Southern District of New York held in 1969:

The grand jury proceeding is not an adversary proceeding, open to the public, but rather investigatory and secret. To allow plaintiffs herein to conduct a voir dire of the grand jury to determine whether any member thereof was unduly influenced by reports in the news media would lead to chaos and confusion in the workings of the grand jury every time an indictment is returned in a case which catches the public eye and draws the attention of the press.

Melville v. Morgenthau, 307 F. Supp. at 741.

⁵⁷United States v. Baker, 262 F. Supp. at 670.

⁵⁸See United States v. Archer, 355 F. Supp. at 989, and United States v. Sweig, 316 F. Supp. at 1155.

⁵⁹United States v. Roethe, 418 F. Supp. at 1119.

was not persuaded that the defendant had demonstrated "particularized need" or "compelling necessity" sufficient to grant the motion.⁶⁰ Another court suggested that requests for evidentiary hearings and inspection of minutes be considered after there is a trial and conviction.⁶¹

¶31 Defendants challenge indictments on various grounds. Many argue on the general ground that widespread or massive publicity prior to and during the grand jury proceedings prejudiced the grand jurors in their deliberations.⁶²

Motions may also be based on a claim that the judge impaneling the grand jury breached his duty to ascertain on voir dire whether any prospective grand juror had been influenced by adverse publicity, or erred in failing to instruct the grand jury to ignore such publicity.⁶³ Defendants may charge that it was government-inspired publicity that induced the grand jury to return an indictment.⁶⁴ Yet, few claims of error have been successful because they have faced such a

⁶⁰ Id.

⁶¹ United States v. Sweig, 396 F. Supp. at 1155.

⁶² See United States v. Mandel, 415 F. Supp. 1033, 1061 (D.MD. 1976); United States v. Archer, 355 F. Supp. at 987.

⁶³ See Beck v. Washington, 369 U.S. 541 (1962); United States v. Hoffa, 205 F. Supp. 710, 719 (S.D. Fla.), cert. denied, 371 U.S. 892 (1962).

⁶⁴ See Gorin v. United States, 313 F.2d 641, 645 (1st Cir.), cert. denied, 374 U.S. 829 (1963); United States v. Khanaher, 204 F. Supp. 921, 923 (S.D.N.Y. 1962), aff'd., 317 F.2d 459 (2d Cir. 1963); and 8 Moore's Federal Practice ¶6.03(4) (2d ed. 1966).

strong presumption of regularity in the deliberations and proceedings of the grand jury:

It must be presumed that the grand jury followed the court's instructions as to its powers, duties and obligations and that each grand juror fully lived up to and observed his solemn oath.⁶⁵

¶32 Motions to dismiss or challenge indictments based on grand jury bias induced by pre-indictment publicity fail persistently. Although success of such motions is not impossible, it is extremely unlikely.⁶⁶ The requirement of showing that, of the normal complement of twenty-three grand jurors, a sufficient number were so prejudiced by publicity that there did not remain twelve unbiased jurors concurring in the indictment, presents an additional hardship for the accused.⁶⁷ The future validity or dismissal of indictments tainted by pre-indictment publicity may depend on the final resolution of the question of whether a defendant has a constitutional right to be indicted by a completely impartial grand jury.

⁶⁵ See United States v. Kahaner, 204 F. Supp. at 923.

⁶⁶ Provisions for dismissal on the ground of prejudice were included in the preliminary drafts of Fed. R. Crim. P.6, but conspicuously absent in the final draft. "The going is hard under that rule because it is quite clear that the draftsmen of the rule did not have bias and prejudice in mind as an allowable ground for a motion to dismiss." Bartlett, "Defendant's Right," supra note 9, at 555.

⁶⁷ Id.

B. Constitutional Issues

1. Beck v. Washington

¶33 The United States Supreme Court considered the legal issue of a constitutional right to an impartial grand jury in Beck v. Washington,⁶⁸ but refused to express any view. David Beck was the head of the Teamsters Union when his activities were investigated by Senator McClellan's Select Committee on Improper Activities in the Labor or Management Field. Accused of misusing union funds, Beck appeared before the McClellan Committee in 1957; he claimed the Fifth Amendment privilege against self-incrimination.

¶34 While the widely publicized Senate hearings were in progress,⁶⁹ a special grand jury was convened in the State of Washington to investigate the charges against Beck. Beck was indicted and then convicted on a charge of grand larceny. The conviction was upheld by an equally divided vote of the

⁶⁸ 369 U.S. 541, 546 (1962).

⁶⁹ The Supreme Court's majority opinion notes the pre-indicment publicity caused by the Senate hearings:

Petitioner appeared before the Committee on March 26, and the newspapers reported: "BECK TAKES 5TH AMENDMENT President of Teamsters 'Very Definitely' Thinks Records Might Incriminate Him." Television cameras were permitted at the hearings. One Seattle TV station ran an 8 and 3/4-hour 'live' broadcast of the session on March 27, and films of this session were shown by various TV stations in the Seattle-Tacoma area. The April 12 issue of the U.S. News & World Report ran a caption: 'Take a look around Seattle these days, and you find what a Senate inquiry can do to a top labor leader in his own home town.'

Washington Supreme Court, the four affirming justices holding that an impartial grand jury was not required by due process or Washington law.⁷⁰

¶35 In his attempt to set aside the indictment, Beck did not contend in the United States Supreme Court that any particular grand juror was prejudiced or biased. He argued instead that the impaneling judge had failed properly to voir dire and instruct the grand jury in regard to bias and prejudice. The Supreme Court recognized that Beck's appearance before the Senate Committee was "news of high national interest and quite normally was widely publicized throughout the Nation . . . ," that Beck's answers and "conduct before the Committee disclosed the possibility that he had committed local offenses . . . ,"⁷¹ and that the judge had not admonished the grand jurors to disregard news reports concerning the petitioner.⁷²

¶36 Nevertheless, after considering the circumstances and procedures of the special grand jury that indicted Beck, the Court upheld the conviction. The Court concluded that the State of Washington had provided an unbiased grand jury, but skirted the issue of whether there was a constitutional obligation to do so:

⁷⁰State v. Beck, 56 Wash.2d 474, 480, 349 P.2d 387, 390, aff'd on rehearing, 56 Wash.2d 474, 537, 353 P.2d 429 (1960).

⁷¹Beck v. Washington, 369 U.S. at 546.

⁷²Id. at 548.

It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure--a question upon which we do not remotely intimate any view--we have concluded that Washington, so far as is shown by the record, did so in this case.⁷³

The Court directly rejected Beck's equal protection argument that Washington had singled him out for special treatment by denying him the safeguards that state law afforded others to ensure an unbiased grand jury.⁷⁴

¶37 Beck and its progeny seem to stand for the proposition that a challenge to grand jurors requires a greater showing of bias than a challenge to a petit jury.⁷⁵ The cases that have considered the question of pre-indictment publicity and its effect on the grand jury have declined to hold that pre-indictment publicity is inherently prejudicial or cause for dismissal of the indictment. A defendant must show not only the existence

⁷³Id. at 546.

⁷⁴Id. at 554-55. The majority rejected the equal protection argument for three reasons. First, they found no reported Washington cases supporting the claim that the state law provides procedural safeguards to insure an unbiased grand jury. Second, the argument was contrary to the finding of the Washington Superior Court that the grand jurors were lawfully selected and instructed. Third, the Court noted that even assuming such procedural safeguards existed in Washington, misapplication of the state law could not be shown to be an invidious discrimination. The Court noted the established principle that the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error.

⁷⁵J. Ranney, "Grand Juries in Pennsylvania," 37 U. Pitt. L. Rev. 1, 12 (1975).

of publicity, but that the publicity specifically caused prejudice in the grand jurors, and that the indictment returned was essentially the result of unfairness.⁷⁶

¶38 As in the Beck decision, cases following it have not recognized a constitutional right to an impartial grand jury. The cases base their conclusions on the fact that "no prejudice was shown."⁷⁷ While the courts' ambivalence may cloud the issue, the practical result remains the same: no actual prejudice is ever proven to the court's satisfaction.⁷⁸

⁷⁶ See, e.g., United States v. Osborn, 350 F.2d 497 (6th Cir. 1965), aff'd., 385 U.S. 323 (1967); United States v. Mandel, 415 F. Supp. at 1061; United States v. Anzelmo, 319 F. Supp. 1106, 1113-1114 (E.D. La. 1970). See also cases in note 78, infra.

⁷⁷ See, e.g., Martin v. Beto, 397 F.2d 741, 752 (5th Cir. 1968).

⁷⁸ See, e.g., Beck v. United States, 298 F.2d 622, 625 (9th Cir. 1962); United States v. Tallant, 407 F. Supp. 878, 889 (N.D. 1975); United States v. Mitchell, 372 F. Supp. 1239, 1248 (S.D.N.Y. 1973); United States v. Garrison, 353 F. Supp. 306, 310 (E.D. La. 1972); United States v. Bally Manufacturing Corp., 345 F. Supp., at 421.

United States v. Mitchell, for example, involved a multi-count indictment against former Attorney General John N. Mitchell, alleging conspiracy, obstruction of justice and perjury. Among the grounds upon which Mitchell moved for a dismissal of the indictment was a New York Times article of May 10, 1973, which was ascribed to "sources close to the investigation" and headlined "Indictment of Mitchell, Stans, and Vesco is Expected Today in Political-Gift Case." 372 F. Supp. at 1246. Citing United States v. Kahaner, 204 F. Supp. at 923, the court held that "The defendants' conclusory allegation of prejudice cannot outweigh the 'strong presumption of regularity accorded to the deliberations and findings of grand juries.'" 372 F. Supp. at 1248.

United States v. Garrison involved a three count indictment, concerning tax returns, against the District Attorney for the Parish of Orleans, Louisiana. Beyond submitting a photocopy of newspaper serialization of the affidavit executed by the government agent in support of the complaint and a photocopy of the Revised U.S. Department of Justice Fair

¶39 The need to show actual prejudice of the grand jurors resulting from pre-indictment publicity is a heavy burden.

According to Judge Frankel:

[S]uch rulings, perhaps reflecting the nearly impenetrable armor traditionally protecting indictments, have tended to prescribe a test normally impossible of fulfillment. The secrecy of the grand jury's work, usually preserved in large measure at least until or after the trial, is a barrier to even an attempted showing of prejudice. It has sometimes seemed, therefore, that attacks upon indictments because of prejudicial publicity were inevitably doomed as a matter of law.⁷⁹

The district court in United States v. Mandel⁸⁰ suggests several reasons justifying this burden. First, there is the well-established presumption of regularity surrounding grand jury proceedings, as well as a practice of maintaining the secrecy of the deliberations.⁸¹ Second, if pre-indictment publicity alone was sufficient to cause the dismissal of an indictment, many prominent or notorious persons could readily avoid indictment.⁸²

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Trial--Free Press Guidelines, no other evidence in support of the motion to dismiss was offered. The court concluded that this was insufficient:

Merely citing the publicity falls far short of establishing that the grand jury here was, in fact, prejudiced against him. Specific showing of prejudice is necessary to vitiate the indictment and no such showing has been made.

353 F. Supp. at 309, 310.

⁷⁹United States v. Sweig, 316 F. Supp. at 1153-54.

⁸⁰415 F. Supp. 1033, 1063 (D. Md. 1976).

⁸¹See United States v. Kahaner, 204 F. Supp. at 923.

⁸²See United States v. Garrison, 353 F. Supp. at 310.

Third, the role of the grand jury has differed historically from that of the petit jury; the same freedom from outside influences is not required.⁸³

2. The constitutional argument: pro and con

¶40 Although the Supreme Court refused even to "remotely intimate any view" on the validity of the claim that the due process clause requires an unbiased grand jury,⁸⁴ the majority in the Beck case did cite dicta indicating a plausible argument in its support might be made.⁸⁵ In Costello v. United States, the Supreme Court indicated in dictum that the Fifth Amendment requires "a legally constituted and unbiased grand jury."⁸⁷ The Court used almost identical language in Lawn v. United States⁸⁸ in 1958, and cited both Costello and Lawn in Beck in 1962 in relation to the suggestion that the Due Process Clause of the Fourteenth Amendment may require states to furnish an unbiased grand jury.⁸⁹ Since 1962, several lower

⁸³See United States v. Mandel, 415 F. Supp. at 1063.

⁸⁴Beck v. Washington, 369 U.S. at 546.

⁸⁵See United States v. Baker, 262 F. Supp. 657, 668 (D.D.C. 1966).

⁸⁶350 U.S. 359 (1956).

⁸⁷Id. at 363. The Court cited Pierre v. Louisiana, 306 U.S. 354 (1939) on the bias point. Pierre v. Louisiana, however, concerned a Fourteenth Amendment claim that Louisiana countenanced systematic exclusion of Blacks from the grand jury rolls. It might be argued, therefore, that the Court's reference to the unbiased grand jury was relevant only to that line of cases. Bartlett, "Defendant's Right," supra note 9, at 556.

⁸⁸355 U.S. 339, 349-50 (1958).

⁸⁹Beck v. Washington, 369 U.S. at 546.

courts have acknowledged the significance of this dicta by suggesting that there may be a due process right to an impartial grand jury.⁹⁰

¶41 The two dissenting opinions in Beck also support the view that an accused has an equal protection or due process right that may be violated by biased grand juries.⁹¹ Justice Black contended that Washington statute and case law provided that grand juries should be impartial and unprejudiced.⁹² He noted that the unprecedented and intense public accusation and publicity accompanying the Senate hearings "imposed a very heavy duty on the presiding judge under Washington law to protect Beck from a biased and prejudiced grand jury."⁹³

The court continued:

I think that the failure of the Washington courts to follow their own state law by taking affirmative action to protect the petitioner Beck from being indicted by a biased and prejudiced grand jury was a denial to him of the equal protection of the laws guaranteed by the Fourteenth Amendment.⁹⁴

⁹⁰See Martin v. Beto, 397 F.2d at 751 (Thornberry, J., concurring): ". . . several Supreme Court decisions suggest that the grand jury must be impartial;" and United States v. Roethe, 418 F. Supp. at 1119:

While the Supreme Court has never squarely held that a criminal defendant is entitled to be indicted by a grand jury whose members have not been prejudiced by preindictment publicity, dicta in a number of opinions suggest that such a right may exist.

See also United States v. Baker, 262 F. Supp. at 668.

⁹¹See 369 U.S. at 558 (Black, J. and the Chief Justice dissenting) and 369 U.S. at 579 (Douglas, J., dissenting).

⁹²369 U.S. at 561.

⁹³Id. at 563-65.

⁹⁴Id. at 558.

The defendant, however, must find support in his state laws that the state grand jury procedure is required to be impartial for the equal protection argument to be persuasive.

¶42 Justice Douglas, in a separate dissent, asserted that the due process issue was determinative of the case in Beck's favor, on the ground that an accused has a federal constitutional right to protect against biased grand juries in state courts. In part, Douglas noted: "Whenever unfairness can be shown to infect any part of a criminal proceeding, we should hold that the requirements of due process are lacking."⁹⁵

¶43 Another constitutional argument for an impartial grand jury may be found in Escobedo v. Illinois,⁹⁶ in which the Court held that the constitutional right to effective assistance of counsel attaches to a criminal proceeding when the process shifts from investigatory to accusatory. An argument may be made, on the basis of the Escobedo holding, that constitutional guarantees are as necessary in the grand jury room as in the police station.⁹⁷

⁹⁵Id. at 581. Douglas contended that under both federal and state grand jury proceedings, "the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial." In support of this view, Justice Douglas cites the line of cases prohibiting the exclusion of particular classes from grand jury service. Id. at 579. (In Beck v. United States, 298 F.2d 622, 625 (9th Cir.), cert. denied, 370 U.S. 919 (1962), the court suggests that this line of cases is irrelevant to the issue of bias resulting from unfavorable publicity. See also note 87, supra.)

⁹⁶378 U.S. 478 (1964).

⁹⁷See Bartlett, "Defendant's Right," supra note 9, at 564 where it is contended that support for this view can be found

¶44 The best prospect for the crystallization of a constitutional right to an impartial grand jury is the possibility of extending Supreme Court holdings in the area of the constitutional right to a fair trial. In Estes v. Texas,⁹⁸ decided in 1965, and Sheppard v. Maxwell,⁹⁹ decided in 1966, the Court established the "inherently prejudicial test" for fair trial issues:¹⁰⁰

It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.

¶45 Because these two cases, subsequent to the 1962 Beck decision, represent major Supreme Court pronouncements in the area of pretrial publicity, the question arises as to the effect the decisions may have on grand jury proceedings. It has been suggested that:

[C]ourts could extend Estes and Sheppard to grand juries by focusing on the parts of those decisions suggesting that because this massive press coverage is increasingly prevalent and difficult to efface, there should be some judicial effort to prevent or neutralize its effect.¹⁰¹

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in Sheridan v. Garrison, 273 F. Supp. 673 (E.D.La. 1967).
The judge held that a plan to have the petitioner's attorney remain outside the grand jury room was inadequate to protect the right to counsel as recognized by Escobedo.

⁹⁸381 U.S. 532 (1965). See also supra ¶11 of text.

⁹⁹384 U.S. 333 (1966). See also supra ¶12 of text.

¹⁰⁰384 U.S. at 352, citing Estes v. Texas, 381 U.S. at 542-43.

¹⁰¹Martin v. Beto, 397 F.2d at 753 (Thornberry, J., concurring).

In this way, the "inherently prejudicial test" adopted for intense publicity at the trial stage could be adopted at the grand jury stage.¹⁰² After considering the possibility of extending Estes and Sheppard, Circuit Judge Thornberry in 1968 concluded that:

[T]he rule today is that the grand jury is an accusatory body which does not have to be impartial and that we depend on a fair trial to secure the liberty promised by the fourteenth amendment¹⁰³

The Supreme Court since then has not yet changed the rule.¹⁰⁴

¶46 Regardless of the Supreme Court's position in Beck v. Washington¹⁰⁵ that the issue of a constitutional right to an impartial grand jury is an open question, there are several courts that have considered the matter closed.¹⁰⁶

¹⁰² On the other hand, the application of Estes and Sheppard might still not remove the burden showing specific prejudice. "Courts might adhere to the specific proof requirement by holding that the grand juror's duty to ferret out crime includes using the information that publicity reveals." Id. at 752.

¹⁰³ Id. at 753.

¹⁰⁴ Since 1970, at least two lower courts have considered arguments that pre-indictment publicity was so intense that it was inherently prejudicial. In United States v. Anzelmo, 319 F. Supp. 1106, 1114 (E.D. La. 1970), the contention "that the inherently prejudicial rule, proper at the trial, is applicable to grand jury procedures because such a rule could prevent or postpone grand jury investigations," was rejected. In United States v. Archer, 355 F. Supp. 981, 987-88 (S.D.N.Y. 1972), an Assistant District Attorney in New York was involved in fixing the dismissal of charges at the grand jury stage. Defendants submitted that the "inherently prejudicial test" should be extended to cover pre-indictment publicity when that publicity is of the breadth and scope presented in their case. The court rejected the argument.

¹⁰⁵ 369 U.S. 541 (1962).

¹⁰⁶ Some courts in the past have displayed surprisingly little regard for the issue of bias at the grand jury level. In

Such cases have declared that bias due to pre-indictment publicity will not be grounds for relief.¹⁰⁷

¶47 At least two lower court opinions since Beck formulate the majority rule to be that a defendant has no constitutional right to an impartial grand jury.¹⁰⁸ In Gorin v. United States,¹⁰⁹ the case most often cited for this proposition, the defendants moved to dismiss, contending that either there is a Fifth Amendment right to be indicted by a grand jury free of calculated, government-instigated prejudice or proper standards for enforcement of the criminal law in the federal courts sanction only indictment by an uninfluenced grand jury. The court was not prepared to grant these presuppositions.

So far as we are aware, none has the sanction of any decision of the Supreme Court of the United States and all have been rejected in one or another carefully considered opinion of a lower federal court.¹¹⁰

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United States v. Smyth, 104 F. Supp. 283 (N.D.Cal. 1952), the Assistant United States Attorney had, among other things, invited the grand jurors to his home for cocktails to discuss the indictments prior to their return. But when the defendant later objected, Judge Fee expressed the view that defendant was impertinent and that proven malice on the part of one or more grand jurors would not be grounds for quashing the indictment.

¹⁰⁷ See United States v. Roethe, 418 F. Supp. at 1119.

¹⁰⁸ See Martin v. Beto, 397 F.2d at 751-52 (Thornberry, J., concurring), and United States v. Archer, 355 F. Supp. at 988.

¹⁰⁹ 313 F.2d 641 (1st Cir. 1963). Defendants were charged with conspiracy to bribe an employee of the Internal Revenue Service.

¹¹⁰ Id. at 645. The cases cited by the court in support of this view are as follows: United States v. Nunan, 236 F.2d 576, 592 et seq. (2d Cir. 1956), cert. denied, 353 U.S. 912

C. Judicial Reluctance to Dismiss

¶48 Apart from the constitutional issue, some federal courts adhere to the proposition that dismissal of an indictment is an unnecessary and impractical method of protecting the defendant from prejudice. The Ninth Circuit, in Silverthorne v. United States¹¹¹ noted the grand jury's function as an accusing body, is to deliberate and indict on the standard of "reasonable probability." If the grand jury is prejudiced by outside sources, "the greatest safeguard to the liberty of the accused is the petit jury" ¹¹²

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(1957); Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. denied, 370 U.S. 919 (1962); United States v. Dioguardi, 20 F.R.D. 33 (S.D.N.Y. 1956); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962).

In a pre-Beck decision, Judge Holtzoff confidently remarked that "challenges for bias, or for any cause other than lack of legal qualifications, are unknown as concerns grand jurors." United States v. Knowles, 147 F. Supp. 19,20 (D.D.C. 1957). The opinion goes on to express a clear view on the right to an impartial grand jury:

The basic theory of the functions of a grand jury does not require that grand jurors should be impartial and unbiased. In this respect, their position is entirely different from that of petit jurors. The Sixth Amendment to the Constitution of the United States expressly provides that the trial jury in a criminal case must be "impartial." No such requirement in respect to grand juries is found in the Fifth Amendment, which contains the guaranty against prosecutions for infamous crimes unless on a presentment or indictment of a grand jury.

Id. at 21.

¹¹¹ 400 F.2d 627, 633 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971).

¹¹² Id. at 634.

And if the petit jury is lacking in impartiality, "the cure is reversal by the appellate courts."¹¹³

¶49 Many reasons underlie the reluctance of the courts to dismiss indictments on grounds of grand jury bias. The year before Silverthorne, the court in United States v. Zovluck¹¹⁴ noted that an indictment was merely a charge which had to be tried and proven beyond a reasonable doubt. At trial, the defendant is the beneficiary of all the customary procedural safeguards to assure fairness, and the application of the safeguards is subject to appellate review.

In the face of such safeguards it would be wasteful and unnecessary for this court to set out in pursuit of the will-of-the-wisps of prejudice suggested by the defendants' motion papers.¹¹⁵

¶50 Considerations of this kind have led the courts of several states to refuse to permit a defendant to challenge an indictment because of the possible effect of adverse publicity on a grand jury.¹¹⁶ The Supreme Court of Illinois, for example, held that an "attack upon a grand jury indictment will not lie upon the ground of pre-indictment publicity."¹¹⁷

¹¹⁴ 274 F. Supp. 385 (S.D.N.Y. 1967).

¹¹⁵ Id. at 390.

¹¹⁶ See People ex rel Sears v. Romiti, 50 Ill.2d 51, 277 N.E.2d 705 (1972), citing the following cases: Commonwealth v. Monohan, 349 Mass. 139, 154-156, 207 N.E.2d 29, 39-40 (1965); Piracci v. State, 207 Md. 499, 514-515, 115 A.2d 262, 268-69 (1955); State v. Winsett, 200 A.2d 692, 693-694 (Super. Ct. Del. 1964).

¹¹⁷ 50 Ill.2d at 57, 277 N.E.2d at 711.

Judge Fee, in United States v. Smyth,¹¹⁸ proposed that the grand jury, as the voice of the community, is biased by nature, allowing it the flexibility needed to be an effective force against public corruption and organized crime. Another reason for resisting the motion to dismiss is the possible strain on the effective administration of criminal justice.¹¹⁹ As Justice Frankfurter warned in United States v. Johnson,¹²⁰ undue restrictions on grand jury procedure could make the proceeding a "pawn in a technical game." Methods of reviewing grand jury motives--by interlocutory or post-conviction proceedings--would be impractical and unsatisfactory.¹²¹ Interlocutory appeals would not only be dilatory, but inquiry into the motives of grand jurors could compromise the traditional cloak of secrecy surrounding the deliberations. Post-conviction proceedings would come too late to save a wrongly accused defendant from the ordeal of trial, and would be unnecessary in the case of the guilty.¹²²

¹¹⁸ 104 F. Supp. 283 (N.D. Cal. 1952).

¹¹⁹ See Note, "Constitutional Law," 111 U. Pa. L. Rev. 1000 (1963).

¹²⁰ 319 U.S. 503, 512 (1943).

¹²¹ See, Note, 111 U. Pa. L. Rev., supra note 119, at 1004.

¹²² Id.

¶51 As noted in Silverthorne and Zovluck,¹²³ the courts traditionally rely on a fair trial to protect the liberty of an accused: "any defect in grand jury procedure washes out in the trial of the case."¹²⁴ Finally, bestowing substantial procedural safeguards upon grand jury proceedings might dignify the process to the point where petit juries would defer to grand jury findings to the prejudice of the accused.¹²⁵

D. Public Corruption Cases and the Grand Jury

¶52 Public corruption cases command massive publicity:

The indictment and trial of former public officials is intrinsically a newsworthy event; cases involving public figures will invariably attract publicity¹²⁶

Public corruption cases are treated no differently than any other indictment. The courts have been firm in the position that such defendants cannot escape indictment, even in the face of widespread and unfavorable publicity. The public official, like any other defendant, must show actual prejudice.¹²⁷ To hold otherwise

¹²³400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971), and 274 F. Supp. 385 (S.D.N.Y. 1967).

¹²⁴Bartlett, "Defendant's Right," supra note 9, at 560.

¹²⁵See Note, "Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings," 72 Yale L. J. 590, 599 note 44 (1963).

¹²⁶United States v. Corallo, 284 F. Supp. 240 (S.D.N.Y. 1968), aff'd, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

¹²⁷See United States v. Garrison, 353 F. Supp. 306, 310 (E.D. La. 1972).

would produce absurd results, since no one who is prominent and well known could be charged with the commission of any crime because the charge against such a person no doubt would cause very large and widespread adverse publicity, precluding an indictment.¹²⁸

A public official who is a well-known figure may even induce his own pre-indictment publicity.¹²⁹ Prominence, therefore, is a handicap that must be borne by the public official, not by the courts.

¹²⁸United States v. Hoffa, 205 F. Supp. at 717. District Judge Boyle supported this same view in United States v. Garrison, 353 F. Supp., at 310. Defendant Garrison contended that the mere existence of publicity prejudiced the grand jury to the extent that it did not give fair and impartial consideration to the matters presented to it. The court noted the problem of adopting this contention:

In such a case no persons, who may be prominent and well known or who may be elected officials, whether popular and established, as defendant contends he is, or not, could be charged with commission of any crime because doubtlessly the fact of charging would cause unfavorable pre-indictment publicity, thus precluding indictment or vitiating one found by a grand jury.

¹²⁹See, e.g., United States v. Garrison, 353 F. Supp. at 310. Garrison himself contributed to the very publicity which he claimed had prejudiced the grand jury, by making statements to the news media attacking the federal government and by generating further publicity by filing charges against the United States Attorney and the Attorney in charge of the New Orleans Organized Crime Strike Force. See also Kennedy v. Justice of the District Court of Dukes County, 356 Mass. 367, 376 (S.J.C., Suffolk 1969), where Senator Ted Kennedy's request that the inquest into the death of Mary Jo Kopechne be kept secret was denied. Kennedy had used the national television and radio networks to broadcast his explanation of the incident, and the court noted that

petitioner Kennedy's own resort to television may itself have increased public interest in the events of July 18, 1969, and public demand for a more complete investigation and explanation of those events.

¶53 Because publicity of corruption is anathema to the public official, the prosecutor may be in a good bargaining position, in extraordinary cases, to get the official to cooperate with investigatory proceedings.¹³⁰ Or, the public officials themselves may attempt to use grand jury proceedings offensively or defensively for purposes of political maneuvering.¹³¹

E. The Effect of Prosecutorial Misconduct

¶54 There have been intimations in the federal courts that prosecution-inspired publicity may be treated more harshly than publicity that arises as a regular news event.¹³²

Federal courts have been sensitive to claims of prejudice arising from publicity caused by the action of the government.¹³³ Leaks of information to the press by government

¹³⁰ An extraordinary case, Special Prosecutor Leon Jaworski attempted to bargain with President Richard Nixon. On March 1, 1973, Nixon had been named as an unindicted co-conspirator by the grand jury which indicted Haldeman, Ehrlichman, Mitchell, and four others as participants in the Watergate cover-up. The information remained sealed and secret. On May 5, 1973, Jaworski met at the White House with Nixon's Chief of Staff, Alexander Haig, and offered not to reveal the President's status as an unindicted co-conspirator, in exchange for a certain number of the White House tapes that Jaworski wanted for his investigation. After privately listening to the tapes requested, however, the President balked at this bargain. See R. Woodward and C. Bernstein, The Final Days at 154-158 (1976).

¹³¹ See In re Biaggi, 478 F.2d 489 (2d Cir. 1973).

¹³² United States v. Sweig, 316 F. Supp. at 1154, citing: Silverthorne v. United States, 400 F.2d at 633-34; United States v. Nunan, 236 F.2d at 593; United States v. Kahaner, 204 F. Supp. at 922.

¹³³ Silverthorne v. United States, 400 F.2d at 633, citing:

sources and the relief to which such conduct entitles a defendant are debated issues.¹³⁴ Prosecutorial misconduct may well result in professional discipline. Both the ABA Standards¹³⁵ and the Code of Professional Responsibility¹³⁶ emphasize the obligation of a prosecutor to refrain from making statements not absolutely necessary to the advancement

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Berger v. United States, 295 U.S. 78 (1935); United States v. Milanovich, 303 F.2d 626 (4th Cir. 1962); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960); Massicot v. United States, 254 F.2d 58 (5th Cir. 1958).

¹³⁴See, e.g., Temporary Commission of Investigation of the State of New York, The Nadjari Office and the Press (1976). The Commission explored improper disclosures of Grand Jury investigations emanating from the office of the Special Prosecutor and uncovered deliberate leaks and disclosures on the part of Special Prosecutor Maurice A. Nadjari and his chief assistant, Joseph A. Phillips, between 1972 and 1975.

¹³⁵See Reardon Report, supra note 27.

¹³⁶See ABA Code of Professional Responsibility, (1970), Disciplinary Rule 7-107(A):

A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
- (2) That the investigation is in progress.
- (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
- (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
- (5) A warning to the public of any dangers.

See also Reardon Report, supra note 27, at §1.3.

of an investigation.¹³⁷ Although the legal profession condemns pretrial publicity instigated by either prosecutor or defense counsel, the courts are more likely to admonish the lawyers involved than to grant defendants' motions to dismiss because of prejudicial news leaks.

¶55 Nevertheless, some cases have held that the source of the publicity is of no consequence in considering a motion to dismiss an indictment; only the prejudicial effect of the publicity is important. As one court said when dismissing the defendant's charge that the United States Attorney had engendered the sensational news exploitation of the case:¹³⁸

¹³⁷The Code, supra note 136, includes "ethical considerations" which are aspirational objectives toward which every lawyer should strive. See, e.g., Ethical Consideration 7-33:

A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury.

See also ABA Project on standards for Criminal Justice, The Prosecution Function and the Defense Function 46-46 (1970):

Public statements.

(a) The prosecutor should not exploit his office by means of personal publicity connected with a case before trial, during trial and thereafter.

(b) The prosecutor should comply with the ABA Standards on Fair Trial and Free Press. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

¹³⁸See United States v. Dioguardi, 20 F.R.D. 33, 34 (S.D.N.Y., 1956). See also United States v. Hoffa, 205 F. Supp. 710, 718 (S.D. Fla.), cert. denied, 371 U.S. 892 (1962), where defendants moved to dismiss the indictment,

To the extent that 'trial by newspaper' was indulged in by Federal law-enforcement officials, it is to be regretted and condemned. But the issues raised by the defendant's motion require an examination into the existence and prejudicial effect of the publicity, rather than into its source and inspiration.

¶56 More recently, however, the cases have suggested that dismissal of the indictment may be warranted with or without a showing of actual prejudice. For example, in United States v. Mandel,¹³⁹ involving the governor of Maryland, the District Court of Maryland noted:¹⁴⁰

It is possible that in a proper case the Court would dispense with the requirement of actual prejudice. Such a case could arise when it is clear that a substantial amount of publicity is inspired by the prosecution.

The court found no need to pursue this line of reasoning, however, concluding that the defendant had failed to present a concrete basis for inferring that government officials were responsible for a substantial amount of the publicity.¹⁴¹

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alleging that adverse publicity emanated from high government officials, members of the cabinet, and the President of the United States. The court stated that it was "in full agreement with the holdings of Dioguardi," and rejected the defendants contention that "there is no need to prove specific bias and prejudice" when the publicity emanates from the government. Similarly, in United States v. Archer, 355 F. Supp. at 987-88, the court rejected the defendants' argument that the inherent prejudice rule should be extended to apply "when the publicity is the direct result of prosecutorial misconduct"

¹³⁹ 415 F. Supp. 1033 (D.Md. 1976).

¹⁴⁰ Id. at 1064.

¹⁴¹ Id. See also United States v. Archer, 355 F. Supp. at 989 where defendants asserted that pre-indictment publicity was intentionally created by the government in a sophisticated attempt to pressure either one or more of the

¶57 Publicity generated by the prosecution is subject to the same struggle between free expression and fair criminal proceedings as any news story. But, as Judge Frankel recognized in United States v. Sweig, "greater demands should be made upon the court's own officers than upon those whose business it is to gather and purvey the 'news'."¹⁴² The court in Sweig did not define precisely how government-inspired publicity might be treated differently, however, because it found that the defendants had offered no substantial proof that the government was the source of the publicity.¹⁴³

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defendants into cooperating with the government in their continuing investigation of official corruption, and to create an atmosphere of hostility which carried over to the grand jury proceedings. The court concluded:

While a situation possibly could exist where prosecutorial misconduct in releasing information to the press would be so prejudicial as to warrant dismissal of an indictment against a defendant, . . . that situation is not presented by the instant case.

¹⁴² See United States v. Sweig, 316 F. Supp. at 1154. See also, Medina Report, supra note 39; and Reardon Report, supra note 27, at 1:

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial judicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

¹⁴³ See United States v. Sweig, 316 F. Supp. at 1155.

¶58 Although the courts are sensitive to prosecution-inspired publicity,¹⁴⁴ defendants have been unsuccessful in capitalizing on the new judicial attitude. Instead of granting defendants' motions to dismiss for prejudicial publicity, courts reprimand prosecutors: "prosecutors must observe some limits of essential fairness in their work with such investigatory bodies."¹⁴⁵ Several courts rely on procedural rules to deal with the regulation of pre-indictment statements to the press by officers of the court.¹⁴⁶ The Department of Justice has adopted similar rules,¹⁴⁷ and, as the court in United States v. Capra noted, "an agency may deny due process if it fails to obey its own regulations."¹⁴⁸ Consequently, prosecutors in the Department of Justice must exercise care so that they will not occasion unfair publicity. Those who prosecute on the state and local level should do no less.

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Defendants subject to legislative hearings on public corruption have been known to argue that public hearings are the equivalent of government-inspired publicity. See United States v. Mitchell, 373 F. Supp. 1239 (S.D.N.Y. 1973), and Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). Such arguments have been unsuccessful.

¹⁴⁴See, e.g., United States v. Capra, 372 F. Supp. at 616, ". . . the atmosphere and our principles are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutors' press conferences and photographic spreads."

¹⁴⁵United States v. Sweig, 316 F. Supp. at 1153.

¹⁴⁶Id. at 1154.

¹⁴⁷Department of Justice regulations are published at 28 C.F.R. §50.2 (1976).

¹⁴⁸372 F. Supp. at 612.

CONSPIRACY

Conspiracy

Outline

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Summary

¶1 The conspiracy prosecution is a necessary tool for controlling organized crime. At common law, conspiracy was the agreement of two or more persons to act together to achieve an unlawful end, or a lawful end by unlawful means. Conviction required at least two conspirators intending the unlawful conduct or result, with some grounds for knowing that their conduct was unlawful. Many modern statutes, including the federal general conspiracy statute, also require at least one conspirator to commit an overt act in furtherance of the conspiracy for criminal liability to attach to the group.

¶2 Since the exact scope, membership, and duration of a conspiracy determine the substantive liability of defendants for the acts of co-conspirators, their determination is important. The secret nature of conspiracies means that much must be inferred from circumstantial evidence. Successfully prosecuting a conspiracy often requires broad joinder of defendants and offenses. This creates troublesome jurisdictional, venue, and evidentiary issues. Finally, because of the conspiracy's special nature and its relation to unlawful objectives, an issue of its appropriate punishment arises.

I. Introduction: Conspiracy Prosecution is Necessary to Deal with Organized Crime

¶3 Conspiracy is a necessary adjunct to substantive offenses aimed at controlling organized crime. Members of criminal rings often play varying parts in the commission of a series of interrelated offenses. In complicated crimes, it often happens that the conduct of no single member meets all requirements for commission of the crime, and determining the member or members principally liable is correspondingly difficult. Conspiracy law simplifies prosecutions by making each member liable for all related acts of his co-conspirators.

¶4 Additionally, group crime is viewed as an aggravated form of individual crime.¹ Crimes of great magnitude and complexity are often beyond the power of individuals.

¹ See, e.g., Callanan v. United States, 364 U.S. 587, 593-94, rehearing denied, 365 U.S. 825 (1961):

[C]ollective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not combined to the substantive offense which is the immediate aim of the enterprise.

Criminal groups are self-encouraging and more likely to carry out crimes once planned. A criminal group formed for a specific purpose often remains intact and moves on to new offenses once the originating plan is completed.

¶5 Since conspiracy prosecution allows the breakup and punishment of criminal groups well before they achieve their objectives, it is vital for the protection of the public. Finally, additional penalties and prosecution advantages in conspiracy prosecutions are needed to meet the special dangers of concerted criminal activity.

II. The Elements of Conspiracy

¶6 Traditionally conspiracy, in its simplest formulation, has been thought to be an agreement between two or more persons to achieve, by concerted action, either an unlawful object or a lawful object by unlawful means.² Analyzed in modern terms, the individual conduct requirement is agreement.³ The attendant circumstances requirement is the

²See, e.g., Commonwealth v. Hunt, 45 Mass. (4 Metc.) 111, 123 (1842), quoted in note 33 *infra*, and accompanying text. The Hunt definition was adopted by the Supreme Court in Pettibone v. United States, 148 U.S. 197, 203 (1893).

³It has been objected that conspiracy "impinges" on the traditional maxim that the common law does not "punish an evil intent alone." Goldstein, "Conspiracy to Defraud the United States," 68 Yale L. J. 405, 406 (1959). This view is mistaken. As the Supreme Court of New Jersey observed in State v. Carbone, 10 N.J. 329, 336-37, 91 A.2d 571, 574 (1952):

So long as [an unlawful] design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act

concurrence of others in the scheme and its unlawful character. The state of mind requirement as to factual attendant circumstances is knowledge. The courts are split on the state of mind requirement as to legal attendant circumstances: some indicate knowledge; others hold that it is strict liability. Conspiracy has no result requirement. Courts are also split on the issue of state of mind as to the contemplated result: some require intent; others, knowledge.

¶7 The basic federal conspiracy statute is 18 U.S.C. §371.⁴

3 (continued)

in itself The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement.

See also Aikens v. Wisconsin, 195 U.S. 194, 205 (1904) (Holmes, J.) ("The very plot is an act in itself").

4

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

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §371 (1970).

In addition to section 371, title 18 contains more than twenty other statutes which have their own conspiracy provisions:

Set forth seriatim, they are: sections 224 (Bribery in Sporting Contests); 241 (Conspiracy against Rights of Citizens); 286 (Conspiracy to

This provision makes it a felony for two or more persons to conspire to commit any offense against, or to defraud, the United States if "one or more of such persons do[es] any act to effect the object of the conspiracy."⁵ As at common law, the essence of the crime is conduct constituting

4 (continued)

Defraud the Government with Respect to Claims); 351 (Congressional assassination, kidnapping and assault); 372 (Conspiracy to Impede or Injure Officer); 757 (Prisoners of War or Enemy Aliens); 793 (Gathering, Transmitting or Losing Defense Information); 794 (Gathering or Delivering Defense Information to Aid Foreign Government); 799 (Violation of Regulation of National Aeronautics and Space Administration); 892 (Making Extortionate Extension of Credit); 894 (Collection of Extensions of Credit by Extortionate Means); 956 (Conspiracy to Injure Property of Foreign Government); 1201 (Kidnapping); 1751 (Presidential Assassination, Kidnapping and Assault); 1792 (Mutiny, Riot, Dangerous Weapons Prohibited in Federal Penal Institutions); 1951 (Interference with Commerce by Threats or Violence); 2153 (Destruction of War Material, War Premises or War Utilities); 2154 (Production of Defective War Material, War Premises, or War Utilities); 2155 (Destruction of National-Defense Materials, National-Defense Premises, or National-Defense Utilities); 2156 (Production of Defective National-Defense Material, National-Defense Premises or National-Defense Utilities); 2192 (Incitations of Seamen to Revolt or Mutiny); 2271 (Conspiracy to Destroy Vessels); 2384 (Seditious Conspiracy); 2385 (Advocating Overthrow of Government); and 2388 (Activities Affecting Armed Force during War).

Many of these sections vary from section 371 in that, as at common law, they do not require an overt act for a violation to be consummated. Senate Comm. on the Judiciary, "Report to Accompany the Criminal Justice Codification, Revision, and Reform Act of 1974," S. Rep. No. 93-0000, Part II, 93d Cong., 2d Sess. 174 note 49 (1974).

⁵If the intended substantive offense is a misdemeanor only, however, punishment for conspiracy "shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. §371 (1970).

an agreement (intentionally or otherwise) between two or more parties. The statute, however, adds the requirement of an overt act. It also restricts relevant unlawful objectives, criminal or civil, to those of a federal nature in conformance to federal jurisdictional limitations.

¶8 Conspiracy law in the states is generally consistent with the common law and federal jurisprudence. Some states rely almost entirely on the common law;⁶ others essentially restate the common law in statutory form;⁷ while still others have enacted comprehensive conspiracy codes.⁸ A frequent statutory change from the common law is, like the federal statute, the requirement of an overt act in furtherance of the conspiracy.⁹

⁶ See generally Toomey, "Some Procedural Aspects of the Prosecution of a Conspiracy in the Commonwealth of Massachusetts," 53 Mass. L. Q. 207 (1968). Massachusetts statutes make several specific types of conspiracy illegal: conspiracy against trade (ch. 93, §9), conspiracy to violate the Massachusetts Controlled Substances Act (ch. 94C, §40) (Mass. Ann. Laws, 1975), and conspiracy to affect the results of horse or dog races (ch. 128A, §13C) (Mass. Ann. Laws, 1972). Punishment for conspiracy is codified in Mass. Ann. Laws ch. 274, §7 (Supp. 1975) (see Appendix).

⁷ E.g., N.J. Stat. Ann. §§2A:98-1 and 2A:98-2 (1969). (See Appendix.) By the savings provision of N.J. Stat. Ann. §2A:85-1 (1969), however, common law conspiracy in New Jersey has not been pre-empted by statute. See State v. Aircraft Supplies, Inc., 45 N.J. Super. 110, 115, 131 A.2d 571, 573 (1957).

⁸ See, e.g., N.Y. Penal Law art. 105 (McKinney 1975) (see Appendix).

⁹ See, e.g., N.Y. Penal Law §105.20 (McKinney 1975). See also N.J. Stat. Ann. §2A:98-2 (1969), which requires an overt act for the prosecution of conspiracies except for those intending "arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery or sodomy."

A. Agreement

¶9 The essence of conspiracy is the conduct of agreement plus the appropriate state of mind. The important aspects of the agreement are the intent to agree and the concurrence of others in the agreement.¹⁰

1. Intent to Agree

¶10 Since agreement is, in the first instance, entirely volitional, intent to bring about the prohibited objective is implied in agreement itself and it is difficult to talk of it as a separate aspect of the act.¹¹ Intent and agreement cannot be shown in the abstract, however, and it is in proving agreement that express consideration of state of mind of the individual conspirator becomes relevant.

¶11 A conspiracy is a legal concept that must be generally inferred from the words and acts of its members. The agreement creating the conspiracy must also be inferred from the often ambiguous words and actions of the conspirators.¹² Identical words and behavior may or may

¹⁰ Federal law will be the basis of discussion, since it is more mature on the subject of conspiracy. Reference will be made to state law where relevant and available.

¹¹ See generally "Developments in the Law--Criminal Conspiracy," 72 Harv. L. Rev. 920, 935 (1959) (hereinafter referred to as "Developments").

¹² As is usual in cases of alleged unlawful agreements . . . the government is without the aid of direct testimony In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

Interstate Circuit v. United States, 306 U.S. 208, 221 (1939). Some commentators suggest that standards for showing conspiracy in antitrust cases, such as Interstate Circuit, are looser than in general conspiracy law. See "Developments," supra note 11, at 72 Harv. L. Rev. 1000.

not lead to a finding of conspiracy, depending whether or not the individuals involved, by the better rule, intend to cooperate in bringing about the common objective. If one of the parties lacks such intent, even if he knows of and is furthering the unlawful ends of the other parties, he is not, by the better rule, agreeing and hence is not in the conspiracy.¹³

¹³ Because the issue of state of mind is difficult to separate from the act of agreement, it is often difficult to isolate it in opinions. In Falcone v. United States, 109 F.2d 579, 581 (2d Cir. 1940), Judge Learned Hand dealt with the issue while reversing convictions of persons supplying sugar, yeast, and metal cans to illegal distillers:

It is not enough that . . . [the accused] does not forgo a normally lawful activity, of the fruits of which he knows others will make unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

Though the Supreme Court affirmed the reversal, it did so on the limited ground that the government was trying to make the accused a part of a separately existing bootlegging conspiracy, and no proof was made that the defendants had knowledge of that conspiracy. United States v. Falcone, 311 U.S. 205, 210-11 (1940).

In Direct Sales Co. v. United States, 319 U.S. 703 (1943), although holding that "knowledge" of furthering illegal use of controlled substances in the course of its legal sales was sufficient proof of "intent" to convict a pharmaceutical company of conspiracy, the Supreme Court held that the intent "to further, promote, and cooperate in [the illegal enterprise] is the gist of conspiracy." (319 U.S. at 711).

State of mind requirements in the states vary both in the knowledge or intent required and in clarity of expression. In Massachusetts, knowledge plus "affirmative acquiescence" may be sufficient for conspiracy. Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 249-50, 275 N.E.2d 33, 69 (1971); cert. denied, 407 U.S. 910 and 914 (1972).

In New York, the cases traditionally hold that "common design on the part of persons charged to act together for the accomplishment of the unlawful

¶12 As long as the requisite state of mind and agreement are shown, no formalities of agreement are required.¹⁴ Mere knowledge and approval of, or acquiescence in, the object of a conspiracy, absent actual agreement to cooperate in achieving such purpose, does not make a person a party to a conspiracy.¹⁵ A tacit understanding, however, is sufficient.¹⁶ The intent required is the formation of a partnership to achieve common unlawful ends.¹⁷

2. Concurrence of Others in the Agreement

¶13 Agreement, by its nature, requires two or more parties. Proof of conspiracy against an individual requires a showing that he conspired with one or more

13 (continued)

purpose" had to be established. People v. Flack, 125 N.Y. 324, 332-33, 26 N.E. 267, 269 (1891). By statute, the state of mind now required is intent. N.Y. Penal Law art. 105 (McKinney 1975).

New Jersey requires showing of a "criminal purpose held in common." Carbone, supra note 3, at 10 N.J. 338, 91 A.2d 575.

¹⁴American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946) (conspiracy to monopolize tobacco trade implied from concerted action of major firms).

¹⁵United States v. Downen, 496 F.2d 314, 318-19 (10th Cir. 1974); United States v. Edwards, 488 F.2d 1154, 1158 (5th Cir. 1974). Note, however, the distinctions made in Falcone and Direct Sales (supra note 13). Sale of unrestricted goods with knowledge of illegal use was held insufficient to infer intent, while sale of restricted drugs combined with encouragement of bulk sales and grounds for knowing of illegal use was sufficient to infer intent.

¹⁶United States v. Georgia, 210 F.2d 45, 48 (3d Cir. 1954). See also Direct Sales, supra notes 13 and 15.

¹⁷"Conspiracy is a partnership in criminal purposes." United States v. Kissel, 218 U.S. 601, 608 (1910); Carbone, supra note 3, at 10 N.J. 34, 91 A.2d 576.

other individuals.¹⁸ The two conspirators may be husband and wife.¹⁹ A corporation may be indicted as a conspirator.²⁰ For criminal purposes, a corporation can be in conspiracy with its agents and employees only,²¹ but it cannot conspire with its own single agent.²²

¶14 Plurality does not require that all alleged conspirators be convicted for the conviction of any. An individual can be indicted and convicted for conspiracy although his alleged co-conspirators are never brought to trial and their names are unknown.²³ The co-conspirators can be given a nolle prosequi²⁴ or be immune from prosecution on

¹⁸"It is impossible . . . for a man to conspire with himself." Morrison v. California, 291 U.S. 82, 92 (1934). Statutes as well as common law formulations uniformly require the presence of two or more parties.

¹⁹United States v. Dege, 364 U.S. 51 (1960) (refusing to follow the historical presumption that a wife acts exclusively under her husband's control).

²⁰Alamo Fence Co. v. United States, 240 F.2d 179, 181 (5th Cir. 1957) (conspiracy to defraud the United States under 18 U.S.C. §371).

²¹See, e.g., Alamo Fence Co., *supra* note 20; Mininsohn v. United States, 101 F.2d 477, 478 (3d Cir. 1939) (conspiracy to defraud the United States). A corporation acting with its officers and employees alone does not establish a Sherman Act conspiracy. Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953) (civil suit for treble damages).

²²Union Pacific Coal Co. v. United States, 173 F. 737, 745 (8th Cir. 1909) (antitrust prosecution).

²³Rogers v. United States, 340 U.S. 367, 375, rehearing denied, 341 U.S. 912 (1951).

²⁴United States v. Shipp, 359 F.2d 185, 189 (6th Cir.), cert. denied, 385 U.S. 903 (1966) (nolle prosequi not the equivalent of acquittal).

unrelated grounds.²⁵ The conviction of one conspirator is not affected by the severance and potential acquittal of his co-conspirators at a separate trial.²⁶

¶15 Confusion about the nature of conspiracy led to the development of a concept called "mutuality." Mutuality is said to require equal treatment in the prosecution and conviction of alleged co-conspirators.²⁷ In many instances, conspiracy defendants have been acquitted, even though their actions and states of mind were those required for conspiracy, because surrounding circumstances outside this knowledge prevented conviction of their supposed partners.²⁸ A defendant's intentional concurrence in concerted criminal activity should be a separate question from the guilt of

²⁵Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938) (diplomatic immunity).

²⁶DeCamp v. United States, 10 F.2d 984, 985 (D.C. Cir. 1926). Acquittal or non-trial of alleged co-conspirators is not relevant as long as the basis for plurality remains. United States v. Marquez, 424 F.2d 236, 239 (2d Cir.), cert. denied, 400 U.S. 828 (1970); Vannata v. United States, 289 F. 424, 426 (2d Cir. 1923).

²⁷Where one of two alleged co-conspirators lacks knowledge of the circumstances that make the agreement a criminal conspiracy, his acquittal is required. Plurality, requiring a sharing of the criminal purpose, is lacking and the remaining defendant must be acquitted of conspiracy. Morrison, *supra* note 18, at 291 U.S. 93. Many courts have misapplied this concept to require that any acquittal or failure of conviction of all but one of the parties to the agreement operates as an acquittal of the one remaining. *See*, e.g., Feder v. United States, 257 F. 694, 696 (2d Cir. 1919).

²⁸*See*, e.g., State v. Dougherty, 88 N.J.L. 209, 212, 96 A. 56, 57 (1915) (conspiracy was not criminal as necessary party was police officer, who lacked criminal intent).

those with whom he thought he was in a conspiracy.²⁹ Many jurisdictions now require only apparent plurality coupled with necessary state of mind and agreement on the part of the individual defendant.³⁰

¶16 A final question of plurality arises when the substantive offense that is the object of the conspiracy requires more than one party. Many courts follow the doctrine called Wharton's Rule which states that whenever an offense requiring the willing cooperation of two or more persons is charged, conspiracy cannot also be charged if only the required minimum number of persons is involved.³¹ Application of the rule is often limited. In federal law, the rule creates only a presumption that once the substantive offense is proven, punishment for conspiracy is merged within it unless more than the required number have participated. This presumption is, in any case, rebuttable by a

²⁹ See generally "Developments," supra note 11, at 72 Harv. L. Rev. 973-74.

³⁰ Some statutes, e.g., N.Y. Penal Law §105.30 (McKinney 1975) expressly exclude a co-conspirator's incapability of conviction as a defense (see Appendix). Courts in other states interpret their statutes to reach the same result. Saienni v. State, 17 Crim. L. Rptr. 2515 (Del. Sup. Ct. Sept. 11, 1975); State v. St. Christopher, 17 Crim. L. Rptr. 2514 (Minn. Sup. Ct. Aug. 29, 1975).

³¹ See generally Iannelli v. United States, 420 U.S. 770 (1975). A motion for retrial (on other grounds) under Fed. R. Crim. P. 33 has been denied in this case, 18 Crim. L. Rptr. 2428 (3d Cir. Jan. 26, 1976). The circuit court indicated, however, that it would consider relief under 28 U.S.C. §2255 if initials on wiretap order were in fact, as claimed by appellants, not those of John Mitchell and wiretap therefore violated. 18 U.S.C. §2516(1).

showing of legislative intent to the contrary.³²

B. Unlawful Objective

¶17 The crucial circumstance distinguishing a conspiratorial agreement from a legal counterpart is its unlawful objective. As noted above, at common law a conspiracy is an agreement "to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."³³ This language is interpreted to encompass a broad range of ends and means which, although not criminal in themselves, are particularly injurious to individuals or the public when done in concert.³⁴

³²Iannelli, supra note 31, at 770 U.S. 785-86.

³³Hunt, supra note 2, at 45 Mass. 123. The court continued:

We use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment.

³⁴Commonwealth v. Dyer, 243 Mass. 472, 485, 138 N.E. 296, 303 (1922), cert. denied, 262 U.S. 751 (1923):

It is the consensus of opinion that conspiracy as a criminal offense is established when the object of the combination is either a crime, or if not a crime, is unlawful, or when the means contemplated are either criminal, or if not criminal, are illegal, provided that, where no crime is contemplated either as to the ends or the means, the illegal but non-criminal element involves prejudice to the general welfare or oppression of the individual of sufficient gravity to be injurious to the public interest.

¶18 Modern statutes tend to retain the broad sweep of the common law.³⁵ Under the federal statute, 18 U.S.C. §371, conspiracy prosecution is possible even though no specific substantive statute is violated.³⁶ Conspiracy to commit an offense prohibited by an act of Congress is also punishable even if only civil penalties are provided for the substantive violation.³⁷

¶19 Most formulations of the offense of conspiracy imply no state of mind requirement as to the unlawful nature of the objective. If conspirators have the requisite state of mind to be convicted for the offense which is their objective (other than strict liability offenses), then that is sufficient for conviction of conspiracy.³⁸ Knowledge of attendant circumstances conferring federal jurisdiction

³⁵ 18 U.S.C. §371 (1970) operates against all conspiracies to commit any federal offense or to defraud the United States, seemingly approaching the limits of recognized federal jurisdiction. N.J. Stat. Ann. §2A:98-1 (1969) specifies eight types of conspiracy, but the common law offense is retained (see note 7, *supra*). New York, on the other hand, limits the unlawful objective to the commission of a crime. A. Hechtman, "Practice Commentary to N.Y. Penal Law art. 105" (McKinney 1975).

³⁶ Glasser v. United States, 315 U.S. 60, 66-67 (1942). Conspiracy to defraud the United States goes beyond common law fraud and includes "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." Haas v. Henkel, 216 U.S. 462, 479 (1910).

³⁷ United States v. Hutto, 256 U.S. 524, 529 (1921).

³⁸ United States v. Feola, 420 U.S. 671, 692 (1975):

We hold here only that where a substantive offense embodies only a requirement of mens rea as to each of its elements, the general federal conspiracy statute requires no more.

is now held to be irrelevant in a conspiracy prosecution if it is irrelevant to the prosecution of the substantive federal offense.³⁹ The Supreme Court, however, has specifically declined to rule on what, if any, state of mind is required in prosecution for conspiracy to commit a substantive offense with no specific state of mind requirement.⁴⁰

C. An Overt Act

¶20 At common law, there was no overt act requirement. The offense of conspiracy rested solely on the act of illegal agreement. 18 U.S.C. §371 is representative of the modern statutory trend in requiring that one of the conspirators "do any act to effect the object of the

³⁹ Id. at 420 U.S. 694-95. The Court specifically rejected Judge Learned Hand's ruling in United States v. Crimmins, 123 F.2d 271, 273 (1941) that it was an impermissible enlargement of the scope of conspiracy to attribute to that conspiracy liability for attendant circumstances beyond the knowledge of some of its members and therefore beyond the scope of their agreement.

⁴⁰ Id. at 420 U.S. 690-91. Because a broad range of activities may be held to be "unlawful objectives" of a conspiracy, states require varying degrees of criminal knowledge or intent for conviction. In addition to limiting conspiracy to conspiracy to commit a crime (see note 35, supra), New York traditionally required "criminal intent and evil purpose" if the act entered into was merely malum prohibitum rather than malum in se. People v. Harris, 294 N.Y. 424, 433, 63 N.E.2d 17, 22 (1945); People v. Powell, 63 N.Y. 88, 92 (1875). Since New York's current conspiracy statutes require intent as to conduct but no state of mind as to illegality, mistaken belief that the intended conduct is legal should not constitute a defense. See N.Y. Penal Law §15.20 (McKinney 1975). Powell has been followed in Massachusetts. Commonwealth v. Benesch, 290 Mass. 125, 135, 194 N.E. 905, 910 (1935).

conspiracy."⁴¹

¶21 The overt act functions merely to show the conspiracy is at work.⁴² Though it may be preliminary in nature, it must be committed both during the existence of and in furtherance of some objective of the conspiracy.⁴³ The act may be by omission,⁴⁴ and need not be unlawful in itself.⁴⁵ The commission of the substantive crime may be alleged and proved as the overt act.⁴⁶

¶22 The statutes imply no state of mind requirement for an individual conspirator as regards the overt act. The overt act triggering the conspiracy as to all conspirators can be committed by any of their number,⁴⁷ or even by an

⁴¹See note 4, *supra*. Various federal special purpose conspiracy statutes also lack the overt act requirement (e.g. 18 U.S.C. §372 (1970): conspiracy to impede or injure officer). While common law conspiracy states such as Massachusetts do not require an overt act (*Beneficial Finance*, *supra* note 13, at 360 Mass. 249, 275 N.E.2d 69), many states with conspiracy statutes make an overt act an element of some or all types of conspiracy (see note 9 *supra*). In New Jersey, "the agreement alone can satisfy the [overt] act requirement because intent and act can be merged in the areement." *State v. General Restoration Co.*, 42 N.J. 366, 375, 201 A.2d 33, 38 (1964).

⁴²*Yates v. United States*, 354 U.S. 298, 334 (1957).

⁴³*Fiswick v. United States*, 329 U.S. 211, 216 (1946). In addition to triggering the conspiracy statute, proof of overt acts is also relevant to determining the duration and scope of the conspiracy. *Id.*

⁴⁴E.g., *United States v. Offutt*, 127 F.2d 336, 339 (D.C. Cir. 1942) (failure to report for induction).

⁴⁵*Braverman v. United States*, 317 U.S. 49, 53 (1943).

⁴⁶*Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

⁴⁷*Bannon v. United States*, 156 U.S. 464, 468-69 (1895).

innocent third party if his action is caused by a conspirator.⁴⁸ In these circumstances, and since the act merely serves as proof of the existence and operation of the conspiracy, a state of mind requirement for the individual is unnecessary.

III. The Attributes of a Conspiracy

¶23 Once the existence of a conspiracy is shown, a number of issues arise in determining its nature and scope. Although conspiracy requires at least two members, the exact membership of a given conspiracy is often in issue. When two or more criminal objectives are involved, there may be one or several conspiracies. Related to and complicated by these issues is the question of a conspirator's liability for the crimes of his co-conspirators. For statutes of limitations and definitional purposes, duration is also an issue. Finally, there is the question of possible defenses.

A. Parties

¶24 A person cannot conspire when he is unaware of the other party's existence.⁴⁹ When there is knowledge of the existence of other parties, however, knowledge of their

⁴⁸ Montgomery v. United States, 440 F.2d 694, 696 (9th Cir.), cert. denied, 404 U.S. 884 (1971) (car carrying drugs driven across the Mexican border by innocent party).

⁴⁹ Falcone, supra note 13, at 311 U.S. 210.

identity is unnecessary for finding them to be co-conspirators.⁵⁰

A person joining a continuing conspiracy takes the risk of being implicated with an unknown number of associates engaged in the common purpose.⁵¹

¶25 The issue of membership arises particularly in prosecuting "chain" and "wheel" conspiracies. Chain conspiracies consist of a series of discrete operations, or "links" with each link knowing those on either side but knowing of the whole chain only by implication (as in the smuggling and distribution of drugs).⁵² Where each link knows of the scope of the conspiracy and that his own success depends on the success of the whole, all can be convicted as one conspiracy "without requiring evidence of knowledge of all its details or of the participation of others."⁵³

¶26 A wheel conspiracy involves several individuals, or "spokes," engaged in parallel activities in conjunction with a common individual or group known as the "hub." When

⁵⁰ See, e.g., United States v. Blumenthal, 332 U.S. 539, 557-58 (1947), rehearing denied, 332 U.S. 856 (1948).

⁵¹ United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944).

⁵² United States v. Bruno, 105 F.2d 921, 922 (2d Cir.), reversed on other grounds as to one defendant, 308 U.S. 287 (1939) (narcotics smugglers and retailers convicted as one conspiracy without evidence of communication between them). The circuit court distinguished United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) in which the continued sale of counterfeit money through a chain of purchasers did not establish the concert of purpose necessary to find a single conspiracy.

⁵³ Blumenthal, supra note 50, at 332 U.S. 557.

evidence of interconnections among the spokes is lacking, several conspiracies are present rather than one.⁵⁴ Knowledge of the other parties can be inferred, however, from such facts as knowledge of the size of the project⁵⁵ or knowledge that each party's success depends on the success of others.⁵⁶

¶27 Although plurality requires at least two parties to a conspiracy, "one person can be convicted of conspiring with persons whose names are unknown."⁵⁷ Proof of conspiracy with unknown parties may include a showing that certain overt acts could not have been performed alone.⁵⁸ Co-conspirators can be sufficiently identified by description even though their names are learned only later.⁵⁹ Finally, a conspiracy indictment is not invalid through failure to include known co-conspirators.⁶⁰

B. Objectives

¶28 Whether a criminal scheme encompasses one or more

⁵⁴Kotteakos v. United States, 328 U.S. 750, 768-69 (1946).

⁵⁵Blumenthal, supra note 50, at 332 U.S. 558 (conspiracy to sell two car-loads of whiskey at above ceiling prices).

⁵⁶See, e.g., United States v. Anderson, 101 F.2d 325, 331 (7th Cir.), cert. denied, 307 U.S. 625 (1939) (where success of striking unions was mutually dependant).

⁵⁷Rogers, supra note 23, at 340 U.S. 375.

⁵⁸Nee v. United States, 267 F. 84, 86-87 (3d Cir. 1920).

⁵⁹Rubio v. United States, 22 F.2d 766, 767 (9th Cir. 1927), cert. denied, 276 U.S. 619 (1928).

⁶⁰E.g., Ng Pui Yu v. United States, 352 F.2d 626, 633 (9th Cir. 1965).

conspiracies depends more on the nature of the underlying agreement than on the multiplicity of objectives.⁶¹ The question is, as with membership, one of the knowledge of the participants of its scope, and their intent to participate in it to its full scope.⁶² The nature of the agreement and the question of one or multiple conspiracies is primarily one of fact for the jury.⁶³ Indictment for one conspiracy when the proof at trial shows two or more may, however, be grounds for reversible error.⁶⁴

¶29 A single agreement to commit several offenses may be

⁶¹As stated in Braverman, supra note 45, at 317 U.S. 53-54:

[T]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes . . . the single agreement is the prohibited conspiracy, and however diverse its objectives, it violates but a single statute.

⁶²See Kotteakos, supra note 54, as opposed to Blumenthal, supra note 50. See also Andolschek, supra note 51, and the text accompanying notes 51-54.

⁶³See, e.g., United States v. Dardi, 330 F.2d 316, 327 (2d Cir.), cert. denied, 379 U.S. 845 (1964).

⁶⁴Kotteakos, supra note 54, at 328 U.S. 767-69. When the indictment charged one conspiracy, but the evidence showed several, error permeated the entire trial and charge to the jury. The danger feared is "loss of identity in the mass." Id. at 776. In some circumstances prejudicial variance can be rendered harmless by means of proper instructions to the jury. United States v. Varelli, 407 F.2d 735, 746 (7th Cir. 1969) (variance due to failure of government proof rather than nature of transaction). There is no danger of prejudice when one conspiracy is alleged, but two are proven, when the defendant is shown to have participated in each. Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

but one conspiracy.⁶⁵ Similarly, a conspiracy exists where several parties agree to perform different functions in carrying out common objectives.⁶⁶ A single agreement is but one conspiracy even though it continues over time,⁶⁷ or there are gaps in proof of continuity or changes in membership.⁶⁸ Once the central criminal purposes have been attained, however, subsequent efforts to conceal the conspiracy do not extend its life unless such concealment was part of the original plan.⁶⁹

¶30 The issue of multiple objectives often arises in cases of wheel and chain conspiracies. In both cases, an immediate objective, i.e., purchase and sale of narcotics, may be the subject of a general objective, i.e., profit from one overall importation and distribution scheme. Finding single or multiple conspiracies, therefore, becomes a question of the state of mind of the members. Consequently, a narcotics distribution chain involving supplier, distributor, and buyer may be one conspiracy.⁷⁰ The spokes of a wheel conspiracy, i.e.,

⁶⁵ See Braverman, supra note 45.

⁶⁶ E.g., Varelli, supra note 64, at 407 F.2d 742.

⁶⁷ Braverman, supra note 45, at 317 U.S. 52.

⁶⁸ See, e.g., United States v. Stromberg, 268 F.2d 256, 263-64 (2d Cir.), cert. denied, 361 U.S. 863 (1959).

⁶⁹ Grunewald v. United States, 353 U.S. 391, 401-402 (1957). See notes 82-84, infra, and accompanying text.

⁷⁰ See, e.g., United States v. Tramaglino, 197 F.2d 928, 930-31 (2d Cir.), cert. denied, 344 U.S. 864 (1952).

bribery by commercial suppliers of governmental purchasing agents can become "parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."⁷¹

C. Substantive Liability of Conspirators

¶31 Conspiracy is an offense separate and distinct from substantive offenses that may be its object. A conspirator can be indicted, convicted, and sentenced on both substantive and conspiracy counts.⁷² As a consequence, double jeopardy concerns do not bar conviction for the substantive offense following acquittal of the conspiracy charge.⁷³ Substantive acquittal does not in itself bar conspiracy conviction.⁷⁴

¶32 Under federal law a party to a continuing conspiracy is responsible as a principal for any substantive offense

⁷¹Blumenthal, supra note 50, at 332 U.S. 558.

⁷²Iannelli, supra note 31, at 420 U.S. 779. The exception to this is Wharton's Rule, discussed in the text accompanying notes 31 and 32, supra.

⁷³Sealfon v. United States, 332 U.S. 575, 578 (1948). Collateral estoppel, however, may bar conviction if the conspiracy acquittal involved adverse determination of facts essential to conviction of the substantive offense. See, e.g., State v. Cormier, 46 N.J. 494, 218 A.2d 138 (1966) (conspiracy conviction reversed on basis of prior substantive acquittal, where both cases turned on same issue of fraud).

⁷⁴The elements of conspiracy are different from those of the substantive offenses. Since both charges arise from the same transaction, however, collateral estoppel effects may arise.

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committed by a co-conspirator in furtherance of the conspiracy. This applies regardless of the degree of the defendant's participation in or knowledge of the commission of the offense.⁷⁵ Since vicarious liability is disfavored, courts require the jury to find that:

1. the substantive offense was committed by a member of the conspiracy,
2. the party on trial was a member of the conspiracy at the time of the offense, and
3. the substantive offense was actually committed in furtherance of the conspiracy as understood by the defendant.⁷⁶

¶33 One who joins an existing conspiracy adopts and acquires substantive liability for offenses previously committed in furtherance of the conspiracy.⁷⁷ The question is one of conspiratorial involvement, absent which no substantive liability is acquired.⁷⁸

¶34 Courts hold that attempt statutes do not permit con-

⁷⁵ Pinkerton, supra note 46, at 328 U.S. 645-48. Many states have similar rules making defendants liable for the substantive offenses of co-conspirators. See, e.g., People v. Luciano, 277 N.Y. 348, 358, 14 N.E.2d 433, 435, cert. denied, 305 U.S. 620 (1938). See also Carbone, supra note 3, at 10 N.J. 339-40, 91 A.2d 575-76.

⁷⁶ See, e.g., United States v. Castellana, 349 F.2d 264, 277-78 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966).

⁷⁷ United States v. Sansone, 231 F.2d 887, 893 (2d Cir.), cert. denied, 351 U.S. 987 (1956).

⁷⁸ See Bollenbeck v. United States, 326 U.S. 607, 610-11 (1946) (fence joining in disposal of stolen goods transported interstate not part of conspiracy to transport); cf. United States v. Cardillo, 316 F.2d 606, 614 (2d Cir.), cert. denied, 375 U.S. 822 (1963) (fence knowingly purchasing automobile stolen and transported interstate joined conspiracy, where sale to innocent buyer was ultimate object).

viction for attempted conspiracy.⁷⁹

D. Duration

¶35 The duration of a conspiracy is important for determining its scope as well as for the running of the statute of limitations. Similarly, the duration of an individual's participation in a conspiracy is relevant in determining his substantive liability and the running of the statute as to him.

¶36 Once created by agreement, a conspiracy endures until terminated through success or abandonment.⁸⁰ Abandonment of a conspiracy of a continuing nature will not be presumed.⁸¹ The statute of limitations runs from the last overt act proved.⁸²

¶37 The "success" terminating a conspiracy is not necessarily the commission of the substantive offense which was the objective of the conspiracy, but may also include concealment activity. There is no objection to including concealment activity within the objectives of the conspiracy where it is demonstrated to be one of the original objectives of the conspiracy necessary to its ultimate

⁷⁹ Hutchinson v. State, 17 Crim. L. Rptr. 2304 (Fla. Ct. App. June 18, 1975) See also "Developments," supra note 11, at 72 Harv. L. Rev. 926 note 35.

⁸⁰ See Kissel, supra note 17, at 218 U.S. 610.

⁸¹ Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293, 297-98 (1934).

⁸² See Grunewald, supra note 69, at 353 U.S. 396-97.

success.⁸³ Since secrecy is an element of every conspiracy, however, the Supreme Court requires concealment activity tolling the statute to be by explicit agreement other than the inevitable cover up.⁸⁴

¶38 Where an overt act is required, abandonment terminating the conspiracy as to all parties is presumed if no member commits an overt act within the period of limitations.⁸⁵ Active abandonment and disbanding of the conspiracy will also start the running of the statute.⁸⁶

¶39 The issue of individual abandonment or withdrawal arises most often when an individual seeks to show that he left the conspiracy before some or all of the substantive offenses were committed. Since one of the evils of conspiratorial agreement is the mutual encouragement to plan and commit substantive offenses, the courts generally require more than inactivity to establish an individual's abandonment. The defendant has the burden of proof⁸⁷ to show at

⁸³ See Forman v. United States, 361 U.S. 416, 423-24 (1960).

⁸⁴ See, e.g., Grunewald, supra note 69, at 353 U.S. 402:

[A]llowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely.

⁸⁵ See, e.g., id. at 353 U.S. 396-97. States with overt act requirements follow a similar rule. See, e.g., People v. Hines, 284 N.Y. 93, 112-13, 29 N.E.2d 283, 293 (1940).

⁸⁶ See, e.g., Kissel, supra note 17 at 218 U.S. 610.

⁸⁷ See, e.g., United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied sub nom. Mogavero v. United States, 379 U.S. 960 (1965).

least some "affirmative action" disassociating himself from the conspiracy.⁸⁸ Some courts require that he actually take steps to prevent the conspiracy's success.⁸⁹

E. Defenses

¶40 Short of presenting an affirmative defense, the defendant may challenge the sufficiency of proof as to any element of conspiracy. The government must show the agreement, illicit objective, and overt act (if required).⁹⁰ Conspiracy can, of course, be proved by circumstantial evidence;⁹¹ each element is a question of fact for the jury.⁹²

⁸⁸Hyde v. United States, 225 U.S. 347, 369-70 (1912):

[U]ntil . . . [a conspirator] does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.

⁸⁹In Eldridge v. United States, 62 F.2d 449, 451 (10th Cir. 1932) the court stated:

A withdrawal from a conspiracy cannot be effected by intent alone; it must be accompanied by some affirmative action which is effective. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set, he must step on the fuse.

The court held that a mere communication to co-conspirators of intent to withdraw from an embezzlement conspiracy was insufficient for abandonment. It was necessary for the defendant to have dissuaded his partner from future embezzlement efforts.

⁹⁰See generally Section II, supra.

⁹¹Glasser v. United States, supra note 36, at 315 U.S. 80.

⁹²See, e.g., id. at 315 U.S. 80 (common purpose); United States v. Dardi, supra note 63, at 330 F.2d 327 (nature of agreement); United States v. Armone,

¶41 Withdrawal is an affirmative defense to substantive liability stemming from conspiracy,⁹³ and possibly to the conspiracy charge as well.⁹⁴ Because of the high standards of proof a defendant must meet to show withdrawal, the issue is often dismissed because of lack of sufficient evidence to even raise the defense.⁹⁵

¶42 Since plurality of agreement is an element of conspiracy, lack of mutuality of prosecution or conviction is sometimes a defense.⁹⁶ The acquittal of all but one of the alleged conspirators has been held to require acquittal of the one remaining.⁹⁷ Giving one of two

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363 F.2d 385, 401 (2d Cir. 1966), cert. denied, 385 U.S. 957 (1967) (whether overt act was in furtherance of conspiracy).

⁹³ See text accompanying notes 87-89, supra.

⁹⁴ See, e.g., United States v. Beck, 118 F.2d 178, 184 (7th Cir.) (dictum), cert. denied, 313 U.S. 587 (1941) (withdrawal before required overt act a possible defense). See generally "Developments," supra note 11, at 72 Harv. L. Rev. 957-60.

⁹⁵ See, e.g., Borelli, supra note 87, at 336 F.2d 388-89.

⁹⁶ See text accompanying notes 18-32, supra.

⁹⁷ Morrison, supra note 18, at 291 U.S. 93; People v. Kuland, 266 N.Y. 1, 2-3, 193 N.E. 439 (1934). Granting a new trial to one of two co-conspirators requires granting one to the other. Feder, supra note 26, at 257 F. 696. Where several conspirators are tried, however, acquitting one or granting him a new trial does not require similar treatment for the others. See, e.g., Reiss v. United States, 324 F.2d 680, 687 (1st Cir. 1963), cert. denied sub nom. Jacobs v. United States, 376 U.S. 911 (1964). For a discussion of the plurality rule and its effectiveness as a defense see the text accompanying notes 27-30, supra.

alleged conspirators a nolle prosequi, however, does not bar conviction of the one remaining.⁹⁸ Other forms of immunity protecting one conspirator from prosecution do not protect the other.⁹⁹

¶43 Entrapment is a defense to conspiracy, but the courts are hesitant to apply it.¹⁰⁰ Where government agents generate the entire scheme and leave only the consummation to the defendant,¹⁰¹ or where the sole required overt act was done by a government agent,¹⁰² there can be no conspiracy conviction. An entrapment instruction is proper on the defendant's general denial, however, if the government's

⁹⁸ Shipp, *supra* note 24, at 359 F.2d 189; United States v. Fox, 130 F.2d 56, 58-59 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942). But see, Miller v. United States, 277 F. 721, 726 (4th Cir. 1921) (*dictum*).

⁹⁹ *E.g.*, Farnsworth, *supra* note 25, at 98 F.2d 544 (*diplomatic-immunity*).

¹⁰⁰ See, *e.g.*, United States v. Maddox, 492 F.2d 104, 106 (5th Cir.), *cert. denied*, 419 U.S. 851 (1974) (conspiracy conviction affirmed although private detectives played major role). Police officers are allowed broad involvement in criminal activities without triggering an entrapment defense. See Hampton v. United States, 19 Crim. L. Rptr. 3039 (U.S. Sup. Ct. April 27, 1976); and Russell v. United States, 411 U.S. 423 (1973). State legislatures and courts are acting to allow conspiracy convictions where government involvement would otherwise destroy plurality of intent. See note 30, *supra*. But see Dougherty, *supra* note 28, at 88 N.J.L. 212, 96 A. 57 (conspiracy was not criminal where government agent was necessary party but lacked criminal intent).

¹⁰¹ Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

¹⁰² See, *e.g.*, DeMayo v. United States, 32 F.2d 472, 474 (8th Cir. 1929). Even the rule in Russell, *supra* note 100, leaves room for finding entrapment in extreme cases of government participation. See Hampton, *supra* note 100, and United States v. Archer, 486 F.2d 670 (2d Cir. 1973) (where federal agents supplied only federal aspect of offense, convictions reversed and indictments dismissed).

evidence raises the defense as a matter of law.¹⁰³

¶44 Incapacity to commit the objective offense is no automatic defense to a conspiracy charge. A person not a bankrupt can, for example, be convicted of conspiring to conceal the assets of a bankruptcy,¹⁰⁴ and private citizens can be convicted of conspiring to deprive a citizen of his civil rights under color of state law.¹⁰⁵ When a statute (such as the Mann Act) specifically contemplates participation of multiple parties and provides no penalty for one of those necessarily involved (the woman transported), however, this is taken as a legislative exclusion from liability preventing that party's conviction of conspiracy to commit that offense.¹⁰⁶

¶45 Impossibility is a limited defense to conspiracy. Alleged conspirators cannot be convicted if neither the object of their agreement nor its intended means of accom-

¹⁰³Sendejas v. United States, 428 F.2d 1040, 1044 (9th Cir.), cert. denied, 400 U.S. 879 (1970). See also Henderson v. United States, 237 F.2d 169, 173 (5th Cir. 1956), where the defendant was allowed to raise entrapment against the overt acts while admitting substantive liability.

¹⁰⁴Tapack v. United States, 220 F. 445, 447 (3d Cir.), cert. denied, 238 U.S. 627 (1915).

¹⁰⁵United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

¹⁰⁶Gebardi v. United States, 287 U.S. 112, 123 (1932). The Court did not say, however, that the transported woman could never be guilty of conspiracy to violate the Act. At 287 U.S. 117-19 it distinguished the holding in United States v. Holte, 236 U.S. 140, 145 (1915) that a "victim" taking an active part in excess of that contemplated by the legislature might lose her immunity and become liable for conspiracy.

plishment are unlawful.¹⁰⁷ Factual impossibility, however, does not prevent conspiracy conviction.¹⁰⁸

IV. Trial Consequences of Conspiracy Prosecutions

¶46 Since they usually involve more than one defendant and one or more substantive charges in addition to conspiracy, conspiracy prosecutions emphasize issues less obvious in other trials. All defendants and offenses might not be joinable in one trial. Since the time, place, and nature of the agreement are difficult to pin down before trial, issues of jurisdiction and venue often arise during conspiracy prosecutions. Because of the multiplicity of defendants and charges, serious evidentiary issues arise. Finally, since conspiracy is intended to sanction group crime in addition to the punishments provided for any substantive offenses, there are questions of appropriate grading and sentencing.

A. Joinder¹⁰⁹

¶47 Under the Federal Rules of Criminal Procedure,

¹⁰⁷Ventimiglia v. United States, 242 F.2d 620, 622 (4th Cir. 1957).

¹⁰⁸See, e.g., Beddow v. United States, 70 F.2d 674, 676 (8th Cir. 1934) (conviction of conspiracy to defraud the United States proper even though scheme could not have succeeded because of improperly witnessed bonds); Craven v. United States, 22 F.2d 605, 609 (1st Cir. 1927), cert. denied, 276 U.S. 627 (1928) (conviction of conspiracy to smuggle liquor possible even though liquor was actually of domestic origin).

¹⁰⁹Joinder is discussed in depth elsewhere in these materials. Only a brief summary is provided here.

prosecution for conspiracy can be joined with that for one or several substantive offenses, and co-conspirators can be prosecuted together even though they are not all charged with each offense.¹¹⁰ Severance is at the discretion of the trial court upon a showing of prejudice to a defendant or the government.¹¹¹ Most states follow similar joinder practices, either by statute or by common law, although a few are much more restrictive.¹¹²

B. Jurisdiction and Venue

¶48 Federal jurisdiction over a conspiracy is incurred whenever any objective, no matter how minor, involves a violation of federal law.¹¹³ Similarly, a conspiracy to defraud the United States exists whenever tax evasion is even a minor objective of a multiple objective conspiracy.¹¹⁴ As noted above, the substantive federal offense requires

¹¹⁰Rule 8(a) provides for joinder of offenses of similar character or arising out of the same transaction. Rule 8(b) provides for joinder of defendants involved in the same act or transaction or series of acts or transactions even though each is not charged in every count. Rule 13 allows the court to order joinder where available. Fed. R. Crim. P., 18 U.S.C.A. (1975).

¹¹¹Rule 14 allows the court to "order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires." Id.

¹¹²Massachusetts law, for example, specifically prohibits joinder of conspiracy with substantive offenses. Mass. Gen. Laws Ann. ch. 278, §2A (Supp. 1975).

¹¹³United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970).

¹¹⁴Ingram v. United States, 360 U.S. 672, 679-80 (1959).

no knowledge of facts giving rise to federal jurisdiction,
no more knowledge is required for federal conspiracy
jurisdiction.¹¹⁵

¶49 Venue exists in any district where the agreement was
made or one or more overt acts were committed.¹¹⁶ Overt
acts that take place in more than one district, such as
interstate telephone calls, permit prosecution in either
place.¹¹⁷ Where overt acts were performed in the district,
the court has jurisdiction and venue for the conspiracy
prosecution of all defendants, including those not
present within the district during the conspiracy's existence.¹¹⁸
Whenever venue is established through a proper allegation
of overt acts, it is unnecessary to set forth the location
where the original agreement was made.¹¹⁹

¹¹⁵ Feola, supra note 38, at 420 U.S. 694.

¹¹⁶ Although the agreement is the essence of conspiracy,
Hyde, supra note 88, at 225 U.S. 362 (1912), specifically
held Sixth Amendment venue requirements satisfied under
such a construction since an overt act is part of the
federal offense.

¹¹⁷ Smith v. United States, 92 F.2d 460, 461 (9th Cir.
1937). 18 U.S.C. §3237 provides, with certain
exceptions, for the prosecution of offenses in any
district where begun, continued, or completed.
Continuing offenses, involving the use of the mails
or transportation in interstate or foreign commerce,
may be prosecuted "in any district from, through,
or into which such commerce or mail matter moves."
18 U.S.C. §3237(a) (1970).

¹¹⁸ United States v. Campisi, 248 F.2d 102, 107 (2d Cir.),
cert. denied, 355 U.S. 892 (1957). 18 U.S.C. §3238
(1970) provides for jurisdiction and venue of offenses
not committed in any district, as on the high seas.

¹¹⁹ This is particularly appropriate since in many cases
the prosecution will not know the place of agreement.
Brown v. Elliott, 225 U.S. 392, 401-02 (1912).

¶50 When prosecution can be brought in more than one district, a defendant may move for transfer of the proceedings as to him "in the interest of justice" or for "the convenience of parties and witnesses."¹²⁰ This can lead to the splitting up of a multi-defendant conspiracy prosecution.¹²¹ Such a transfer is discretionary, however, and may be denied on considerations of hardship to the government and to government witnesses.¹²² Despite the provision for transfer at defendant's request, where prosecution is initiated in an incorrect district any subsequent conviction may be reversed.¹²³

¶51 In conspiracy prosecutions under state law, jurisdiction and venue are proper in the state where the conspiracy was formed, and in any state where an overt act took place.¹²⁴ This applies to permit prosecution, in a state where overt acts took place, of defendants who were not present in the state during the conspiracy's existence.¹²⁵

¹²⁰ Rule 21 (b), Fed. R. Crim. P. 18 U.S.C.A. (1975).

¹²¹ See, e.g., United States v. Choate, 276 F.2d 724, 727 (5th Cir. 1960), where the court denied government petitions to prohibit transfer of the trial of five of seven defendants in a mail fraud and conspiracy prosecution.

¹²² Such decisions involve a balancing process between prosecution and defense interests. United States v. Tellier, 19 F.R.D. 164, 167-68 (E.D.N.Y. 1956), aff'd, 255 F.2d 441 (2d Cir.), cert. denied, 358 U.S. 821 (1958).

¹²³ See, e.g., United States v. Liss, 137 F.2d 995, 1006 (2d Cir.), cert. denied, 320 U.S. 773 (1943).

¹²⁴ State v. La Fera, 35 N.J. 75, 89-90, 171 A.2d 311, 318-19 (1961).

¹²⁵ Commonwealth v. Saul, 260 Mass. 97, 98. 156 N.E. 679 (1927).

C. Evidentiary Issues

¶52 The complexity and secretiveness of modern conspiracies often create difficulties of direct proof.¹²⁶ While the conspiracy may often be shown entirely by circumstantial evidence,¹²⁷ special evidentiary rules apply in the case of conspiracy prosecutions to meet the difficulties involved.

¶53 The most significant evidentiary departure in conspiracy cases is the co-conspirator's exception to the hearsay rule. Under the exception, the declarations and acts of one conspirator made in furtherance of and during the existence of the conspiracy are admissible at trial against any of his co-conspirators.¹²⁸ Acts of co-conspirators present no difficulties as long as they are relevant, and are admissible to show either the existence of a conspiracy or its aims.¹²⁹ Both declarations and acts of co-conspirators are admissible to show motive and intent as well as other facts.¹³⁰

¹²⁶ See, e.g., Blumenthal, supra note 50, at 332 U.S. 557. This can be particularly true in narcotics cases. See, e.g., United States v. James, 494 F.2d 1007 (D.C. Cir. 1974), cert. denied, 419 U.S. 1027 (1975).

¹²⁷ See, e.g., Glasser, supra note 36, at 315 U.S. 80.

¹²⁸ See, e.g., Holson v. United States, 392 F.2d 292, 293 (5th Cir. 1968), cert. denied, 393 U.S. 1029 (1969).

¹²⁹ United States v. Costello, 352 F.2d 848, 854 (2d Cir. 1965), rev'd on other grounds sub nom. Marchetti v. United States, 390 U.S. 39 (1968). Acts after the conspiracy may be admissible to show its existence and nature. Lutwak v. United States, 344 U.S. 604, 607 (1953).

¹³⁰ See United States v. Stadter, 336 F.2d 326, 329 (2d Cir. 1964), cert. denied, 380 U.S. 945 (1965).

before the defendant's entry into the conspiracy.¹³⁶

Conversations antedating the charged conspiracy are admissible to demonstrate the initiation of the defendant's involvement and his state of mind at the time.¹³⁷ Since

a completed or terminated conspiracy can no longer be furthered, any declarations made by a conspirator after termination are inadmissible against co-conspirators.¹³⁸

Co-conspirators need not be tried jointly for the statements of one to be admissible against the other.¹³⁹

Similarly, statements made in furtherance of the conspiracy by unindicted co-conspirators may be admitted where the conspiratorial relation is adequately shown.¹⁴⁰

¶56 Direct testimony by a co-conspirator involves no hearsay problems since it is open to cross-examination. Some states, however, require that such testimony be corroborated.¹⁴¹ In the context of joinder, there is the problem of a defendant's claim of prejudice through the unavailability of the allegedly exculpatory testimony of a codefendant who is exercising his Fifth Amendment

¹³⁶ Lile v. United States, 264 F.2d 278, 281 (9th Cir. 1958).

¹³⁷ United States v. Del Purogatorio, 411 F.2d 84, 86-87 (2d Cir. 1969).

¹³⁸ Lutwak, supra note 129, at 344 U.S. 618.

¹³⁹ United States v. Schroeder, 433 F.2d 846, 850 (8th Cir. 1970), cert. denied, 401 U.S. 943 (1971).

¹⁴⁰ United States v. Nixon, 418 U.S. 683, 701 (1974).

¹⁴¹ See, e.g., N.Y. Crim. Pro. Law §60.22 (McKinney 1971).

right to silence.¹⁴²

¶57 A further problem arises in a joint trial when the prosecution seeks admission of an out-of-court confession of one defendant that implicates other defendants.¹⁴³

Admission of such a confession, even with admonitory instruction may be reversible error.¹⁴⁴

D. Grading and Punishment

¶58 Since conspiracy is an offense over and above any substantive offenses involved, punishment for conspiracy may exceed that provided for conviction of the objective offenses.¹⁴⁵ Conspiracy is a separate offense and

¹⁴²See State v. Alford, 18 Crim. L. Rptr. 2564 (N.C. Sup. Ct. Mar. 2, 1976) (reversal required even though no attempt was made to call codefendant as exculpatory witness, where codefendant could have refused to testify, and where codefendant's out-of-court confession, not introduced at trial, indicated that codefendant's testimony would have been exculpatory).

¹⁴³ [A] co-conspirator's hearsay statements may be admitted against the accused for no purpose whatever unless made during and in the furtherance of the conspiracy.

Wong Sun v. United States, 371 U.S. 471, 491 (1963).

Since confessions are by their very nature not in furtherance of the conspiracy, they do not fall within the co-conspirator's exception.

¹⁴⁴Bruton v. United States, 391 U.S. 123, 126 (1968). If other evidence is so overwhelming that prejudice is insignificant, however, reversal may not be required. Schneble v. Florida, 405 U.S. 427, 429-30 (1972).

¹⁴⁵Clune v. United States, 159 U.S. 590, 594-95 (1895), where a sentence of two years for conspiracy was upheld even though the maximum punishment for the substantive offense was only a fine of one hundred dollars. 18 U.S.C. §371 (1970) provides penalties for conspiracy

consecutive sentences may be imposed for conspiracy and violation of a statute, unless the statutes specify otherwise.¹⁴⁶

145 (continued)

independant of the substantive offense, except in the case of misdemeanors. States vary in the grading and punishment of conspiracy. See, e.g., the Massachusetts, New York, and New Jersey statutes in the Appendix.

¹⁴⁶Pinkerton, supra note 46, at 328 U.S. 643. See also the discussion of the Wharton Rule exceptions for offenses requiring multiple parties in the text accompanying notes 31 and 32, supra.



§ 7. Punishment for Commission of Crime of Conspiracy.

Any person who commits the crime of conspiracy shall be punished as follows:

First, if the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by death or imprisonment for life, by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than twenty years or in jail for not more than two and one half years, or by both such fine and imprisonment.

Second, if clause first does not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by imprisonment in the state prison for a maximum period exceeding ten years, by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than ten years or in jail for not more than two and one half years, or by both such fine and imprisonment.

Third, if clauses first and second do not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by imprisonment in the state prison for not more than ten years, by a fine of not more than five thousand dollars or by imprisonment in the state prison for not more than five years or in jail for not more than two and one half years, or by both such fine and imprisonment.

Fourth, if clauses first through third do not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a crime, by a fine of not more than two thousand dollars or by imprisonment in jail for not more than two and one half years, or both.

If a person is convicted of a crime of conspiracy for which crime the penalty is expressly set forth in any other section of the General Laws, the provisions of this section shall not apply to said crime and the penalty therefor shall be imposed pursuant to the provisions of such other section. (Added by 1968, 721, § 1, approved July 19, 1968, probably effective 30 days thereafter.)

Part II

N.J. Stat. Ann. (1969)

2A:98-1. Conspiracy

Any 2 or more persons who conspire:

- a. To commit a crime; or
- b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or
- c. Falsely to institute and maintain any suit; or
- d. To cheat and defraud a person of any property by any means which are in themselves criminal; or
- e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
- f. To obtain money by false pretenses; or
- g. To conceal or spread any contagious disease; or
- h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

Amended by L.1952, c. 91, p. 425, § 1.

2A:98-2. Overt act necessary; exceptions

Except for conspiracy to commit arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery or sodomy, no person shall be convicted and punished for conspiracy unless some act be done to effect the object thereof by 1 or more of the parties thereto.

ARTICLE 105—CONSPIRACY

Sec.

- 105.00 Conspiracy in the fourth degree.
- 105.05 Conspiracy in the third degree.
- 105.10 Conspiracy in the second degree.
- 105.15 Conspiracy in the first degree.
- 105.17 Repealed.
- 105.20 Conspiracy; pleading and proof; necessity of overt act.
- 105.25 Conspiracy; jurisdiction and venue.
- 105.30 Conspiracy; no defense.

§ 105.00 Conspiracy in the fourth degree

A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the fourth degree is a class B misdemeanor.

Added L.1973, c. 1051, § 5.

§ 105.05 Conspiracy in the third degree

A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the third degree is a class A misdemeanor.

Added L.1973, c. 1051, § 5.

§ 105.10 Conspiracy in the second degree

A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the second degree is a class E felony.

Added L.1973, c. 1051, § 5.

§ 105.15 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the first degree is a class B felony.

Added L.1973, c. 1051, § 5.

§ 105.20 Conspiracy; pleading and proof; necessity of overt act

A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy.

L.1965, c. 1030.

§ 105.25 Conspiracy; jurisdiction and venue

1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.

2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.

3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

L.1965, c. 1030.

§ 105.30 Conspiracy; no defense

It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime.

L.1965, c. 1030.

Conspiracy: Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

- ¶12, Note 15: Following United States v. Downen, cert. denied,
419 U.S. 897 (1974).
- ¶12, Note 16: Correction: United States v. Georgia
- ¶15, Note 30: Following Saienni v. State: 346 A.2d 152 (1975).
- ¶16, Note 32: Correction: 420 U.S. 785-86.
- ¶21, Note 45: Correction: (1942).
- ¶28, Note 64: Following United States v. Varelli: cert.
denied, 405 U.S. 1040 (1969). Varelli was
held to "encourage but not demand the giving
of such an instruction" when the possibility
of a variance appears. U.S. v. Abraham, 541
F.2d 1234, 1237 (7th Cir. 1976).
- ¶33, Note 78: Correction: Bollenbach v. United States.
- ¶34, Note 79: Following Hutchinson v. State: 315 So.2d
546 (1975).
- ¶39, Note 89: Correction: Eldredge v. United States.
- ¶43, Note 100: Following Hampton v. U.S.: 425 U.S. 484
(1976).
- ¶52, Note 126: Correction: cert. denied, 419 U.S. 1020 (1975).
- ¶53, Note 128: Correction: Holsen v. United States.
- ¶54, Note 132: Following 397 U.S. 1028 (1970): But once
the government has established the existence of
a conspiracy, only "slight evidence" need be
introduced to connect an individual to the
common scheme. United States v. Kirk, 534

F.2d 1262, 1272 (8th Cir. 1976). See also
United States v. Crockett, 534 F.2d 589 (5th
Cir. 1976).

¶55, Note 137: Correction: United States v. Del Purgatorio.

¶55, Note 139: Following 401 U.S. 943 (1971): Nor is
admission of testimony under co-conspirator
exception rendered "retroactively improper
by subsequent acquittal of alleged co-con-
spirator." United States v. Cravero, 545
F.2d 406, 419 (5th Cir. 1976), cert. denied,
45 U.S.L.W. 3704 (1977).

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ACCOMPLICE

Accomplice: Definition, Corroboration,
Instruction, and Impeachment



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Summary

¶1 Theft and fencing prosecutions usually find accomplice testimony essential for a conviction. In many jurisdictions, such testimony must be corroborated or is otherwise surrounded by special rules of law. Corroboration is not required in fencing cases in the federal system, Massachusetts, or New Jersey. New York law applies special rules. An instruction to the jury to scrutinize such testimony carefully is usually required. Courts disagree over whether failure to so instruct is reversible error.

¶2 Accomplice witnesses are especially subject to impeachment since they have committed at least one crime and often more. There are few special impeachment rules concerning accomplice testimony, but the traditional techniques for witness impeachment are available. The prosecution may be able to lessen the impact of impeachment by bringing out any discrediting material on direct examination.

Introduction

¶3 Like prosecution of organized crime generally, the prosecution of sophisticated theft and fencing operations depends on witnesses with inside information. Like juries, courts are naturally suspicious of the testimony of accomplices and informants. Insiders are also highly vulnerable to impeachment since they often have criminal connections and their potential bias is obvious. As a result, special rules concerning their testimony are applied. Some jurisdictions require corroboration of accomplice testimony. Others require instructions to the jury to scrutinize such testimony carefully. Accomplice testimony, too, is a fertile field for the artful cross-examiner. The law defines accomplices in different ways for the application of different rules. The prosecutor must master these definitions to succeed in the use of accomplice testimony.

I. Definition of Accomplice

A. Federal

¶4 Under federal law, an accomplice for substantive liability is someone who "aids, abets, counsels, commands, induces, or . . . procures [the] commission"

of a crime.¹ An accessory after the fact² is not an accomplice.³

¶5 The state of mind requirement for an accomplice is not set out explicitly by statute, and the cases are split. One view, represented by Judge Parker in Bakum v. United States,⁴ holds that aid with knowledge of the principal's criminal conduct is sufficient. Another view, represented by Judge Learned Hand in United States v. Peoni,⁵ requires that the accomplice intend that the principal engage in criminal conduct; knowledge alone is not enough. Judge Hand observed:

[The accomplice must] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used --even the most colorless, "abet"--carry an implication of purposive attitude towards it.⁶

The accomplice must, therefore, intend that the conduct constituting the crime be successful. Mere knowledge that

¹18 U.S.C.A. §2 (1969).

²18 U.S.C.A. §3 (1969).

³A person is an accomplice only if he can be indicted for the same crime with which the defendant is charged. United States v. Nolte, 440 F.2d 1124, 1126 (5th Cir.), cert. denied, 404 U.S. 862 (1971). An accessory after the fact is guilty of a separate offense. 18 U.S.C.A. §3 (1969). Thus, he is not an accomplice.

⁴112 F.2d 635 (4th Cir. 1940).

⁵100 F.2d 401 (2d Cir. 1938).

⁶Id. at 402.

his conduct will aid the principal is insufficient. Neither view is uniformly held.⁷

¶6 Under federal law, there may be an additional problem. Is knowledge of attendant circumstances, composing the jurisdictional elements of the crime, necessary for accomplice liability? Such knowledge is not generally an element of the substantive offense.⁸ In conspiracy cases, however, a different rule was followed until it was rejected in 1975 by the Supreme Court in United States v. Feola.⁹ Feola was cited as authority in United States v. Hobson,¹⁰ where the court held that an accessory after the fact¹¹ did not have to know that he was interfering with federal, rather than

⁷ Cases accepting Bakum include United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972), cert. denied, 410 U.S. 929 (1973), and United States v. Harris, 435 F.2d 74, 88-89 (D.C. Cir. 1970), cert. denied, 402 U.S. 986 (1971). Cases accepting Peoni include Clark v. United States, 243 F.2d 445 (5th Cir. 1961), and United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971). Most courts agree that knowledge of attendant circumstances is required for the commission of most offenses. See United States v. Carill, 105 U.S. 611, 613 (1881) (must allege knowledge of forged instrument's character in charge of uttering).

⁸ See, e.g., United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941) (L. Hand).

⁹ 420 U.S. 671 (1975).

¹⁰ 519 F.2d 765 (9th Cir.), cert. denied, 96 S. Ct. 283 (1975).

¹¹ 18 U.S.C.A. §3 (1969).

state justice.¹² The issue has not been decided in litigation involving an accessory before the fact or a principal in the second degree. Fine-distinctions have not been drawn, and such accessories or principals are generally held to be principals without further analysis.¹³ The issue remains open.

¶7 In Stephenson v. United States,¹⁴ one of the few cases concerning receiving stolen property, the court did not reach the question of whether a thief, absent any prior relationship, was an accomplice of the receiver in the crime of receiving stolen property. There, such a prior relationship existed and the court, following the modern approach, held that the thief was the accomplice of the receiver in receiving and that the receiver was the accomplice of the thief in the theft. Thus, in the absence of a prior relationship between the thief and receiver, it is uncertain in the

¹²United States v. Hobson, 519 F.2d 765 (9th Cir.), cert. denied, 96 S. Ct. 283 (1975) (a jurisdictional attendant circumstance in the flight to avoid prosecution case).

¹³United States v. Fernandez, 497 F.2d 730 (9th Cir.), cert. denied, 420 U.S. 990, reh. denied, 421 U.S. 1017 (1974) (accomplice indicted only as a principal); United States v. Miller, 379 F.2d 483 (7th Cir. 1967) (indicted under substantive law and as accomplices -- 18 U.S.C. §2(b)-- but treated the same as principals on the issue of knowledge of jurisdictional elements of the crime).

¹⁴211 F.2d 702, 704-05 (9th Cir. 1954) (comprehensive collection of cases) (plain error to fail to give accomplice instruction under Alaskan law).

federal law whether the thief is the receiver's accomplice in the receiving and whether the receiver is the thief's accomplice in the theft.

B. New York

¶8 Under New York law "accomplice" is a term of art used to describe the status of a witness for corroboration purposes; it does not refer to substantive liability. The Penal Law, defining "accessorial conduct," makes a person criminally liable for conduct if:

Acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in . . . conduct [which constitutes an offense.] ¹⁵

Thus, an accessory for substantive liability must have the same state of mind as the principal, e.g., intent to steal. In addition, he must have knowledge of the required attendant circumstances, e.g., ownership of the property, and he must intend that his conduct bring about the crime.

¶9 Under the criminal facilitation statute,¹⁶ the state of mind requirement is relaxed. The facilitator of a crime must only "believ[e] . . . it probable that he is rendering aid to a person who intends to commit a crime" The facilitator need not have the

¹⁵ N.Y. Penal Law §20.00 (McKinney 1975).

¹⁶ N.Y. Penal Law §115.00 et seq. (McKinney 1975).

same state of mind as the principal or intend that his action aid the principal.¹⁷

¶10 Generally, New York courts hold that if the receiver does not aid the thief in the actual theft, he is not an accessory in the theft.¹⁸ By statute, the thief's uncorroborated testimony may also convict the receiver.¹⁹ This statute is also generally interpreted to mean that a thief is not an accessory to the receiver in the receiving.²⁰

¹⁷The conduct requirement is: "[The facilitator] engages in conduct which provides [the principal]... with means or opportunity [to commit the crime]." The crime must also be successful. N.Y. Penal Law §115.00 (McKinney 1975).

¹⁸See, e.g., People v. Brooks, 34 N.Y.2d 475, 315 N.E.2d 460, 358 N.Y.S.2d 395 (1974); People v. Basch, 36 N.Y.2d 154, 325 N.E.2d 156, 365 N.Y.S.2d 836 (1975).

¹⁹N.Y. Penal Law §165.65 (McKinney 1975):

1. A person charged with criminal possession of stolen property who participated in the larceny thereof may not be convicted of criminal possession of such stolen property solely upon the testimony of an accomplice in the larceny unsupported by corroborative evidence tending to connect the defendant with such criminal possession.

2. Unless inconsistent with the provisions of subdivision one of this section, a person charged with criminal possession of stolen property may be convicted thereof solely upon the testimony of one from whom he obtained such property or solely upon the testimony of one to whom he disposed of such property.

²⁰People v. Valinati, 26 N.Y.2d 553, 556, 260 N.E.2d 541, 543, 311 N.Y.S.2d 910, 911 (1970).

C. New Jersey

¶11 Under New Jersey law, an accomplice for substantive liability is defined as:

Any person who aids, abets, counsels, commands, induces or procures another to commit a crime . . . [or] [a]ny person who willfully causes another to commit a crime 21

¶12 The state of mind requirement for accomplice liability was set out by the Supreme Court of New Jersey in State v. Madden:²²

[O]ne cannot be held as an aider or abettor unless it is found that he shared the same intent required to be proved against the perpetrator. 23

Knowledge of the required attendant circumstances is also an element of accomplice liability.²⁴

¶13 Generally, New Jersey courts hold that a receiver is not an accomplice of the thief in the theft.²⁵ The reverse is also generally thought to be the case: a thief is not an accomplice of the receiver in the receiving.²⁶ Nevertheless, if the receiver aids the

²¹N.J. Stat. Ann. §2A:85-14 (West 1969).

²²61 N.J. 377, 294 A.2d 609 (1972).

²³Id. at 396-97, 294 A.2d at 619.

²⁴State v. Humphreys, 54 N.J. 406, 417, 255 A.2d 273, 279 (1969) (dictum).

²⁵See, e.g., State v. Calvin, 22 N.J.L. 207, 209 (1849); State v. Dancyger, 51 N.J. Super. 150, 160, 143 A.2d 753, 758 (1958); State v. Fox, 12 N.J. Super. 132, 138, 79 A.2d 76, 79 (1951).

²⁶State v. Vanderhave, 47 N.J. Super. 483, 486, 136 A.2d 296, 298 (1957) (dictum) (held prior relation going beyond knowledge warranted finding of co-conspiratorial relationship between thief and receiver, not "naked buy and sell relationship").

thief in the actual theft, he is an accomplice in the theft.²⁷

D. Massachusetts

¶14 Under Massachusetts law, an accomplice for substantive liability is defined as:

Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring, or otherwise procuring such felony to be committed...²⁸

¶15 The state of mind requirement for an accomplice was recently discussed by the Massachusetts Supreme Judicial Court in Commonwealth v. Richards.²⁹ The court stated:

[G]uilt of the accessory is established when it is ... shown that he intentionally assisted the principal in the commission of the crime and that he did this, sharing with the principal the mental state required for that crime... . But it would suffice if the purpose to murder in the mind of the accessory was a conditional or contingent one, a willingness to see the shooting take place should it become necessary to effectuate the robbery or make good an escape.³⁰

¶16 The accomplice must also have knowledge of any attendant circumstances which are known to the principal and are necessary elements of the crime.³¹ As the court said in

²⁷ State v. Dancyger, 51 N.J. Super. 150, 162, 143 A.2d 753, 759 (1958) and cases cited therein.

²⁸ Mass. Gen. Laws Ann. ch. 274, §2 (Supp. 1975).

²⁹ 363 Mass. 299, 293 N.E.2d 854 (1973).

³⁰ Id. at 307-08, 293 N.E.2d at 860.

³¹ Commonwealth v. Mangula, 322 N.E.2d 177 (Mass. App.1975) (explaining the accomplice definition of Commonwealth v. Richards, 363 Mass. 299, 293 N.E.2d 854 [1973]).

Commonwealth v. Mangula:

To be found guilty of armed robbery, the defendant must have had knowledge of the possession of the weapon by his joint venturers.³²

Without this knowledge, an accomplice could not intend that the principal use the gun. Thus, he might be guilty of robbery, but not armed robbery.

¶17 There are few cases in Massachusetts concerning the status of thief and fence as accomplices. In Commonwealth v. Savory,³³ however, the court assumed, without deciding the issue, that a thief is the accomplice of the receiver in the receiving. In light of Massachusetts's rule of not requiring corroboration of accomplice testimony, it is understandable that this question has not been decided.

II. Corroboration

¶18 Traditionally, and today, accomplice witnesses are viewed with suspicion. Courts, like juries, are aware that personal interests of the accomplice may be in conflict with the interests of justice. Originally, courts instructed juries to weigh the accomplice's testimony carefully. Some jurisdictions now require that accomplice testimony be corroborated by other evidence.³⁴

³²322 N.E.2d 177, 181 (Mass. App. 1975).

³³64 Mass. (10 Cush.) 535, 537 (1852).

³⁴Federal courts do not require corroboration. New York courts require corroboration except that of a thief against a receiver of stolen property in the absence of any agreement between them. New Jersey courts do not require corroboration. Massachusetts courts do not require corroboration unless the witness has been given immunity. See Appendix, History and Rationale of the Accomplice Corroboration Rule.

A. Federal

¶19 In the federal courts, corroboration of accomplice testimony is not required to sustain a conviction,³⁵ even if the state within which the federal court sits would require it.³⁶ In federal law, the issue of a witness's credibility is left to the well-instructed jury, case by case. Federal courts, too, can comment on the evidence. Consequently, there is no need for special rules dealing with the sufficiency of the evidence.

B. New York

¶20 In New York, corroboration of accomplice testimony is required by statute.³⁷ The statute requires that the

³⁵Caminetti v. United States, 242 U.S. 470 (1919) ("There is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.") See Holmgren v. United States, 217 U.S. 509 (1910); Crawford v. United States, 212 U.S. 183 (1909); Ryan v. United States, 157 U.S. 301 (1895); Orfield, "Corroboration of Accomplice Testimony in Federal Criminal Cases," 9 Vill. L. Rev. 15 (1963) (discussing these cases). See also notes 63-66 and text accompanying infra.

³⁶United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir. 1969), cert. denied, 396 U.S. 958 (1970); Dougherty v. United States, 230 F.2d 605 (9th Cir. 1956).

³⁷N.Y. Crim. Pro. Law §60.22 (McKinney 1971):

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

(a) The offense charged; or

corroborating evidence "connect the defendant with the commission of the offense."³⁸ This provision is interpreted to require that the evidence "tend to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling

37 continued

- (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

This provision dates back to the "Field Code," which was drafted by David Dudley Field in 1849 and eventually enacted by the legislature in the 1881 Code of Criminal Procedure. Compare N.Y. Crim. Pro. Law §60.22 supra with State of New York, Fourth Report of the Commissioners on Practice and Pleadings, Code of Criminal Procedure §473 (1843) and with Law of June 1, 1881, ch. 442, §399, [1881 v.2] Laws of New York 100. See also notes 178-181, 184 and text accompanying infra. See also N.Y. Penal Law §115.15 (McKinney 1967) (corroboration required of felon testifying against the defendant on a charge of criminal facilitation). In 1969, the Temporary Commission on Revision of the Penal Law and Criminal Code recommended that the corroboration requirement be abolished and a cautionary instruction be substituted. State of New York, Temporary Commission on the Revision of the Penal Law and Criminal Code, Proposed New York Criminal Procedure Law #10, at xx (1969). Nevertheless, the 1971 law retained the corroboration requirement.

³⁸ N.Y. Crim. Pro. Law §60.22 (McKinney 1971).

the truth."³⁹ Corroboration of both the commission of the crime and the defendant's participation is not necessary; the evidence need not "lead exclusively to the inference of the defendant's guilt."⁴⁰ "Matters in themselves of seeming indifference" may be enough.⁴¹

¶21 Under the corroboration statute⁴² an accomplice is defined as:

A witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:
a) The offense charged [against the defendant]; or
b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.⁴³

Even though no state of mind requirement is set out in the statute, it is necessary.⁴⁴ The requirement is characterized as "guilty knowledge of the defendant's intention to commit

³⁹People v. Wheatman, 31 N.Y.2d 12, 286 N.E.2d 234, 334 N.Y.S.2d 842, cert. denied, 409 U.S. 1027 (1972) (bribery and conspiracy); People v. Morhouse, 21 N.Y.2d 66, 233 N.E.2d 705, 286 N.Y.S.2d 657 (1967) (bribery); People v. Fiore, 12 N.Y.2d 188, 188 N.E.2d 130, 237 N.Y.S.2d 698 (1962) (conspiracy); People v. Dixon, 231 N.Y. 111, 131 N.E. 752 (1921) (murder); People v. Ginsburg, 80 Misc.2d 921, 364 N.Y.S.2d 260 (Nassau County Ct. 1974) (larceny by extortion).

⁴⁰People v. Morhouse, 21 N.Y.2d 66, 74-75, 233 N.E.2d 705, 709, 286 N.Y.S.2d 657, 662-63 (1967), disapproving of People v. Mullins, 292 N.Y. 408, 414, 55 N.E.2d 479, 481 (1944) (the corroboration must show "not only that the crime has been committed but that the defendant was implicated in its commission").

⁴¹Id.

⁴²N.Y. Crim. Pro. Law §60.22 (subd. 2) (McKinney 1971).

⁴³Id.

⁴⁴People v. Baker, 46 App. Div.2d 377, 380, 362 N.Y.S.2d 529, 533 (2d Dept. 1974).

a [crime]";⁴⁵ but it probably is the same state of mind as the principal, as required under New York Penal Law §20.00.⁴⁶ ¶22 The crime of criminal possession of stolen property⁴⁷ is a statutory exception to the general accomplice corroboration rule.⁴⁸ Thus, a fence may be convicted on the uncorroborated testimony of a thief.⁴⁹ The courts also hold that this exception allows a thief to be convicted on the uncorroborated testimony of his fence.⁵⁰ Nevertheless, corroboration is required in theft and fencing prosecutions where there is a prior agreement between the parties. Under

⁴⁵Id. This definition broadens the scope of "accomplice" as "the term is applied to witnesses. . . to provide a more equitable, operable and consistent standard. . . in determining when the requirement of corroboration is applicable." N.Y. Crim. Pro. Law §60.22 Practice Commentary p. 195 (McKinney 1971).

⁴⁶(McKinney 1975).

⁴⁷Criminal possession of stolen property is functionally the New York State equivalent of receiving stolen goods. N.Y. Penal Law §165.40 et seq. (McKinney 1975).

⁴⁸N.Y. Penal Law §165.65 (McKinney 1967). But see Comment, "1974 Survey of New York Law," 26 Syracuse L. Rev. 35, 48-54 (1975) (explaining this provision and the most recent cases); People v. Brooks, 34 N.Y.2d 475, 315 N.E.2d 460, 358 N.Y.S.2d 395 (1974) (held: a receiver who testifies at the defendant's trial for larceny is also not an accomplice within the statute); People v. Kupperschmidt, 237 N.Y. 463, 143 N.E. 256, 32 A.L.R. 447 (1924) (overruled by the predecessor to section 165.65).

⁴⁹Id.

⁵⁰

See, e.g., People v. Brooks, 34 N.Y.2d 475, 315 N.E. 2d 460, 358 N.Y.S.2d 395 (1974); People v. Valinoti, 26 N.Y.2d 553, 260 N.E.2d 541, 311 N.Y.S.2d 910 (1970); People v. Robinson, 35 App. Div.2d 624, 312 N.Y.S.2d 920 (3d Dept. 1970).

such circumstances, the parties are accessories in larceny.⁵¹

C. New Jersey

¶23 In New Jersey, corroboration of accomplice testimony is not required.⁵²

D. Massachusetts

¶24 In Massachusetts corroboration of accomplice testimony is not generally required.⁵³

¶25 A major exception to this rule is the immunity statute.⁵⁴

Under that statute, a person may not be convicted "solely on the testimony of, or evidence produced by, a person granted immunity...."⁵⁵ That provision was interpreted recently in

⁵¹See, e.g., People v. Brooks, 34 N.Y.2d 475, 478-80, 315 N.E.2d 460, 462-63, 358 N.Y.S.2d 395, 398-99 (1974).

⁵²State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961); State v. Artis, 57 N.J. 24, 269 A.2d 1 (1970); State v. Gardner, 51 N.J. 444, 242 A.2d 1 (1968) (following Begyn); State v. Butler, 32 N.J. 166, 160 A.2d 8, cert. denied, 362 U.S. 984 (1960) (meagerness of accomplice testimony is not grounds for reversal); State v. Hyer, 39 N.J.L. (10 Vroom) 598, 602 (1877).

⁵³Commonwealth v. DeBrosky, 363 Mass. 718, 729, 297 N.E.2d 496, 504 (1973); Commonwealth v. Flynn, 362 Mass. 455, 467, 287 N.E.2d 420, 431 (1972); Commonwealth v. Taber, 350 Mass. 186, 187, 213 N.E.2d 868 (1966); Commonwealth v. Bosworth, 39 Mass. (22 Pick.) 397 (1839) (the oldest American case cited by Wigmore on accomplice corroboration). But see Commonwealth v. DeBrosky, 363 Mass. at 729 note 11, 297 N.E.2d at 504 note 11 (corroboration required in cases of treason and abduction of women as well as in the case of immunized witnesses).

⁵⁴Mass. Gen. Laws Ann. ch. 233, §20E (1974) (witness granted immunity required to testify or produce evidence before grand jury).

⁵⁵Mass. Gen. Laws Ann. ch. 233, §20I (1974).

Commonwealth v. DeBrosky.⁵⁶ The court held that the evidence connecting the defendant with the crime was sufficient under the statute.⁵⁷ The court did not decide if the evidence would be sufficient "where there [was] no corroboration of [the] testimony that [the] defendant was a participant in the crime."⁵⁸ The court reviewed the general rule of non-corroboration; it then concluded that the statute required only that "there be some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant."⁵⁹ The court accepted Wigmore's logic that "whatever restores our trust in [an accomplice] restores it as a whole."⁶⁰ Thus, the court stated, "evidence corroborating...the commission of the crime would be sufficient under the statute, even if there were no other evidence connecting a defendant to the crime."⁶¹

III. Cautionary Instruction

¶26 Many jurisdictions require the judge to instruct the jury to scrutinize the testimony of an accomplice witness

⁵⁶363 Mass. 718, 297 N.E.2d 496 (1973).

⁵⁷Id. at 728, 297 N.E.2d at 503 (testimony concerning the man's size, his name, and presence with the other criminals after the robbery).

⁵⁸Id.

⁵⁹Id. at 730, 297 N.E.2d at 505.

⁶⁰7 J. Wigmore, Evidence §2059 at 327 (3d ed. 1940).

⁶¹363 Mass. at 730, 297 N.E.2d at 505.

carefully. They allow the jury to convict on the uncorroborated testimony of an accomplice, but the jury must be aware of the possible personal interests of the witness. The courts are split on whether failure to instruct is reversible error. Some jurisdictions allow the judge to comment broadly on the evidence. They tend not to require instructions, but leave it to the judge's discretion.⁶²

A. Federal

¶27 In the federal system, the status of cautionary instructions is unclear. The Supreme Court stated, in Cool

⁶²In the federal courts, it is the better practice to give the instruction. The circuits are split on whether failure to instruct is reversible error. The judge is allowed to comment on the evidence.

In the New York courts a cautionary instruction is not given since corroboration is required. Failure to instruct that corroboration is required is reversible error. The judge may comment on the evidence.

In the New Jersey courts a cautionary instruction must be given on request. The instruction may be given on the court's own motion, but failure to give it when not requested is not reversible error. The judge may comment on the evidence.

In the Massachusetts courts a cautionary instruction is usually given, but it is not reversible error for the judge to refuse to give it. The judge may comment on the evidence.

See Appendix, History and Rationale of the Accomplice Corroboration Rule.

v. United States,⁶³ that, "it [is]... a better practice for courts to caution juries against too much reliance upon the testimony of accomplices."⁶⁴ But the Court has never explicitly ruled on this issue.

¶28 The circuits are split on whether refusal to give a cautionary instruction constitutes reversible error.⁶⁵ In general, the courts look to the facts of each case to decide whether refusal to instruct constitutes reversible error. The factors examined include the existence of corroborating evidence, whether the defendant requested the cautionary instruction, whether other comprehensive instructions made up for the missing accomplice instruction, the strength of the evidence of guilt, whether the accomplice testimony was strong

⁶³409 U.S. 100 (1972). The Court stated:

Accomplice instructions have long been in use and have been repeatedly approved. . . .In most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon its veracity. . . .But in most of the recorded cases, the instruction has been used when the accomplice turned State's evidence and testified against the defendant. . . .No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony "with care and caution." Id. at 103.

See also cases cited note 35 supra and On Lee v. United States, 343 U.S. 747, 758 (1952) (to the extent the government uses accessories and accomplices the defendant is "entitled. . .to have the issues submitted to the jury with careful instructions.") See also United States v. Bloch, 88 F.2d 618, 621 (2d Cir. 1937); United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) (Judge Learned Hand held that it was not error to refuse to instruct).

⁶⁴409 U.S. at 103 (1972).

⁶⁵See Annot., 17 A.L.R. Fed. 249 (1973).

or weak, and whether omission of the instructions affected "substantial rights" of the defendant.⁶⁶ Thus, reversals appear to come close to reversals for insufficient evidence. ¶29 One possible reason that a refusal to instruct is not always reversible error is the policy of allowing federal judges to comment on the evidence.⁶⁷

B. New York

¶30 In New York, a cautionary instruction is not given since corroboration of accomplice testimony is required. An instruction that corroboration is required must be given if the undisputed evidence establishes that the witness is an accomplice.⁶⁸ Refusal to instruct constitutes reversible error.⁶⁹ If the evidence as to the witness's status is unclear, the jury still must be instructed on the corroboration requirement. If they decide that the witness is an accomplice,

⁶⁶ See Annot., 17 A.L.R. Fed. 249 (1973) and cases cited there.

⁶⁷ E.g., Jones v. United States, 361 F.2d 537 (D.C. Cir. 1966):

That trial judges of United States courts have authority to comment on the evidence in their jury instructions is so well established as to require no citation of authority. Id. at 540.

⁶⁸ People v. Basch, 36 N.Y.2d 154, 325 N.E.2d 156, 365 N.Y.S.2d 836 (1975) (burglary); People v. Beaudet, 32 N.Y.2d 371, 298 N.E.2d 647, 345 N.Y.S.2d 495 (1973) (armed robbery).

⁶⁹ Id. But see People v. Luongo, 382 N.Y.S.2d 266 (Suffolk County Ct. 1976) (failure to instruct might not be reversible error). The cases cited, however, are abortion and not accomplice corroboration cases.

then his evidence must be corroborated before they can base a conviction on it.⁷⁰

¶31 The lack of a cautionary instruction requirement is partly remedied by the New York policy of allowing a judge to comment impartially on the evidence.⁷¹

C. New Jersey

¶32 In New Jersey, a defendant has a right, upon request, to a cautionary instruction.⁷² The judge may also give it on his own motion.⁷³ Omission of the instruction, when it is not requested, is not "plain error" requiring reversal.⁷⁴ In fact, the New Jersey Supreme Court states that it is not wise to give the instruction without a request.⁷⁵ Since the judge is allowed to comment on the weight and value of the

⁷⁰Id.

⁷¹People v. Salemi, 309 N.Y. 208, 128 N.E. 2d 377 (1955), cert. denied, 350 U.S. 950 (1956); People v. Becker, 210 N.Y. 274, 104 N.E. 396 (1914); People v. Farning, 131 N.Y. 659, 30 N.E. 569 (1892). As a general rule, however, judges do not comment.

⁷²State v. Begyn, 34 N.J. 35, 54, 167 A.2d 161, 171 (1961); State v. Spruill, 16 N.J. 73, 80, 106 A.2d 278, 282 (1954).

⁷³Id.

⁷⁴State v. Artis, 57 N.J. 24, 269 A.2d 1 (1970); State v. Gardner, 51 N.J. 444, 242 A.2d 1 (1968).

⁷⁵See cases cited note 74 supra. The court noted that labeling a witness an accomplice may lead the jury to believe that the defendant is guilty. The court should, therefore, refrain from giving the instruction on its own motion. State v. Begyn, 34 N.J. 35, 55-56, 167 A.2d 161, 171-72 (1961).

evidence excluding factual issues,⁷⁶ this caution to the jury may be given in another instruction or comment.

D. Massachusetts

¶33 In Massachusetts, the usual practice is to give a cautionary instruction.⁷⁷ It is not, however, reversible error for the judge to refuse to give it.⁷⁸

¶34 This policy is reinforced by the Massachusetts law allowing the judge to comment on the evidence so long as he does not "charge" the jury "with respect to matters of fact."⁷⁹ He is allowed, however, to refer to the weight to be accorded the testimony of an accomplice,⁸⁰ but he may not express his opinion as to the credibility of particular witnesses.⁸¹ The credibility of a witness is decided by the

⁷⁶ State v. Begyn, 34 N.J. 35, 53, 167 A.2d 161, 170 (1961) and cases cited there.

⁷⁷ Commonwealth v. Giacomazza, 311 Mass. 456, 464, 42 N.E.2d 506, 511 (1942); Commonwealth v. Leger, 264 Mass. 217, 220, 162 N.E. 337, 338 (1928); Commonwealth v. Scott, 123 Mass. 222, 237 (1877).

⁷⁸ Commonwealth v. French, 357 Mass. 356, 396, 259 N.E.2d 195, 225, 46 A.L.R.3d 1106, 1134, vacated on other grounds sub nom. Limone v. Massachusetts, 408 U.S. 936 (1970); Commonwealth v. Flynn, 362 Mass. 455, 467, 287 N.E.2d 420, 431 (1972); Commonwealth v. Holmes, 127 Mass. 424, 440-41 (1879).

⁷⁹ Mass. Gen. Laws Ann. ch. 231, §81 (1974).

⁸⁰ Commonwealth v. Larrabee, 99 Mass. 413 (1868).

⁸¹ Harrington v. Harrington, 107 Mass. 329, 332 (1871) (constraint "is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgement or conclusion upon matters of fact."); Commonwealth v. Barry, 91 Mass. (9 Allen) 276 (1864).

jury, even if "both parties argue...on the ground that the witness [is]... an accomplice."⁸²

¶35 It has not been decided if refusal to instruct under the immunity statute corroboration requirement is reversible error.⁸³

IV. Impeaching the Accomplice Witness

¶36 The credibility of an accomplice witness may be crucial to a conviction for theft or fencing. The impeachment of accomplices is, therefore, a real concern to both defense and prosecution. The principles governing impeachment, however, do not deal specially with the testimony of accomplices. Special strategies have not been developed by either the defense or the prosecution for such impeachment. The same considerations which shape impeachment in any criminal trial prevail here. Nevertheless, it may be helpful to review them in this context. From the prosecution's perspective, these principles are the "rules of the game," which limit what a defense counsel may do in attempting to undermine the prosecution's case.

A. Federal

1. Generally

¶37 The Federal Rules of Evidence do not treat impeachment comprehensively. Rules 608 and 609 deal with impeachment

⁸² Commonwealth v. Elliott, 110 Mass. 104, 106 (1872).

⁸³ See Commonwealth v. DeBrosky, 363 Mass. 718, 297 N.E. 2d 496 (1973).

of witnesses by evidence of character and criminal conviction. Rule 613 establishes the foundation requirements for impeachment by prior inconsistent statements. Rule 608(a)(2) deals with rehabilitation and Rule 610 prohibits impeachment based on religious belief. The traditional impeachment devices include:

1. showing bias or interest;
2. use of prior inconsistent statements;
3. attack of witness's reputation for truthfulness;
4. showing prior misconduct; and
5. showing criminal convictions.

2. Bias or Interest

¶38 It is assumed that an accomplice has an interest in the case.⁸⁴ If he denies any interest, then the defense may introduce extrinsic evidence to refute that answer.⁸⁵ The defense may use extrinsic evidence of prior inconsistent conduct without laying a foundation. If a prior statement of the accomplice is used to show an interest, Rule 613(b) requires that the witness be given an opportunity to explain or deny the statement before it is introduced.

3. Prior Inconsistent Statement

¶39 Federal Rule 801(d)(1)(A) changes prior federal law by admitting prior inconsistent statements, not merely for

⁸⁴ This interest may arise out of either the accomplice's relationship with the defendant, e.g., hatred or fear, or the accomplice's relationship with the prosecution, e.g., an agreement of leniency on another indictment.

⁸⁵ United States v. Haggett, 438 F.2d 396, 399 (2d Cir.), cert. denied, 402 U.S. 946 (1971).

impeachment purposes, but substantively under certain circumstances. Rule 613(b) requires a foundation be laid prior to production of extrinsic evidence of a witness's prior inconsistent statement, allowing the witness a chance to rebut or explain. Collateral prior inconsistent statements, however, may be excluded entirely.⁸⁶

4. Attack on Character for Truthfulness

¶40 Impeachment of character is based on the theory that if a person acted badly in the past or had bad character, then he is less worthy of a jury's belief.⁸⁷ It requires extrinsic evidence. General bad character is considered irrelevant to a witness's in-court veracity.⁸⁸ Rule 608 requires the character trait proved by opinion or reputation to be that of truthfulness only. Reputation and opinion testimony under Rule 608 are put into evidence in a procedure identical to admitting such testimony under Rule 405. Thus, specific acts of conduct, for example, may not be inquired about on direct

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See, e.g., Benson v. United States, 402 F.2d 576, 581-82 (9th Cir. 1965).

87

The justification for allowing the character of a witness to have bearing on his credibility is found in history, experience, and the notion that the relative degree of prejudice in such situations will vary from one situation to another. See generally Falknor, "Extrinsic Evidence Affecting Admissibility," 10 Rutgers L. Rev. 574 (1956).

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In summation, however, defense counsel can broadly attack all aspects of a key witness's character in order to discredit his testimony. For an example of this technique, see F. Bailey and H. Rothblatt, Fundamentals of Criminal Advocacy §502 (1974).

examination of a character witness giving opinion or reputation testimony. An accomplice will often have a poor reputation. Thus, he is especially vulnerable to attacks on his truthfulness. To mitigate this factor, the jury should be told that people like the witness are the only ones in a position to give important testimony.⁸⁹

5. Previous Misconduct

¶41 Extrinsic evidence of specific acts of misconduct which did not culminate in criminal conviction or involve false statement under Rule 609 cannot be used to impeach a witness.⁹⁰ A witness, however, may be pressed to admit such acts on cross-examination if:

1. they are probative of character for truthfulness (Rule 608(b)),⁹¹
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⁸⁹ United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), cert. denied, 396 U.S. 958 (1969). See also Marrs, "The Informant and Accomplice Witness: Problems for the Prosecution," 9 John Marshall J. Prac. & Pro. 243 (1975).

⁹⁰ See, e.g., United States v. Allende, 486 F.2d 1351, 1354 (9th Cir. 1973), cert. denied, 416 U.S. 958 (1974).

⁹¹ What types of misconduct are probative of truthfulness is not clear in the federal courts. Nevertheless, Weinstein suggests that they are at least forgery, income tax fraud, bribery, bankruptcy fraud, making false statements to acquire licenses or permits, false swearing, false pretenses, cheating, embezzlement, swindling, false advertising, frauds on creditors, passing bad checks, unauthorized use of a credit card, criminal impersonation, and unlawfully concealing a will. 3 J. Weinstein and M. Berger, Weinstein's Evidence 608-28 (1975).

2. the danger of unfair prejudice to witness credibility does not outweigh probativeness (Rule 403),⁹² and
3. harassment or undue embarrassment would not result (Rule 611(a)).

Thus, although a witness is protected from extrinsic proof of his past misconduct, jurors hearing the cross-examiner's allegations may well assume them to be true.⁹³ The ability of the cross-examiner to exploit this power of suggestion is limited, since the inquiry into previous acts must be conducted in good faith. It is worth noting that while Rule 609 limits evidence of prior convictions to convictions within ten years, Rule 608 on misconduct has no similar limitation.

¶42 It is unclear whether the cross-examiner may ask a witness about his prior arrests or charges which did not result in conviction.⁹⁴ It is argued that Rule 608(b), referring to "specific instances of the conduct of a witness," should be construed to exclude arrests and charges as conduct of the police, not the witness. Thus, the defense could not inquire about charges against the witness on cross-examination.⁹⁵

⁹² Rule 403 affords less protection to the non-party-witness than to the party-witness because the possibility of prejudice is weightiest when the witness is the defendant.

⁹³ For a minority decision excluding inquiry of all non-conviction wrongs see Thurman v. United States, 316 F.2d 205, 206 (9th Cir. 1963).

⁹⁴ Inquiry about defendant's prior arrests and charges is proper upon cross-examination of character witness. Michelson v. United States, 335 U.S. 469 (1948).

⁹⁵ J. Weinstein and M. Berger, Weinstein's Evidence 608-36 (1975).

¶43 The prosecution may also benefit from the right against self-incrimination. This might occur if the witness is cooperating under a narrow grant of transactional immunity. The prosecutor can still prosecute him on other matters. Thus, the witness may be able to use the right against self-incrimination to avoid questions concerning prior misconduct.⁹⁶

6. Prior Criminal Convictions

¶44 Rule 609(a) provides for the impeachment of a witness by cross-examining him about his prior criminal convictions or by putting into evidence a public record of the witness's convictions. The crime supporting the conviction must be punishable by imprisonment in excess of one year; or it must involve dishonesty or false statement. The probative value of the evidence must outweigh its prejudice to the defendant. Rule 609(a) requires that the crime be committed within a ten-year period from the date of conviction or release, but the court may allow its introduction into evidence if it is in the interests of justice and its probative value substan-

⁹⁶The final sentence of Rule 608(b) states that the right against self-incrimination is not waived by a witness with respect to matters relating solely to credibility. Yet the practical effect of this rule is of limited use to prosecutors in sheltering a witness from impeachment. First, it does not apply to questions concerning convictions, 1 McCormick, Evidence §135 at 284 (1954), or to conduct that due to the statute of limitations could not result in criminal proceedings, see, e.g., Malloy v. Hogan, 378 U.S. 1 (1964). Second, it would constitute bad prosecution strategy to suffer a prosecution witness to invoke the privilege. The jury would be suspicious of the remainder of the witness's testimony. Third, the court may find that a witness's assertion of the right against

tially outweighs prejudice to the defendant. Either party must provide notice to the adverse party that it will move to admit such convictions. Rules 609(c) through 609(e) apply to the treatment of pardons, juvenile adjudications, and pending appeals offered for impeachment purposes.

¶45 Impeachment by way of prior criminal conviction can do great damage to the credibility of a prosecution witness. Damage can be mitigated by bringing out all convictions on direct examination and by reminding the jury that this is the only type of witness who can testify in fencing cases.⁹⁷

7. Rehabilitation of the Accomplice

¶46 After a witness's character for truthfulness is attacked, the party first calling him may call witnesses to testify to his character for truthfulness in an effort at rehabilitation. The "no bolstering rule"⁹⁸ precludes the admission of evidence of good character for truthfulness before such good character is attacked. An attack is made by explicit opinion or reputation testimony as to untruthfulness, evidence

96 continued.

self-incrimination on issues solely relating to credibility so affects the witness's testimony that the prosecution must grant immunity or suffer the testimony on direct to be stricken.

⁹⁷United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

⁹⁸Until a witness is impeached, the party offering that witness may not accredit or "bolster" his testimony.

of prior conviction, or witness acknowledgement of non-conviction misconduct.⁹⁹ Evidence of corrupt conduct¹⁰⁰ and insinuations which result from accusatory cross-examination¹⁰¹ also will support rehabilitation for truthfulness. Bias will not.¹⁰²

¶47 Prior consistent statements are inadmissible in support of testimony impeached by prior inconsistent statements with two exceptions: (1) where the prior consistent statement antedates the existence of an alleged motive to falsify at trial, and (2) when the testimony is attacked as a recent contrivance. Rule 801(d)(1)(B) classifies evidence of such prior statements not to be hearsay.¹⁰³

8. Prosecution Strategy: Drawing the Teeth of Cross-Examination

¶48 It is sound strategy for the prosecution to bring out prior criminal convictions or grounds for bias on direct examination. Otherwise, defense counsel will probably reveal them to the jury during cross-examination. A witness gains credibility when such facts are voluntarily elicited

⁹⁹ See C. McCormick, Evidence §49 (1954).

¹⁰⁰ Id., §49 at 107.

¹⁰¹ 4 J. Wigmore, Evidence §1104 (3d ed. 1940).

¹⁰² Cf. Perkins v. United States, 315 F.2d 120, 123 (9th Cir.), cert. denied, 375 U.S. 916 (1963).

¹⁰³ See also Note, "Evidence of Prior Consistent Statements Admissible for Rehabilitation When Witness's Testimony Assailed as Recent Fabrication," 45 Calif. L. Rev. 202 (1957).

by friendly counsel. "Drawing the teeth" of cross-examination is particularly important where bias is suggested in the arrangements made by a witness with the prosecutor regarding his subsequent prosecution for acts relating to those with which the defendant is charged. Juries will be especially suspicious of testimony given in exchange for favorable treatment by the prosecutor. Some prosecutors, however, believe it unnecessary to reveal such arrangements on direct examination. Instead, they respond to charges of bias on re-direct by then eliciting from the prosecution witness the details of the arrangement (if any) and a statement that the witness is currently telling the truth.

¶49 Nevertheless, bringing out all the possible weaknesses in the accomplice's testimony is called "the most effective method with the...accomplice witness."¹⁰⁴ It forces the defense to rehash old testimony or else avoid it entirely.

This tactic creates other advantages in final argument:

[B]ecause the informant or accomplice witness is the potential weak point for the prosecution, defense counsel will undoubtedly berate the prosecution for its use of the "dirty witness" and portray him as a criminal type unworthy of belief. The retort is obvious. First, the Government hid nothing from the jury and fully disclosed his background. Second, it would be lovely if the Government could recruit bank presidents with Ivy League credentials and young, smooth-cheeked clerics to make...

[cases] but that is hardly reality. The defendant, therefore, controls for the most part who the Government will use as a witness. Third, if the witness is an accomplice, the argument can be made that the defendant in

¹⁰⁴ Marrs, "The Informant and Accomplice Witness: Problems for the Prosecution," 9 John Marshall J. Prac. & Pro. 243 (1975). For an excellent example of this approach held proper in a judge's charge to the jury, see United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

effect selected the witness against him and therefore the defense can hardly blame the Government for the witness's less than laudatory resume.¹⁰⁵

9. Defense Strategy: Emphasizing Bias

¶50 Defense counsel will probably ask any accomplice turned state's evidence whether charges were dropped or reduced, or a sentence recommendation was offered in exchange for his cooperation. If the witness falsely responds in the negative, the prosecutor must disclose the truth.¹⁰⁶ Defense counsel might also emphasize the maximum penalty for which the witness would be liable for his acts.¹⁰⁷

B. New York

1. Generally

¶51 There are no special rules concerning the cross-examination and impeachment of accomplices. In general, a witness may be impeached by showing:

1. bias or interest;
2. prior inconsistent statements;
3. poor reputation for truthfulness;
4. previous misconduct;
5. prior criminal convictions; or
6. impaired perceptions.

¹⁰⁵ Marrs, supra note 104.

¹⁰⁶ Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

¹⁰⁷ A. Amsterdam, B. Segal, and M. Miller, Trial Manual for the Defense of Criminal Cases §372 (3d ed. 1975).

2. Bias or Interest

¶52 Bias or interest may be shown by cross-examination or through other witnesses. The witness need not be examined about possible bias before such evidence is admissible.¹⁰⁸

An agreement between an accomplice and the prosecution is an obvious source of bias. If this agreement is denied by the accomplice the conviction can be reversed.¹⁰⁹

3. Prior Inconsistent Statements

¶53 Prior inconsistent statements can be used to impeach the witness,¹¹⁰ but the witness must be questioned concerning them before they are proven as such.¹¹¹ Both parties have a right to any statements of the witness, including those to the police and grand jury, if they relate to his testimony.¹¹²

4. Attack on Character for Truthfulness

¶54 Only the reputation for truthfulness is admissible, not the impeaching witness's opinion or specific acts of

¹⁰⁸People v. Brooks, 131 N.Y. 321, 30 N.E. 189 (1892).

¹⁰⁹People v. Fazio, 14 N.Y.2d 716, 199 N.E.2d 162, 250 N.Y.S.2d 62 (1964).

¹¹⁰Crawford v. Nilan, 289 N.Y. 144, 46 N.E.2d 512 (1943).

¹¹¹Larkin v. Nassau Electric R.R. Co., 205 N.Y. 267, 98 N.E. 465 (1912).

¹¹²People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, 7 A.L.R.3d 174, cert. denied, 368 U.S. 866 (1961) (defendant's right to statements); People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830 (1969) (prosecution's right to statements).

misconduct.¹¹³ Nevertheless, the impeaching witness may be asked whether, based on the prior witness's reputation, he would believe that witness's testimony.¹¹⁴

5. Previous Misconduct

¶55 A witness may be impeached by cross-examination concerning specific acts of misconduct.¹¹⁵ Other evidence of these acts, even if denied, is not admissible.¹¹⁶ The cross-examination, itself, must be in good faith with a reasonable belief that the witness committed the act.¹¹⁷ Knowledge of acquittal for the act precludes such questioning.¹¹⁸

6. Prior Criminal Convictions

¶56 Prior convictions may be shown after the witness has

¹¹³Brill v. Muller Bros. Inc., 13 N.Y.2d 776, 192 N.E.2d 34, 242 N.Y.S.2d 69, cert. denied, 376 U.S. 927 (1964).

¹¹⁴Carlson v. Winterson, 147 N.Y. 652, 42 N.E. 347 (1895).

¹¹⁵People v. Johnston, 228 N.Y. 332, 127 N.E. 186 (1920).

¹¹⁶People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950).

¹¹⁷People v. Kass, 25 N.Y.2d 123, 250 N.E.2d 219, 302 N.Y.S.2d 807 (1969); People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950) is the classic illustration of such abuse. Judge and prosecutor pressed defendant in an abortion prosecution to respond to details about prior abortions contained in a prior plea.

¹¹⁸People v. Santiago, 15 N.Y.2d 640, 204 N.E.2d 197, 255 N.Y.S.2d 864 (1964).

been examined concerning them.¹¹⁹ These may be shown presumptively by the record of the criminal court.¹²⁰ If the conviction is already admitted, the cross-examiner may show the nature of the crime.¹²¹

7. Impaired Faculties

¶57 A witness testifies to what he perceives. He may be impeached on the grounds that those perceptions were faulty due to liquor, drugs, or mental derangement.¹²²

8. Rehabilitation

¶58 A witness's testimony may be rehabilitated¹²³ by prior consistent statements where the in-court testimony of a

¹¹⁹N.Y. Crim. Pro. Law §60.40 (McKinney 1971):

1. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

¹²⁰N.Y. Crim. Pro. Law §60.60 (McKinney 1971).

¹²¹Moore v. Leventhal, 303 N.Y. 534, 104 N.E.2d 892 (1952).

¹²²People v. Webster, 139 N.Y. 73, 34 N.E. 730 (1893).

¹²³A witness's credibility cannot be shown until it has been attacked. People v. Singer, 300 N.Y. 120, 123, 89 N.E.2d 710, 711-12 (1949). There are exceptions to this rule. For example, a timely complaint of coerced confession is admissible to bolster credibility of complainant in subsequent criminal prosecution. People v. Alex, 260 N.Y. 425, 183 N.E. 906, 85 A.L.R. 939 (1933).

witness is attacked as a "recent fabrication," and it can be shown that the prior statement was made before the alleged motive to falsify arose.¹²⁴ Prior inconsistent statements may be explained, denied, or shown to be incorrect reports of what was said.¹²⁵ The impeaching witnesses may, themselves, be impeached.

¶59 If the witness gives testimony which undercuts the calling party's position, prior written, signed, inconsistent statements may be admitted to impeach his credibility.¹²⁶

C. New Jersey

1. Generally

¶60 The New Jersey statutes on impeachment do not cover accomplices in particular. They do not even set out the

¹²⁴People v. Singer, 300 N.Y. 120, 123-25, 89 N.E.2d 710, 711-12 (1949).

¹²⁵People v. Mirenda, 23 N.Y.2d 439, 245 N.E.2d 194, 297 N.Y.S.2d 532 (1969).

¹²⁶N.Y. Crim. Pro. Law §60.35 (McKinney 1971):

1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

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3. When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that disclosed its contents to the trier of the facts.

¹²⁷ N.J. Stat. Ann. §2A:81-12 (West 1976):

For the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter or his conviction of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence. Conviction of crime may be proved by the production of the record thereof, but no conviction of an offender shall be received in evidence against him in a civil action to prove the truth of the facts upon which the conviction was based.

N.J. Stat. Ann. §2A:84A, Rule 20 (West 1976):

Except as otherwise provided by Rules 22 and 47, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence relevant upon the issue of credibility, except that the party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised. No evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony.

N.J. Stat. Ann. §2A:84A, Rule 22 (West 1976):

As affecting the credibility of a witness
(a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing

allowed in cross-examination of accomplices.¹²⁸ The general areas of impeachment are:

1. bias;
2. prior inconsistent statements;
3. attack on character for truthfulness;
4. prior misconduct; and
5. prior criminal convictions.

2. Bias

¶61 A witness's bias may be shown either by cross-examination or by other witnesses' testimony.¹²⁹ Defense counsel will be given great latitude to show bias,¹³⁰ but if that is the only aim of a question, he should so inform the court.¹³¹ Obviously, being an accomplice is a proper subject for this investigation.¹³²

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provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall be inadmissible.

¹²⁸ State v. Zwillman, 112 N.J. Super. 6, 270 A.2d 284 (1970).

¹²⁹ Haver v. Central R. Co. of N.J., 64 N.J.L. 312, 45 A. 593 (1900).

¹³⁰ State v. Furey, 128 N.J. Super. 12, 318 A.2d 783 (1974).

¹³¹ State v. Panelli, 81 N.J.L. 346, 79 A. 1064 (1911).

¹³² State v. Salimone, 19 N.J. Super. 600, 89 A.2d 56 (1952).

3. Prior Inconsistent Statements

¶62 Contradictory statements may be shown to affect credibility, but the witness must be given an opportunity to explain those statements.¹³³ Such statements, if not introduced into evidence, can be used to refresh a witness's memory.¹³⁴

4. Attack on Character for Truthfulness

¶63 Impeachment for poor reputation of truthfulness is governed by N.J.Stat.Ann. §2A:84A, Rule 22(c) (West 1976):

As affecting the credibility of a witness...
(c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible....

The cases do not set out any rules to evaluate what is evidence of these traits.¹³⁵

5. Previous Misconduct

¶64 Evidence of misconduct is governed by N.J. Stat. Ann. §2A:84A, Rule 22(d) (1976):

As affecting the credibility of a witness...
(d) evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall be inadmissible.

¶65 As stated in the previous section, it is difficult to know what is evidence of honesty. Thus, specific acts of misconduct may be admissible under section 2A:84A, Rule 22(c).

¹³³ Nolan v. Pabsco Corp., 42 N.J. Super. 129, 125 A.2d 903 (1956).

¹³⁴ State v. Rajnajt, 132 N.J. Super. 530, 334 A.2d 364 (1975).

¹³⁵ Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974) (unrelated attorney's disbarment was admissible). State v. Hummel, 132 N.J. Super. 412, 334 A.2d 52 (1975) (tendency of witnesses to fabricate stories was inadmissible).

6. Prior Criminal Convictions

¶66 N.J. Stat. Ann. §2A:81-12 (1976) states:

For the purpose of affecting the credibility of any witness... his conviction of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence. Conviction of crime may be proved by the production of the record thereof....

Proof of convictions when the witness was not represented by counsel is not admissible.¹³⁶ The question need not specify any crime,¹³⁷ but such a question cannot be asked if counsel knows that the witness has never been convicted.¹³⁸

7. Rehabilitation

¶67 Rehabilitation of a witness's credibility is not dealt with separately by New Jersey statutes. They do state that a witness may explain any previous contradictory statements.¹³⁹ Any other evidence relevant to credibility may be given to meet a charge of recent fabrication of testimony.¹⁴⁰

¶68 The witness may also be impeached by the party calling

¹³⁶State v. Koch, 119 N.J. Super. 184, 290 A.2d 738 (1972).

¹³⁷State v. Nagy, 27 N.J. Super. 1, 98 A.2d 613 (1953).

¹³⁸State v. Cooper, 10 N.J. Super. 532, 92 A.2d 786 (1953).

¹³⁹N.J. Stat. Ann. §2A:84A, Rule 22(b) (West 1976):

As affecting the credibility of a witness . . .
(b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement

¹⁴⁰N.J. Stat. Ann. §2A:84A, Rule 20 (West 1976).

him, but prior contradictory statements cannot be used unless the testimony surprised counsel.¹⁴¹

D. Massachusetts

1. Generally

¶69 In Massachusetts, there are no special rules concerning cross-examination of accomplices. In general, the cross-examiner is "allowed great latitude of inquiry, limited only by the sound discretion of the court...."¹⁴² This impeachment may include showing:

1. bias;
2. inconsistent statements;
3. prior criminal convictions;
4. a poor reputation for truthfulness; and
5. impaired faculties of perception.

Showing specific instances of prior misconduct is not permitted.¹⁴³ Even if a witness is not impeached in any way, his credibility is for the jury to decide.¹⁴⁴

¹⁴¹ Id.

¹⁴² Hathaway v. Crocker, 48 Mass. (7 Met.) 262, 266 (1843).

¹⁴³ Commonwealth v. Schaffner, 146 Mass. 512, 515, 16 N.E. 280, 282 (1888).

¹⁴⁴ Lydon v. Boston El. Ry. Co., 309 Mass. 205, 34 N.E.2d 642 (1941).

2. Bias

¶70 Cross-examination to show bias of a witness who has testified to a material fact is a matter of right.¹⁴⁵ The inquiry may include questions of rewards for testimony.¹⁴⁶ While some courts require the witness to be cross-examined on the issue, the rule is that a party may use extrinsic evidence without such a foundation.¹⁴⁷

3. Inconsistent Statements

¶71 If a witness testifies to a material issue, his prior inconsistent statements may be shown either by cross-examination or through the testimony of another witness,¹⁴⁸ even if this evidence shows facts otherwise inadmissible.¹⁴⁹ Such statements may also be used to help the witness remember facts.¹⁵⁰

¹⁴⁵ Commonwealth v. Sansone, 252 Mass. 71, 147 N.E. 574 (1925).

¹⁴⁶ Commonwealth v. Dominico, 306 N.E.2d 835 (Mass. App. 1974); Commonwealth v. Tamaselli, 257 Mass. 479, 482-83, 154 N.E. 95, 96 (1926).

¹⁴⁷ Day v. Stickney, 96 Mass. (14 All.) 255 (1867).

¹⁴⁸ Robinson v. Old Colony R.R., 189 Mass. 594, 76 N.E. 190 (1905); Malloy v. Coldwater Seafood Corp., 338 Mass. 554, 567, 156 N.E.2d 61, 68 (1959). Evidence given in a juvenile proceeding may not be used. Mass. Gen. Laws Ann. ch. 119, §60 (1975). The witness need not be asked about the statement before evidence is introduced unless one is impeaching one's own witness. Mass. Gen. Laws Ann. ch. 233, §23 (1974).

¹⁴⁹ Commonwealth v. West, 312 Mass. 438, 440-41, 45 N.E.2d 260, 262 (1942).

¹⁵⁰ Commonwealth v. Hartford, 346 Mass. 482, 487, 194 N.E.2d 401, 404 (1963).

¶72 These statements are only pertinent to the credibility of the witness. On request, the judge will instruct the jury not to consider the statement as proof of the issue at trial. If the statement is the only evidence on the issue a directed verdict must be given.¹⁵¹

¶73 Contradictory statements at trial are to be judged by the jury,¹⁵² unless the later statement repudiates an earlier statement. Then, the repudiated testimony cannot be believed.¹⁵³

4. Attack on Character for Truthfulness

¶74 Only general reputation may be examined for truthfulness. Specific acts of dishonesty and the opinion of an impeaching witness may not be shown.¹⁵⁴ This reputation may be from the witness's home area or from people he works with.¹⁵⁵

5. Previous Misconduct

¶75 Specific acts of misconduct may not be shown to affect a witness's credibility.¹⁵⁶

¹⁵¹ See, e.g., Mroczek v. Craig, 312 Mass. 236, 239, 44 N.E.2d 644, 646 (1942).

¹⁵² Larson v. Boston El. Ry. Co., 212 Mass. 262, 267, 98 N.E. 1048, 1050 (1912).

¹⁵³ Sullivan v. Boston El. Ry. Co., 224 Mass. 405, 112 N.E. 1025 (1916).

¹⁵⁴ Eastman v. Boston El. Ry. Co., 200 Mass. 412, 86 N.E. 793 (1909).

¹⁵⁵ Mass. Gen. Laws Ann. ch. 233, §21A (1974).

¹⁵⁶ Commonwealth v. Schaffner, 146 Mass. 512, 515, 16 N.E. 280, 282 (1888).

6. Prior Criminal Convictions

¶76 Convictions may be shown only by introduction of the record of conviction.¹⁵⁷ These convictions must be within the time limitations set by the statute.¹⁵⁸ Convictions

¹⁵⁷Commonwealth v. West, 312 Mass. 438, 45 N.E.2d 260 (1942). See also Mass. Gen. Laws Ann. ch. 233, §21 (1974).

¹⁵⁸Mass. Gen. Laws Ann. ch. 233, §21 (1974); as amended (Supp. 1975):

The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purposes of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.

may not be shown if the witness was not represented by counsel in those actions.¹⁵⁹ Testimony explaining or otherwise related to the convictions is inadmissible.¹⁶⁰

7. Impaired Faculties

¶77 A competent witness must be able to perceive correctly what he testifies about. Thus, it can be shown that the witness's faculties were impaired at the time due to drunkenness, drug addiction, mental impairment, and other disabling factors.¹⁶¹

8. Rehabilitation

¶78 A witness who has been impeached may be rehabilitated¹⁶² by impeaching the impeaching witnesses, by explaining that evidence,¹⁶³ by proving good character for truthfulness if

¹⁵⁹Subilusky v. Commonwealth, 358 Mass. 390, 265 N.E. 2d 80 (1970).

¹⁶⁰Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411, 124 A.L.R. 1522 (1939). Examination to establish that convictions are of the witness is admissible. Ayers v. Ratchesky, 213 Mass. 589, 101 N.E. 78 (1913).

¹⁶¹Joyce v. Parkhurst, 150 Mass. 243, 247, 22 N.E. 899, 900 (1889) (drunkenness).

¹⁶²Evidence reinforcing credibility may not be shown until the witness is impeached. Commonwealth v. Giacomazza, 311 Mass. 456, 467, 42 N.E.2d 506, 512-13 (1942) and cases cited there.

¹⁶³Commonwealth v. Smith, 329 Mass. 477, 109 N.E.2d 120 (1952).

it has been attacked,¹⁶⁴ by showing prior consistent statements,¹⁶⁵ or by corroborating the witness's testimony with other evidence.¹⁶⁶

¶79 The witness himself may be impeached to avoid the effect of his impeachment, but not by evidence of bad character. If prior inconsistent statements are used, the witness must be allowed to explain them.¹⁶⁷

¹⁶⁴ Gertz v. Fitchburg R. Co., 137 Mass. 77 (1884) (record of conviction introduced); Quinsigamond Bank v. Hobbs, 77 Mass. (11 Gray) 250 (1858) (evidence of bad reputation introduced); Commonwealth v. Ingraham, 73 Mass. (7 Gray) 46 (1856) (unsuccessful attack on reputation allows for rehabilitation).

¹⁶⁵ Only if reason for possible contrivance at the present was not present at the time of the previous statement. Commonwealth v. Heffernan, 350 Mass. 48, 213 N.E.2d 399 (1966).

¹⁶⁶ Allin v. Whittemore, 171 Mass. 259, 50 N.E. 618 (1898). This evidence may not be offered until the witness is impeached unless it "relate[s] to some portion of the testimony which is material to the issue." Commonwealth v. Bosworth, 39 Mass. (22 Pick.) 397, 399 (1839).

¹⁶⁷ Mass. Gen. Laws Ann. ch. 233, §23 (1974):

The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them.

Appendix: History and Rationale of the Accomplice
Corroboration Rule

¶80 The issue of accomplice corroboration did not arise in Anglo-American law until the end of the eighteenth century. Until then, the chief issue concerning accomplice witnesses was their competence to testify -- an intensely political struggle considering the reliance placed by the Crown on accomplice testimony "in the political trials ever since the time of Henry VII."¹⁶⁸ During the seventeenth and eighteenth centuries their competence to testify was continually brought into question; it was usually resolved in favor of competence.¹⁶⁹ Even then, however, no issue was made as to the sufficiency of accomplice testimony when admitted. Once a person took the testimonial oath, under the conceptions of the time, the quality of his testimony was between himself and God. There was "little weighing of the comparative quality of different person's oaths" -- "one oath was as good as another oath."¹⁷⁰

¹⁶⁸ 7 J. Wigmore, Evidence §2056 at 312 (3d ed. 1940). The earliest accomplices to testify turned "King's evidence" when indicted, in hope of a pardon. 3 Holdsworth, A History of English Law 608 (3d ed. 1927). Once found guilty of the felony, however, the accomplice was considered incompetent to testify. See People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 903 (1911).

¹⁶⁹ 2 J. Wigmore, supra note 168 §526, at 619-20 citing Thistlewood's Trial, 33 How. St. Tr. 681, 921 (1827); Shaftesbury's Case, 2 Dougl. El. C. 2d ed. 303, 308, 315 (1775); Clarke v. Shee, 1 Cowp. 197 (1774); Charnock's Trial, 12 How. St. Tr. 1377, 1403 (1696).

¹⁷⁰ 7 J. Wigmore, supra note 168 §2056, at 312.

¶81 As time wore on, however, modern conceptions of testimony began to develop, and it became apparent that one could discriminate as to the quality of testimony offered by a witness.¹⁷¹ Toward the eighteenth century, therefore, a practice arose to discourage a conviction based solely upon the testimony of an accomplice.¹⁷² This was only a practice, not a rule of law. It was merely considered part of the judge's "exercise of his common law function of advising a jury upon the weight of the evidence and was not...binding upon the jury."¹⁷³ A conviction based upon such testimony, therefore, would stand.

It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice....But it has been laid down in many cases, that the judge ought not to leave the case to the jury without warning them firmly that the evidence of an accomplice must always be regarded with grave suspicion, and that they ought not to convict unless the evidence of the accomplice is corroborated; further, he ought to point out to the jury what corroborative evidence there is, if any....¹⁷⁴

¶82 This counsel of caution from judge to jury was, therefore, generally understood to be only a rule of practice and not a rule of law in both England and the United States during the

¹⁷¹ See 1 Hale, Pleas of the Crown 305 (2d ed. 1680); Regina v. Rudd, 1 Cowp. 331, 336 (N.P. 1775) ("Though under this practice [accomplices] are clearly competent witnesses, their simple testimony alone is seldom of sufficient weight to convict the offenders.").

¹⁷² See 7 J. Wigmore, supra note 168 §2056, at 313 note 3.

¹⁷³ Id.

¹⁷⁴ Rex v. Feigenbaum, 1 K.B. 431 (1919) (opinion of Darling, J.).

early nineteenth century.¹⁷⁵ The credibility of an accomplice witness was solely a matter for the determination of the jury, and the omission of the cautionary instruction, being solely within the judge's discretion, was not a ground for a new trial.¹⁷⁶

¶83 Toward the end of the nineteenth century in the United States, however, this cautionary practice was, by statute, turned into a rule of law by many states. According to Wigmore, the reason for this development was the elimination, in many states, of the common law function of the judge to comment on the evidence.¹⁷⁷ To preserve the benefits of the established rule of practice, Wigmore thought, the state legislators turned it into a statutory rule of law. This rationale, however, appears to suffer from the benefit of hindsight. From the available evidence, it appears possible that this development took place without a realization of its development or its significance.

¹⁷⁵ See 7 J. Wigmore, supra note 168 §2056, at 315 note 6, listing 31 states in which this was, or is still, true.

¹⁷⁶ Id. at 319.

¹⁷⁷ Id. at 322, §2551. Wigmore lists twenty-four states in which this statutory development took place. Id. at 319 note 10. England, on the other hand, completed this transformation by case law at the turn of the century. Rex v. Tate, 2 K.B. 680 (1908); Rex v. Baskerville, 2 K.B. 658 (1916). For a comparison of those states restricting the judge's power to comment with the corroboration states, see Note, "The Rosenberg Case: Some Reflections on Federal Criminal Law," 54 Colum. L. Rev. 219, 234-35 notes 60, 67-9 (1954) ("Of the twenty one states requiring corroboration, fifteen . . . had restricted the judge's charge at the time they adopted their corroboration statutes.") Id. at 235.

¶84 The first statutory provision requiring corroboration of accomplice testimony appeared in the proposed Code of Criminal Procedure, drafted in 1849 by David Dudley Field.¹⁷⁸ The Code, which became the model for those enacted later in other states, contains in its report no explanation or discussion of the change. The report, in fact, states that its provisions applicable to the trial are "declaratory of existing law" or propose "such additions or substitutes as do not conflict with its spirit,"¹⁷⁹ a position taken by subsequent state statutes modeled on the "Field Code" (e.g., California).¹⁸⁰ The cases, however, which are cited supporting the requirement of corroboration do not support it. In fact, they are merely declaratory of the common law: corroboration is not required to uphold a conviction and refusal to instruct does not constitute reversible error.¹⁸¹

¹⁷⁸State of New York, Fourth Report of the Commissioners on Practice and Pleadings, Code of Criminal Procedure §473, at 121-22 (1849).

¹⁷⁹Id. at lix. The Report also points out that there are a few provisions "which are new, not so much in principle as in their application." It then proposes to discuss "one or two of them only." The accomplice corroboration statute is not included in that discussion. Id. at lxii.

¹⁸⁰State of California, Penal Code §1111 (Haymond & Burch annot. ed. 1872) (compare §375 of California Criminal Practice Act of 1851 to the original Field Code provision, note 178 supra).

¹⁸¹Id. citing Rex v. Webb, 6 C.&P. 595, 172 Eng. Rep. 1380 (N.P. 1834) (robbery, corroborating evidence "not such confirmation . . . as will entitle his evidence to credit so as to affect other persons"; verdict of not guilty); Rex v. Wilkes & Edwards, 7 C.&P. 175, 173 Eng. Rep. 120 (N.P. 1836) (stealing a lamb; "you may legally convict on the evidence

¶185 In any case, a person could not be convicted on the testimony of an accomplice, under these state statutes, unless that testimony was corroborated. Although this binding rule of law "differs little from the terms of the common law practice,"¹⁸² its procedural impact is far different. In contrast with the former cautionary practice, the judge must instruct the jury on the rule of law, and it is their duty to follow it. As well, it is now the judge, rather than the jury, who defines the precise conditions for the rule's application. The existence of corroboration, therefore, has become a legal question for the judge, rather than a factual question for the jury, and a verdict of guilty may be set aside for lack of corroboration. Under the statute,

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of an accomplice only if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with 'the offense'; verdict of guilty); People v. Davis, 21 Wend. 297, 62 N.Y. Com. L. 297 (Sup. Ct. 1839) (citing Wilkes and Webb; "the question usually is, whether the jury will believe in such parts of his narrative as the confirmation does not extend to"); People v. Costello, 1 Den. 83, 75 N.Y. Com. L. 83 (Sup. Ct. 1845) (accomplice testimony "will authorize conviction in any case"). See also Regina v. Dyke, 8 C.&P. 261, 173 Eng. Rep. 486 (N.P. 1838) (stealing a lamb; "it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused"; verdict of not guilty). A comparison of the 1849 Field Code Provision with the headnote of the People v. Davis case supra, invites the suspicion that Field, in fact, did his research for his famous Code inaccurately, at best, through the use of headnotes rather than reading the cases. See also note 184 infra.

¹⁸² J. Wigmore, supra note 168 §2056, at 320.

refusal to give the instruction, when requested, is also reversible error.¹⁸³ In contrast with the former practice of leaving the question of the sufficiency of accomplice testimony to the jury, the testimony of an accomplice witness, under these statutes, is presumptively insufficient regardless of quality unless corroborated. But why should an accomplice witness's testimony be singled out for suspicion?

¶186 Two reasons for regarding accomplice testimony with suspicion are generally raised: the inherent suspicion of the truthfulness of one who already admits committing a crime,¹⁸⁴ and the feeling that the accomplice "may expect to save himself from punishment by procuring the conviction of others" through false accusation.¹⁸⁵ Although "[w]e have passed beyond the stage of thought in which his commission of crime, self-confessed, is deemed to render him radically a liar,"¹⁸⁶ an accomplice will still tend "to be repugnant..."

¹⁸³ Id. at 320-21.

¹⁸⁴ See Marrs, "The Informant and Accomplice Witness: Problems for the Prosecution," 9 John Marshall J. Prac. & Pro. 243-44 (1975). Wigmore thought that this was not really a reason. See notes 186, 191-193 and text accompanying infra. Bentham, however, thought that this was the strongest reason. 7 J. Bentham, The Works of Jeremy Bentham 413-15 (Bowring ed. 1843). Bentham's objections to having "the doors of justice thrown open to the scum of the earth thus collected" may well have been the real reason Field included a statutory provision on the subject in his Code. Id. at 415. Yet, if Field relied on this rationale personally, he must have been aware of the common law rule permitting an accomplice's testimony as sufficient evidence to convict, for Bentham mentions it in his text. This realization leads ultimately to the conclusion that Field probably knew exactly what he was doing, but never bothered to tell anyone, especially the legislature for which he wrote the Code, what he was up to. Id. at 414 and see notes 178-181 supra.

¹⁸⁵ 7 J. Wigmore, Evidence §2057 at 322 (3d ed. 1940).

¹⁸⁶ Id. at 322.

to the jury...[as well as] the judge...."¹⁸⁷ To the ordinary juror, accepting the truthfulness of a self-confessed felon may not be easy. Second, a grant of immunity from prosecution tends to increase the suspicion that the felon-accomplice is falsely accusing others.¹⁸⁸ Even if there is no promise of leniency, "its existence is always suspected."¹⁸⁹ These factors lead courts to conclude that "when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others."¹⁹⁰

¶87 An examination of these reasons leads to the conclusion that whatever persuasiveness they may hold for a rule of practice, they are insufficient to justify an inflexible rule of law. First, the credibility of any witness, even of a felon, must vary with the individual. Even the fact of commission of a crime cannot be conclusive for all cases.

If it be the moral guilt of the witness that affects his credit, the degree to which his credit is affected must depend upon and vary with the magnitude of the crime of which each witness confesses himself to be guilty. Crimes are of every different shade, from the most menial petit larceny to the most atrocious murder. Yet to all the rule equally applies.¹⁹¹

¹⁸⁷ Marrs, supra note 184, at 241. For a vivid example of this, see J. Mills, The Prosecutor 120-28 (1970).

¹⁸⁸ See Mass. Gen. Laws Ann. ch. 233, §20I (1974) for an example, in a non-corroboration state, of a statute which explicitly recognizes this connection and requires corroboration only in the case of an immunized witness under ch. 233, §20E.

¹⁸⁹ J. Wigmore, supra note 168 §2057, at 322.

¹⁹⁰ Regina v. Farler, 8 C.&P. 106, 173 Eng. Rep. 418 (N.P. 1837).

¹⁹¹ J. Wigmore, supra note 168 §2056, at 323 citing Baron Joy, Evidence of Accomplices 4 (1844).

¶88 Second, if an essential element of the distrust of accomplice testimony is fear of a promise of conditional clemency, the rule should be restricted to those situations and not extended to all cases.¹⁹² Finally, even when granted, the influence of immunity "must vary infinitely with the nature of the charge and the personality of the accomplice."¹⁹³ Thus, the rule of law requiring corroboration of all accomplice testimony is a remedy that extends beyond the wrong it was intended to correct and presents an unnecessary procedural hurdle for the prosecution. As one author has noted, the conflicting social policies balanced under the rule are the "likelihood of perjury sufficiently skillful to produce unjust convictions against the harm of allowing the guilty to escape punishment because corroborating evidence is unobtainable."¹⁹⁴ By confusing the danger of "some" perjury with a flat rule against "all" accomplices as potential perjurers, the corroboration rule creates an unnecessary hurdle for the prosecution and an unwarranted benefit for the defense. As the New York Commission on the Administration of Justice noted almost forty years ago, in arguing for abolition of the rule:

¹⁹² See note 188 supra for an example of this.

¹⁹³ J. Wigmore, supra note 168 §2056, at 322.

¹⁹⁴ Comment, "Accomplice Corroboration, Its Status In California," 9 U.C.L.A. L. Rev. 190, 193 (1962).

The Committee was strongly of the opinion that [the statute requiring corroboration] in the present Code is a refuge of organized crime and protects the principals in racketeering cases.... The Committee carefully considered the possibility that the deletion of this provision might encourage frame-ups and related abuses, but was strongly of the opinion that such would not be the case. The deletion of this provision merely restores the common law and permits the trial court to give appropriate instructions in each case affecting credibility of the testimony offered instead of binding the court to the general rule prescribed by the statute.¹⁹⁵

¹⁹⁵ State of New York, Commission on the Administration of Justice, 3d Supp. Rep. 16 (Leg. Dec. No. 77, 1937). The recommendation was not adopted, just as it was not adopted nearly forty years later. See note 37 and text accompanying supra. For the present New York statute, see notes 37-51 and text accompanying supra.



Accomplice: Definition, Corroboration, Instruction
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Errata

(Double underlining indicates corrected material)

- ¶5: Correction: Backum v. United States. (Also at:
¶5, note 7)
- ¶5, Note 7: Correction: Clark v. United States, 293
F.2d 445; United States v. Carll.
- ¶6, Note 10: Correction: cert. denied, 423 U.S. 931
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- ¶6, Note 12: Correction: cert. denied, 423 U.S. 931
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- ¶10, Note 20: Correction: People v. Valinoti
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- ¶20, Note 40: Correction: People v. Mullens
- ¶53, Note 110: Correction: Cranford v. Nilan, 289 N.Y.
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- ¶54, Note 113: Correction: Brill v. Muller Bros. Inc.,
13 N.Y.2d 776, 192 N.E.2d 34, 242 N.Y.S.
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- ¶62, Note 134: Correction: State v. Rajnai
- ¶66, Note 138: Correction: State v. Cooper, 10 N.J.
532, 92 A.2d 786 (1952)
- ¶70, Note 146: Correction: Commonwealth v. Tomasselli
- ¶76, Note 159: Correction: Subilosky v. Commonwealth
- ¶78, Note 166: Correction: Allin v. Whittlemore.
- ¶83, Note 177: Correction: Id. at 322, §2056
- ¶86, Note 187: Correction: The Prosecutor, 120-28 (1969)
- ¶87, Note 191: Correction: supra note 168 ¶2057

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Addenda

¶2a In some jurisdiction, it is possible in bribery and graft prosecutions, to convict the payer and payee as both principals and accomplices for the same illegal payment. This will have special significance where cumulative sentences can be imposed. Where the payer and payee are considered accomplices of each other's conduct, some states will require that their testimony be corroborated. The payer in extortion is a victim and can generally use the extortionate demand as a defense to any bribery charge.

A. Federal

4. Accomplices in Bribery, Graft, and Extortion

¶7a The conduct requirements in the Federal bribery and graft statutes^{14a} encompass two distinct offenses.

This permits four methods of indictment:

- (1) as a principal in giving, offering, or promising;
- (2) as a principal in asking, receiving, etc.;
- (3) as an accomplice in giving, offering, or promising; and
- (4) as an accomplice in asking, receiving, etc.

¶7b In the usual application of the Federal accomplice statute,^{14b} a person may be convicted for acting

^{14a}18 U.S.C. §201 (1970) (gives, offers, or promises anything of value and asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive the same).

^{14b}See supra Note 1 for the federal accomplice statute.

as an agent to the payer or payee of a bribe. In addition, since these statutes define two offenses, the payer of a bribe may be convicted both as a principal in giving and as an accomplice to the payee in receiving. Likewise, the payee could be convicted as both a principal and an accomplice.

¶7c The Second Circuit sanctioned this possibility in United States v. Umans.^{14c} The court held that no error was committed in simultaneously indicting and convicting the payer of a bribe as both a principal under 18 U.S.C. §201^{14d} and as an aider or abettor to 26 U.S.C. §7214(a)(2).^{14e} The court stated that the indictments were permissible because the statutes involved constituted separate offenses with different elements of proof.^{14f}

^{14c} 368 F.2d 725 (2nd Cir. 1966).
See also United States v. Barash, 266 F.Supp. 126 (S.D.N.Y. 1966), cert. denied, 396 U.S. 832 (1966) (in dictum, cites United States v. Umans for the proposition that the payer of a bribe can be convicted both as a principal and as an accomplice); United States v. Cogan, 266 F.Supp. 374 (N.Y. 1967) (the payer of a bribe can be charged with aiding and abetting the payee); United States v. Kenner, 354 F.2d 780, 785 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966) (the payer of a bribe can be an aider and abettor under 18 U.S.C. §2).

^{14d} Convicted as the giver of a bribe; see supra note 14a.

^{14e} 26 U.S.C. §7214(a)(2) (1970) (proscribes revenue officers from knowingly demanding or receiving sums of money except as allowed by law).

^{14f} 368 F.2d at 728.

¶7d In an earlier case, May v. United States,^{14g} the court held that where Congressmen received compensation for rendering governmental services, the persons paying the compensation were guilty as aiders and abettors to the receiving.^{14h} The court did not consider, however, whether the defendants were also guilty as principals in giving the payment.

¶7e All of the cases cited above pertain to the bribery of internal revenue agents or congressmen and involve another statute in addition to 18 U.S.C.

§201. The issue still remains unanswered whether a person can be simultaneously convicted under section 201 as both a principal and as an accomplice in regard to the same bribe. The issue, however, may have significance where it is desired that cumulative sentences be imposed.

¶7f Under federal law, a person can be convicted of both extortion and bribery for same payment.¹⁴ⁱ

^{14g}175 F.2d 994, cert. denied, 338 U.S. 830 (1949). See also United States v. Johnson, 337 F.2d 180, 196 (4th Cir. 1964), cert. denied, 385 U.S. 846, 385 U.S. 889 (1966) (where members of Congress were convicted for receiving illegal compensation for services rendered, the payers of the bribe were also convicted as aiders and abettors to the receiving).

^{14h}The court applied 18 U.S.C. §2 to 18 U.S.C. §281 (now §203).

¹⁴ⁱSee United States v. Kahn, 472 F.2d 272, 278 (2nd Cir.), cert. denied, 411 U.S. 982 (1973); United States v. Hathaway, 534 F.2d 386, 394 (1st Cir.), cert. denied, 45 U.S.L.W. 3249 (1976).

Thus, an agent of the extortioner can be an accomplice to both crimes. The payer in extortion, however, is a victim and can invoke extortion as a defense to bribery.^{14j}

B. New York

4. Accomplices in Bribery, Graft, and Extortion

¶10a The New York bribery and graft statutes set out two conduct requirements.^{20a}

Anyone acting as an accessory to the giving or taking of a bribe can be convicted as an aider and abettor.^{20b}

¶10b Until 1965, the possibility also existed that the payer and payee in a bribery or graft charge could both

^{14j} But see United States v. Kabot, 295 F.2d 848, 854 (2nd Cir. 1961), cert. denied, 369 U.S. 803 (1962) (in dictum), even if government officials contemplated extortion, it would be no defense to a bribery charge).

^{20a} The New York bribery statutes are N.Y. Penal Law §200.00 (McKinney 1975) (confers, offers, or agrees to confer a benefit) and N.Y. Penal Law §200.10 (McKinney 1975) (solicits, accepts and agrees to accept a benefit). The New York graft statutes are N.Y. Penal Law §200.30 (McKinney 1975) (offers, confers, agrees to confer a benefit) and N.Y. Penal Law §200.35 (McKinney 1975) (solicits, accepts or agrees to accept a benefit).

^{20b} See People v. Kuss, 36 App. Div. 2d 306, 320 N.Y.S.2d 169 (1971), aff'd, 32 N.Y.2d 436, 345 N.Y.S.2d 1002, 299 N.E.2d 249 (1973), cert. denied, 415 U.S. 913 (1974); People v. Monhouse, 21 N.Y.2d 66, 286 N.Y.S.2d 657, 233 N.E.2d 705 (1967).

be convicted as principals and accomplices.^{20c} Section 20.10 of the Penal Law, however, specifically precludes the prosecution of an individual for both bribe giving and bribe receiving with regard to one instance of conduct.^{20d}

¶10c In New York, a principal and an accomplice can be convicted for both bribery and extortion in regard to a single payment.^{20e} The statutory law provides the payer of an extortionate taking with a defense to any bribery charge.^{20f}

^{20c} See People v. Hyde, 156 App. Div. 618, 141 N.Y.S. 1089 (1st Dep't 1913) (court stated that the giver of a bribe could be convicted as a principal in the crime of receiving, and vice versa); People v. Winant, 24 Misc. 361, 53 N.Y.S. 695 (Sup. Ct. Kings County 1898) (payee could be the accomplice of the payer).

^{20d} N.Y. Penal Law §20.10 (McKinney 1975) states:

Notwithstanding the provisions of sections 20.00 and 20.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

^{20e} N.Y. Penal Law §200.15 (McKinney 1975).

^{20f} N.Y. Penal Law §200.05 (McKinney 1975).

C. New Jersey

4. Accomplices in Bribery, Graft, and Extortion

¶13a The New Jersey bribery statute defines two distinct offenses.^{27a} Any person who aids and abets either offense will be an accomplice.^{27b} This means that the payer and payee might be convicted as principals and accomplices for the same illegal payment.^{27c}

The New Jersey courts, however, have not yet confronted this issue. The payer and payee in a bribery charge have only been convicted as principals in giving or receiving.^{27d}

¶13b The New Jersey graft statute only defines one offense.^{27e} Any person who aids and abets a judge, magistrate, or public official in receiving or taking an illegal fee or reward can be convicted as an accomplice. Thus, the payer in a graft indictment could be the

^{27a}N.J. Stat. Ann. §2A: 93-1 (West 1969) (offers, gives, or promises money, real estate, service or other value and receives or accepts same).

^{27b}See State v. Sherwin, 127 N.J. Super 370, 317 A.2d 414 (Super. Ct. 1974) (two officials were charged as accomplices in receiving a bribe).

^{27c}See ¶¶7b-7c for additional commentary.

^{27d}See State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961) (Where the bribe was actually received, under common law bribery the court held that both the briber and bribee could be found guilty without the official action bargained for actually taking place).

^{27e}N.J. Stat. Ann. §2A: 105-1 (West 1969) (receives or takes a fee or award).

accomplice of the payee. Further, the New Jersey bribery statute seems broad enough to be applied to the payer where the public official receives an illegal fee or reward for past services.^{27f} The public official could then be indicted as an accomplice to the payer. ¶13c Although there are no cases directly in point,^{27g} by definition, the payer in extortion should have a defense to any bribery charge. New Jersey has not yet clearly decided whether a person extortionately demanding property (and an accomplice, if applicable) can be simultaneously convicted for both bribery and extortion.^{27h}

D. Massachusetts

4. Accomplice in Bribery, Graft, and Extortion

¶17a The Massachusetts bribery and graft statutes each define two distinct offenses.^{33a} Thus, the payer and payee may possibly be convicted as both principals

^{27f}See N.J. Stat. Ann. §2A: 93-1 (West 1969) (the statute prohibits the offering, giving or promising of money, real estate, service or other value as a bribe or a reward).

^{27g}Cf. State v. Seaman, 114 N.J. Super. 19, 274 A.2d 810 (1971), cert. denied, 404 U.S. 1015 (1972) (the court draws a distinction between extortion and bribery).

^{27h}In State v. Seaman, supra, the court implies that extortion and bribery are mutually exclusive. 114 N.J. Super at 31, 274 A.2d at 816.

^{33a}Mass. Ann. Laws. Ch. 268A, §2 (Michie/Law. Co-op 1968) (bribery); Mass. Ann. Laws. Ch. 268A, §3 (Michie/Law. Co-op 1968) (graft).

and accomplices.^{33b} No Massachusetts court, however,
has addressed this issue.

¶17b Even though no cases directly apply, by definition,
the payer in extortion^{33c} should have a defense to any
bribery charge.

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^{33b}See ¶17b-7c for additional commentary.

^{33c}There are two extortion statutes: Mass. Ann. Laws.
Ch. 265, §25 (Michie/Law. Co-op 1968) and Mass. Ann.
Laws. ch. 268A, §2 (Michie/Law. Co-op 1968).

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Joinder and Severance

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Summary

¶1 Society's increasing complexity is reflected in complex crime. Prosecution of complicated cases depends on the tools of joinder and severance.

¶2 The Federal Rules of Criminal Procedure provide for broad joinder, and restrict severance to cases where probable or actual prejudice can be shown.

Though criticized by some, the Federal Rules reflect the rationale behind joinder and severance procedure in the majority of states. A minority of states have widely varying joinder rules or lack them altogether.



I. Introduction: The Need for Joinder

¶3 Traditionally, American jurisprudence strove for simplified criminal procedure focused on specific issues of guilt and innocence. The jury system was thought to work best in simple trials, where jurors were not potentially confused by a plethora of complex issues or long and involved instructions. Simple trials, therefore, were thought to protect both the state and the accused from verdicts based on confusion. Simple trials also reduced strains on the judicial system from extended proceedings, unnecessary appeals, and retrials.

¶4 Today, society's increasing complexity is reflected in the area of crime and criminal law. In addition to the traditional crimes of violence by individuals or small groups, modern criminal law must deal with far-flung criminal networks engaged in disparate criminal activities. It is questionable, therefore, whether the principal, accessory, and conspiracy theory implemented in the context of restrictive rules of joinder or liberal rules of severance, is an adequate vehicle to present to juries a complete description of the real roles of individuals within complex crime rings.

¶5 An example may illustrate the problem: A prosecutor seeks to convict the members of a truck hijacking ring. The leader of the group obtains infor-

mation on valuable cargos and organizes the theft and fencing operations. Working with him in each of a series of thefts is the dispatcher of the victim's trucking company. The men doing the actual hijacking participate in some, but not all, of the thefts, and may or may not know of and be involved with the dispatcher. The regular buyers of the stolen goods are otherwise-legitimate businessmen who buy only those stolen goods that suit their needs; they are each involved only in some of the thefts. These buyers may or may not know of and be involved with the thefts in advance. To fill out the example, we may assume that some of these buyers also commit perjury before the grand jury investigating the thefts in an effort to maintain their legitimate covers.

¶6 A prosecutor, attempting to draw up an indictment or series of indictments dealing with this ring, has a long list of possible criminal charges:

1. Against the Leader and Dispatcher -- a series of counts of theft¹ and conspiracy to steal;

2. Against the Hijackers individually -- a smaller series of theft and conspiracy charges with differing groups of their overall number and with Leader; some or all may be in the conspiracy with the Dispatcher as well.

¹Although hijacking began as a forcible taking, often at gunpoint, it is now often carried out with the collusion or active assistance of the drivers. This hypothetical will not deal with the distinction between robbery and larceny.

3. Against each individual Buyer with regard to those thefts from which he received merchandise -- either (a) receiving stolen property; or (b) theft and conspiracy counts, depending on the nature of his involvement, including particularly his knowledge of the character of the ring;

4. With respect to some of the Buyers -- perjury before the grand jury.

¶7 Because of uncertainties as to proof and the need to present the jury with a comprehensive picture of the whole scheme, the prosecutor may want to try the entire group together or in two or more individual trials, charging the defendants with all possible offenses. Whether the prosecutor can do this will not depend solely on principal, accessory, and conspiracy substantive theory; it also will depend on the procedural tool of joinder available in his jurisdiction. Involved, too, will be the defense's strategy. Whether the defense attorney can limit the scope of his proof, sever individuals and offenses, or conduct a series of trials will depend on the availability and nature of joinder in his jurisdiction. These materials will explore the implications of joinder for the prosecution of on-going criminal activity.

II. American Joinder and Severance Laws

¶8 Prosecution and defense are generally at odds on how many and which offenses and defendants should be joined in a single trial. Legal systems, too, have

their own interests in simplicity and efficiency. The resolution of these conflicting desires is now made through complex joinder and severance rules.

¶9 Prior to statutory treatment of joinder and severance, the common law governed.² Typically, common law joinder rules attempted to keep criminal trials uncomplicated. A joint indictment could be found where the same evidence applied to all the persons indicted, and several persons could be indicted jointly for offenses arising wholly out of the same joint act.³ Similarly, offenses which related to the same act or transaction could be charged in the same indictment.⁴

¶10 Severance standards at common law were similar to those of joinder. Where two or more offenses were charged against a defendant in a single indictment, or where two or more defendants were charged in one indictment, the matter of severance was purely one of discretion, with prejudice to the defendant the key consideration.⁵

²United States v. Marchant, 25 U.S. (12 Wheat.) 297 (1827).

³See, e.g., Watson v. State, 184 Tenn. 177, 182, 197 S.W.2d 802, 804 (1946).

⁴See, e.g., Lawson v. State, 202 Ind. 583, 586, 177 N.E. 266, 267 (1931).

⁵See, e.g., State v. McCarthy, 130 Conn. 101, 103, 31 A.2d 921, 923 (1943).

¶11 Today, standards of joinder and severance are generally codified in most jurisdictions. Some statutes provide for joinder and severance practices substantially as they existed at common law;⁶ most, however, adopt significant variations. Some are more liberal, while others are more restrictive than the common law. One variation is a limitation of the offenses which might be joined together in a single indictment. In Arkansas, for example, the joinder of twelve pairs of offenses is permitted, presumably to the exclusion of all other combinations.⁷ Probably the most significant abrogation of the common law is found among the various states granting a

⁶See, e.g., Mich. Stat. Ann. §28.1028 (1954), as to joinder of defendants and Conn. Gen. Stat. Ann. § 54-57 (1960) as to joinder of issues.

⁷Ark. Stat. Ann. §43-1010 (1964). See also W. Va. Code Ann. §62-2-24 (1966). Some jurisdictions have somewhat arcane, isolated acts which were passed in order either to slightly narrow or slightly broaden the common law rule to meet a particular problem. Thus, for reasons unknown, the only joinder and severance statute on the books in New Hampshire is an 1859 enactment which forbids the joinder of murder with the charge of concealing the death of a newborn child. N.H. Rev. Stat. Ann. §601:6-a (1974). To the same effect is an 1841 Tennessee law which permits the joinder of obtaining property under false pretenses and horse stealing. Tenn. Code Ann. §40-1827 (1975). As in New Hampshire, it is the only joinder or severance statute in the jurisdiction. See, however, the Proposed Final Draft to the Tennessee Code of Criminal Procedure (Nov. 1973), §§40-1601 through 40-1607, which represents a substantial effort to make the more common joinder and severance rules explicit.

defendant either an absolute or a qualified right to a severance of offenses or defendants at his election.⁸ This increased right of severance allows a defendant to avoid, in many cases, possible prejudice he might otherwise suffer from liberal joinder provisions. An expanded right to severance, however, has the disadvantage of undercutting the prosecutor's interest in comprehensive litigation and the court's interest in judicial efficiency.⁹

A. The Federal Rules of Criminal Procedure

¶12 By far the broadest and most influential provisions dealing with joinder and severance are Rules

⁸The right to severance from other defendants is sometimes restricted either to capital crimes only, see Ga. Code Ann. §27-2101 (1971) or to felonies only, see Iowa Code §780.1 (1975), but statutes conferring an absolute right of severance regardless of the level of crime are not uncommon. See, e.g., W. Va. Code Ann. §62-3-8 (1966); Va. Court Rules 3A:13(a). Similar rules exist for severance of offenses. See, e.g., Tex. Penal Code Ann. §3.04 (a) (1974).

⁹This is true only in cases where the defendant perceives an advantage to separate trials and elects accordingly. Absent some corresponding statutory right of the prosecutor to elect joint or separate trials, see, e.g., Kan. Stat. Ann. §22-3204 (1971), a defendant may sometimes wisely opt for a joint trial. It is not always disadvantageous from the defendant's point of view to join other defendants or offenses in the same trial, given 1) the possibility of concurrent sentencing; 2) the possibly inconsequential role which the jury may attribute to the defendant when he is compared to the other defendants; 3) the physical and emotional strain of several trials; and 4) the need to preserve the health, presence, and memory of defense witnesses; and other factors.

8, 13, and 14 of the Federal Rules of Criminal Procedure.¹⁰ Rule 8(a) allows the prosecutor to join in one indictment or information all offenses, regardless of whether they are misdemeanors or felonies, which either are of "similar character" or are based on acts or transactions "connected together or constituting parts of a common scheme or plan." Rule 8(b) permits joinder of defendants participating in the same series of acts or transactions even though all defendants are not charged in each count. Rule 13 allows the court to join for trial indictments or informations where the offenses and defendants could have been joined under Rule 8. Rule 14 allows the court to grant severance or order an election on the basis of prejudice to either a defendant or the government.

¶13 Under the Federal Rules the hypothetical prosecutor could probably join, it seems clear, all members of the theft ring in one indictment for one trial of all offenses. All offenses relevant to each defendant are joinable under Rule 8(a) since they are apparently and arguably "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The separate hijackings are certainly

¹⁰ See Appendix I (Text of Fed. R. Crim. P. 8, 13, 14).

joinable since they "are of the same or similar character," and since Dispatcher and Leader participated in them all. All the defendants are joinable under Rule 8(b) since "they are alleged to have participated in the same act or transaction or series of acts or transactions."

¶14 Rule 8(b) expressly authorizes joinder, even though all the defendants are not charged in each count. Though the perjury count may arguably not be part of the acts or transactions constituting the substantive crimes, some courts have held it properly joinable in similar situations.¹¹

¹¹See, e.g., United States v. Isaacs, 493 F.2d 1124, 1158-60 (7th Cir.), cert. denied, 417 U.S. 976 (1974), and United States v. Carson, 464 F.2d 424, 436 (2d Cir.) cert. denied, 409 U.S. 949 (1972). In addition, Supreme Court decisions appear to uphold alternative inconsistent pleading, such as joinder of theft and receiving counts, which was used with respect to Buyers in the hypothetical. Recently, in United States v. Gaddis, 44 U.S.L.W. 4293, 4294 (U.S. Mar. 3, 1976) the Court observed:

In many prosecutions. . . evidence will not, of course, be so clearcut. . . . Situations will no doubt often exist where there is evidence before a grand jury or prosecutor that a person participated in a . . . robbery and also evidence that the person, though not himself the robber, at least knowingly received the . . . [property from] the robbery. In such a case there can be no impropriety for a grand jury to return an indictment or for a prosecutor to file an information containing counts charging . . . [robbery] as well as . . . [receiving]. If, upon trial of the case the [court] is satisfied that there is sufficient evidence to go to the jury on both counts, he must. . . instruct the members of the jury

¶15 Since all the offenses and defendants are properly joined under the Federal Rules, any defendants seeking severance must show prejudice under Rule 14. An attempt to show prejudice must pass strict scrutiny, demonstrating actual or probable prejudice as opposed to mere hypothetical or potential prejudice.¹² In the absence of peculiarities in the nature of the evidence, it is unlikely that defendants in the hypothetical could obtain severance in a federal trial.¹³

B. Responses to the Federal Rules: The ABA Standards

¶16 Some aspects of the Federal Rules on joinder and severance provoke sharp criticism. Rule 8(a) permitting joinder of similar offenses is often

11 (continued)

that they may not convict the defendant both for . . . [robbery] and for . . . [receiving]. He should instruct them that they must first consider the . . . [robbery counts], and should consider the . . . [receiving counts] only if they find insufficient proof that the defendant himself was a participant in the robbery (citations omitted).

The practice of indicting in the alternative is also prevalent in state courts. See, e.g., State v. Bell, 55 N.J. 239, 243, 260 A.2d 849, 852 (1970); and Title 13 La. Code Crim. Pro. Ann. art. 482 (West 1966) specifically permitting joinder of theft and receiving counts.

¹²United States v. Martinez, 486 F.2d 15, 22 (5th Cir. 1973).

¹³Defendants in conspiracy and other complex trials must meet particularly high standards of scrutiny in attempting to show prejudice from failure to sever. United States v. Diez, 515 F.2d 892, 904 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3398 (Jan. 13, 1976); Davenport v. United States, 260 F.2d 591, 594 (9th Cir. 1958), cert. denied, 359 U.S. 909 (1959).

criticized.¹⁴ Although joinder of perjury with substantive counts is also criticized,¹⁵ other commentators note that joinder of a perjury count is a valuable prosecution tool.¹⁶ Since proof of perjury is often

¹⁴ Commentators have been especially harsh and call for its abolition: *

Abandonment of similar offense joinder will not greatly expand expenditures of time and money by either the parties or the courts. The historical development of similar offense joinder indicates that it was not designed to produce savings. Moreover, since the offenses on trial are distinct, trial of each is likely to require its own evidence and witnesses. The time spent where similar offenses are joined may not be as long as two trials, but the time saved by impanelling only one jury and by setting the defendant's background only once seems minimal. Finally, the lack of utility in similar offense joinder may be indicated by state practice. At present two thirds of the states make no provision for this type of joinder, and it seems reasonable to assume that they either have found its savings to be negligible or have determined that any savings are outweighed by the prejudice caused by joinder.

Note: "Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure," 74 Yale L. J., 553, 560 (1964) (footnote omitted). See also Maguire, "Proposed New Federal Rules of Criminal Procedure," 23 Ore. L. Rev. 56, 58-59 (1943); and Orfield, "A Note on Joinder of Offenses," 41 Ore. L. Rev. 128, 129-31 (1962).

¹⁵ Note: "Joinder of Substantive Offenses and Perjury in One Indictment," 66 J. Crim. Law & Criminology 44 (1975).

¹⁶ Beigel, "The Investigation and Prosecution of Police Corruption," 65 J. Crim. Law & Criminology 135, 143 (1974).

substantially identical to proof of the substantive counts, joinder is logical and efficient. Questions concerning federal joinder standards are raised in large measure because of the difficulties defendants have in meeting severance standards of prejudice under Rule 14.¹⁷

¶17 In 1968, the American Bar Association approved its own proposed standards for joinder and severance.¹⁸ The ABA Standards preserve broad joinder as in the Federal Rules, but with a major change in severance provisions. While similar-offense-joinder is retained,¹⁹ the defendant has an absolute right to severance of offenses joined purely because of similarity if he makes his motion before trial.²⁰ Severance of related offenses remains largely within the discretion of the trial court.²¹ Standards for severance of defendants, although spelled out in greater detail, retain the

¹⁷See note 12 supra, and accompanying text. Attention should be paid to the emphasis placed on severance difficulties in the articles cited in note 14 supra.

¹⁸American Bar Association Advisory Committee on the Criminal Trial, "Standards Relating to Joinder and Severance," November 1967, Supplement September 1968. Adopted as supplemented August 6, 1968. For selected text see Appendix II.

¹⁹ABA Standards §1.1(a).

²⁰ABA Standards §2.2(a), in conjunction with §2.1(a).

²¹ABA Standards §2.2(b).

essential consideration of prejudice to defendants or the government embodied in the Federal Rules.²²

¶18 Prosecution of defendants in the hypothetical under the ABA Standards might differ substantially from that under the Federal Rules. If the several hijackings appear as similar offenses only, and not as a series of acts constituting parts of a single scheme or plan, then defendants have a right to severance under Section 2.2(a). This right is absolute if exercised before trial even though no prejudice can be shown from joinder. Severance would produce

²²ABA Standards §2.3. Section 2.3(a) granting severance to escape unavoidable prejudice from use of codefendant's out-of-court statement was designed to avoid the holding in Delli Paoli v. United States, 352 U.S. 232, 242 (1957) that such prejudice could be cured by instructions and, therefore, was not reversible error. Delli Paoli was overruled in Bruton v. United States, 391 U.S. 123, 126 (1968). All Bruton errors need not produce a reversal because some may be harmless. Schneble v. Florida, 405 U.S. 427, 430 (1972).

Section 2.3(a) no longer represents a major departure from federal law.

The ABA Standards further add to the federal rules in the following respects:

1. Consequences of prosecution failure to join related offenses (§1.3);
2. Timing and waiver of motions for severance (§2.1); and
3. Contingency where the prosecution fails in its proof of the grounds for joinder in defendants (§2.4).

Federal Rule 13, which permits joinder of offenses on the court's own motion, is preserved in §3.1, which also adds the right to sever.

a series of trials with a different array of defendants in each hijacking. The splitting up of the substantive counts might, in turn, necessitate separate trials on the perjury counts to recombine the evidence of criminal activity.

¶19 It is probable, however, that the separate hijackings in our hypothetical would appear as acts in a common scheme and be joinable under the ABA Standards as under the Federal Rules. In fact, the ABA Standards permit a defendant to compel joinder of related offenses.²³ A prosecutor failing to join related offenses might find subsequent prosecutions barred.²⁴

¶20 Joinder and severance of defendants in each prosecution are essentially the same under Sections 1.2 and 2.3 of the ABA Standards as under the Federal Rules.²⁵

C. State Laws of Joinder and Severance

¶21 Approximately three-fifths of the states have adopted joinder and severance statutes which are

²³ABA Standards §1.3(b).

²⁴ABA Standards §1.3(c).

²⁵The ABA Standards make no mention of the joinder of alternative inconsistent counts, as is desired against Buyer to charge either theft or receiving. Much state statutory law is similar in this regard and this issue, except for the federal case (see note 11, supra) is left omitted from this paper.

patterned entirely, or in part, upon either the Federal Rules or the ABA rules.²⁶ Some have adopted the Federal Rules verbatim or with insignificant changes.²⁷ Only two have taken the ABA plan substantially as written,²⁸ and one other has adopted the plan with a major variation.²⁹ Several states combine features of both plans.³⁰ The

²⁶Alaska R. Crim. Pro. 8, 13, and 14; Ariz. R. Crim. Pro. 13.3 and 13.4 (1973); Colo. R. Crim. Pro. 8, 13, and 14; Del. R. Crim. Pro. 8, 13, and 14; Fla. Stat. Ann. §§3.150 to 3.152 (1975); Hawaii R. Crim. Pro. 8, 13, and 14, see also Hawaii Penal Code §§806-21 to 806-23 (Supp. 1975); Idaho Code Ann. §§19-1432 and 19-2106 (Supp. 1975); Ill. Rev. Stat. ch. 38, §§111-4, 114-7, and 114-8 (1971); Ind. Code §§35-3.1-1-9 and 35-3.1-1-11 (Burns 1975); Kan. Stat. Ann. §§22-3202, 22-3203, and 22-3204 (1974); Ky. R. Crim. Pro. 6.18, 6.20, 9.12, and 9.16; La. Code Crim. Pro. Ann. arts. 481, 493, 494, 495.1, and 704 to 706 (Supp. 1975); Me. R. Crim. Pro. 8, 13, and 14 (1967); Md. Ann. Code R. Pro. 716, 734, and 735 (1971); Mont. Rev. Codes Ann. §95-1504 (1969); Neb. Rev. Stat. §29-2002 (1964); Nev. Rev. Stat. §§173.115, 173.135, 174.155, and 174.165 (1975); N.J. Court R. (Crim. Pract.) §§3:7-6, 3:7-7, 3:15-1, and 3:15-2 (1976); N.M. Stat. Ann. §§41-23-10, 41-23-11, and 41-23-34 (1964); N.C. Gen. Stat. §§15A-926 and 15A-927 (1975); N.D. R. Crim. Pro. 8, 13, and 14 (1975); Ohio R. Crim. Pro. 8, 13, and 14 (1975); Okla. Stat. tit. 22, §§404 and 436 to 439 (1969); Pa. R. of Court (Crim. Pro.) 219 (1975); Utah Code Ann. §§77-21-31 and 77-21-44 (Supp. 1975); Vt. R. Crim. Pro. 8 and 14; Wash. Court R. (Crim. Pro.) 4.3 and 4.4 (1974); Wis. Stat. Ann. §971.12 (1971); and Wyo. R. Crim. Pro. 11 to 13 (1975).

²⁷Alaska, Delaware, Hawaii, Illinois, Kentucky, Maine, Nebraska, Nevada, New Jersey, North Dakota, Wisconsin, and Wyoming.

²⁸Indiana and Vermont.

²⁹Washington.

³⁰Arizona, Florida, New Mexico, and North Carolina.

balance has used the Federal Rules as a model, but with significant variations.³¹

¶22 Another fifth of the states have extensive, often equally liberal, formulations of joinder and severance rules, but which bear little or no outward resemblance to either the Federal Rules or ABA rules.³²

¶23 The final fifth of the states has either few³³ or no³⁴ joinder and severance statutes at all.

¶24 Because of this disparity, generalizing about joinder and severance rules in the states is difficult. Since three-fifths of the states follow the Federal Rules or the ABA Standards, the probability of

³¹Colorado, Idaho, Kansas, Louisiana, Maryland, Montana, Ohio, Oklahoma, Pennsylvania, and Utah.

³²Ala. Code tit. 15, §§247 to 249, and 319 (1959); Ark. Stat. Ann. §§43-1010, 43-1801, and 43-1802 (1964); Cal. Penal Code §§954 and 1098 to 1101 (1970); Iowa Code §§773.36, 773.37, 773.38, and 780.1 (1975); Minn. R. of Court (Crim. Pro.) 17.03 (1975); Mo. R. of Court (Crim. Pro.) §§24.04 to 24.07 (West 1976), and Mo. Rev. Stat. §§545.880 and 545.885 (1969); N.Y. Crim. Pro. Law §§200.20 and 200.40 (McKinney 1971); Ore. Rev. Stat. §§132.560 and 136.060 (1973); S.D. Compiled Laws Ann. §§23-32-6, 23-32-8, and 23-42-4 (1967); Tex. Penal Code §§3.02 to 3.04 (1974), and Tex. Code Crim. Pro. arts. 21.24 and 36.09 (Supp. 1975); Va. Sup. Ct. R. (Crim. Pro.) 3A:7(b) and 3A:13 (Supp. 1975).

³³Conn. Gen. Stat. Ann. §54-57 (1960); Ga. Code Ann. §27-2101 (1972); Mass. Ann. Laws ch. 277 §46 and ch. 278, §2A (1968); Mich. Stat. Ann. §28.1028 (1972); Miss. Code Ann. §§99-15-47 and 99-15-49 (1973); S.C. Code Ann. §17-404 (Supp. 1975); and W. Va. Code Ann. §§62-2-24 and 62-3-8 (1966).

³⁴New Hampshire (but see supra note 7); Rhode Island and Tennessee (but see supra note 7).

joinder in the hypothetical in those states depends on the extent to which the state courts follow federal court interpretations. In fact, the states do tend to follow federal case law. Alaska refers to the federal standard of prejudice in its interpretation of Alaska Rule of Criminal Procedure 14.³⁵ Delaware's emphasis on judicial economy echoes much federal case law.³⁶ Despite Florida's mixture of the federal and ABA rules, its courts explicitly say that reference to federal standards is proper;³⁷ Wyoming says that federal precedent is to be given great weight.³⁸ Joinder of all offenses and all defendants in the hypothetical would be permissible in many majority rule states, although slight variations in wording or judicial emphasis can greatly affect the outcome.³⁹

¶25 Because of the wide discrepancies involved in

³⁵Richards v. State, 451 P.2d 359, 361 (Alas. 1969).

³⁶Mayer v. State, 320 A.2d 713, 717 (Del. Supr. 1974).

³⁷Wilson v. State, 298 So.2d 433, 435 (Fla. App. 1974), appeal dismissed, 327 So.2d 35 (1976).

³⁸Dobbins v. State, 483 P.2d 255, 258 (Wyo. 1971).

³⁹New Jersey, for example, departs in a way worthy of mention, although its departure probably does not affect the hypothetical. N.J. Ct. Rule 3:7-6 reads, in part, exactly like the federal rule. Yet New Jersey courts have shown remarkable unwillingness to try similar but unrelated offenses together. One appellate court held such joinder plain error,

the law in non-majority jurisdictions⁴⁰ no prediction as to the outcome of attempted joinder in the hypothetical is possible. In Virginia, for example, no two defendants can be prosecuted together without their consent.⁴¹ Joinder rules are, therefore, best inspected on a state-by-state basis.⁴²

III. Epilog: Difficulties With Joinder

¶26 Though joinder is a valuable tool in the prosecution of complex criminal activity, the complicated trial that results has its drawbacks. The goal of the criminal trial is to find specific guilt and innocence. A complicated trial involving many defendants and offenses can give a jury the whole picture; it can also produce a confused jury, defense claims of prejudice, and an unsatisfactory result.

39 (continued)

State v. Baker, 90 N.J. Super. 488, 489, 218 A.2d 170, 171 (App. Div. 1966), although on appeal the decision was reversed by a holding that the defendant's remedy is a pre-trial motion for severance which was apparently not made. State v. Baker, 49 N.J. 103, 105, 228 A.2d 339, 341 (1967), cert. denied, 389 U.S. 868 (1968). Since then, New Jersey courts have held that contrary to federal practice, severance motions on similar offenses should be routinely granted. State v. Harris, 105 N.J. Super. 319, 321, 252 A.2d 160, 161 (App. Div. 1969).

⁴⁰ See, e.g., notes 6 - 8 supra and accompanying text.

⁴¹ Va. Sup. Ct. R. (Cr. Pr.) 3A-13(a) (Supp. 1975).

⁴² For a comprehensive breakdown of state joinder and severance statutes see Appendix III.

¶27 Included among the issues raised in joint trials is possible prejudice to one defendant from the admission of evidence inadmissible as to him but admissible as to a co-defendant.⁴³ Another is possible prejudice to defendants from the joinder of defendants or offenses.⁴⁴ Since joinder is often based on findings that its benefits outweigh possibilities of prejudice, the manner of dealing with misjoinder of defendants, found during or after trial, is also a difficult question.⁴⁵ Because of these and other defects potentially leading to costly

⁴³ One example is the admission of a codefendant's out-of-court statement, when the codefendant himself does not testify. See note 22 supra.

⁴⁴ In State v. Alford, 18 Crim. L. Rptr. 2564 (N.C. Sup. Ct. Mar. 2, 1976), the court reversed the conviction of a defendant at a joint trial on the grounds that his inability to call his codefendant as an exculpatory witness (because of the codefendant's Fifth Amendment right to refuse to testify) violated due process, even though no attempt was made to call the codefendant to testify. (To be sure, a confession by the codefendant not introduced at trial indicated that his testimony would prove exculpatory.) For an example involving the joinder of offenses, see notes 15 and 16 supra, and accompanying text (joinder of perjury with substantive counts).

⁴⁵ Federal Rule 8(b) permitting joinder of defendants "alleged" to have participated in the same transaction or scheme has been held to permit a joint trial to continue even after the grounds for joinder were disposed of, because no prejudice was found. Schaffer v. United States, 362 U.S. 511, 516 (1960).

Section 2.4 of the ABA Standards allows a defendant to move for severance during trial if there is a failure of evidence for joinder. The standard for ruling on the motion is the necessity of giving the defendant a fair trial.

and time-consuming appeals and mistrials, joinder may be available but inadvisable. Consequently, care should be exercised in planning a joint trial.⁴⁶

⁴⁶See generally Zuckerman and Lyons, "Strategy and Tactics in the Prosecution of Complex Wire-Interception Cases," Commission Studies: National Commission for the Review of Federal and State Laws Regulating Wiretapping and Electronic Surveillance 25-26 (1976) for an analysis of one complex series of trials involving wiretapping. For a successful but complicated joint trial in the theft and fencing area, see United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).



Appendix I: 18 U.S.C.A. Federal Rules of Criminal
Procedure, Rules 8, 13, and 14

Rule 8.

JOINDER OF OFFENSES AND OF DEFENDANTS

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

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

Rule 13.

TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Rule 14.

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966.

1966 Amendment

Added the second sentence.

Appendix II: ABA Standards Relating to Joinder
Severance, §§1.1., 1.2, 2.2, 2.3
as adopted August 6, 1968.

PART I. JOINDER OF OFFENSES AND DEFENDANTS

1.1 Joinder of offenses.

Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (a) are of the same or similar character, even if not part of a single scheme or plan; or
- (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

1.2 Joinder of defendants.

Two or more defendants may be joined in the same charge:

- (a) when each of the defendants is charged with accountability for each offense included;
- (b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- (c) when, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
 - (i) were part of a common scheme or plan; or
 - (ii) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

2.2 Severance of offenses.

(a) Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of offenses whenever:

- (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or
- (ii) if during trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court should consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

2.3 Severance of defendants.

(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(ii) if during trial upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

Appendix III: State Joinder and Severance Laws

State	*** Statutes		Offenses		Defendants	
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Alabama	yes	yes		yes		at election of either defendant
Alaska	yes	yes	prejudice to defendant or to state	yes	yes	prejudice to defendant or to state
Arizona	yes	yes	as of right by defendant if similar only; otherwise for fair trial	yes	yes	for fair trial
Arkansas		specified groups of offenses		at discretion of trial court		at election of of defendant in capital cases
California		yes	by trial court for good cause	mandatory		by discretion of trial court

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes		Offenses		Defendants	
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Colorado		mandatory	if joinder is prejudicial	yes	yes	if some evidence admissible against co-defen- dant only; other- wise if joinder prejudicial
Connecticut	Yes		court discretion			
Delaware	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Florida		yes	to promote fair trial	yes	yes	to promote fair or speedy trial
Georgia						at election of defendants in capital cases unless death penalty waived; otherwise at discretion of trial court

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes		Offenses		Defendants	
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Hawaii	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Idaho	yes	yes			discretion of court	
Illinois		yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Indiana	yes	yes	defendant has right to sever if similar only; otherwise if necessary for fair trial	yes	yes	if necessary for fair trial
Iowa	no	yes		yes		at election of any felony codefendant; otherwise at court discretion
Kansas	yes	yes	at court discretion	yes	yes	at court discretion

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

<div> <div>Statutes***</div> <div>State</div> </div>	Offenses			Defendants		
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Kentucky	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Louisiana	yes	yes	for fair trial	yes	yes	requirements of justice
Maine	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Maryland	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Massachusetts		trial of conspiracy simultaneously with substantive offense prohibited; otherwise joinder permitted				
Michigan				discretion of court		

*** For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes	Offenses		Defendants		
		Joinder		Joinder		Severance
		Similar Offense	Same Transaction	Same Counts	Same Separate Counts	
Minnesota			yes	in felony and gross misdemeanor cases, joinder only upon motion in the interests of justice		
Mississippi						in felonies, at election of any defendant; in misdeameanors at discretion of court
Missouri			yes		yes	at election of any felony defendant, except for certain sexual offenses
Montana		yes	yes	in the interests of justice and for good cause shown	yes	yes if joinder is prejudicial

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes	Offenses		Defendants			
		Joinder		Severance	Joinder		Severance
		Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Nebraska		yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Nevada			yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
New Hamp.			joinder of murder with concealing the death of a newborn child pro- hibited				
New Jersey		yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
New Mexico		yes	yes	if joinder is prejudicial			by election of any defendant if some evidence admissible against codefen- dant only; other- wise if joinder is prejudicial

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes	Offenses		Defendants			
		Joinder		Severance	Joinder		Severance
		Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
New York		yes	yes	similar offenses may be severed in the interests of justice for good cause shown	yes	for trial of joint offenses only	for good cause cause shown
North Carolina			yes, defendant may compel joinder or election	for fair trial	yes	yes	for fair and speedy trial, or at election of defendant if proof of basis for joinder fails
North Dakota		yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Ohio		yes	yes	if joinder is prejudicial	joinder in capital offenses only for good cause shown; other- wise permitted	yes	if joinder is prejudicial
Oklahoma		no	no		yes	no	if joinder is prejudicial

*** For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes	Offenses		Defendants			
	Joinder		Severance	Joinder		Severance	
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts		
Oregon		no	yes			at election of any felony defendant; other- wise at discre- tion of court	
Pennsylvania		yes, except where murder is charged	yes, except that only manslaughter can be joined with murder	court discretion	yes	yes	court discretion
Rhode Island							
South Carolina			joinder of charge of carrying a con- cealed weapon, when available, is required with any charge of murder, man- slaughter, or aggravated assault				
South Dakota		yes	yes	in the interests of justice	yes		court discretion

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

State	*** Statutes		Offenses		Defendants	
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Tennessee		false pretenses may be joined with horse stealing and larceny				
Texas		yes	at election of defendant	at trial court discretion	at trial court discretion (same trans- action only)	if joinder is prejudicial
Utah	yes	yes		yes	yes	
Vermont	yes	yes	severance of similar offenses is defendant's right; otherwise if joinder is prejudicial	yes	yes	at election of any felony defendant; other- wise if joinder is prejudicial
Virginia		at court dir- ection with consent of de- fendant and prosecutor		if defendants consent	if defendants consent	

***For citations to specific statutes see notes 26-34 and text accompanying

Appendix III: State Joinder and Severance Laws

Statutes State	Offenses			Defendants		
	Joinder		Severance	Joinder		Severance
	Similar Offense	Same Transaction		Same Counts	Same Separate Counts	
Washington	yes	yes	for fair trial	yes	yes	for fair or speedy trial
West Virginia		receiving stolen goods or embezzle- ment may be joined with larceny; false swearing with perjury				on election of felony defendant
Wisconsin	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial
Wyoming	yes	yes	if joinder is prejudicial	yes	yes	if joinder is prejudicial

***For citations to specific statutes see note 26-34 and text accompanying



Joinder and Severance: the Official Corruption Context

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Joinder and Severance: the Official Corruption Context

Addenda and Errata

(Double underlining indicates corrected material)

¶2A: Joinder of substantive offenses and perjury is especially effective in prosecuting official corruption cases, where complex facts, much testimony, and sophisticated defendants make rulings on joinder and severance crucial.

¶14, Note 11: Correction: United States v. Gaddis,
424 U.S. 544 (1976)

¶15, Note 13: Correction: United States v. Diez, 515
F.2d 892, 904 (5th Cir. 1975), cert.
denied, 432 U.S. 1052 (1976)

IIA. Joinder and Severance in the Official Corruption
Context

¶25A: Like the sophisticated theft and fencing scheme discussed above, official corruption can often be most effectively attacked through joinder of many defendants and many charges. Joinder of perjury before the investigating grand jury with complex substantive corruption charges (bribery, graft, or extortion) can be especially effective.

¶25B: When official corruption involves many actors and a complex series of transactions, it is a good investigative strategy for the prosecutor to call before the grand jury everyone suspected

of being involved in or having knowledge of the corruption.¹ This strategy, however, may result in objections being raised on the ground of harassment or mere pretence to obtain damaging admissions² or to build the foundation for a perjury prosecution.³ Nevertheless, the Second Circuit has concluded that the strategy is not objectionable under federal law:

If we put ourselves in the position of the prosecutor at the time the subpoenas were served ... it was apparent from the ex parte statements... that the prosecution was dealing with a long, devious and complicated conspiracy, full of scheming and trickery. There had already been a certain amount of running to cover by the various co-conspirators. No investigation would be adequate and in any sense complete without at least an effort to glean some small harvest of information from those suspected of being involved. The prosecutor had by no means wholly developed his case. This was not a case of pressure upon some single, indigent and perhaps ignorant person. All of those who were summoned were sophisticated people, with varying motives to save themselves at the expense of some of the others, if they could, and possessed of

¹This strategy is of minimal value in New York because transactional immunity attaches to every witness in a grand jury proceeding unless the witness waives such immunity. N.Y. Crim. Proc. Law §190.40 (McKinney 1971). New York also defines permissible joinder in such a way that perjury and substantive corruption offenses can not be joined. N.Y. Crim. Proc. Law §200.20 (McKinney 1971).

²United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

³United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

information of importance to the prosecution.
Several of them were lawyers.⁴

¶25C: If an individual so questioned commits perjury before the grand jury,⁵ joinder of a perjury charge with the substantive bribery, extortion or graft charge is generally permissible.⁶ The joint trial of offenses⁷ and defendants allows the prosecutor to develop the whole scheme of corruption at one time.⁸ Joinder also provides an opportunity to show the character of the defendant in its true light.⁹

⁴United States v. Corallo, 413 F.2d 1328. See also United States v. Sweig, 441 F.2d 121:

Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know most about the matters under inquiry.

⁵ or under oath in any other proceeding or investigation. See, e.g., United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, reh. denied, 418 U.S. 955 (1974) (false statements to I.R.S. agent foundation of perjury count of indictment).

⁶ Fed. Rule Crim. P. 8(a). See, e.g., United States v. Isaacs, supra note 41; United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971); United States v. Pacente, 503 F.2d 543 (7th Cir. 1974), rev'g on rehearing en banc, 490 F.2d 661 (7th Cir. 1973).

⁷ Obstruction of the grand jury investigation is another possibility for joinder. See infra ¶25G. Filing a false income tax return is a third. United States v. Isaacs, 493 F.2d 1124 (7th Cir.) cert. denied, 417 U.S. 976, reh. denied, 418 U.S. 955 (1974).

⁸ See, e.g., United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, reh. denied, 418 U.S. 955 (1974) (corruption involved activities over a period of years, involving numerous transactions and actors).

⁹ See discussion infra ¶25L.

¶25D: Joinder, nevertheless, is only one side of the coin. Severance must also be considered.¹⁰ Because severance as of right or liberally granted can give official corruption witnesses, in effect, a license to lie when called before a grand jury, it ought to be resisted by prosecutors. When a public official goes before a grand jury, silence is impractical. Even if no statute mandates the dismissal of officials who refuse to waive Fifth Amendment privilege,¹¹ anything but a broad claim of innocence will ruin reputations and blight career prospects. A guilty official will, therefore, be sorely tempted to explain away corruption allegations, no matter how likely a later perjury prosecution may be; the lies may even be "brazen Corallo, 413 F.2d at 1327.

¶25E: At the trial of a severed substantive corruption charge, moreover, the defendant may be able to win an acquittal by successfully telling new lies that only differ slightly from those told to the grand jury, but that negate one or more elements of the

¹⁰ If a party can show prejudice, denial of severance might then be an abuse of discretion. See, e.g., United States v. Pacente, 503 F.2d 543 (7th Cir. 1974), rev'g rehearing en banc, 490 F.2d 661 (7th Cir. 1973) (joinder of perjury and extortion not prejudicial). For discussion of real prejudice, see sources cited supra notes 14, 15, and 16.

¹¹ These statutes have been held unconstitutional. See, e.g., Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973); Lefkowitz v. Cunningham, New York Times, June 14, 1977, p.1, col.5 (U.S. June 13, 1977).

prosecution case. A successful lie and acquittal then would make a later perjury prosecution look vindictive or politically motivated. Consequently, it may be unlikely. Unsuccessful lies and conviction of corruption may also make a later perjury prosecution unlikely or less than successful. The cost of re-presenting the whole, convoluted fact pattern may be too high for the prosecution to bear. If the perjury charge goes to trial, a judge or jury may think the humiliation of the first conviction and its sentence sufficient punishment, and may not convict. Where a conviction is obtained, sentences may be set to run concurrently. Severance of substantive and perjury counts granted as of right would, therefore, largely remove most adverse risk associated with the threat of a perjury conviction. Severance liberally granted, but not as of right, would also come close to the same result, because witnesses who could not remain silent might still rely on the possibility of severance to protect them from the consequences of their perjury.

¶25F: The unsuccessful prosecution of former Secretary of the Treasury John B. Connally for Watergate related corruption, at a time when he was an active political candidate and when dozens of related Watergate prosecutions were unfolding, illustrates several of these considerations.

¶25G: Connally was indicted for accepting two \$5,000 payments in return for influencing the Secretary of Agriculture's decision to raise the support price for milk, and for conspiring with Jake Jacobson to obstruct the grand jury investigation of graft by telling consistent stories, and finally for two counts of perjury before the grand jury.¹²

¶25H: The defense, headed by Edward Bennet Williams, moved to sever, arguing, "A grand jury of 23 people had a mini-trial of this case, and found the defendant guilty of perjury." The joined perjury count, the defense said, would be treated as evidence that Connally lied, and would spill over to prejudice his case that no money was ever accepted. See brief for defense on the motion to sever, quoted in Washington Post, November 26, 1974, §A, p. 6, col. 5. The Special Watergate Prosecutor argued that joinder is the "regular practice in such cases and that economy would be served by joinder," id. The trial judge severed in an oral ruling, id., and later rejected a prosecution motion to reconsider. Washington Post, December 11, 1974 §A, p. 10, col. 3, quoting the prosecution brief and a prosecution source as saying that the ruling on

¹² See verbatim indictment Washington Post, July 30, 1974 §A p. 12 col. 1. Jacobson had faced a number of felony charges related to graft and to misconduct as director of a savings bank, but was allowed to trade testimony against Connally for one misdemeanor perjury charge and dismissal of all others. Id. col. 2.

severance might give the defendant the case.

¶25I: The jury unanimously acquitted Connally on the two graft counts.¹³ The Special Prosecutor later submitted an affidavit asking that the severed perjury and conspiracy counts be dropped:

In large part, all of the evidence which would have been admitted (on the perjury count) was admitted during the (bribery) trial and considered by the jury.

Washington Post, April 19, 1975, SA, p. 15, col. 4, quoting affidavit of Frank Turkheimer, representing Special Prosecutor, with paraphrasing inserted by UPI.

¶25J: If Connally had not been called before the grand jury, there would have been no grand jury story detailing where and when Connally met Jacobson, or what each said. There would also have been no evidence of conspiracy to tell consistent stories and no leads taken from his testimony. Calling Connally helped develop a case, and the character of his testimony made it more likely he would be convicted of perjury if not graft.

¶25K: But once Judge Hart severed the substantive graft counts from the perjury counts, the inconsistencies between the grand jury and trial court stories could only be admitted on cross-examination of Connally, to impeach his testimony on receipt

¹³The press called it bribery, but 18 U.S.C. §201(g) (1970) was the basis for the indictment, and it deals with accepting gratuities after official action, see counts 2 and 3, Washington Post, July 30, 1974, SA p. 12.

of the graft.¹⁴ To affect the graft verdict, the jury would have had to conclude that Connally told at least one lie about the meetings or conversations, and that Connally was, therefore, generally untruthful, consequently his words denying receipt of the graft were lies, and he took the money.

¶25L: The Connally jury evidently would not make these inferences, at least in the severed graft trial where the key issue was, "Did Connally take the money?" This, too, was precisely the issue Williams wanted to try. See Washington Post November 26, 1974, §A, p. 6, col. 5. The defense wanted to exploit the doubt that a rich politician would trade for so small a "bribe," and to do this they wanted the jury to focus only on whether Connally took the money. Given a joined perjury count, on the other hand, the jury might have decided that Connally told lies about the peripheral details in the perjury counts, the meetings, conversations, etc. This might make Connally look less like a wealthy, respected politician (whose friends Billy Graham and Barbara Jordan were right about his honesty), and more like a man who might

¹⁴See New York Times, April 17, 1975, p. 12, col. 8; Washington Post, April 17, 1975 §A p. 10 col. 5. Both quote at length from the cross-examination of Connally. Compare to indictment, counts 5 and 6, to illustrate use of specific perjury allegations in attempt to impeach. Other details used in impeachment were the overt acts under conspiracy count 4. See indictment in Washington Post, July 30, 1974 §A p. 12.

take a tip for actions he would have done anyway. If the jury decided that Connally was a man who told small lies, rather than a sterling character, besides convicting on perjury, they might find that he told the big lie and that he took the \$10,000 as a tip.

¶25M: Not all corruption trials are Watergate dimension. But smaller scale corruption and perjury cases would be governed by similar pressures; local prosecutors may not face national media, but the smaller scale means the prosecutor is closer to the accused, and perhaps to the accused official's friends or partisans. Joinder and severance issues might, therefore, be even more crucial locally.

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Crim. L. Rptr. examined through issue dated April 6, 1977.

ILLEGALITY

Defending Illegality

Outline

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Summary

¶1 A court's power to suppress evidence derives from the Constitution, inherent supervisory powers, or statutes. The procedure governing this power in federal courts is set out in Fed. R. Crim. P. 41. Wiretap cases are controlled by 18 U.S.C. §2518 (1970). New York's procedure is set out by statute, while rules of court govern in Massachusetts and New Jersey.

¶2 Generally, motions to suppress evidence are made before trial, unless the defendant shows a compelling reason for failing to make a pretrial motion.

¶3 Hearings proceed after an initial showing of fact is made by the moving party. The defendant must first establish that alleged illegal acts violated his personal rights. Next, he must show illegality and that the product of the illegality will be used against him.

¶4 After establishing standing, the moving party carries the burden of proving illegality when the police collected the evidence under a warrant. Where evidence is seized without a warrant, the government must prove that it is lawful under recognized exceptions. Similarly, when a confession is challenged, the government must prove that it was made voluntarily.

¶5 If "tainted" evidence provides substantial leads to other evidence, the other evidence must be suppressed. The defendant must prove that the derivative evidence was obtained by the exploitation of the primary illegal action.

When the government alleges that the alleged derivative evidence came from an independent source or that the connection is attenuated it must so persuade the court. Although illegal evidence is inadmissible on the question of guilt, prosecutors may introduce it to impeach witnesses, to refresh their memories, or to facilitate decisions in sentencing and parole hearings.

¶6 Each jurisdiction provides for appeal of the suppression decision. Federal and New York courts permit the government to make an interlocutory appeal while the defendant must wait until after trial. In Massachusetts and New Jersey, either party may take an interlocutory appeal; only the defendant may appeal after verdict.

I. Sources of the Power to Suppress

A. Constitutional

¶7 The exclusionary rule prohibits the use of unconstitutionally obtained evidence in criminal prosecutions. Because the Fifth Amendment specifically forbids compelled self-incrimination, the exclusionary rule was first applied to challenge compelled testimony.¹ Federal courts later expanded the rule to exclude evidence obtained in violation of the Fourth Amendment's search and seizure clause.²

¶8 Over the years several justifications for this expansion evolved. The most debatable of these is that the rule deters unlawful police conduct.³ The courts also uphold the rule as an essential guarantee of constitutional rights.⁴ Finally, it is justified as the imperative of judicial integrity.⁵

¹Boyd v. United States, 116 U.S. 616, 634-35, 638 (1896).

²Weeks v. United States, 232 U.S. 383, 393 (1914).

³For arguments in support of deterrence, see Elkins v. United States, 364 U.S. 206, 217 (1959); and Linkletter v. Walker, 381 U.S. 618, 636 (1964). The opposing view is set out by Chief Justice Burger's dissent in Bivens v. Six Unknown Agents, 403 U.S. 388, 411-24 (1971).

⁴United States v. Calandra, 414 U.S. 338, 347 (1974).

⁵Justice Brandeis expressed this view in his dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928):

In a government of laws, existence of the government will be imperilled if it fails to

¶9 In 1961, despite continual debate over the utility of the rule, the Supreme Court applied it to state criminal proceedings through the Fourteenth Amendment.⁶ Currently, evidence obtained in violation of other constitutional provisions is also rendered inadmissible by the exclusionary rule.⁷

B. Supervisory

¶10 Federal courts also exclude evidence on the basis of their supervisory authority, regardless of constitutional violations.⁸ Although the McNabb confession rule was ostensibly superseded by section 3501 of the Omnibus Crime Control Act of 1968, exclusion of evidence based on judicial supervisory powers remains possible. Few courts, however,

5 (continued)

observe the law scrupulously. Our Government is the potent the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

⁶Mapp v. Ohio, 367 U.S. 643, 655 (1961).

⁷These violations include:

1. evidence received as a direct result of an unconstitutional entry and arrest, Wong Sun v. United States, 371 U.S. 471, 487 (1963); and
2. evidence obtained in the absence of defendant's counsel in violation of the Sixth Amendment, Massiah v. United States, 377 U.S. 201, 205-06 (1964) (confession); United States v. Wade, 388 U.S. 218, 224, 227 (1967) (line-up identification).

⁸McNabb v. United States, 318 U.S. 332, 340-41 (1943) (confession of defendant ruled inadmissible because it was obtained during an illegal detention before arraignment).

continued to suppress evidence on the basis of their supervisory powers.

C. Statutory

¶11 Suppression of evidence may be required by statute. Before current wiretap legislation was passed, the Court implemented statutory suppression in Nardone v. United States.⁹ Evidence obtained in violation of section 605 of the Federal Communications Act of 1934 was excluded. Police failure to comply with recent electronic surveillance laws may currently be grounds for suppression.¹⁰

¶12 In 1974, the Supreme Court handed down two decisions discussing violations of the federal electronic surveillance statute that require suppression.¹¹ Approval of tap applications by an official not designated by the statute rendered the product of the tap suppressible in United

⁹ 320 U.S. 379 (1937).

¹⁰ See, e.g., 18 U.S.C.A. §§2510-2520 (1970), as amended, (Supp. 1976); N.Y. Crim. Pro. Law art. 700 (1971), as amended, (Supp. 1975); N.J. Stat. Ann. §2A:156A (1971); Mass. Gen. Laws Ann. ch. 272, §99 (1968), as amended, (Supp. 1976).

¹¹ A motion to suppress evidence obtained by electronic surveillance may be, inter alia, based on the following theories:

1. absence of probable cause, 18 U.S.C.A. §2518(1)(b) (1970); N.Y. Crim. Pro. Law §700.15(2) (McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c) (1971); Mass. Gen. Laws Ann. ch. 272, §99F(2)(a), (3) (Supp. 1976);
2. absence of required executive authorization, 18 U.S.C.A. §2516(1) (Supp. 1976); N.Y. Crim. Pro. Law §700.20(2)(a) (McKinney 1971); N.J. Stat. Ann. §2A:156A-8(1971); Mass. Gen. Laws Ann. ch. 272, §99F(1) (Supp. 1976);

States v. Giordano.¹² The Court reasoned that "pre-application approval was intended to play a central role in the statutory scheme. . . ." ¹³ Mere misidentification of the proper official who approved a tap application, however, does not rise to these standards according to United States v. Chavez.¹⁴ Consequently, violations of the wiretap statute may or may not require suppression depending on how they are categorized under Giordano-Chavez.

¶13 Likewise, minor irregularities in procedure or

11 (continued)

3. failure to identify all parties, 18 U.S.C.A. §2518(1)(b)(1970); N.Y. Crim. Pro. Law §700.20(2)(b)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(1)(1971); Mass. Gen. Laws Ann. ch. 272, §99K(3)(Supp. 1976);
4. failure to minimize, 18 U.S.C.A. §2518(5)(1970); N.Y. Crim. Pro. Law §700.30(7)(McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f)(1971); Mass. Gen. Laws Ann. ch. 272, §99K(3)(Supp. 1976);
5. absence of investigative need, 18 U.S.C.A. §2518(1)(c)(1970); N.Y. Crim. Pro. Law §700.15(4)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(6)(1971); not required by Massachusetts statute;
6. omissions or errors in affidavits, applications, or warrants;
7. failure to list all prior related wiretaps, 18 U.S.C.A. §2518(1)(e)(1970); N.Y. Crim. Pro. Law §700.20(2)(f)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(e)(1971); Mass. Gen. Laws Ann. ch. 272, §99F(2)(h)(Supp. 1976); and,
8. failure to give notice, 18 U.S.C.A. §2518(8)(d)(1970); N.Y. Crim. Pro. Law §700.50(3)(McKinney 1971); N.J. Stat. Ann. §2A:156A-16(1971); Mass. Gen. Laws Ann. ch. 272, §99O(1)(2)(Supp. 1976).

¹² 416 U.S. 505 (1974).

¹³ 416 U.S. at 528.

¹⁴ 416 U.S. 562, 569 (1974).

insignificant violations of administrative regulations generally do not mandate exclusion.¹⁵ In federal courts, therefore, if evidence is not obtained in violation of the Constitution or a statute requiring suppression for violation, it is not suppressible.¹⁶ Theoretically, courts could exercise their supervisory powers to exclude such evidence, but this is seldom done.

II. Motion to Suppress: Authority

A. Federal

¶14 Fed. R. Crim. P. 41(f) provides for a pretrial motion to suppress evidence. The motion may be made in the district of trial; afterwards, the judge may convene a hearing and receive evidence on the motion. If the defendant fails to move to suppress before trial, he waives the right to object.¹⁷ But, if the opportunity to move

¹⁵ Recently, a federal court commented that the violation of agency regulations, designed to protect a defendant's rights in a criminal tax fraud prosecution, would probably not constitute grounds for suppression of the evidence. Although the First, Fourth, and Ninth Circuits have held the other way, the court noted disillusionment with the exclusionary rule in recent Supreme Court opinions, as the basis for its dictum. United States v. Leonard, 524 F.2d 1076, 1088-89 (2d Cir. 1975). Also see, Bivens v. Six Unknown Agents, 403 U.S. 443 (1971) (Burger, C.J. dissenting); and Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

¹⁶ Olmstead v. United States, 277 U.S. 438, 467-68 (1928).

¹⁷ Seguro v. United States, 275 U.S. 106, 111-12 (1927); United States v. Mauro, 507 F.2d 802, 806-07 (2d Cir.), cert. denied, 420 U.S. 991 (1974). See also United States v. Sisca, 503 F.2d 1337, 1349 (2d Cir. 1974), cert. denied, 419 U.S. 1008 (1975). Some courts have been more permissive on the grounds that Fed. R. Crim. P. 12(b) (1) states that pre-trial motions may be made before trial. This wording does leave room for judicial discretion. See United States v. Collins, 491 F.2d 1050, 1052 (5th Cir. 1974).

did not arise or if the defendant was not aware of grounds for the motion, the court has discretion to hear the motion at trial or in a separate hearing.¹⁸

¶15 Fed. R. Crim. P. 41(e) deals specifically with the return and inadmissibility of illegally seized property.¹⁹ Motions to suppress unconstitutionally obtained confessions are treated analogously, except that these motions are commonly made during trial.²⁰

¶16 The federal wiretap statute specifically provides for a motion to suppress.²¹ Defense attorneys must make such motions before trial.²² This provision was included to

¹⁸United States v. Ramos-Zaragosa, 516 F.2d 141, 143 (9th Cir. 1975) (prosecutor and defense counsel agreed to exclude seized heroin, but analysis of it was not suppressed; defendant was not to be penalized for making untimely motion due to counsel's maneuvers).

¹⁹Before 1972, Fed. R. Crim. P. 41(e) set out the grounds for a motion to suppress evidence:

1. the property was illegally seized without a warrant; or,
2. the warrant is insufficient on its face; or,
3. the property seized is not that described in the warrant; or,
4. there was no probable cause for believing the existence of the grounds on which the warrant was issued; or,
5. the warrant was illegally executed.

²⁰Pinto v. Pierce, 389 U.S. 31, 32-33 (1967). But see, Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975) (if a motion to suppress is made at trial, the defendant has a right not to have the hearing before the jury).

²¹18 U.S.C.A. §2518(10)(a) (1970).

²²United States v. Sisca, 503 F.2d 1337, 1348-49 (2d Cir. 1974), cert. denied, 419 U.S. 1008 (1975).

prevent defeat of the government's right to appeal under subparagraph 10(b) of the same section.²³

B. New York

¶17 In New York, motions to suppress evidence are governed by N.Y. Crim. Pro. Law §710 (McKinney 1971). The motion must be brought and decided in the Supreme Court within the same jurisdiction as the trial court. If the motion involves a simplified traffic information, a prosecutor's information, or a misdemeanor complaint, it can be made in the local criminal court.^{23a} Section 710.70 designates this motion the exclusive means of suppressing evidence in criminal prosecutions. Failure to make a timely motion constitutes waiver, but a motion may be made during the trial if:

1. the defendant was unaware of the facts;²⁴ or
2. the defendant had no reasonable opportunity to make the motion before trial.

Section 710 also deals with confessions and tainted in-court identifications. If a defendant was not notified of the prosecutor's intent to use involuntary statements by the defendant to a public official or testimony of a witness who made an improper identification, a motion to exclude such evidence may be made during the trial.

²³ S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

^{23a} N.Y. Crim. Pro. Law §710.50 (McKinney Supp. 1975).

²⁴ People v. McCall, 17 N.Y.2d 152, 156-57, 216 N.E.2d 570, 573, 269 N.Y.S.2d 396, 399-400 (1966).

¶18 The New York wiretap statute does not specifically authorize a motion to suppress the product of an illegal wiretap. Nevertheless, the courts treat such evidence as they treat results from any illegal search and seizure.²⁵

C. Massachusetts

¶19 Massachusetts provides for the suppression of evidence through rules of its District and Superior Courts.²⁶ An unjustified failure by the defense to make a motion within ten days of pleading constitutes a waiver.²⁷ Exceptions are recognized when there is no opportunity to make the motion or when the defendant is unaware of the grounds for such a motion.²⁸ Generally, motions to suppress confessions are made at trial.²⁹

¶20 The Massachusetts wiretap statute permits the defendant to suppress the contents of intercepted wire or oral communications for the reasons noted below.³⁰ In practice,

²⁵ People v. McCall, 19 App. Div.2d 630, 631, 241 N.Y.S.2d 439 (2d Dept. 1963).

²⁶ See Mass. Super. Ct. R. 8, 61 and Mass. Dist. Ct. R. 73-A.

²⁷ Commonwealth v. Hanger, 357 Mass. 454, 468, 258 N.E.2d 555, 558 (1970).

²⁸ Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 572 (1970). See also Mass. Super. Ct. R. 61.

²⁹ Commonwealth v. Campbell, 352 Mass. 387, 403, 226 N.E.2d 211, 220-21 (1967).

³⁰ Mass. Gen. Laws Ann. ch. 272, §99 P (Supp. 1976):

1. That the communication was unlawfully intercepted.

Massachusetts courts look to the rule of court governing regular motions to suppress for procedure requirements.

D. New Jersey

¶21 In New Jersey, motions to suppress evidence obtained by illegal search and seizure are governed by New Jersey Rule of Criminal Practice 3:5-7. The motion may be made in the Superior Court of trial or in the county court of the county where the evidence was obtained.³¹ Failure to make a pre-trial motion waives the right,³² but an exception is granted when the defendant was unaware of grounds for the motion at that time.³³

¶22 New Jersey rules distinguish a motion to suppress from an objection to the admissibility of a confession.³⁴ Objec-

30 (continued)

2. That the communication was not intercepted in accordance with the terms of this section.
3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.
4. That the interception was not made in conformity with the warrant.
5. That the evidence sought to be introduced was illegally obtained.
6. That the warrant does not conform to the provisions of this section.

³¹N.J. Rules of Criminal Practice 3:5-7(a).

³²N.J. Rules of Criminal Practice 3:5-7(c). See also State v. McKnight, 52 N.J. 35, 48, 243 A.2d 240, 247-48 (1968).

³³N.J. Rules of Criminal Practice 3:5-7(a); State v. Roccasecca, 130 N.J. Super. 585, 591, 328 A.2d 35, 38 (Law Div. 1974).

³⁴State v. Hale, 127 N.J. Super. 407, 412, 317 A.2d 731, 733 (App. Div. 1974).

tions to confessions may be raised during the trial.

¶23 Like the federal statute, New Jersey's wiretapping law provides for a motion to suppress illegally obtained evidence. It must be made ten days before the trial, unless the moving party was not aware of grounds for the motion.³⁵ The law enumerates the grounds on which evidence from a tap may be challenged.³⁶

III. Initial Showing

¶24 All four jurisdictions require a defendant to make a minimal initial showing of fact with his motion to obtain a pre-trial hearing. The motion is summarily denied unless the accompanying affidavit or evidence is definite and sufficiently detailed to permit the court to conclude that relief is warranted, if the allegations are proved.³⁷

¶25 In New York, the affidavit accompanying the motion may be the defendant's or another person's, provided the affiant has personal knowledge of the facts alleged.³⁸ For

³⁵ N.J. Stat. Ann. §2A:156A-21 (1971).

³⁶

1. The communication was unlawfully intercepted; or,
2. the order of authorization is insufficient on its face; or,
3. the interception was not made in conformity with the order of authorization.

³⁷ United States v. Ledesma, 499 F.2d 36, 39 (9th Cir. 1974); People v. Coleman, 72 Misc.2d 202, 203, 338 N.Y.S. 2d 168, 170 (Dutchess County Ct. 1972); State v. Cullen, 103 N.J. Super, 360, 366-67, 247 A.2d 346, 349-50 (App. Div. 1968); Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 573 (1970).

³⁸ N.Y. Crim. Pro. Law §710.60 (McKinney Supp. 1975); People v. Harry, 65 Misc.2d 553, 558, 318 N.Y.S.2d 172, 176-77 (Westchester County Ct. 1971).

a motion to suppress a confession, an affidavit by the defense counsel raising a constitutional objection is enough to get a hearing. Nonetheless, a failure to allege involuntariness permits denial of the motion.³⁹

¶26 Massachusetts requires a written motion with verification by affidavit. The motion is readily dismissed for lack of specificity about the evidence to be excluded.⁴⁰ In contrast, a defendant may obtain a hearing on the voluntariness of a confession upon request.⁴¹

¶27 In New Jersey, any motion to suppress must be accompanied by a full brief on the facts and the law.⁴² A defendant may get a hearing upon request in confession cases.⁴³

¶28 Generally, an initial showing is not difficult to make in search and seizure, confession, or identification cases because the defendant is likely to have first-hand knowledge of irregularities. Electronic surveillance cases pose

³⁹People v. Spartarella, 34 N.Y.2d 157, 162, 313 N.E.2d 38, 40-41, 356 N.Y.S.2d 566, 569 (1974).

⁴⁰Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 573 (1970); Commonwealth v. Slaney, 350 Mass. 400, 403, 215 N.E.2d 177, 180 (1966).

⁴¹Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943).

⁴²N.J. Rules of Criminal Practice, 3:5-7(a); State v. Walker, 117 N.J. Super. 397, 398, 285 A.2d 37, 38 (App. Div. 1971).

⁴³N.J. Rules of Evidence 8(3):

In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury.

special problems to the defense. Consequently, the government must give defendants access to surveillance records before trial so that they can take full advantage of pre-trial motions.⁴⁴

IV. Hearing

A. Nature of Proceedings

¶29 Although a defendant has no constitutional right to be present at the suppression hearing, Fed. R. Crim. P. 43 implies that he should be present, particularly if testimony is given.⁴⁵ On the other hand, New York and Massachusetts courts hold that the defendant has the right to be present upon his request.⁴⁶

¶30 All four jurisdictions agree that admissibility of

⁴⁴ Alderman v. United States, 394 U.S. 165, 182 (1969). See also, Taglianetti v. United States, 394 U.S. 316, ". . . an adversary proceeding and full disclosure were required in those cases [Alderman and companion cases], . . . only because the in camera procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." 394 U.S. at 317.

⁴⁵ In part, Fed. R. Crim. P. 43 provides:

. . . . The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence, except as otherwise provided by these rules.

See also, United States v. Dalli, 424 F.2d 45, 48 (2d Cir.), cert. denied, 400 U.S. 821 (1970), and Burley v. United States, 295 F.2d 317, 319 (10th Cir. 1961).

⁴⁶ People v. Anderson, 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1966); People v. Restifo, 44 App. Div.2d 870, 355 N.Y.S.2d 496 (3d Dept. 1974); Amado v. Commonwealth, 349 Mass. 716, 212 N.E.2d 205 (1965).

evidence is an issue for the court.⁴⁷ The presence of a jury is not, however, reversible error. The rules of evidence are usually relaxed or inapplicable at these hearings.⁴⁸

B. Standing

¶31 The Supreme Court recognized the personal nature of Fourth, Fifth, and Sixth Amendment rights over a period of time beginning in 1905 with McAlister v. Henkel.⁴⁹ The

⁴⁷United States v. Whitaker, 372 F.2d 154, 161 (3d Cir. 1974). See also, People v. DuBois, 31 Misc.2d 157, 161, 221 N.Y.S.2d 21, 25 (Queens County Ct. 1961) (whether evidence should be suppressed as the fruit of an illegal search is to be determined by the court); People v. Leftwich, 82 Misc.2d 993, 996, 372 N.Y.S.2d 888, 891 (Sup. Ct. New York County 1975) (the voluntariness of a confession is first determined by the judge); State v. Price, 108 N.J. Super. 272, 282, 260 A.2d 877, 883 (Law Div. 1970) (determining the voluntariness of a consent to a search is a factual decision to be made by the hearing judge); State v. Smith, 32 N.J. 501, 161 A.2d 520, cert. denied, 364 U.S. 936 (1960) (the trial judge makes the initial determination of the voluntariness of a confession, but the ultimate issue is left to the jury); Commonwealth v. LePage, 352 Mass. 403, 410, 226 N.E.2d 200, 204 (1967) (whether a search was illegal is a question for the judge and not the jury); Commonwealth v. Johnson, 352 Mass. 311, 316, 225 N.E.2d 360, 364, cert. denied, 389 U.S. 816, cert. dismissed, 390 U.S. 511 (1967) (the judge passes on the voluntariness of a confession in the first instance, but the final determination is one of fact for the jury).

⁴⁸For example, hearsay is admissible and counsel is permitted to ask leading questions. See United States v. Matlock, 415 U.S. 164, 172-73 (1974); People v. Harrington, 70 Misc.2d 303, 305, 332 N.Y.S.2d 789, 792-93 (Allegany County Ct. 1972); Commonwealth v. Lehan, 347 Mass. 197, 206, 196 N.E.2d 840, 846 (1964).

⁴⁹201 U.S. 90, 91 (1905) (Fifth Amendment right against self-incrimination is personal to the witness himself). This view was recently reaffirmed in Fisher v. United States, ___ U.S. ___, 19 Crim. L. Rptr. 3018, 3021, 3024 (Apr. 21, 1976). Fourth Amendment rights are personal as set forth in United States v. Miller, ___ U.S. ___, 19 Crim. L. Rptr. 3031, 3033 (Apr. 21, 1976). The Sixth Amendment right to counsel may be raised only by the individual whose right was violated. Massiah v. United

Court recognized this rationale, too, in 1969 in the wiretap area.⁵⁰ As a consequence, defendants must have standing to complain about unconstitutionally acquired evidence before it can be suppressed on their request.

¶32 To illustrate, a defendant may move to suppress only his own confession. Search and seizure cases present more complex standing problems. To object, the defendant must have a privacy interest in the premises searched or in the property seized. Finally, standing in electronic surveillance cases is currently defined by privacy and property rights.⁵¹ Katz found eavesdropping in a public telephone booth a violation of the defendant's "reasonable expectation of privacy."⁵² But the court also affirmed the vitality of property principles in Alderman by granting standing to the owner of the place where a wiretap was located; his participation in the intercepted conversations was held irrelevant.⁵³

1. Search and Seizure

¶33 The concept of standing is most fully developed in

49 (continued)

States, 377 U.S. 201, 205 (1963). See also, People v. Estrada, 28 App. Div.2d 681, 280 N.Y.S.2d 825 (2d Dept. 1967); State v. Casale, 106 N.J. Super. 157, 254 A.2d 531 (App. Div. 1969); Commonwealth v. Dirring, 354 Mass. 523, 532, 238 N.E.2d 508, 513-14 (1968).

⁵⁰ Alderman v. United States, 394 U.S. 165, 176 (1969).

⁵¹ See infra ¶42 and note 79.

⁵² Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁵³ Alderman, 394 U.S. at 179-80.

search and seizure cases. In Jones v. United States,⁵⁴ the Supreme Court recognized traditional ideas of standing based on the ownership or possession of the premises searched.⁵⁵ The decision went on to articulate a new principle which expanded standing in these cases to those who were legitimately on the premises during the search.

¶34 In practice, federal courts grant standing to:

1. a tenant complaining about an illegal search of his apartment;⁵⁶
2. an occupant of a hotel room whose room was illegally searched;⁵⁷
3. a guest or licensee of the owner or tenant of the premises searched;⁵⁸ and,
4. one of the users of an office that was illegally searched.⁵⁹

Federal courts refuse to grant standing to:

1. one who had assumed rent payments for the leased building before the search occurred;⁶⁰

⁵⁴362 U.S. 256 (1960).

⁵⁵This concept was reaffirmed in Brown v. United States, 411 U.S. 223 (1972). See ¶40 of these materials.

⁵⁶Chapman v. United States, 365 U.S. 610, 617-18 (1961).

⁵⁷Stoner v. California, 376 U.S. 483, 488-90 (1964); United States v. Anderson, 453 F.2d 174 (9th Cir. 1971).

⁵⁸United States v. Wright, 466 F.2d 1256, 1259 (2d Cir.), cert. denied, 410 U.S. 916 (1972); United States v. Miguel, 340 F.2d 812, 814 (2d Cir.), cert. denied, 382 U.S. 854 (1965).

⁵⁹Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968).

⁶⁰United States v. Konigsberg, 336 F.2d 844, 847 (3d Cir. 1964); United States v. Wolfson, 299 F. Supp. 1246, 1249-50 (D. Del. 1969).

2. a business associate of the co-defendant and owner of the property searched;⁶¹

3. a tenant who willfully abandoned the premises before the illegal search occurred;⁶² and,

4. a trespasser who merely used the premises searched.⁶³

¶35 Generally, New York, Massachusetts, and New Jersey follow federal guidelines where standing is governed by the defendant's relationship to the property searched.⁶⁴

¶36 If a defendant does not have standing because of his interest in the premises he may achieve it through his interest in the property seized. Total ownership⁶⁵ or possessory interest⁶⁶ establish standing to complain. Possessory interest is broadly defined in the federal

⁶¹United States v. Grosso, 358 F.2d 154, 161 (3d Cir. 1966).

⁶²Feguer v. United States, 302 F.2d 214, 248-49 (8th Cir.), cert. denied, 371 U.S. 872 (1962).

⁶³United States v. Watt, 309 F. Supp. 329, 331 (N.D. Cal. 1970).

⁶⁴Defendants had standing to protest as guests of the lessee of an apartment where incriminating narcotics were seized. People v. Cokley, 42 App. Div.2d 538, 344 N.Y.S.2d 796 (1st Dept. 1973).

A defendant had no standing to object to the seizure of a car that he neither owned nor possessed. Commonwealth v. Campbell, 352 Mass. 387, 402, 226 N.E.2d 211, 220 (1967). A person does have standing if he has a proprietary, possessory, or participatory interest in the place where the evidence was found. State v. Allen, 113 N.J. Super. 245, 273 A.2d 587 (App. Div. 1970).

⁶⁵Schwimmer v. United States, 232 F.2d 855, 860-61 (8th Cir.), cert. denied, 352 U.S. 833 (1956) (a lawyer had standing to complain about subpoena duces tecum of records he had deposited with a corporation for storage).

⁶⁶United States v. Ong Goon Sing, 149 F. Supp. 267, 268 (S.D. N.Y. 1957) (defendant was holding papers seized for a third person from whom he purchased laundry).

courts to include constructive possession of property.⁶⁷

¶37 If a defendant relinquishes his interest in property before the illegal search, he has no standing to complain.⁶⁸

Likewise, a defendant has no standing to object to the seizure by federal officers of papers filed with a state court.⁶⁹

¶38 Until 1960, defendants charged with a possessory offense faced a special dilemma when they asserted standing through ownership of seized property. If possession of the seized property itself constituted a crime, a defendant could not, in effect, acquire standing without confessing an incriminating interest in contraband or stolen property. The Court first recognized this dilemma in Jones v. United States.⁷⁰ There it held that where "possession both convicts and confers standing" the defendant need not allege an interest in the premises or property.

⁶⁷Mancusi v. DeForte, 392 U.S. 364, 367 (1968). See also, United States v. Re, 313 F. Supp 442 (S.D. N.Y. 1970) (records stored with an accountant, in absence of agreement, were not constructively possessed by defendant); United States v. Birrell, 242 F. Supp. 191, 200 (S.D. N.Y. 1965) (records of defendant stored with an attorney).

⁶⁸Abel v. United States, 362 U.S. 217, 240-41 (1960) (evidence reclaimed from hotel wastebasket after defendant vacated room). New York follows a similar rule. People v. Pantoja, 76 Misc.2d 869, 351 N.Y.S.2d 873 (Sup. Ct. Bronx County 1974) (defendant gave rifles to third party who held them at the time of the search). But New York courts did find standing where abandonment of property was unintentional. People v. Adorno, 37 Misc.2d 36, 234 N.Y.S.2d 674 (New York City Criminal Ct. 1962).

⁶⁹United States v. Silverman, 449 F.2d 1341, 1345 (2d Cir. 1971).

⁷⁰362 U.S. 257, 261 (1960).

¶39 The scope of Jones may well have been narrowed in Simmons v. United States.⁷¹ The court held that the Jones automatic standing doctrine applies where the defendant is accused of possessory offenses. He must, the Court said, continue to allege possession to achieve standing to challenge evidence when charged with a non-possessory offense.⁷² The court further added

. . .when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.⁷³

¶40 Consequently, under Simmons it could be argued that the need for automatic standing was removed. Indeed, in Brown v. United States,⁷⁴ the court held that defendants in a possession crime had to allege possession to establish standing to suppress.⁷⁵ Later, however, the opinion is careful to note that it was not yet necessary to decide if Simmons removed the need for "automatic standing." The court specifically reserved that decision for a case "where possession at the time of the contested search and seizure is 'an essential element of the offense charged.'"⁷⁶

⁷¹390 U.S. 377 (1967).

⁷²Simmons, 390 U.S. at 389-93.

⁷³Simmons, 390 U.S. at 394.

⁷⁴411 U.S. 223 (1972).

⁷⁵Brown, 411 U.S. at 228.

⁷⁶Brown, 411 U.S. at 228, quoting Simmons, 390 U.S. at 390.

2. Electronic Surveillance

¶41 Electronic surveillance provides a complex setting for the application of standing rules. The terms "search and seizure" or "unlawful invasion of privacy" are used in reference to recordings of conversations overheard by government authorities. Frequently, these recordings are acquired without physical trespass onto the defendant's property. Rarely is there seizure of tangible property. Traditional standing doctrines illustrated by Jones or Brown do not readily apply to electronic surveillance situations.

¶42 Katz v. United States⁷⁷ defined an illegal wiretap, under the Fourth Amendment, as one that invaded person's "reasonable expectation of privacy." The Court recognized Katz's standing to object to the tap even though his calls were made from a public telephone booth. Standing in the context of electronic surveillance was faced more directly in Alderman v. United States.⁷⁸ There the Court recognized two classes of defendants who have standing to suppress evidence from an illegal electronic surveillance:

1. a party to the conversations overheard; and
2. the owner of the premises where the tap was located, regardless of his presence at the time of the conversations.⁷⁹

⁷⁷389 U.S. 347, 361 (1967).

⁷⁸394 U.S. 165 (1969).

⁷⁹Id. at 176-80. New York also grants standing to defendants who participated in the conversations intercepted. People v. Butler, 33 App. Div. 675, 305 N.Y.S.2d 367 (1st Dept. 1969). A person who was not party to conversations

¶43 Under 18 U.S.C. §2510(10) (1971) an "aggrieved person" is entitled to invoke the motion to suppress evidence from illegal electronic surveillance. Such a person is one who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.⁸⁰

3. Confessions

¶44 In general, a defendant only has standing to suppress his own confession, if it was obtained by unconstitutional methods.⁸¹ Nevertheless, he may suppress the confession of his co-defendant in particular circumstances.⁸²

79 (continued)
intercepted under an originally defective wiretap order lacked standing to attack conversations intercepted under the order. State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (Law Div. 1973).

⁸⁰ 18 U.S.C.A. §2510(11) (1970). Comments in the legislative history of the bill indicate that this provision was intended to reflect existing law. See Jones v. United States, 362 U.S. 257 (1960); Goldstein v. United States, 316 U.S. 114 (1942); and Wong Sun v. United States, 371 U.S. 471 (1963). S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968).

⁸¹ Constitutional rights are personal; they may not be asserted vicariously. Alderman v. United States, 394 U.S. 165, 174 (1969). An involuntary confession may violate several of the defendant's constitutional rights, depending on how it was obtained. A coerced confession violates the right against self-incrimination. Boyd v. United States, 116 U.S. 616 (1896). A confession received in the absence of counsel may violate Sixth Amendment guarantees. Massiah v. United States, 377 U.S. 201, 205-06.

⁸² In Bruton v. United States, 391 U.S. 123 (1968), the Court set aside a conviction because a co-defendant's confession implicating the defendant was received in evidence. Although the jury was instructed to disregard the confession, the Court felt that there was substantial risk that it influenced the verdict. The joint trial also precluded cross-examination of the co-defendant, in violation of the defendant's right of confrontation under the Sixth Amendment.

C. Illegality: Allocation of Burdens

¶45 In a motion to suppress, the burden of proof is upon the moving party to show that the evidence to be excluded was obtained by illegal means. To succeed, the showing must be made by a preponderance of the evidence.⁸³

¶46 New York places the initial burden of coming forward with a showing of legality upon the state. When that is met, the ultimate burden of persuasion rests on the moving party.⁸⁴

1. Search With Warrant

¶47 In a marginal case, the courts tend to sustain a search under a warrant, where without one it would fail.⁸⁵

⁸³United States v. Matlock, 415 U.S. 164, 177 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 484-90, reh. denied, 404 U.S. 874 (1971); Commonwealth v. Hanger, 357 Mass. 464, 467-68, 258 N.E.2d 555, 558 (1970); State v. Stolzman, 115 N.J. Super. 231, 236, 279 A.2d 114, 115 (App. Div. 1971) (implication).

⁸⁴People v. Malinsky, 15 N.Y.2d 86, 96, 204 N.E.2d 188, 195, 255 N.Y.S.2d 850, 861 (1965); People v. Berrios, 28 N.Y.2d 361, 367-68, 270 N.E.2d 709, 712-13, 321 N.Y.S.2d 884, 888-89 (1971).

⁸⁵United States v. Ventresca, 380 U.S. 102, 106 (1965). Grounds for attacking a warrant follow:

1. The warrant is invalid on its face because of:
 - a. failure to show probable cause;
 - b. failure to specify with particularity, the places to be searched, or persons or things to be seized;
 - c. facial inaccuracy; or
 - d. improper authorization.
2. The warrant was improperly executed because:
 - a. either notice, inventory, or return was neglected; or
 - b. the search was beyond the scope of the warrant.

If the violation is technical or clerical, proof of illegality does not mandate suppression.⁸⁶ To suppress evidence, then, the defendant must show bad faith, prejudice, or infringement of substantial rights. Further, if the prosecutor makes a showing of substantial compliance or good faith, the suppression motion may often be defeated.⁸⁷

¶48 In contrast, if the violation is constitutional and the burden is carried, suppression is required.⁸⁸

⁸⁶United States v. Hall, 505 F.2d 961 (3d Cir. 1974).

Rule 2 expresses values sought to be achieved by the Federal Rules of Criminal Procedure. We are commanded to give the rules a construction which secures 'simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.' Id. at 963.

See also, People v. Mallard, 79 Misc.2d 270, 359 N.Y.S.2d 622 (Sup. Ct. Queens County, 1974); Commonwealth v. Cromer, Mass., 313 N.E.2d 557, 559 (1974).

⁸⁷United States v. Hall, 505 F.2d 961, 963 (3d Cir. 1974) (failed to return search warrant promptly); United States v. Harrington, 504 F.2d 130, 134 (7th Cir. 1974) (failure to leave a copy of the warrant and a receipt for the property taken); United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir. 1970) (nighttime search of unoccupied room); United States v. Sturgeon, 501 F.2d 1270, 1275 (8th Cir. 1974) (issuance by state judge without designating a federal magistrate to whom it was to be returned); United States v. Burke, 517 F.2d 377, 381 (2d Cir. 1975) (failure of affidavit to recite reliability of informant, where reliability was apparent from the facts); People v. Rose, 52 Misc.2d 648, 276 N.Y.S.2d 450 (Dist. Ct., Nassau County, 1st Dist. 1967) (failure to give receipt for property seized); Commonwealth v. Cromer, Mass., 313 N.E.2d 557, 561 (seven day delay in execution of warrant) (1974); State v. Bisaccia, 58 N.J. 586, 279 A.2d 674 (1971) (erroneous address in affidavit and warrant).

⁸⁸Coolidge v. New Hampshire, 403 U.S. 443, 447 (1971) (approval by chief prosecutor acting as magistrate); People v. Malinsky 15 N.Y.2d 86, 204 N.E.2d 188, 255 N.Y.S.2d 850 (1965) (lack of probable cause); People v. Rothenberg, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 317 (1967) (lack of specificity in warrant); Commonwealth v. Owens, 350 Mass. 633, 636, 216 N.E.2d 411, 412-13 (1966) (lack of probable cause; reliability of informant not established).

¶49 The jurisdictions handle attacks on supporting affidavits differently.⁸⁹ Despite diversity in approach,⁹⁰

⁸⁹ Federal courts may go beyond the face of the affidavit to consider any facts asserted under oath before the magistrate who received the application. United States v. Focarile, 340 F. Supp. 1033, 1043-44 (D. Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522, aff'd, 473 F.2d 906, aff'd, 416 U.S. 505 (1974). New York and New Jersey also consider supplemental testimony given under oath before the issuing magistrate. It must be recorded or transcribed, however. In New Jersey the transcript must be attached to the affidavit. People v. Schnitzler, 18 N.Y.2d 456, 460, 223 N.E.2d 28, 30, 276 N.Y.S.2d 616, 618 (1966); State v. Stolzman, 115 N.J. Super. 231, 234-35, 279 A.2d 114, 115 (App. Div. 1971). Federal and New Jersey courts indicate the prosecution may call the issuing magistrate to verify oral testimony accompanying the affidavit under some circumstances, United States v. Falcone, 364 F. Supp. 877, 888, 895 (D.N.J. 1973), aff'd, 500 F.2d 1401 (3d Cir. 1974); State v. Clemente, 108 N.J. Super. 189, 198, 260 A.2d 514, 520 (App. Div. 1969). Massachusetts does not permit supplementation of the affidavit by sworn testimony. Commonwealth v. Monosson, 351 Mass. 327, 330, 221 N.E.2d 220, 221 (1966).

⁹⁰ Most of the federal circuits hold that a defendant is entitled to a hearing delving below the surface of a facially sufficient affidavit upon a showing of:

1. a misrepresentation by the government of a material fact; or
2. an intentional misrepresentation by the government, regardless of materiality. United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973); Jackson v. United States, 336 F.2d 579, 580 (D.C. Cir. 1964); United States v. Dunning, 425 F.2d 836, 840 (2d Cir.), cert. denied, 397 U.S. 1002 (1969); King v. United States, 282 F.2d 398, 400-01 (4th Cir. 1960); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973); United States v. Marihart, 492 F.2d 897, 899-90 (8th Cir. 1974); United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972); United States v. Damitz, 495 F.2d 50, 53-54 (9th Cir. 1974).

New York will inquire into the veracity of an affidavit, but a presumption in favor of validity exists. People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

New Jersey does not permit such an inquiry. State v. Petillo, 61 N.J. 165, 173, 293 A.2d 649, 653, cert. denied, 410 U.S. 944 (1972).

each places a heavy burden on a defendant who wishes to go behind an affidavit in a suppression hearing.⁹¹

2. Search Without a Warrant

¶50 Searches conducted outside the judicial process on a defendant's property are per se unreasonable.⁹² Once a defendant shows that a search took place without a warrant, the government must prove that circumstances justified the action under one of the recognized exceptions to the rule.⁹³ The government need only go forward with evidence to establish the exception by a preponderance of the evidence; proof beyond a reasonable doubt is not necessary.⁹⁴

¶51 Exceptions to the prohibition of warrantless searches present variations to the general rule.⁹⁵ These exceptions and their procedural implications are treated in the

⁹¹United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (defendant must show recklessness regarding a material error or intentional untruthfulness).

⁹²Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

⁹³Coolidge, 403 U.S. at 453; People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888-89; Commonwealth v. Autobenedetto, ___ Mass. ___, 315 N.E.2d 530, 534 (1974); State v. Contursi, 44 N.J. 422, 425, 209 A.2d 829, 832 (1965). Exceptions include search incident to arrest, consent search, seizure of objects in plain view, and search under exigent circumstances.

⁹⁴United States v. Matlock, 415 U.S. 164, 177 (1974); People v. Harrington, 70 Misc.2d 303, 305, 332 N.Y.S.2d 789, 792-93 (Allegany County Ct. 1972); State v. Brown, 132 N.J. Super. 180, 185, 333 A.2d 264, 267 (App. Div. 1975).

⁹⁵United States v. Jeffers, 342 U.S. 48 (1951).

Only where incident to a valid arrest. . . or in exceptional circumstances. . . may an exemption lie and then the burden is on those seeking the exemption to show the need for it. . . . Id. at 51 (citations omitted).

following sections.

a. Search Incident to Arrest

¶52 When the government asserts that a warrantless search was incident to an arrest, it must show a lawful arrest. The arrest must conform both to the requirements of state law;⁹⁶ and to the mandates of the federal Constitution.⁹⁷ Beyond this, the prosecution must prove that the search was appropriately limited in scope. Arrests fabricated to permit warrantless searches under this doctrine are not tolerated.⁹⁸

⁹⁶United States v. Montos, 421 F.2d 215, 224 (5th Cir. 1970).

⁹⁷Ford v. United States, 352 F.2d 927, 932-33 (D.C. Cir. 1965); People v. Martin, 32 N.Y.2d 123, 125, 296 N.E.2d 245, 246, 343 N.Y.S.2d 343, 345-46 (1973); State v. Brown, 132 N.J. Super. 180, 185, 333 A.2d 264, 266-67 (App. Div. 1975); Commonwealth v. Autobenedetto, ___ Mass. ___, 315 N.E.2d 530, 533 (1974). The Constitution requires that probable cause exist to arrest without a warrant.

⁹⁸The Supreme Court set out the factors that determine the scope of a search in Chimel v. California, 395 U.S. 752 (1969):

. . . it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.
Id. at 763.

The decision also permitted a search of the area into which the defendant might reach for weapons or evidence. For examples, see Coolidge v. New Hampshire, 403 U.S. 443, 478 (the prosecution had to prove that the evidence seized was within the grasp of the arrestee); People v. Lewis, 26 N.Y.2d 547, 260 N.E.2d 538, 311 N.Y.S.2d 905 (1970) (when a suspect is arrested in his apartment, a search of his car is not proper).

b. Plain View

¶53 If evidence is in plain view when police are making a lawful search or arrest it may be seized. The government must show that the challenged object was exposed to the view of the officer. It must also prove that the officer had a right to be where he was when he saw the object.⁹⁹

¶54 Generally, the legality of a policeman's presence may be proved by showing:

1. he was present to make a lawful arrest,
2. he was present with a warrant, or
3. he was on the premises with consent of the owner or occupant.

¶55 Federal courts also require the prosecution to prove that the discovery was inadvertant.¹⁰⁰ A recent Fourth Circuit decision, however, indicates that lower courts do not always require a showing of inadvertance.¹⁰¹

c. Consent

¶56 In contrast to the minimal showing required in the previous two sections, a heavy burden to show voluntariness is on the government in consent searches.¹⁰² Clear and

⁹⁹Harris v. United States, 390 U.S. 234, 236 (1968); People v. Gatti, 29 App. Div.2d 617, 285 N.Y.S.2d 437 (4th Dept. 1967); Commonwealth v. Fields, Mass., 319 N.E.2d 461, 463 (1974); State in Interest of A.C., 115 N.J. 77, 81, 278 A.2d 225, 227 (App. Div. 1971). The intrusion that brings the officer within plain view of the object may be under warrant or under one of the exceptions to the warrant rule. Coolidge v. New Hampshire, 403 U.S. 443, 463.

¹⁰⁰Coolidge, 403 U.S. at 469.

¹⁰¹United States v. Bradshaw, 490 F.2d 1097, 1101 at note 3 (4th Cir. 1974).

¹⁰²Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

convincing proof of consent must be offered.¹⁰³ Lower federal courts distinguish between consent given in custody and consent given out of custody.¹⁰⁴ Recently, the Supreme Court also implied that the burden on the government varies depending on whether the defendant was in or out of custody when he gave consent.¹⁰⁵ In general, a slightly higher standard of proof is required in cases where consent was given while the defendant was in police custody. Some courts use the language of presumption to describe this standard,¹⁰⁶ but it would be more accurate to think of it as a "favored inference."

¶57 While New York and New Jersey clearly follow federal practice, the situation in Massachusetts is not clear. The

¹⁰³United States v. Jones, 475 F.2d 723, 728 (5th Cir. 1973); State v. Price, 108 N.J. Super. 272, 282, 260 A.2d 877, 883 (Law Div. 1970).

¹⁰⁴United States v. Montos, 421 F.2d 215, 223 (5th Cir.), cert. denied, 397 U.S. 1022 (1970) (postal inspector asked employee two routine questions); United States v. Candella, 469 F.2d 173, 175 (2d Cir. 1972) (defendant under arrest, pointed locations of handguns after he was informed of his rights); United States ex rel. Dunham v. Quinlan, 327 F.Supp. 115, 123 (S.D. N.Y. 1971) (defendant under arrest, gave keys of his apartment to sheriff and told him to search it after he was advised of his rights). Findings of consent were upheld in all cases.

¹⁰⁵Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1970).

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

¹⁰⁶United States v. Elrod, 318 F. Supp. 524, 526 (E.D. La. 1970), aff'd, 441 F.2d 353 (5th Cir. 1971).

Autobenedetto decision, in 1974, required the prosecution to show the legality of a warrantless search for the first time. The standards applicable to the showing are not yet established. Previously, a policeman's testimony was adequate proof of voluntariness.¹⁰⁷ Now, this would probably not be sufficient.

d. Stop and Frisk

¶58 All four jurisdictions require the prosecution to justify a "frisk" preceded by a temporary detention.¹⁰⁸ Massachusetts has a statutory provision governing "stop and frisk." The courts construe it to conform with requirements set out in federal cases.¹⁰⁹

e. Exigent Circumstances

¶59 A final exception to the prohibition of warrantless searches is where officers reasonably should not be expected to obtain a search warrant. In these cases the prosecution must show that the officers reasonably believed the evidence or objects sought would be destroyed or removed if not

¹⁰⁷ Commonwealth v. Garrefffi, 355 Mass. 428, 431, 245 N.E.2d 442, 445 (1969).

¹⁰⁸ United States v. Cupps, 503 F.2d 277, 280-81 (6th Cir. 1974); People v. Mack, 26 N.Y.2d 311, 315, 258 N.E.2d 703, 707, 310 N.Y.S.2d 292, 296 (1970); State v. Dilley, 49 N.J. 460, 464, 231 A.2d 353, 357 (1967). See generally, Terry v. Ohio, 392 U.S. 1 (1968).

¹⁰⁹ Mass. Gen. Laws Ann. ch. 41, §98 (1973). Commonwealth v. Anderson, ___ Mass. ___, 318 N.E.2d 834 (1974).

seized immediately.¹¹⁰

¶60 Airport body searches are the most recent exception to the search warrant rule. In general, the courts require the government to show that from all the facts available to the officer, he was justified in taking immediate action.¹¹¹

3. Electronic Surveillance

¶61 After the defendant makes a minimal showing required for a hearing, the prosecution bears the burden of persuasion on most of the issues raised. The standard of proof required is preponderance of the evidence, but the burden itself varies with the issue.¹¹² If violation of the governing statute rises to a "constitutional" level the prosecution must show compliance with the statute. On the other hand, if the violation is "ministerial," the government may show substantial compliance or good faith on the part of the officers to carry its burden and avoid suppression.

¶62 The defendant must prove that the government failed

¹¹⁰ Schmerber v. California, 384 U.S. 757, 770-71 (1966) (blood samples taken before alcohol dissipated); Carroll v. United States, 267 U.S. 132, 159 (1925) (search of an automobile immediately after the chase); People v. McIlwain, 28 App. Div.2d 711, 281 N.Y.S.2d 218 (2d Dept. 1967) (entry by officer seeking narcotics after hearing a toilet flush).

¹¹¹ See United States v. Moreno, 475 F.2d 44, 48-50 (5th Cir. 1973); United States v. Bell, 464 F.2d 667, 672 (2d Cir. 1972); United States v. Slocum, 464 F.2d 1180, 1183 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769, 770-71 (4th Cir. 1972); People v. Boyles, 73 Misc.2d 576, 578, 341 N.Y.S.2d 967, 969 (Sup. Ct., Queens County 1973); State v. Adams, 125 N.J. Super. 587, 312 A.2d 642 (App. Div. 1973).

¹¹² See note 11 for a list of issues.

to minimize the interceptions.¹¹³ This is rather difficult because the courts apply a general good faith test to establish proper minimization.¹¹⁴

¶63 Failure to notify¹ the defendant after a tap may be grounds for suppression.¹¹⁵ Where this is an accepted basis for suppression, the defendant is usually required to show failure to notify plus resulting prejudice.¹¹⁶

¹¹³United States v. Cox, 462 F.2d 1293, 1300-01 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

¹¹⁴Interception of all calls is not failure to minimize per se. United States v. James, 494 F.2d 1007, 1018 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975); State v. Dye, 60 N.J. 518, 534, 291 A.2d 825, 833 (1971), cert. denied, 409 U.S. 1090 (1972). Even if the defense can show improper minimization, a showing of good faith by the prosecution will prevent suppression. United States v. King, 353 F. Supp. 523, 541-44 (S.D. Ca. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); United States v. Curreri, 363 F. Supp. 430, 437 (D. Md. 1973); People v. Solomon, 75 Misc.2d 847, 849-50, 348 N.Y.S.2d 673, 676-77 (Sup. Ct., Kings County 1973); State v. Molinaro, 122 N.J. Super. 181, 182, 299 A.2d 75 (App. Div.), cert. denied, 62 N.J. 574, 303 A.2d 327 (1973); State v. LaPorte, 62 N.J. 312, 316, 301 A.2d 146, 148 (1973) (search of car subjected to less stringent standards than in federal cases); Commonwealth v. Duran, ___ Mass. ___, 293 N.E.2d 285, 287 (1972) (suitcases unidentifiable except upon arrival, were seized at the airport). For further discussion see Coolidge v. New Hampshire, 403 U.S. 443, 474-84; United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974).

¹¹⁵The circuits split on this issue. The Fourth and Sixth Circuits held failure to notify is grounds for suppression, while the Second Circuit did not find it sufficient to suppress. See, e.g., United States v. Donovan, 513 F.2d 337, 343 (6th Cir. 1975) (grounds for suppression); United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.) (not grounds for automatic suppression), cert. denied, 417 U.S. 944 (1974).

¹¹⁶United States v. Iannelli, 477 F.2d 999, 1003 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975); People v. Tartt, 71 Misc.2d 955, 959, 336 N.Y.S.2d 919, 923 (Sup. Ct., Erie County 1972); People v. Hueston, 34 N.Y.2d 116, 356 N.Y.S.2d 272, 120, 312 N.E.2d 462, 356 N.Y.S.2d 272, 275-76 (1974); State v. Dye, 60 N.J. 518, 546, 291 A.2d 825, 839-40 (1972).

4. In-court Identification

¶64 To defeat a motion to suppress an in-court identification, based upon a prior illegal identification,¹¹⁷ the prosecution must show that the in-court testimony comes from a legal source.¹¹⁸ The burden of persuasion is met by a preponderance of the evidence.¹¹⁹

5. Confessions

¶65 Treatment of confessions is somewhat confused presently. Nevertheless, all four jurisdictions agree that when the government introduces an inculpatory statement or confession by the defendant, it must prove that it was made voluntarily.¹²⁰

¶66 The Supreme Court approved the practice of New Jersey and Massachusetts when it found proof by a preponderance of

¹¹⁷ See, United States v. Wade, 388 U.S. 218, 223-27 (1967) as modified by Kirby v. Illinois, 406 U.S. 682, 687-91 (1972); and United States v. Ash, 413 U.S. 300, 313-17 (1973).

¹¹⁸ Wade, 388 U.S. at 242; People v. Bilinski, 40 App. Div.2d 617, 335 N.Y.S.2d 785 (3d Dept. 1972); Commonwealth v. Cefalo, 357 Mass. 255, 257-58, 257 N.E.2d 921, 923 (1970).

¹¹⁹ Factors to consider in determining independence are:

1. prior opportunities to observe the defendant;
2. discrepancies between a pre-line-up description and the actual description of the defendant;
3. previous mistaken identifications;
4. pre-line-up identification of the defendant by photography;
5. failure to identify the defendant on a prior occasion; and
6. time lapse between the crime and the line-up.

Commonwealth v. Cooper, 356 Mass. 74, 84, 248 N.E.2d 253, 260 (1969) quoting United States v. Wade, 388 U.S. at 241.

¹²⁰ Miranda v. Arizona, 384 U.S. 436, 475 (1966); People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967).

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the evidence on this issue passes constitutional muster.¹²¹
New York goes beyond this standard to require proof beyond a
reasonable doubt.¹²²

¶67 All four jurisdictions submit the question of voluntariness to both the judge and the jury. First, the judge conducts a hearing on admissibility from which the jury is excluded. If he finds the confession "voluntary" for constitutional admission purposes, the trial continues with the introduction of the evidence. Finally, the judge instructs the jury to weigh the confession during its deliberations. His previous determination does not preclude a finding of involuntariness on its part for credibility purposes.¹²³

¹²¹Lego v. Twomey, 404 U.S. 477, 489 (1972); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967); State v. Yough, 49 N.J. 587, 600, 231 A.2d 598, 603-04 (1967). Note, the New Jersey Supreme Court recommended that state courts switch to a "beyond a reasonable doubt" standard in light of the Miranda line of decisions. After Lego v. Twomey, the same court cited Yough for the proposition that "beyond a reasonable doubt" standard should be applied. The court also indicated that Lego might have some effect here. It seems, therefore, likely that New Jersey will return to the preponderance of the evidence rule. State v. Kelly, 61 N.J. 283, 294, 294 A.2d 41, 47 (1972).

¹²²People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); People v. Thasa, 32 N.Y.2d 712, 714, 296 N.E.2d 804, 344 N.Y.S.2d 2 (1973).

¹²³18 U.S.C.A. §3501(a) (1969); People v. Huntley, 15 N.Y. 2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); State v. Tassiello, 39 N.J. 282, 291-93; 188 A.2d 406, 411-12 (1963); Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943). Note, in New York a defendant must raise his objections to a confession at trial in order for the jury to be charged on voluntariness. People v. Cefaro, 23 N.Y.2d 283, 288-89, 244 N.E.2d 42, 46, 296 N.Y.S.2d 345, 350-51 (1968).

¶68 Arriving at a suitable definition for "voluntary" has caused the most confusion in this area of law. "Voluntary" can mean "trustworthiness"; it can also mean "given with full understanding of the consequences." The crux of the issue has come initially to mean: did the defendant know about his rights to remain silent and to have counsel? Case law developed the knowledge requirement beyond reading Miranda warnings upon arrest. Now the government must prove both that the defendant had the capacity to understand his rights, and that he did, in fact, understand them.¹²⁴ Any showing of misunderstanding on the part of the defendant might refute "voluntariness" in the sense of knowledge of the consequences. Once the Miranda rules are met, traditional voluntariness standards obtain.¹²⁵

6. Harmless Error¹²⁶

¶69 Not all violations of the Constitution mandate

¹²⁴United States v. Cox, 487 F.2d 634, 636 (5th Cir. 1973) (defendant was informed of rights, signed waiver, and officers testified to his apparent coherence; confession admitted); United States v. Fraizer, 476 F.2d 891, 897 (D.C. Cir. 1973) (expert testimony established defendant had capacity to understand Miranda warnings given to him). People v. Lux, 34 App. Div.2d 662, 310 N.Y.S.2d 410 (2d Dept. 1970) (despite low IQ, capacity shown by level of education, employment, and service in the army).

¹²⁵Davis v. North Carolina, 384 U.S. 737, 740-41 (1966); Clewis v. Texas, 386 U.S. 707, 708-09 (1967). In both of these cases, the trial took place before the Miranda decision. Consequently, the Court looked to Miranda plus traditional tests of voluntariness for guidelines to judge the admissibility of the defendants' confessions.

¹²⁶Harmless error is to be distinguished from clerical or ministerial errors where the wrong address is typed on a search warrant or the name of the object of a wiretap is misspelled on the application. See, e.g., State v. Bisaccia, 58 N.J. 586, 592, 279 A.2d 675, 678 (1971).

suppression or retrial where illegally obtained evidence is admitted. On appeal, after the defendant shows that evidence was obtained unconstitutionally, the prosecution may prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."¹²⁷

At the same time, courts recognize, ". . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . ."¹²⁸

¶70 In practice, the Court seems to view all of the evidence to decide what impact the challenged elements had on the jury's decision. If the evidence was not decisive, the verdict usually stands¹²⁹ despite language in Chapman indicating that if it had any influence at all, there was reversible error.¹³⁰

¶71 The federal wiretap statute requires suppression on specified grounds.¹³¹ In addition, other violations of

¹²⁷Chapman v. California, 386 U.S. 18, 24 (1967).

¹²⁸Id. at 23. The Court seems to be referring to coerced confessions. It cites Payne v. Arkansas, 356 U.S. 560, 568 (1958) where it previously held, "the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

¹²⁹Harrington v. California, 395 U.S. 250, 254 (1969); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (overwhelming evidence of the prisoner's guilt, aside from the the challenged materials, was presented); People v. Crimmens, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 791, 367 N.Y. S.2d 213, 218 (1975); State v. Bankston, 63 N.J. 263, 273, 307 A.2d 65, 70 (1973); Commonwealth v. McDonald, ___ Mass. ___, 333 N.E.2d 189, 192 (1975).

¹³⁰Chapman, 386 U.S. at 23-24.

¹³¹18 U.S.C.A §2518(10) (c) (1970).

the statute have been held bases for suppression.¹³² As with constitutional errors, not all statutory violations result in automatic suppression. For instance, the Third Circuit affirmed a lower court's refusal to suppress wiretap evidence where the purpose of the violated provision had been served and the defendant failed to demonstrate prejudice or intentional neglect on the part of the government.¹³³

V. Fruit of the Poisonous Tree

¶72 Evidence derived from other illegally obtained evidence must be suppressed. This "fruit of the poison tree" doctrine was set out by the Supreme Court in Silverthorne Lumber Co. v. United States.¹³⁴ The Court refused to admit evidence obtained as a direct result of an illegal search saying, ". . . the knowledge gained by the government's own wrong cannot be used in the way proposed."¹³⁵

¹³²United States v. Giordano, 416 U.S. 505, 528 (1974):

We are confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored.

¹³³United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973), aff'd, 485 F.2d 682 (3d Cir. 1973), aff'd, 487 F.2d 1395 (3d Cir. 1973) (government failed to serve defendants with copies of applications and court orders for wiretap, ten days before the trial). See also United States v. Burke, 517 F.2d 377 (2d Cir. 1975) (affidavit failed to recite reliability of informant, but reliability was apparent from facts).

¹³⁴251 U.S. 385 (1920).

¹³⁵Silverthorne Lumber Co. v. United States, 251 U.S. 385, 393 (1920).

¶73 Since Silverthorne, evidence derived from illegal wiretaps,¹³⁶ illegal entry and arrest,¹³⁷ and illegal line-ups¹³⁸ has been excluded from trial.

¶74 To determine whether evidence is the fruit of the poisonous tree, courts look to "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality. . .".¹³⁹

A. Standing

¶75 The Supreme Court determined the standing issue by analogy to simple search and seizure cases.¹⁴⁰ To suppress derivative evidence, a defendant must be the victim of the primary illegality.

B. Attenuation

¶76 From the outset, courts recognized that although

¹³⁶Nardone v. United States, 308 U.S. 338 (1939).

¹³⁷Wong Sun v. United States, 371 U.S. 471 (1963).

¹³⁸United States v. Wade, 388 U.S. 218 (1967).

¹³⁹Wong Sun, 371 U.S. at 388. See also, People v. Robinson, 13 N.Y.2d 296, 301, 196 N.E.2d 261, 262, 246 N.Y.S.2d 623 (1963).

¹⁴⁰Goldstein v. United States, 316 U.S. 114 (1942):

. . . the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of unconstitutional search and seizure to object to the introduction in evidence of that which was seized. A fortiori the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. Id. at 121.

derived from illegal acts, some evidence would be admissible. If the knowledge was gained from an independent source,¹⁴¹ or if the connection between the acts and the evidence becomes "so attenuated as to dissipate the taint,"¹⁴² it may be introduced at trial.¹⁴³

¹⁴¹Silverthorne, 251 U.S. at 392. Some courts suggest that if derivative evidence would have been discovered through lawful investigation, it should be admissible regardless of illegal police activity. Roberts v. Ternullo, F.2d ___, 18 Crim. L. Rptr. 2415 (2d Cir., Jan. 7, 1976), People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973). The Fifth Circuit recently rejected this view. United States v. Castellana, 488 F.2d 325 (5th Cir. 1974).

¹⁴²Nardone, 308 U.S. at 341. Dissipation of the taint is often proved in confession cases by demonstrating that the confession was an act of free will. Wong Sun, 371 U.S. at 491. The court must judge free will according to the facts of each case. For instance, in Brown v. Illinois, 422 U.S. 590, 605 (1975) the Court found a confession made two hours after an illegal arrest, insufficiently attenuated for admission. See also State v. Hodgson, 44 N.J. 151, 156-57, 207 A.2d 542, 545, cert. denied, 384 U.S. 1021 (1965).

¹⁴³Nardone, 308 U.S. at 341:

. . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

On remand to the Second Circuit, the admission of evidence in Nardone was upheld. United States v. Nardone, 127 F.2d 521 (2d Cir.), cert. denied, 316 U.S. 698 (1942). Judge Learned Hand found that evidence, obtained after police uncovered illegal evidence, was properly admitted. The illegal evidence contributed to the prosecution only insofar as it convinced police to continue the investigation. Commenting on the previous Supreme Court rulings, Hand wrote:

Such expressions indicate no dispositions towards the refinements inevitable in deciding how far the illicit information may have encouraged and

C. Allocation of Burdens

¶77 The defendant has the initial burden to show that the evidence introduced against him derives from illegal police activity. Once this is done, the government must convince the trial court that the "fruit" is either purged of the primary illegality or removed enough to be attenuated from it.

D. Collateral Uses

¶78 Unlawfully obtained evidence may, however, be used at trial on issues other than guilt. Illegally seized evidence or voluntary, but otherwise illegal, confessions may be introduced to impeach the defendant's testimony.¹⁴⁴

Further, illegally seized evidence may be admitted during trial to refresh a witness's memory.¹⁴⁵

¹⁴³ (continued)

sustained the pursuit. We hold that, having proved to the satisfaction of the trial judge that the "taps" and telegrams did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses, the prosecution had purged itself of its unlawful conduct. Id. at 523.

Also in Brown, 420 U.S. at 504, the Supreme Court held that the burden of showing the voluntariness of a confession made in custody after an illegal arrest is on the prosecution. Factors to be considered are:

1. temporal proximity of arrest and confession;
2. presence of intervening circumstances; and,
3. purpose and flagrancy of official misconduct.

¹⁴⁴ Monroe v. United States, 234 F.2d 49, 56-57 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

¹⁴⁵ Walder v. United States, 347 U.S. 62 (1954) (search and seizure); Harris v. New York, 401 U.S. 222 (1971) (confession); Oregon v. Hass, 420 U.S. 714 (1975). Recently, New Jersey adopted the impeachment exception for the use of unconstitutionally obtained confessions in State v. Miller, N.J., 17 Crim. L. Rptr. 2121 (May 14, 1975). The impeachment exception is also applicable to wiretaps. United States v. Caron, 474 F.2d 506 (5th Cir. 1973).

¶79 In Gilbert v. California,¹⁴⁶ the Supreme Court excluded from a penalty hearing testimony derived from an illegal line-up identification.¹⁴⁷ Some lower courts admit such evidence at sentencing hearings for various reasons.¹⁴⁸

¶80 Involuntary confessions are treated differently. Some courts reject them because admission conflicts with fundamental fairness.¹⁴⁹

¶81 Finally, illegally obtained evidence is admissible at parole revocation proceedings, so long as it is reliable.¹⁵⁰

VI. Appeal

¶82 In federal courts, a defendant may raise the suppression decision during his appeal after conviction. In contrast, the government may appeal the ruling directly

¹⁴⁶ 388 U.S. 263 (1967).

¹⁴⁷ Gilbert v. California, 388 U.S., 263, 272-74 (1967).

¹⁴⁸ United States v. Schipani, 435 F.2d 26, 28 (1970), cert. denied, 401 U.S. 983 (1971) (illegal wiretap evidence was admitted in sentencing hearing where it was reliable and it was not gathered to improperly influence sentencing); Armprister v. United States, 256 F.2d 294, 297 (4th Cir. 1958) (illegally obtained confession not sufficient grounds to vacate sentence because no prejudice to defendant was shown). Contra, United States v. Weston, 448 F.2d 626, 631-32 (9th Cir. 1972) and Verdugo v. United States, 402 F.2d 599, 610-13 (9th Cir. 1968). See also, People v. Jackson, 20 N.Y.2d 440, 231 N.E.2d 722, 285 N.Y.S.2d 8, cert. denied, 391 U.S. 928 (1967) (involuntary confessions inadmissible at sentencing hearings).

¹⁴⁹ United States ex rel. Brown v. Rundle, 417 F.2d 282, 284-85 (3d Cir. 1969).

¹⁵⁰ United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (1970).

under 18 U.S.C. §3731 (Supp. 1976). The appeal must be made before the defendant is put in jeopardy, and after the United States attorney certifies that the action is not dilatory and that the evidence is substantial proof of a material fact.

¶83 The federal electronic surveillance statute specifies that in addition to other rights of appeal, the government may appeal the granting of a motion to suppress. Again, the U.S. attorney must certify that the appeal is not made for delay. Notice of appeal must be filed within thirty days of the order.¹⁵¹

¶84 New York's Criminal Procedure Law permits defendants to appeal the denial of a motion to suppress upon an appeal of the conviction.¹⁵² The People may appeal as of right after filing a notice of appeal and a statement asserting that the deprivation of evidence makes it almost impossible to pursue the prosecution to conviction.¹⁵³

¶85 In New Jersey, both the State and the defendant may appeal a suppression decision with leave of the Appellate Division.¹⁵⁴ The state wiretap statute specifically provides for an immediate appeal by the State provided the

¹⁵¹18 U.S.C.A. §2518(10)(b)(1970).

¹⁵²N.Y. Crim. Pro. Law §710.70(2) (McKinney 1971).

¹⁵³N.Y. Crim. Pro. Law §§450.20(8), 450.50 (McKinney 1971).

¹⁵⁴See N.J. Court Rules 2:3-1 (Appeals by the state in Criminal Actions), 2:5-6(a) (Appeals from Interlocutory Orders, Decisions, and Actions), and 2:2-3 (Appeals to the Appellate Division from Final Judgments, Decision, Actions, and from Rules).

officer who authorizes the tap certifies that the appeal is not taken for purposes of delay.¹⁵⁵

¶86 Massachusetts permits the defendant to appeal after the trial. In addition, interlocutory appeal may be made upon application of either party; provided a justice or the chief justice of the Supreme Judicial Court determines an immediate appeal would facilitate the administration of justice.¹⁵⁶

¹⁵⁵N.J. Stat. Ann. §2A:156A-21 (1971).

¹⁵⁶Mass. Gen. Laws Ann. ch. 278, §28E(Supp. 1976).

Defending Illegality: Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶7, Note 1: The continuing validity of the substantive holding of Boyd is questionable after Fisher v. United States, 425 U.S. 391 (1976) and United States v. Miller, 425 U.S. 435 (1976).

¶11, Note 9: Correction: 308 U.S. 338 (1939).

¶11, Note 10: Correction: N.J. Stat. Ann. §2A-156A (1971), as amended, (Supp. 1977) (Also at ¶23, Note 35, ¶12, Note 11, ¶87, Note 155).

¶12, Note 11, Subpart #5: Correction: Delete: Not required by Massachusetts statute; Add: Mass. Gen. Laws Ann. ch. 272, §99E(3) (Supp. 1976);

¶12, Note 14: Add at end: But courts are careful to assure proper authorization, see United States v. Iannelli, 528 F.2d 1290 (3rd Cir. 1976).

¶13, Note 15: Correction: United States v. Leonard, 524 F.2d 1076, 1088-89 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

¶14, Note 17: Correction: United States v. Collins, 491 F.2d 1050, 1052 (5th Cir.), cert. denied, 419 U.S. 857 (1974).

¶15, Note 20: Correction: Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975), cert. denied, 424 U.S. 958 (1976).

¶21: The motion may be made in the Superior Court of trial . . . : Delete: of trial.

¶23, Note 36, subpart #3: Add at end: , or in accordance
with the requirements of N.J. Stat. Ann. §2A-
156A-12 (1971), as amended, (Supp. 1977).

¶27 : Correction: A defendant shall get a hearing in
confession cases.

¶27, Note 42: Correction: State v. Walker, 117 N.J. Super.
397, 398, 285 A.2d 37, 38 (App. Div. 1971),
cert. denied, 63 N.J. 258 (1973).

¶27, Note 43: Correction: N.J. Rules of Evidence 8 (3):

Where by virtue of any rule of law a judge is
required in a criminal action to make a preliminary
determination as to the admissibility of a statement
by the defendant, the judge shall hear and determine
the question of its admissibility out of the presence
of the jury.

¶28: Add at end: In Federal courts the initial showing
required for a suppression hearing
on wiretap evidence is the same as that
for other types of evidence. United
States v. Losing, 539 F.2d 1174 (8th Cir.
1976).

¶29, Note 45: Fed. R. Crim. P.43, as amended, 416 U.S. 1016
(1974) provides:

. . .The defendant shall be present at the
arraignment, at the time of the plea, at every
stage of the trial including the impanelling of
the jury and the return of the verdict, and at
the imposition of the sentence, except as other-
wise provided by these rules.

¶30, Note 47: Following State v. Smith: State v. Hampton, 61 N.J. 250, 294 A.2d 93 (1972) (The judge alone determines compliance with and/or waiver of Miranda rights and makes the initial determination of voluntariness, but if the judge decides in favor of the State, the ultimate determination of voluntariness is left to the jury).

Correction: United States v. Whitaker, 372 F. Supp. 154, 161 (M.D. Pa.), aff'd, 503 F.2d 1412 (3rd Cir. 1974), cert. denied; 419 U.S. 1113 (1975); Commonwealth v. Johnson, 352 Mass. 311, 396, 225 N.E.2d 360, 364, cert. granted, 389 U.S. 816, cert. dismissed, 390 U.S. 511 (1967).

¶30, Note 48: Following Commonwealth v. Lehan: But see N.J. Rules of Evidence 8(3) (In a hearing on a motion to suppress a statement by the defendant the rules of evidence apply).

¶31, Note 49: Correction: Fisher v. United States, 425 U.S. 391 (1976) . . . United States v. Miller, 425 U.S. 435 (1976) . . . People v. Estrada, 28 App. Div.2d 681, 280 N.Y.S.2d 825 (2d Dept. 1967), aff'd, 23 N.Y.2d 719, 244 N.E.2d 364, 296 N.Y.S.2d 57 (1969), cert. denied, 394 U.S. 953 (1969).

¶33, Note 54: 362 U.S. 257 (1960).

¶37, Note 68: Correction: People v. Pantoja, 76 Misc.2d

869, 351 N.Y.S.2d 873 (Sup. Ct. Bronx County
1974), aff'd, 47 App. Div.2d 814 (1975).

¶37, Note 69: Correction: United States v. Silverman,
449 F.2d 1341, 1345 (2d Cir. 1971), cert.
denied, 405 U.S. 918 (1971).

¶42, Note 79: Correction: People v. Butler, 33 App. Div.
2d 675, 305 N.Y.S.2d 367 (1st Dept. 1969),
aff'd, 28 N.Y.2d 499, 267 N.E.2d 943, 318
N.Y.S.2d 943 (1971).

¶45, Note 84: Correction: People v. Malinsky, 15 N.Y.2d 86,
91, 204 N.E.2d 188, 192, 255 N.Y.S.2d 850,
856 (1965);

¶47, Note 86: Correction: Commonwealth v. Cromer, 365
Mass. 519, 521-22, 313 N.E.2d 557, 559 (1974).
(Also at: ¶47 Note 87)

¶47, Note 87: Correction: United States v. Ravich, 421
F.2d 1196, 1201 (2d Cir. 1970), cert. denied,
400 U.S. 834 (1970) . . . United States v.
Sturgeon, 501 F.2d 1270, 1275 (8th Cir. 1974),
cert. denied, 419 U.S. 1071 (1974).

¶49, Note 89: Correction: State v. Clemente, 108 N.J.
Super. 189, 198, 260 A.2d 514, 520 (App.
Div. 1969), cert. denied, 55 N.J. 450, 262
A.2d 704 (1970).

¶50, Note 94: Following State v. Brown: State v. Whittington,

142 N.J. Super. 45, 51-52, 359 A.2d 881, 885
(App. Div. 1976).

¶53, Note 99: Correction: State in Interest of A.C., 115 N.J.
Super. 77,81, 278 A.2d 225, 227 (App. Div.
1971).

¶56, Note 105: Correction: Schneckloth v. Bustamonte, 412
U.S. 218, 248 (1973).

¶56, Note 105 A: United States v. Abbott, 20 Crim. L. Rptr.
2343 (10th Cir. Jan. 6, 1977) (The court
applied a waiver test to consent searches
while ignoring Schneckloth).

¶62, Note 114: Correction: Commonwealth v. Duran, 363
Mass. 229, 231, 293 N.E.2d 285, 287 (1972).

¶63, Note 116: Correction: People v. Hueston, 34 N.Y.2d
116, 120, 312 N.E.2d 462, 465, 356 N.Y.S.2d
272, 275-76 (1974), cert. denied, 421 U.S.
947 (1975); State v. Dye, 60 N.J. 518, 546,
291 A.2d 825, 839-40 (1972), cert. denied,
409 U.S. 1090 (1972).

¶68, Note 124: Correction: People v. Lux, 34 App. Div.2d
662, 310 N.Y.S.2d 416 (2d Dept. 1970), aff'd,
29 N.Y.2d 848, 277 N.E.2d 923, 328 N.Y.S.2d 2
(1972).

¶70, Note 129: Correction: People v. Crimmins . . .
Following Commonwealth v. McDonald: See
also United States v. Hunt, 20 Crim. L. Rptr.
2381 (9th Cir. Jan. 6, 1977).

¶76, Note 141: Correction: People v. Fitzpatrick, 32
N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d
793 (1973), cert. denied, 414 U.S. 1033 (1974).

¶78, Note 145: Correction: State v. Miller, 67 N.J. 229, 337
A.2d 36 (1975).

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CROSS-EXAMINATION RELATING TO PAST FINANCIAL TRANSACTIONS

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SUMMARY

¶1 These materials examine the extent to which a prosecutor can inquire about financial transactions on the cross-examination of a defendant being indicted for public corruption.

¶2 By using a technique called the net worth-expenditure principle, the prosecutor can determine a defendant's financial history prior to trial. This permits the prosecutor to test the authenticity of what the defendant reveals on the cross-examination. A discrepancy tends to show a motive for criminal activity.

¶3 In general, the courts have not clearly decided to what extent the prosecutor can cross-examine a defendant about his financial history and thus utilize the net worth-expenditure principle in this fashion. In crimes of public corruption, however, the probative value of permitting such questioning seems to outweigh any prejudicial effect.

I. SCOPE OF ANALYSIS

¶4 The purpose of these materials is to examine the scope of cross-examination in cases involving public corruption. Specifically, where illegal profits and a desire for wealth are the primary motives in a crime, these materials indicate how far beyond the direct examination the prosecutor can go in questioning the defendant about his financial transactions.

¶5 Since all public officials enter the courtroom covered by a cloak of innocence, the prosecutor must employ effective and workable methods to secure appropriate convictions.

Analysis of the financial records of a defendant to establish a motive for accepting illegal payments provides such a mechanism. The only limitations on this technique are the rules governing the extent to which the courts will permit the prosecutor to elicit such information in cross-examination.

¶6 These materials do not examine other methods of admitting financial data into evidence, such as on direct examination of a government witness or as corroboration of immoral acts committed by the defendant. Focus here is on cash inflows and outflows as motives for white collar crime.

II. STRATEGY INVOLVED

¶7 The Seventh Basic Investigative Technique¹ outlines the methods for conducting an investigation into the financial transactions of a defendant. The procedure involves the use of an accounting process called the net worth-expenditure principle, defined as "a mathematical computation designed to determine the total accumulation of wealth and annual expenditures made by an individual."² When thoroughly conducted, this technique traces a person's entire financial history from banking and safe deposit transactions to personal expenditures. This principle can be applied to:

- (1) gather financial data;
- (2) enhance the questioning of a defendant;
- (3) corroborate evidence of a crime;
- (4) determine the scope of criminal activity;
- (5) determine the location of a defendant's assets; and
- (6) identify a defendant's assets.³

The data obtained from the investigation may reveal whether a defendant spends money beyond the capability of his legitimate source of income or whether he incurs substantial debts. The prosecutor can then confront the defendant with any

¹R. Nossen, The Seventh Basic Investigative Technique (a handbook resulting from the October, 1975 National Conference on Organized Crime and prepared and financed by a grant from the Law Enforcement Assistance Administration) [hereinafter cited as Nossen].

²Nossen, supra note 1, at 5.

³Nossen, supra note 1, at 5-6.

ambiguity these figures reveal. The defendant must then reconcile the difficulty under close cross-examination. For instance, if the data divulges a spending pattern \$50,000 per year greater than the legitimate source of income, the defendant can respond in at least four ways:

- (1) he can allege that he accumulated the money in previous years;
- (2) he can allege that the money originated from gifts;
- (3) he can allege that he borrowed the money; or
- (4) he can allege that he inherited the money.⁴

The veracity of any of these explanations can then be confirmed or refuted.

III. GENERAL SCOPE OF CROSS-EXAMINATION

¶8 While this procedure is theoretically effective in establishing evidence or motives of a crime, the extent to which a prosecutor can elicit such data on cross-examination remains uncertain. If the court does not permit the prosecutor to question a defendant about his financial history, then the net worth-expenditure principle loses much of its value.

¶9 Generally, the scope of the cross-examination lies within the discretion of the trial court.⁵ In Marteney v.

⁴Nossen, supra note 1, at 31.

⁵Alford v. United States, 282 U.S. 687, 694 (1931).

United States⁶ the Tenth Circuit described this scope:

While cross-examination should be limited to matters brought out on direct examination and to subjects which are relevant to the issues, the purpose of cross-examination is to elicit the truth. For this purpose the examination of collateral matters rests largely within the discretion of the trial court, and its ruling will not be disputed unless it appears that there has been a clear abuse of this discretion and an injustice done.⁷

The Federal Rules of Evidence similarly define the scope cross-examination.⁸ The issue, therefore, is whether inquiries on cross-examination about financial transactions constitute relevant evidence, even though they were not discussed on direct examination.

III. LAW INVOLVED

¶10 Through disclosure of the financial transactions of a defendant the prosecutor attempts to display a motive for the violation of a crime. This may be accomplished by demonstrating that:

- (1) the defendant incurred substantial debts, or
- (2) the defendant maintained a lifestyle significantly beyond the capability of his legitimate source of income.

⁶ 218 F.2d 258 (10th Cir. 1954), cert. denied, 348 U.S. 953 (1955).

⁷ 210 F.2d at 265.

⁸ Fed. R. Evid. 611(b).

A. Impecuniosity

1. Pro and Con

¶11 The courts are divided over whether a prosecutor can divulge an individual's impecuniosity during cross-examination. Some courts seem to favor the admissibility of such evidence. For instance, in United States v. Tierney the Ninth Circuit held it was not error to admit evidence of the defendant's failing financial condition to show a motive for manufacturing counterfeit notes.⁹

¶12 Other courts have stated that the impecuniosity of a defendant should not be admitted as a motive for committing a crime. For instance, in Davis v. United States the District of Columbia Circuit stated that it is impermissible for a prosecutor to establish that a person who lacks sufficient funds to live within a given budget will consequently commit crime.¹⁰ Wigmore also cautions against the use of such information:

⁹ 424 F.2d 643, 647 (9th Cir.), cert. denied, 400 U.S. 850 (1970). See also United States v. Caci, 401 F.2d 664, 670 (2d Cir. 1968), cert. denied, 394 U.S. 917 (1969) (although not elicited on cross-examination, the Court held that a series of bounced checks were admissible to show that the defendant lacked sufficient funds and thus had a motive to participate in the alleged crime).

¹⁰ 409 F.2d 453, 457 (D.C. Cir. 1969). See also State v. Mathis, 47 N.J. 455, 221 A.2d 529 (1966) (questioning on cross that tended to show that the defendant had no apparent means of income and therefore was likely to commit a crime was error); State v. Copeland, 94 N.J. Super. 196, 227 A.2d 523 (1967) (impecuniosity should not be allowed to show a motive or willingness to commit a crime); and United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966) (evidence that the defendant was a narcotics addict was by itself too speculative to show a need for money and thus a motive to commit crime).

The lack of money by A might be relevant to show the probability of A's desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under such unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence....¹¹

2. Conclusions

¶13 Ultimately, the prosecutor must determine whether questioning a defendant about his financial transactions (when not brought up on direct) warrants the risk of reversal by the appellate court. In public corruption offenses the prosecutor should be able to convince the trial court of the relevancy of the individual's lack of money since these crimes involve a desire for enrichment. Of course, where a defendant submits evidence on direct examination showing that he had no need for money, the scope of the cross-examination can extend to an analysis of his financial status.¹²

¹¹2 J. Wigmore, Evidence, §392 (3d. ed. 1940).

¹²United States v. Graydon, 429 F.2d 120, 123 (4th Cir. 1970) (the court held that after the defendant submitted evidence showing that he did not need money, the extension of the scope of cross to show the defendant's poor financial state was not plain error). See also 2 J. Wigmore, Evidence, §392, at 341 (3d ed. 1940). This states:

But when a defendant...seeks to show that his possession of money deprived him of any motive for crime, the fact may of course be disproved by the prosecution....

B. High Life Style

1. Pro and con

¶14 The courts also disagree over whether evidence of a defendant's high life style, as revealed by his cash flows, can be elicited on cross-examination. In United States v. Polansky¹³ an Internal Revenue Service agent was convicted for accepting a \$1,000 payment in exchange for improperly conducting his official duties. The Second Circuit held, inter alia, that the Government's cross-examination of the defendant concerning his liabilities over a three year period was proper.¹⁴ The court stated:

This, of course, tended to show that Polansky had a motive for seeking and accepting gratuities. The questioning was, therefore, proper on cross-examination of the defendant.¹⁵

Likewise, the Seventh Circuit stated in United States v. Kintek:¹⁶

Expensive trips, gambling and other signs of high living may be pertinent in crimes involving a motive of enrichment. Proof of prior impecunity [sic] is not necessary. Admission of this type of evidence is addressed primarily to the sound discretion of the Trial Judge.

¹³ 418 F.2d 444 (2d Cir. 1969).

¹⁴ See also United States ex. rel. v. State of New Jersey, 423 F.2d 537, 541 (3d Cir. 1970) (the court states in dicta that some crimes, such as embezzlement or similar financial misconduct, justify the use of evidence of financial embarrassment to show the accused's knowledge and motive).

¹⁵ United States v. Polansky, 418 F.2d at 448.

¹⁶ 467 F.2d 1222, 1225 (1972), cert. denied, 409 U.S. 1079 (1972) (appeal from a conviction of armed robbery).

¶15 Not all courts share the Polansky view. In United States v. Bass¹⁷ the Government questioned the defendant about his high life style on cross-examination. The District of Columbia Circuit held that this was not error since the defense had previously attempted to show that the defendant's possession of money deprived him of any motive to commit a crime. The court did state in dictum, however, that "but for the fact that appellant 'opened the door' to the challenged testimony, we would be deeply troubled by its 'admissibility.'"¹⁸ The court listed two difficulties that would be incurred in allowing the Government to use the defendant's financial situation to establish a motive for a crime:

- (1) inferences that the defendant's legitimate sources of income could not support his life style would be speculation without evidence of the cost of specific items; and
- (2) if the Government established that the defendant needed illicit income to support his life style in July 1974 (the time in question), then it would also be established that he previously needed illicit income and thus the Government would be submitting evidence of other crimes.¹⁹

2. Conclusions

¶16 The information gained through the utilization of The Seventh Basic Investigative Technique allows the prosecutor to test the authenticity of what the defendant reveals on cross-examination. Any substantial discrepancy

¹⁷ 535 F.2d 110 (D.C. Cir. 1976) (appeal from a conviction of distributing a controlled substance).

¹⁸ 535 F.2d at 115, n. 7.

¹⁹ Id.

between what the prosecutor knows and what the defendant reveals shows a motive for criminal activity. Further, in cases involving public corruption, the prosecutor should be able to persuade the court to follow the Polansky view and allow cross-examination of financial transactions. Several reasons support this.

¶17 First, in crimes involving public officials and corruption, financial records are particularly relevant as evidence of a motive, because enrichment is the principle motive; violence is usually not involved.

¶18 Second, if the net worth-expenditure principle is used, the belief of the court in Bass that the evidence concerning the high life style might be speculative is unfounded. The net worth-expenditure technique, when properly conducted, results in accurate, itemized data.

¶19 Third, an instruction by the trial court judge advising the jury not to consider whether other crimes have been committed should reduce the second difficulty the Bass court expressed. Although such an instruction obviously does not eliminate all harmful effects, the probative value of ascertaining the truth seems to outweigh the prejudicial effect.

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III. GENERAL SCOPE OF CROSS-EXAMINATION

¶8 While this procedure is theoretically effective in establishing evidence or motives of a crime, the extent to which a prosecutor can elicit such data on cross-examination remains uncertain. If the court does not permit the prosecutor to question a defendant about his financial history, then the net worth-expenditure principle loses much of its value.

¶9 Generally, the scope of the cross-examination lies within the discretion of the trial court.⁵ In Marteney v.

⁴Nossen, supra note 1, at 31.

⁵Alford v. United States, 282 U.S. 687, 694 (1931).

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While cross-examination should be limited to matters brought out on direct examination and to subjects which are relevant to the issues, the purpose of cross-examination is to elicit the truth. For this purpose the examination of collateral matters rests largely within the discretion of the trial court, and its ruling will not be disputed unless it appears that there has been a clear abuse of this discretion and an injustice done.⁷

The Federal Rules of Evidence similarly define the scope of cross-examination.⁸ The issue, therefore, is whether inquiries on cross-examination about financial transactions constitute relevant evidence, even though they were not discussed on direct examination.

III. LAW INVOLVED

¶10 Through disclosure of the financial transactions of a defendant the prosecutor attempts to display a motive for the violation of a crime. This may be accomplished by demonstrating that:

- (1) the defendant incurred substantial debts, or
- (2) the defendant maintained a lifestyle significantly beyond the capability of his legitimate source of income.

⁶218 F.2d 258 (10th Cir. 1954), cert. denied, 348 U.S. 953 (1955).

⁷210 F.2d at 265.

⁸Fed. R. Evid. 611(b).

A. Impecuniosity

1. Pro and Con

¶11 The courts are divided over whether a prosecutor can divulge an individual's impecuniosity during cross-examination. Some courts seem to favor the admissibility of such evidence. For instance, in United States v. Tierney the Ninth Circuit held it was not error to admit evidence of the defendant's failing financial condition to show a motive for manufacturing counterfeit notes.⁹

¶12 Other courts have stated that the impecuniosity of a defendant should not be admitted as a motive for committing a crime. For instance, in Davis v. United States the District of Columbia Circuit stated that it is impermissible for a prosecutor to establish that a person who lacks sufficient funds to live within a given budget will consequently commit crime.¹⁰ Wigmore also cautions against the use of such information:

⁹ 424 F.2d 643, 647 (9th Cir.), cert. denied, 400 U.S. 850 (1970). See also United States v. Caci, 401 F.2d 664, 670 (2d Cir. 1968), cert. denied, 394 U.S. 917 (1969) (although not elicited on cross-examination, the Court held that a series of bounced checks were admissible to show that the defendant lacked sufficient funds and thus had a motive to participate in the alleged crime).

¹⁰ 409 F.2d 453, 457 (D.C. Cir. 1969). See also State v. Mathis, 47 N.J. 455, 221 A.2d 529 (1966) (questioning on cross that tended to show that the defendant had no apparent means of income and therefore was likely to commit a crime was error); State v. Copeland, 94 N.J. Super. 196, 227 A.2d 523 (1967) (impecuniosity should not be allowed to show a motive or willingness to commit a crime); and United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966) (evidence that the defendant was a narcotics addict was by itself too speculative to show a need for money and thus a motive to commit crime).

The lack of money by A might be relevant to show the probability of A's desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under such unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence....¹¹

2. Conclusions

¶13 Ultimately, the prosecutor must determine whether questioning a defendant about his financial transactions (when not brought up on direct) warrants the risk of reversal by the appellate court. In public corruption offenses the prosecutor should be able to convince the trial court of the relevancy of the individual's lack of money since these crimes involve a desire for enrichment. Of course, where a defendant submits evidence on direct examination showing that he had no need for money, the scope of the cross-examination can extend to an analysis of his financial status.¹²

¹¹2 J. Wigmore, Evidence, §392 (3d. ed. 1940).

¹²United States v. Graydon, 429 F.2d 120, 123 (4th Cir. 1970) (the court held that after the defendant submitted evidence showing that he did not need money, the extension of the scope of cross to show the defendant's poor financial state was not plain error). See also 2 J. Wigmore, Evidence, §392, at 341 (3d ed. 1940). This states:

But when a defendant...seeks to show that his possession of money deprived him of any motive for crime, the fact may of course be disproved by the prosecution....

B. High Life Style

1. Pro and con

¶14 The courts also disagree over whether evidence of a defendant's high life style, as revealed by his cash flows, can be elicited on cross-examination. In United States v. Polansky¹³ an Internal Revenue Service agent was convicted for accepting a \$1,000 payment in exchange for improperly conducting his official duties. The Second Circuit held, inter alia, that the Government's cross-examination of the defendant concerning his liabilities over a three year period was proper.¹⁴ The court stated:

This, of course, tended to show that Polansky had a motive for seeking and accepting gratuities. The questioning was, therefore, proper on cross-examination of the defendant.¹⁵

Likewise, the Seventh Circuit stated in United States v. Kintek:¹⁶

Expensive trips, gambling and other signs of high living may be pertinent in crimes involving a motive of enrichment. Proof of prior impecunity [sic] is not necessary. Admission of this type of evidence is addressed primarily to the sound discretion of the Trial Judge.

¹³ 418 F.2d 444 (2d Cir. 1969).

¹⁴ See also United States ex. rel. v. State of New Jersey, 423 F.2d 537, 541 (3d Cir. 1970) (the court states in dicta that some crimes, such as embezzlement or similar financial misconduct, justify the use of evidence of financial embarrassment to show the accused's knowledge and motive).

¹⁵ United States v. Polansky, 418 F.2d at 448.

¹⁶ 467 F.2d 1222, 1225 (1972), cert. denied, 409 U.S. 1079 (1972) (appeal from a conviction of armed robbery).

¶15 Not all courts share the Polansky view. In United States v. Bass¹⁷ the Government questioned the defendant about his high life style on cross-examination. The District of Columbia Circuit held that this was not error since the defense had previously attempted to show that the defendant's possession of money deprived him of any motive to commit a crime. The court did state in dictum, however, that "but for the fact that appellant 'opened the door' to the challenged testimony, we would be deeply troubled by its 'admissibility.'"¹⁸ The court listed two difficulties that would be incurred in allowing the Government to use the defendant's financial situation to establish a motive for a crime:

- (1) inferences that the defendant's legitimate sources of income could not support his life style would be speculation without evidence of the cost of specific items; and
- (2) if the Government established that the defendant needed illicit income to support his life style in July 1974 (the time in question), then it would also be established that he previously needed illicit income and thus the Government would be submitting evidence of other crimes.¹⁹

2. Conclusions

¶16 The information gained through the utilization of The Seventh Basic Investigative Technique allows the prosecutor to test the authenticity of what the defendant reveals on cross-examination. Any substantial discrepancy

¹⁷ 535 F.2d 110 (D.C. Cir. 1976) (appeal from a conviction of distributing a controlled substance).

¹⁸ 535 F.2d at 115, n. 7.

¹⁹ Id.

between what the prosecutor knows and what the defendant reveals shows a motive for criminal activity. Further, in cases involving public corruption, the prosecutor should be able to persuade the court to follow the Polansky view and allow cross-examination of financial transactions. Several reasons support this.

¶17 First, in crimes involving public officials and corruption, financial records are particularly relevant as evidence of a motive, because enrichment is the principle motive; violence is usually not involved.

¶18 Second, if the net worth-expenditure principle is used, the belief of the court in Bass that the evidence concerning the high life style might be speculative is unfounded. The net worth-expenditure technique, when properly conducted, results in accurate, itemized data.

¶19 Third, an instruction by the trial court judge advising the jury not to consider whether other crimes have been committed should reduce the second difficulty the Bass court expressed. Although such an instruction obviously does not eliminate all harmful effects, the probative value of ascertaining the truth seems to outweigh the prejudicial effect.

Sentencing the Racketeer

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Appendix

I. Recidivist Sentencing-----¶38

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Summary

¶1 The primary goals of a sentence in an organized crime prosecution should be deterrence and incapacitation, not rehabilitation. Traditionally, the prosecutor's task was thought to stop at the conviction. This view is misguided; the prosecutor should seek, through all lawful means, to secure an appropriate sentence in all criminal prosecutions, but particularly in organized crime cases. The presentence report usually provides the sentencing judge with the information essential to his decision in imposing sentence within the statutory range. Few statutory or constitutional requirements limit its scope. Individualized sentencing requires that the judge's scope of inquiry not be limited. The prosecutor, therefore, ought to provide the probation department with all relevant information in organized crime cases. Further, he should actively draw the court's attention to the report's significance, recommending, in the public interest, appropriate sentences in all organized crime prosecutions. His goal should be to obtain, in appropriate cases, the maximum authorized jail time and fine. Statutory and constitutional limits remain on the prosecutor's right to appeal a sentence, but recent decisions have begun to broaden this right; it should be vigorously pursued. When possible, the prosecutor should use recidivist and special dangerous offender provisions to secure extended terms.



I. Introduction

A. The Special Problem

¶2 The sentencing process can be a crucial phase in the prosecution of organized crime. It is here that the risks of involvement in organized crime can be made clear to present and prospective members and associates. Similarly, sentencing can be a key tool for imposing economic burdens on those involved in organized crime.

¶3 Organized crime functions, on the conscious level, as a business. The motives of those engaged in its activities are "rational." Thus, organized crime participants should be influenced by altering the risks of punishment and the rewards of criminal endeavor. At the same time, a sentencing policy designed to render a criminal useless, and possibly burdensome to his associates for substantial periods of time, will strike at the special strength of organized crime. It can force a new cost-benefit analysis; profits will be realized only at a higher price. Membership in an organization may appear less attractive, and the rewards for joining may have to be commensurately greater. The long-term loss of a convicted member's services may not wholly cripple the activities of the organization, but it should render it somewhat less profitable.¹

¹The Director of the National Council on Crime and Delinquency, Milton G. Rector, aptly observed:

¶4 The special character of organized crime, in short, demands a sentencing policy designed to render its activities more difficult to conduct,² and if no other goal is served, the commission of additional crime may be made more difficult through long-term imprisonment.

B. The Traditional Sentencing Pattern: Leniency

¶5 Ironically, studies have shown that stern sentences for racketeers are the exception, not the rule. A Department of

1 (continued)

A presentence investigation of an "unimportant" numbers runner, bookie or gambling operator may reveal him as a stable individual; if it also reveals him as a salaried employee of a criminal organization, he should be incarcerated for as long a time as possible under the law. Maximum imprisonment inflicts heavy costs on the syndicate for his family's support and other "fringe benefits," in addition to legal fees and bail which the organization must provide to maintain its operations. His ties to the organization and his financial needs make it improbable that he will want or be allowed to seek other employment until he himself is too expensive a risk. Despite his otherwise apparent eligibility for a fine, suspended sentence, or probation, he must be regarded as a capillary feeding the heart of organized crime and be committed for the purpose of increasing the operation costs of the business of crime and racketeering. Rector, "Sentencing the Racketeer," 8 Crime and Delinquency 386, 389 (1962).

² There is legal support for this policy. In State v. Ivan, 33 N.J. 197, 202-03, 162 A.2d 851, 853-54 (1960), the New Jersey Supreme Court observed:

. . . [I]f the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offender. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement. . . [W]hen the offense serves the interests of a widespread conspiracy, it would be a mistake to think of the defendant as an isolated figure. He is part and parcel of an enterprise. . . [I]f the crime is part of a larger operation, it merits stern treatment.

Justice study of the years 1960-1969 revealed, for example, that two-thirds of the Cosa Nostra members indicted by the Department faced maximum jail terms of only five years or less. Only 23% of the convicted members subject to indeterminate sentences received the maximum; most of the sentences ranged from 40% to 50% of the maximum.³

¶6 Such a pattern of leniency neither deters nor incapacitates. The conclusion seems inescapable: prosecutors should direct their efforts not only to securing evidence and conviction, but also to securing higher sentences.

C. The Prosecutor's Power: Beyond the Recidivist Statutes

¶7 Organized crime offenders may be vulnerable to an increased sentence under an "habitual criminal" or "persistent felony

³ See S. Rep. No. 91-617, 91st Cong., 1st Sess. 85 (1969). For a similar pattern, see Report for 1971 by New York State Joint Legislative Committee on Crime, its Causes, Control and Effect on Society, reprinted in Hearing before the Subcommittee on Criminal Laws and Procedures of Committee on the Judiciary of the United States Senate, 92d Cong., 2d Sess. 4188-90 (1972). A study of 1,762 cases involving organized crime members in New York State courts showed that 44.7 per cent of all indictments against racketeers ended in dismissal; while only 11.5 per cent of indictments against all defendants resulted in dismissal. Organized crime figures were convicted in 193 cases; 46 per cent of those cases ended in suspended sentences or fines. The Committee computed the probabilities for an organized crime figure going to jail; the figures are sobering.

Arrested for:	Probability of going to jail or prison
Larceny-----	1 in 5
Gambling-----	1 in 50
Extortion-----	1 in 3
Narcotics-----	1 in 4
Assault-----	1 in 7

For a vivid journalistic description of the leniency problem, see the New York Times, Sept. 25, 1972, p. 1, col. 6, reprinted, the Senate Hearing cited supra.

offender" statute. Such a statute will usually require that the maximum penalty be imposed on such an offender.⁴ These special procedures, where appropriate, should be vigorously pursued. There is more, however, that the prosecutor can do in the typical situation where the task is to secure higher maximums within normal ranges.⁵ Here, too, there is a need for vigorous action.

II. Function of the Presentence Report

A. Individualized Sentencing and the Presentence Report

¶8 The American judicial system has long recognized the importance of individualizing criminal sentences.⁶ The task of matching the sentence to the individual requires the judge to balance a series of factors in the context of the facts of a

⁴ See, e.g., Mass. Gen. Laws Ann. ch. 279 §25:

Whoever has been twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced.

The constitutionality of this statute was upheld in McDonald v. Massachusetts, 180 U.S. 311 (1901).

⁵ See Appendix for bibliography on recidivist and "dangerous special offender" sentencing.

⁶ See Williams v. New York, 337 U.S. 241, 247 (1949):

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

particular case. The judge must rely heavily on the presentence report in making his decision. Influencing the contents of that report is the first step towards influencing the judge's decision.

B. Functions of the Prosecutor and the Probation Office

¶9 The prosecutor must make available to the court any information he has that is material to the determination of the punishment. Information both favorable and unfavorable to the defendant should go to the court.⁷ He must, of course, make sure that the sentence is not based on a mistake of fact or faulty information.⁸ As a rule, the prosecutor conveys this information to the court through the probation office. It may, in fact, be a violation of due process for the prosecutor to convey information directly to the sentencing judge in absence of the defendant's counsel.⁹ The probation department is, therefore, a necessary intermediary. The probation department should seek to obtain all the relevant information the prosecutor possesses; the prosecutor has a duty to respond.¹⁰

¶10 The probation department summarizes the information it has collected in a presentence report. This report is the sentencing

⁷Brady v. Maryland, 373 U.S. 83, 92 (1963).

⁸United States v. Malcolm, 432 F.2d 809, 818 (2d Cir. 1970).

⁹Haller v. Robbins, 409 F.2d 857, 861 (1st Cir. 1969).

¹⁰See United States v. Needles, 472 F.2d 652, 654-55 (2d Cir. 1973):

[N]o defendant can reasonably expect the probation office to refrain from seeking whatever information the prosecutor may have regarding the case then before the court or any other case involving that defendant. In fact, a failure to so inquire or refusal to respond accurately would be a breach of duty (emphasis added).

judge's primary guide.

C. The Right of Allocution

¶11 The presentence report, of course, is not the judge's only source of information. All jurisdictions recognize the defendant's right to make a statement before sentencing--the right of allocution. New Jersey Court Rule 3.21-4(b), for example, provides:

Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. . . .

N.Y. Crim. Pro. Law §380.50 (1971) also permits both the defendant and his counsel an opportunity to speak before sentence is set. The judge must ask the defendant whether he wishes to make a statement.

¶12 The general acceptance of the right of allocution, however, does not qualify the central importance of the presentence report. It remains the sentencing judge's primary guide, and its scope should then be a matter of great concern to the prosecutor.

¶13 Section 380.50 also provides the prosecutor with a right to speak before sentencing.

The statute reads: "At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence." New Jersey Court Rule 3.21-4(b), however, contains no such provision. In all cases the prosecutor ought to seek to be heard in the public interest.

III. Scope of the Presentence Report

A. General Admissibility of Information

¶14 The pertinent statutes offer only general guidance, but they do indicate the wide range of information which may be included in a presentence report. Rule 32(c)(2) of the Federal Rules of Criminal Procedure, for example, states:

The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances effecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

The analogous New York statute, N.Y. Crim. Pro. Law

§390.30(1) (1971), provides that the presentence investigation should consist of:

the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic stature, education and personal habits.

This section of the statute also allows the agency conducting the investigation to include any other information it considers relevant to the question of the sentence. Other statutes in New Jersey and Massachusetts are less explicit on what information, beyond the criminal record of the defendant, may be included in the presentence report.¹¹ The general rule underlying these

¹¹See N.J. Court Rule 3:21-2 and Mass. Gen. Laws Ann. ch. 279 §4A, ch. 276 §85, ch. 276 §100. The vagueness of the New Jersey requirements, however, should not lead the prosecutor in that state to underestimate the importance of the presentence report. In New Jersey, the sentencing judge is strictly confined to reliance on material contained in that report. Rule

statutes is that there should be no formal limitations on the contents of presentence reports. This rule reflects the philosophy of the individualized sentence; a judge must have a wide scope of inquiry in determining the proper sentence.¹² The rules of evidence and the due process guarantees of the trial therefore, play no role here.

¶15 Accordingly, the sentencing judge may usually consider information not ordinarily admissible at trial, including hearsay evidence or evidence not related to the crime for which the

11 (continued)

3:21-2 requires that, "The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing on the sentence. . . . "

This principle was followed in State v. Leckis, 79 N.J. 479, 487, 192 A.2d 161, 165 (1963), which held that a judge should limit himself in passing sentence to what he learned in the course of the trial or from the presentence report. A New Jersey court has even held that a judge's personal knowledge of the defendant's history must be officially recorded in the presentence report in order for the judge to use it in sentencing. State v. Gattling, 95 N.J. Super. 103, 230 A.2d 157 (1967).

¹² See Williams v. New York, 337 U.S. 241, 247 (1949):

. . . modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

See also United States v. Baratta, 360 F. Supp. 512, 514-15 (S.D.N.Y. 1973):

No clamp should be placed upon the sentencing judge or barrier created to prevent him from pursuing. . . a reasonable inquiry into a defendant's behavioral pattern over a substantial period of time antedating the criminal act which brought him before the court--for whatever good or bad may come from it.

defendant was convicted.¹³ 18 U.S.C. §3577, for example, reflects this principle in federal law:

No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

New York has a similar statute applicable to persistent felony offenders.¹⁴

¶16 The prosecutor should use this liberal policy when he seeks a long-term sentence for the convicted racketeer. Upper echelon organized crime figures often face prosecution for nonviolent crimes, such as tax evasion. The prosecutor may, however, use a history of violence associated with the offender to shape the presentence report to obtain a longer sentence. The general character of the sentencing process, therefore, seems well suited to the control of organized crime.

B. General Limits

¶17 There are, of course, certain general due process limits

¹³See Williams v. New York, 337 U.S. 241, 246 (1949); Williams v. Oklahoma, 358 U.S. 576, 586 (1959). There is generally no special burden of proof applicable in sentencing. Nevertheless, where the sentencing judge wishes to rely on trial perjury to enhance the sentence, the trend is to require that the fact of perjury be found beyond a reasonable doubt. See United States v. Hendrix, 505 F.2d 1233, 1236-37 (2d Cir. 1974) and authorities cited therein.

¹⁴N.Y. Crim. Pro. Law §400.20(5) (1971). For this separate problem of the special dangerous offender see section II of the Appendix to these materials.

on what information can be used to determine a sentence.¹⁵

The Supreme Court wrote broad tests for reviewing the sentencing process in Hill v. United States:^{15a}

Is sentencing infected with fundamental defects resulting in a miscarriage of justice?

--Is it consistent with the rudimentary demands of fair procedure? The application of this language usually turns on

a determination of whether the report's factual assertions have an appropriate degree of reliability. Sentences founded upon "misinformation of a constitutional magnitude" or

"extensively and materially false" information cannot stand.¹⁶

This qualification tempers the general rule that presentence reports need not conform to the rules of evidence or limit themselves to established facts.¹⁷

¶18 The sentencing judge is free to decide the degree of required factual support on a case-by-case basis. The enormous

¹⁵Note first a special limitation defined in New Jersey. If the defendant may have the presentence report disclosed to him certain irrelevancies, confidential statements, and medical/diagnostic opinions should be excluded if they would harm the defendant's rehabilitation. Such matters may certainly be investigated, but may not be included in the report. See State v. Green, 62 N.J. 547, 303 A.2d 312 (1973).

^{15a}368 U.S. 424, 428 (1962).

¹⁶See United States v. Tucker, 404 U.S. 443, 447 (1972) (sentence founded in part upon misinformation of a constitutional magnitude); Townsend v. Burke, 334 U.S. 736, 741 (1948) (prejudice created by the prosecution's submission of misinformation regarding defendant's prior criminal record or by the court's careless misreading of that record yielded a denial of due process of law; sentence invalid).

¹⁷For a statement of that general rule, see Farrow v. United States, 373 F. Supp. 113 (S.D.Cal. 1974) (presentence reports are not required to conform to the rules of evidence, and their contents are not restricted to established facts).

variety of information available requires such an ad hoc method.¹⁸ The Ninth Circuit has tried, however, to set certain minimum standards. In United States v. Weston,¹⁹ the defendant received an additional fifteen year sentence on the basis of an unsworn statement of unverified reports, by an anonymous informer, alleging that the defendant engaged in additional and far more serious crimes; the court stated:

. . . In Townsend v. Burke, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.

The Ninth Circuit, however, recently limited Weston in Santorio v. United States,²⁰ holding that the defendant must make an affirmative showing of direct prejudice (i.e., led to higher sentence) for the court to disregard the hearsay portion of

¹⁸A court may rely on "responsible unsworn or 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." Williams v. Oklahoma, 358 U.S. 576, 584 (1959).

¹⁹448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972). The court stated:

Here the other criminal conduct charged was very serious, and the factual basis for believing the charge was almost nil. It rested upon only two things: the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs, and the unsworn statement of one agent that an informer had given him some information lending partial support to the charge. Id. at 633.

²⁰462 F.2d 612 (9th Cir. 1973). The District Court of the Southern District of California, part of the Ninth Circuit, applied this qualification in Farrow v. United States, 373 F. Supp. 113, 119 (1974) (absent an affirmative showing of direct prejudice, there is no compulsion to disregard the hearsay portion of the presentence report).

the presentence report. The defendant, therefore, bears the double burden of showing both the falsity of the information and its prejudicial effect. An attempt to use the Weston holding in the First Circuit failed in United States v. Williams.²¹ There, the court found that sworn testimony from three individuals concerning the defendant's role in a heroin distribution racket was adequate to justify a sentence in the upper range of the authorized maximum.

¶19 What happens when the defendant challenges the factual basis of a presentence report? The Supreme Court in Specht v. Patterson held:

The Due Process Clause of the Fourteenth Amendment . . . [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he comes to determine the sentence to be imposed.²²

Thus, as a general rule, the manner of rebutting hearsay assertions in a presentence report is determined by the informed discretion of the sentencing judge.²³ This policy of reliance upon the judge's discretion keeps the defendant

²¹499 F.2d 52 (1st Cir. 1974).

²²386 U.S. 605, 606 (1967).

²³Farrow v. United States, 373 F. Supp. 113, 118 (1974). See also State v. Green, 62 N.J. 547, 303 A.2d 312, 321 (1973), citing State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960):

Ordinarily, where there is an issue of prejudice claimed by a defendant, it is presumed that a sentencing judge disregarded incompetent or immaterial evidence in estimating the appropriateness of a particular degree of punishment.

from initiating an endless series of collateral disputes.²⁴

C. The Admissibility of Information: Specific Issues

1. Hearsay

¶20 Judges often view hearsay evidence, inadmissible at trial, as sufficiently reliable for sentencing.²⁵ A court may rely, for example, on pertinent evidence from another case

²⁴The Second Circuit, in United States v. Needles, 472 F.2d 652, 657-58 (2d Cir. 1973), remarked on this problem of challenges by the defendant:

The real question is whether the judge was entitled to credit the statements of unidentified undercover agents over defendant's denials and explanations. It is conceded that "material false assumptions as to any facts relevant to sentencing render the entire sentencing procedure invalid as a violation of due process. (citations omitted). It does not follow, however, that an evidentiary hearing must be held whenever a defendant asserts the falsity of some statement in his presentence report. . . . Since sentences should not be based upon misinformation, a defendant should not be denied an opportunity to state his version of the relevant facts (citations omitted) and in some circumstances the probation office or prosecution should be requested to provide substantiation of challenged information submitted to the judge. . . . In appropriate instances the defendant ought to be allowed to present evidence in the form of affidavits, documents, or even oral statements by knowledgeable persons on matters the court deems material to its decision on the severity of sentence. But this court has generally left the decision as to the appropriateness in any particular case of these procedures largely to the discretion of the sentencing judge. . . .

Perhaps in a case where the defendant denied everything and there was a chance that an entire incident had been manufactured or that serious charges in the presentence report on which the judge sought to rely were completely false, we would require further corroboration of the report even though the sentencing judge thought it unnecessary. But this is not such a case. . . .

²⁵See Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959).

in determining sentence, although such evidence is hearsay with respect to the defendant.²⁶

2. Polygraph Tests

¶21 A New Jersey court has held that expert testimony interpreting a polygraph test may be used in sentencing.²⁷ Note that the taking of the test was voluntary, and that the expert testimony could only be used to show facts not decided by the trial jury or material to its deliberations. Even this circumscribed use of the polygraph, however, reflects the liberal standards for the use of evidence in sentencing.

3. Prior Conviction Record

¶22 The prosecutor may also use a prior conviction record to argue for a long sentence for the racketeer. This practice does not create double jeopardy for the defendant since he is not being tried or punished again for the earlier offense.²⁸ Instead, the judge tries to determine if the record indicates a pattern of criminal behavior aggravating the latest offense.

4. Invalid Prior Convictions

¶23 The judge may not consider previous convictions

²⁶United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973).

²⁷State v. Watson, 115 N.J. Super. 213, 218, 278 A.3d 543, 546 (1971).

²⁸Cf. Moore v. Missouri, 159 U.S. 673, 677 (1895) (aggravation of present offense by special circumstances).

which are constitutionally invalid.²⁹ This rule of Tucker may, however, be narrower than it appears. In Lipscomb v. Clark, the Fifth Circuit defined a test for the use of invalid prior convictions.³⁰ If on review, without consideration of the invalid conviction, the maximum sentence seems appropriate then it may be affirmed. If it does not, then a special evidentiary hearing must be held.³¹ Tucker, in short, does not require automatic resentencing. The Eighth and Fourth Circuits have taken an alternate route. They require the defendant to invalidate the disputed prior conviction in the court from which it was originally obtained before using it to seek relief under Tucker.³² Taking still another approach, the

²⁹United States v. Tucker, 404 U.S. 443, 444 (1972). Note also that a conviction void under statutory or decisional law, or because of constitutional infirmity, cannot form the basis for the application of a recidivist statute. Burgett v. Texas, 389 U.S. 109, 114 (1967) (" . . . to permit a conviction obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), to be used against a person either to support guilt or enhance punishment for another offense. . . is to erode the principle of that case.")

³⁰468 F.2d 1321 (5th Cir. 1972).

³¹The First Circuit followed Lipscomb in United States v. Sawaya, 486 F.2d 890, 893 (1st Cir. 1973) (case remanded to district court for review of the presentence report to determine whether the sentence would be appropriate without consideration of prior constitutionally invalid convictions). The Southern District of California followed Lipscomb in Farrow v. United States, 373 F. Supp. 113, 117 (1974).

³²Brown v. United States, 483 F.2d 116, 118 (4th Cir. 1973) (if prior state convictions have been invalidated for want of counsel in habeas corpus proceedings begun initially in the convicting state court, then Tucker demands resentencing. If there is no such invalidation in that court the Tucker rule may not be invoked); Young v. United States, 485 F.2d 292, 294 (8th Cir. 1973) (Lipscomb rejected; petitioner invoking the Tucker rule must first invalidate the prior convictions in the jurisdictions where they were obtained).

Ninth Circuit has held that "the mere fact that an invalid conviction has been obtained does not immunize the facts underlying the conviction from consideration by the sentencing judge."³³

5. Evidence Derived from Arrests not Leading to Convictions

¶24 The law is unclear as to the use of evidence obtained from prior arrests not leading to conviction. The dispute turns on whether the facts underlying the arrest may be considered by the sentencing judge. The Second Circuit, in United States v. Malcolm, stated the general rule:

A sentencing judge is not so narrowly restricted in imposing sentence that he cannot predicate sentence on habitual misconduct, whether or not it resulted in conviction.³⁴

Certain jurisdictions have statutes, however, which limit the judge's power to consider evidence derived from prior acquittals. Examples of such statutes are Mass. Gen. Laws Ann. ch. 276 §85 and Mass. Gen. Laws Ann. ch. 279 §4A, which require that the presentence report "shall not contain as part thereof any information of prior criminal prosecutions, if any, of the defendant wherein the defendant was found not guilty by the court or jury in said prior criminal prosecution."

³³ United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973). Note, however, that in Farrow, a district court within the Ninth Circuit followed the Lipscomb rule (see note 31, supra).

³⁴ 432 F.2d 809, 816 (2d Cir. 1970). See also Jones v. United States, 307 F.2d 190, 192 (D.C. Cir.), cert. denied, 372 U.S. 919 (1962) (Fed. R. Crim. P. 32(c)(2) interpreted as permitting consideration of criminal charges not leading to convictions).

¶25 The Supreme Court of New Jersey noted that a prior arrest could be relevant in certain circumstances.³⁵ The sentencing judge may not infer guilt from the mere fact of arrest, but the fact of arrest may lead the court to other admissible facts. The court may, for example, consider factual material which the defendant did not contest and which bears on the question of sentence.³⁶ The judge may also consider that the earlier arrest failed to deter the defendant from committing the current offense.

¶26 The courts have also held that evidence from pending indictments and from charges dismissed without adjudication may be considered by the sentencing judge.³⁷ A court may

³⁵ State v. Green, 62 N.J. 547, 571, 303 A.2d 312, 325 (1973) (i.e., the sentencing judge may find it significant that a defendant who experienced an unwarranted arrest was not deterred by that fact from committing a crime thereafter). Here the Supreme Court of New Jersey found that the challenged items in the arrest report did not influence the sentencing court to enlarge the penalties.

³⁶ Id. at 571.

³⁷ The Second Circuit held in United States v. Metz, 470 F.2d 1140, 1142 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973):

. . . that indictments for other criminal activity are of sufficient reliability to warrant their consideration by a sentencing judge.

Accord, United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965):

[F]ew things could be so relevant as other criminal activity of the defendant.

But see State v. Barbato, 89 N.J. Super. 400, 215 A.2d 75, 80 (1965):

. . . reliance upon other pending charges as a basis for increasing the penalty for the charge before the court is of highly questionable propriety.

even admit, for sentencing purposes, evidence of crimes for which the defendant has neither been charged nor indicted,³⁸ and, at least in the Second Circuit, evidence of crimes of which the defendant has been acquitted.³⁹

6. Evidence Excluded from Trial because of Fourth Amendment Violations

¶26A In United States v. Verdugo,⁴⁰ the Ninth Circuit held that it is not proper to use evidence obtained in violation of the Fourth Amendment to determine the sentence. The court rested its holding on the rationale that the "use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures."⁴¹ Verdugo,

³⁸United States v. Weston, 448 F.2d 626, 633 (1971), cert. denied, 404 U.S. 1061 (1972):

We do not desire to transform the sentencing process into a second trial, and we believe that other criminal conduct may properly be considered, even though the defendant was never charged with it or convicted of it.

³⁹See United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972):

Acquittal does not have the effect of conclusively establishing the untruth of all evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.

⁴⁰402 F.2d 599 (9th Cir. 1968), cert. denied, 397 U.S. 925 (1970), cert. denied, 402 U.S. 961 (1971).

⁴¹Id. at 613.

however, has not resulted in the blanket exclusion of such evidence. In United States v. Schipani,⁴² the Second Circuit allowed the use in sentencing of evidence derived from illegal wiretaps. The court observed:

The information obtained by the wiretaps was highly relevant to the character of the sentence to be imposed. . . .

We believe that applying the exclusionary rule for a second time at sentencing after having applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule. It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory for sentencing purposes, although the evidence would be inadmissible on the issue of guilt. . . .

Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence.⁴³

7. Reputation

¶27 A New York District Court, in United States v. Rao,⁴⁴ ruled that "the defendant's alleged underworld associates and his alleged status in the Mafia or Cosa Nostra cannot and do not constitute a predicate or criterion for punishment."⁴⁵ This is no longer good law. The Second Circuit decision in Schipani undermined this ruling. There, the court affirmed

⁴²435 F.2d 626 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

⁴³Id. at 28. The Fourth Circuit recently followed Schipani and distinguished Verdugo. United States v. Lee, 19 Crim. L. Rptr. 2194 (4th Cir. June 2, 1976).

⁴⁴296 F. Supp. 1145 (S.D.N.Y. 1969).

⁴⁵Id. at 1149.

a District Court judge's decision to consider in sentencing the defendant's reputation as a racketeer. The First Circuit followed a similar course of action in United States v. Strauss.⁴¹ In Strauss, the sentencing judge had before him sworn Senate testimony alleging that the defendants were members of a criminal syndicate. Accordingly, he gave them seven years instead of five, out of a possible ten.

¶28 In addition, the New Jersey Supreme Court, in State v. Leverette,⁴⁷ affirmed a long-term sentence for a defendant whose presentence report showed no prior criminal record and that he was a responsible husband and father. In so doing, the court upheld the sentencing judge's reliance in making his decision on the defendant's identity as a racketeer.⁴⁸ The court amplified this holding in State v. Souss,⁴⁹ stating

⁴⁶443 F.2d 986 (1st Cir. 1971). The court stated:

Although the judge failed to articulate why he thought this evidence warranted an additional two years, we note that membership in a criminal syndicate is clearly relevant to questions of corrigibility and likelihood of reformation in a short period of time.
Id. at 990.

The Seventh Circuit recently refused to follow Rao and approved the use of "organized crime connections in imposing a sentence." United States v. Cordi, 17 Crim. L. Rptr. 2363 (7th Cir. July 10, 1975).

⁴⁷64 N.J. 569, 319 A.2d 219 (1974).

⁴⁸Id. at 571, 323 A.2d at 220. The court observed:

The sentencing judge, based on the trial record, characterized the defendant as the key figure in a substantial gambling operation. The sentence was bottomed on the foregoing evaluation of the defendant's involvement and warrants the sentence imposed.

⁴⁹65 N.J. 453, 323 A.2d 484 (1974).

that:

[A] defendant's connection with organized crime is a most important factor to consider, along with all the other circumstances, in determining the severity of punishment to be meted out.⁵⁰

The prosecutor's ability to use what he knows about the racketeer, therefore, appears to be growing.⁵¹

8. Defendant's Right to View and Challenge the Presentence Report

§28A New Jersey, Massachusetts, and the federal system have statutes

⁵⁰Id. at 461, 323 A.2d at 488-89.

⁵¹The recent New Jersey cases echo an earlier decision, State v. Destasio, 49 N.J. 247, 229 A.2d 636, cert. denied, 389 U.S. 830 (1967). There, the New Jersey Supreme Court defended an administrative rule directing a single judge in each county to impose sentence in gambling cases, in the interest of uniformity.

By and large the defendants who are caught are not vicious and do not menace society in other respects, but they are the hired help of the syndicate without which it could not operate. The difficulty has been that some judges cannot see beyond the individual they are sentencing. If such a judge imposes nothing more painful than a fine, his view is almost certain to become the rule of the county in which he sits. This is so because defendants will wait for that judge, if they can, and plead guilty before him. Moreover, a soft judge can make a sensible one seem harsh and severe, and hence, unhappily, judges tend to abide by the performance of the most unrealistic among them. 49 N.J. at 254-55, 229 A.2d at 640.

The court then concluded:

Nor is there substance to the claim that the individual is denied equality when the court deals specially with the special evils of syndicated crime. . . . Id. at 260, 229 A.2d at 643.

requiring disclosure of the presentence report.⁵² The New York statute leaves disclosure to the judge's discretion.⁵³ The New York courts have tended, however, to encourage disclosure as the rule of practice.⁵⁴ The defendant also has different kinds of statutory protection in New York. He may file a presentence memorandum covering his entire life history.⁵⁵ The court, in its discretion, may hold a presentence conference to resolve any discrepancies between the information submitted by the defendant and that received from other sources.⁵⁶ The prosecutor must

⁵²For New Jersey, see N.J. Court Rule 3:21-2. See also State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969). For Massachusetts see Mass. Gen. Laws Ann. ch. 279 §4A and ch. 276 §85. For the federal courts, as of Dec. 1, 1975, see Fed. R. Crim. P. 32 (c)(3). Note that the Federal Rule has changed from leaving disclosure to the judge's discretion to mandating it. A total refusal to disclose remains a permissible option in certain extraordinary situations. The court in United States v. Long, 19 Crim.L. Rptr. 2201-02 (E.D. Mich., April 29, 1976) found that such an extraordinary situation did not exist in that case and that the sentencing magistrate erred in following such a course. The magistrate should have disclosed the contents of the report to the counsel and instructed him not to pass the information along to his client. The court remarked that this alternative would be helpful in cases involving potential harm to third persons if the defendant learned the contents of the report. This procedure may be of limited use in the organized crime context, in situations where the defense attorney may ignore the judge's instructions.

⁵³N.Y. Crim. Pro. Law §380.50 (McKinney 1971).

⁵⁴See People v. Perry, 36 N.Y.2d 114, 120, 365 N.Y.S.2d 518, 522, 324 N.E.2d 878, 881 (1975) (fundamental fairness and the appearance of fairness may be best served by the disclosure of presentence reports, but the refusal to disclose the report does not constitute an abuse of discretion).

⁵⁵N.Y. Crim. Pro. Law §390.40 (McKinney 1971).

⁵⁶Id. §400.10.

have reasonable notice of that conference, and an opportunity to participate.⁵⁷ The court may compel the prosecutor to reveal questioned evidence to the defendant at that conference for the purpose of rebuttal.

¶29 A policy of disclosing presentence reports to defendants can help the prosecutor. If the defendant has an opportunity to view and challenge the report, the prosecutor's responsibility to verify the report's allegations may lessen. Those allegations may have to meet a lower measure of reliability.

¶30 In sum, these flexible safeguards provide the prosecutor with clear opportunities to introduce the defendant's connection with organized crime.

IV. Appellate Review of Sentence

A. In General

¶31 The hornbook rule is that an appellate court will not disturb a criminal sentence unless it either exceeds statutory limits or represents a clear abuse of discretion.⁵⁸ Most jurisdictions, however, have statutes authorizing the appeal of illegal sentences. Traditionally, these statutes have been construed as not sanctioning the increase of a

⁵⁷Id.

⁵⁸Gore v. United States, 357 U.S. 386, 393 (1958) (sentence imposed by federal district judge, if within statutory limits, held generally not subject to review).

sentence on review.⁵⁹ In New York, for example, the prosecutor may appeal only those sentences which are invalid as a matter of law.⁶⁰ Nevertheless, it might legitimately be argued that a judge, as a matter of law, abuses his discretion when he sets too lenient a sentence.⁶¹ If so, then a sentence substantially too lenient could be characterized as illegal, and it could be reviewed on appeal by the prosecutor. The New York prosecutor may, however, under the usual interpretation, challenge only those sentences which fail to meet the minimum legal terms.

B. Defendant's Right to Appeal and the Danger of an Increased Sentence

¶32 Massachusetts, Connecticut, and Maryland allow the appellate court to increase the sentence when certain defendants appeal.⁶²

⁵⁹See, e.g., Fed. R. Crim. P. 35; N.J. Court Rule 3:21-10. For a brief description of other such state statutes see McClellan, "The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55, 178-79, note 567 (1970). The leading case propounding this interpretation is Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874). See also United States v. Benz, 282 U.S. 304, 307 (1931) (to increase the sentence already in service is to subject the defendant to double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment). In United States v. Sacco, 367 F.2d 368 (2d Cir. 1966), the court considered, but finally rejected, the defendant's proposed exception to the rule of Lange, supra.

⁶⁰N.Y. Crim. Pro. Law §§440.40, 450.30 (McKinney 1971).

⁶¹But see, id., §450.30, Commission Staff Comment. The comment casts doubt on this argument.

⁶²Mass. Gen. Laws Ann. ch. 278 §§28A and 28B (Cum. Supp. 1975); Conn. Gen. Stat. Ann. §51-196 (Supp. 1976); Md. Ann. Code art. 27, §§645JA to 645JG (1976). Mass Gen. Laws Ann. ch. 278 §28A reads in part:

There shall be an appellate division of the superior

The constitutional objection usually raised against such proceedings is that the possibility of an increase in sentence violates the defendant's due process rights. The Supreme Court's decision in North Carolina v. Pearce is the usual base upon which this objection rests.⁶³ There, the Court held that a defendant who has obtained a retrial after making an appeal should be protected from the imposition of an increased sentence by a vindictive judge. The crux of the Pearce decision

62 (continued)

court for the review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed, and for the review of sentences to the reformatory for women for terms of more than five years imposed by final judgments in such criminal cases. . . . No justice shall sit or act on an appeal from a sentence imposed by him.

The relevant portions of Mass. Gen. Laws Ann. ch. 278 §28B stipulate:

A person aggrieved by a sentence which may be reviewed may appeal to the appellate division for a review of such sentence. . . The justice who imposed the sentence appealed from may transmit to the appellate division a statement of his reasons for imposing the sentence and shall make such a statement within seven days if requested to do so by the appellate division.

The appellate division shall have jurisdiction to consider an appeal with or without a hearing, review the judgment so far as it relates to the sentence imposed and also any other sentence imposed with the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence, and shall have jurisdiction to amend the judgment by ordering substituted therefore a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal. Its decision shall be final. . . . The appellate division may require the production of any records, documents, exhibits or other things connected with the proceedings. . . .

⁶³395 U.S. 711 (1969).

was the fear of vindictiveness because of a defendant's appeal. Later cases, however, have read Pearce narrowly.⁶⁴ In short, the ". . . lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a likely threat of vindictiveness."⁶⁵

¶33 The Supreme Judicial Court of Massachusetts has held since Pearce that its statutory procedure precludes the possibility of vindictiveness.⁶⁶ Under Mass. Gen. Laws Ann. ch. 278 §278A, the sentencing judge cannot sit as a member of the appellate division, the court that sets the final sentence. The court also supported its decision by pointing to the record of the appellate division proceedings from July 1, 1955 to June 30, 1969; the record showed a greater than four-to-one ratio of sentence reduction to sentence increase.⁶⁷ Finally, the

⁶⁴ See Colten v. Kentucky, 407 U.S. 104 (1972) (higher sentence after "appeal" from lower trial court to higher court for de novo trial upheld); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (higher sentence after retrial imposed by jury not shown to be vindictive).

⁶⁵ Blackledge v. Perry, 417 U.S. 21, 27 (1974).

⁶⁶ Walsh v. Commonwealth, 358 Mass. 193, 260 N.E.2d 911 (1970).

⁶⁷ Id. at 199, 260 N.E.2d at 915:

Disposition

Appeals Entered-----	4,201
Appeals Withdrawn----	1,644
Appeals Dismissed----	1,892
Sentences Reduced----	395 (9.42%)
Sentences Increased--	87 (2.07%)
Appeals Pending-----	139
Appeals Moot-----	44

same court suggested that the Pearce holding was actually inapplicable to the Massachusetts statute:

We note finally that the Pearce rule does not seem suited to Appellate Division proceedings. It does not permit consideration of any factors but the defendant's conduct subsequent to the first trial. Such a rule would seriously hamper the work of the Appellate Division because it would limit it to the brief period that the defendant has been serving the sentence in the State prison or a reformatory awaiting hearing on the appeal. Moreover, the rule would preclude consideration of the very factor which the Appellate Division was established to consider: whether a particular defendant's sentence is excessively short or long compared to other defendants' sentences for the same or similar offenses. Since the Supreme Court was not considering this procedure, we do not believe that it meant the Pearce rule to apply to it. . . .⁶⁸

C. Prosecutor's Appeal for Increased Sentence

¶34 The Massachusetts statute allows an increase in sentence only upon a defendant's appeal. The need remains, however, for a way in which prosecutors can call for an increase in sentence. There should be some means of supervising those trial judges who, because of corruption, political considerations, or lack of knowledge, give light sentences to racketeers.⁶⁹

¶35 The constitutional barriers to such a power do not appear insurmountable. Due process objections present the least difficulty. Pearce, it should be emphasized, turns on the issue of vindictiveness caused by a defendant's appeal. Absent this factor, the due process rationale for denying an increased sentence seems thin, particularly when the prosecutor, not the

⁶⁸ Id. at 201, 260 N.E.2d at 916.

⁶⁹ See The Challenge of Crime in a Free Society, The Report of the President's Commission on Law Enforcement and Administration of Justice, 203 (1967).

defendant, appeals a sentencing decision made in favor of the defendant. The Pearce rationale of vindictiveness should, therefore, be limited to a situation in which a resentencing judge is reversed for making an error against the defendant after an appeal brought by the defendant.

¶36 The Double Jeopardy Clause of the Fifth Amendment also should not pose an insuperable difficulty. As the Supreme Court recently observed, "... [T]he Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment."⁷⁰ This distinction gains force from other recent Supreme Court decisions expanding the government's right of appeal in criminal cases. In United States v. Wilson,⁷¹ the Court held:

We therefore conclude that when a judge rules in favor of the defendant [on a legal question] after a verdict of guilty has been entered by the trier of fact, the government may appeal from that ruling without running afoul of the Double Jeopardy Clause.⁷²

Under Wilson, only facts going to guilt or innocence resolved by the trier of fact are protected from appellate review.

¶37 The prosecutor should, therefore, be aware of these new possibilities for appealing a sentence thought to be too lenient. Prosecutors in states with statutes like New York's should also take them into account when seeking to define the scope of their states' relatively liberal statutes. These

⁷⁰Price v. Georgia, 398 U.S. 323, 329 (1970).

⁷¹420 U.S. 332 (1975).

⁷²Id. at 352.

recent decisions suggest that there is no constitutional barrier to seeking review of a judge's abuse of discretion in sentencing. A new interpretation of the present appeal statute might also be secured in the right case.

Appendix

I. Recidivist Sentencing

¶38 Recidivist sentencing [Note: works predating Specht v. Patterson, 386 U.S. 605 (1967), and Burgett v. Texas, 389 U.S. 109 (1967), do not reflect the current state of the law].

Note, "Defendant's Right to Protection from Prior Uncounseled Convictions," [1973] Wash. U.L.Q. 197.

Comment, "Constitutional Law--Right to Counsel--Valid Misdemeanor Conviction Cannot be Used as Basis for Recidivist Sentence if Defendant Was Not Represented by Counsel at Misdemeanor Trial," 43 N.Y.U.L. Rev. 1012 (1968).

Annot., "Pardon as affecting consideration of earlier conviction in applying habitual criminal statute," 31 A.L.R.2d 1186 (1953).

Annot., "Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes," 24 A.L.R.2d 1247 (1952).

Annot., "Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender," 19 A.L.R.2d 227 (1951).

Annot., "What constitutes former 'conviction' within statute enhancing penalty for second or subsequent offense," 5 A.L.R.2d 1080 (1949).

Note, "'Defective Delinquent' and Habitual Criminal Offender Statutes--Required Constitutional Safeguards," 20 Rutgers L. Rev. 756 (1966).

Note, "Recidivist Procedure," 40 N.Y.U.L. Rev. 332 (1965).

Annot., "Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute, enhancing punishment for repeated offenses," 80 A.L.R.2d 1196 (1961).

Annot., "Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal," 79 A.L.R.2d 826 (1961).

Annot., "Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction," 11 A.L.R.2d 870 (1950).

(Bibliography obtained from T. Amsterdam, B. Segal, and M. Miller, Trial Manual 3 for the Defense of Criminal Cases, ALI-ABA Joint Committee on Continuing Legal Education (1975), pp. 2-154 to 2-155).

II. Dangerous Special Offender Sentencing

¶39 The Sixth Circuit has recently affirmed the constitutionality of the federal dangerous special offender statute, 18 U.S.C.

§3575, a part of Title X of the Organized Crime Control Act of 1973, in United States v. Stewart, 531 F.2d

326 (1976). Section 3575 provides an increased sentence for dangerous special offenders once certain age, frequency of conviction, and time standards are met. Section 3575(b) reads:

. . . the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

The court below had ruled that section 3575(b) was unconstitutionally vague and that a sentence given under its terms would be a denial of due process in violation of the

Fifth Amendment. The court similarly held that section 3575(f) was unconstitutionally vague. Section 3575(f) reads:

. . . a defendant is dangerous for purposes of this section if a period of confinement longer than that required for such felony is required for the protection of the public from further criminal conduct by the defendant.

¶40 The Sixth Circuit reversed both holdings. First, the court listed several procedural safeguards regulating use of the

increased sentence, and found that those procedures were far less arbitrary than those employed in ordinary sentencing practices. For example, section 3575(b) requires a presentence hearing, detailed notice to the defendant, and reasonable time for verification of allegations. The statute expressly guarantees the defendant the right to counsel, compulsory process, and cross examination. The court found these procedural safeguards, extraordinary for a presentence hearing, to reflect Congress's intent to control carefully the use of the statute ". . . and not disproportionate in severity to the maximum term otherwise authorized. . . ." as further manifesting that intent. Finally, the court emphasized that the very broad scope for review of such sentences, allowed under section 3576, would check any abuse of judicial discretion.

¶41 Second, the court distinguished this statute from the New Jersey statute discussed in United States v. Duardi.⁷³ That New Jersey statute made it a crime to be a "gangster"; Title X, in contrast, did not make it a crime to be "dangerous." Section 3575 is directed, instead, at those who have actually been convicted of a crime. Having made this distinction, the court held, on the basis of United States v. National Dairy Products,⁷⁴ that when a statute is challenged for vagueness, a court must seek

⁷³384 F. Supp. 874 (W.D.Mo. 1974). The statute was held unconstitutional for vagueness by the district court. The Eighth Circuit did not reach the issue of vagueness, however, when it affirmed the district court's decision. United States v. Duardi, 529 F.2d 123 (8th Cir. 1975).

⁷⁴372 U.S. 29 (1965).

an interpretation which supports the constitutionality of the legislation. Accordingly, the district court's finding of vagueness was reversed, and the constitutionality of section 3575(f) affirmed.

Sentencing the Racketeer: Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶3, Note 1: Correction: Rector, "Sentencing the Racketeer,"

8 Crime and Delinquency 385, 389 (1962).

¶5, Note 3: Correction: See S. Rep. No. 91-617, 91st

Cong., 1st Sess. 85 (1969). For a similar pattern,

see Report for 1971 by the New York State Joint

Legislative Committee on Crime, its Causes, Con-

trol and Effect on Society, reprinted in part

in Reform of the Federal Criminal Laws, Part IV:

Hearing before the Subcommittee on the Judiciary

of the United States Senate, 92nd Cong., 2d

Sess. 4188-4198 (1972). A study of 1,792 cases

involving 500 organized crime members showed that in 295

New York City Supreme Court cases involving racketeers, 44.7%

of indictments against all other defendants

(n = 99,771) ended in dismissal. In 500 State

Supreme Court cases involving racketeers, 193

convictions resulted (38 per cent); 89 of these

convictions (46 per cent) ended in suspended

sentences or fines. In 189 Federal District

Court cases involving organized crime members 78

convictions resulted (41 per cent); 26 of these

cases (32 per cent) ended in suspended sentences

or fines. The committee computed the probabili-

ties of an organized crime figure going to jail;

the figures are sobering:

Arrested for:

Probability of going
to jail or prison:

Larceny	1 in 5
Gambling	1 in 50
Extortion	1 in 3
Narcotics	1 in 4
Assault	1 in 7

For a vivid journal journalistic description of the leniency problem, see the New York Times, Sept. 25, 1972, p. 1, col. 6, reprinted in the Senate Hearing, supra. at 4182-4188.

¶9, Note 7: Correction: Brady v. Maryland, 373 U.S. 83, 87 (1963).

Following Brady v. Maryland: United States v. Agurs, 96 S.Ct. 2392 (1976) (Brady explained : an omission is material if it creates a reasonable doubt that did not otherwise exist).

¶9, Note 8: Following United States v. Malcolm: See United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) (the possibility of reliance on false information invalidates a sentence).

¶14, Note 11: Correction: Rule 3:21-2 requires that, "...The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence..."

Correction: State v. Leckis, 79 N.J. Super. 479, 487, 192 A.2d 161, 165 (App. Div. 1963).

Commonwealth v. LeBlanc, ___ Mass. ___, 346 N.E.2d 874 (1976), discusses the scope of Mass. Gen. Laws Ann. ch. 279 §4A.

¶14, Note 12: Correction: United States v. Baratta, 360 F.Supp. 512, 514-515 (S.D.N.Y. 1973): No clamp should be placed upon the sentencing

judge or barrier erected...

¶14, Note 13: The trend is to permit the judge to consider trial perjury in the imposition of the sentence as opposed to viewing perjury as a separate crime. Compare United States v. Hendrix, 505 F.2d 1233, 1236-1237 (2d Cir. 1974) (trial perjury may be a sentencing factor if the judge is persuaded beyond a reasonable doubt) with, Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) and Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975) (perjury a separate crime not to be considered in sentencing). The "beyond a reasonable doubt" standard of Hendrix was not adopted in United States v. Nunn, 525 F.2d 958 (5th Cir. 1976) or United States v. Gamboa, 543 F.2d 545 (5th Cir. 1976). The fifth Circuit permits judges to consider a "feeling" that the defendant has perjured himself as a sentencing factor.

¶17, Note 15: Correction: State v. Green, 62 N.J. 547, 564, 303 A.2d 312, 321 (1973).

¶18, Note 16: Following Townsend v. Burke: United States v. Robin, 545 F.2d 775, 779 (2d Cr. 1976) ("Where there is a possibility that sentence was imposed on the basis of false information concerning the defendant, an appeal will lie to this Court and the sen-

tence will be vacated.").

¶18, Correction: Santoro v. United States

¶18, Note 20: Correction: 462 F.2d 612 (9th Cir. 1972).

¶19, Note 23: Correction: State v. Green, 62 N.J. 547,
564, 303 A.2d 312, 321 (1973).

¶21, Note 27: Correction: State v. Watson, 115 N.J.
Super. 213, 218, 278 A.2d 543, 546 (Hudson
County Ct.1971)

¶23, Note 29: Following Burgett v. Texas: United States
v. Durbin, 542 F.2d 486 (8th Cir. 1976)

(sentence enhancement after a defendant's
successful appeal under Tucker violates Fifth
Amendment double jeopardy).

¶23: Correction: ...the Ninth Circuit has held that "the
mere fact that an invalid conviction was
obtained does not immunize the facts
underlying this conviction from consid-
eration by the sentencing judge."

¶23, Note 32: Correction: Young v. United States, 485
F.2d 292, 294 (8th Cir. 1973), cert. denied
416 U.S. 971 (1974).

¶24, Note 34: Correction: Jones v. United States, 307
F.2d 190, 192 (D.C. Cir. 1962), cert. denied,
372 U.S. 919 (1963).

¶24: See Commonwealth v. LeBlanc, ___ Mass. ___, 346 N.E.2d 874
(1976) (sentencing judge may be advised of and may
consider pending criminal charges against defendant
but cannot force the defendant to establish his

innocence of the other charges).

¶25, Note 37: Correction: The Third Circuit held in
United States v. Metz...

Following United States v. Doyle: See also United States v. Marines, 535 F.2d 552 (10th Cir. 1976) (sentencing judge may consider fact that a felony indictment was dismissed pursuant to a plea bargain) and Commonwealth v. LeBlanc, 346 N.E.2d 874 (1976) supra.

Correction: State v. Barbato, 89 N.J. Super. 400, 408,
215 A.2d 75, 80 (Union County Ct. 1965).

¶26A, Note 38: Correction: United States v. Weston,
448 F.2d 626, 633 (9th Cir. 1971), cert.
denied, 404 U.S. 1061 (1972).

¶26A, Note 42: 435 F.2d 26 (2d Cir. 1970)...

¶26A, Note 43: Correction: United States v. Lee, 540
F.2d 1205, 1212 (4th Cir. 1976).

¶27, Note 46: Correction: United States v. Cardi, 519
F.2d 309, 313-314 (7th Cir. 1975).

Following United States v. Cardi: See also United States v. Seijo, 537 F.2d 694 (2d Cir. 1976) (refused to extend Hendrix "beyond a reasonable doubt" standard to other aggravating circumstances; permissible sentencing factor here was that defendant had a "major role" in a drug operation). United States v. Crusco, 536 F.2d 21 (3d Cir. 1976) demonstrates the complexities introduced by plea bargaining; there the government was not permitted to outline defendant's organized crime background after a plea bargain which included a promise that the government would take no posi-

ion in sentencing.

¶27, Note 48: Correction: Id. at 571, 319 A.2d at 220.

¶27, Note 51: Following State v. Destasio: But see United States v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976):

When there is a substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation.

¶28, Note 52: Correction: United States v. Long, 411 F.Supp. 1203 (E.D. Mich. 1976)

Add at end:
See also United States v. Robin, 545 F.2d 775 (2d Cir. 1976) (defendant's limited access to the presentence report necessitated resentencing).

¶31, Note 58: Following Gore v. United States: But see Dorszynski v. United States, 418 U.S. 424, 443 n.12 (1974) citing United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974);

Careful scrutiny of the judicial process by which the particular punishment was determined... [is] a necessary incident of what has always been appropriate appellate review of criminal cases.

¶31, Note 59: Correction: In United States v. Sacco, 367 F.2d 368 (2d Cir. 1966), the court considered, but finally rejected, the appellee's (government's) proposed exception to the

rule of Lange, supra.

¶33, Note 66: Following Walsh v. Commonwealth: Walsh v. Picard, 328 F.Supp. 427 (D. Mass.), aff'd, 446 F.2d 1209 (1st Cir.), cert. denied, 407 U.S. 921 (1972).

¶35, Note 65: Following Blackledge v. Perry: But see United States v. Durbin, 542 F.2d 486 (8th Cir. 1976). A more severe resentence after a successful Tucker appeal was found to violate Fifth Amendment double jeopardy. The Court explicitly rejected the government's argument that appellant had waived his Fifth Amendment rights by appealing. The Court distinguished situations where the resentence followed a new trial or reconviction and where the original sentence was void or illegal.

¶36, Note 70: Following Price v. Georgia: But see United States v. Durbin, 542 F.2d 486, 487 (8th Cir. 1976):

It is beyond dispute that the Fifth Amendment guarantee against double jeopardy provides protection against multiple punishments for the same offense.

Durbin cites those cases found in note 59 supra.

¶38: Add at end:

Ginsberg, "'Dangerous Offender' and Legislative Reform," 10 Willamette L.J. 167 (1974).

Klein, "Habitual Offender Legislation and the Bargaining Process," 15 Crim. L.Q. 415 (1973).

Note, "Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis," Wash. U.L.Q. 147 (1974).

Note, "Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals," 89 Harv. L. Rev. 356 (1975).

Note, "Constitutional Problems in Enhancing Sentences for 'Dangerous' Special Offenders," 40 Mo. L. Rev. 660 (1975).

Note, "Criminal Procedure-Recidivism-Constitutionality of the West Virginia Recidivist Statute," 77 W. Va. L. Rev. 343 (1975).

Annot. "Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment." 27 A.L.R. Fed. 110 (1976).

- ¶39: Correction: United States v. Stewart, 541 F.2d 326, cert. denied, 96 S. Ct. 2629 (1976).
- ¶40: For example, section 3575(b) requires a presentence hearing, detailed notice to the defendant, and reasonable time for verification of allegations. United States v. Stewart, 531 F.2d 326, 331-332 (6th Cir.), cert. denied, 96 S. Ct. 2629 (1976).
- ¶41: Section 3575 is directed, instead, at those who have actually been convicted of a crime. 531 F.2d at 336-337.
- Add ¶42: The District Court for the Northern District of Texas upheld the constitutionality of 18 U.S.C. § 3575 in United States v. Holt, 397 F. Supp. 1397 (1975), modified on other grounds sub nom. United States v. Bailey, 537 F.2d 845 (5th Cir. 1976) (announcement by the government of the filing of §3575 petitions before the verdict

violates the statutory prerequisite for enhancement). The term "dangerous" was not found vague or overbroad, but rather a permissible criterion for "special handling" after conviction. The Court distinguished the use of "dangerous" in 18 U.S.C. § 3575 from its use in the New Jersey statute discussed in *United States v. Duardi*, 384 F. Supp. 874 (W. D. Mo.), aff'd, 529 F.2d 123 (8th Cir. 1975):

There can never be a 'litmus paper test' for whether an offender is or is not a danger to the community. Here, however, it is important to note that we do not have a statute making it criminal to be 'dangerous'...We deal instead, with a statute specifying special handling for criminals convicted—not of being dangerous—but of having violated a law of the United States

397 F. Supp. at 1399.

Add ¶43: The district Court also affirmed the use of a "preponderance of the evidence" standard in the determination of "dangerousness," as the sentencing judge considers enhancement only after a verdict of guilty. The information considered is little different from that found in the presentence report and should be treated similarly.

Add ¶44: The Seventh Circuit upheld the constitutionality of 18 U.S.C. § 3575 in *United States v. Neary*, No. 75-1781 (7th Cir. 1977). The Court did not read Title X as a revision of the Criminal Code which increased maximum sentences in Title 18

to 25 years and established the "special" and "dangerous" criterion as mere "guidelines" to structure the discretion of the sentencing judge. Rather the Court interpreted Title X as having no effect on Title 18 maximum sentences unless and until separate and further factual determinations are made. Such findings of fact raise due process issues not normally present in the sentencing procedure.

Add ¶45: The Court distinguished findings that the defendant is a special offender under § 3575(E) and that the defendant is a dangerous offender under § 3575(F):

The former involves historical facts, either prior convictions (under (E)(1) or the character and concomitants of the offensive conduct (under (E)(2) and (3)). The latter essentially involves both evaluation of the character of the defendant and a prediction of future conduct, matters which are traditionally left to wide discretion of a sentencing court. Because of this difference, we conclude that the essential function of finding of special offender, under (E), is to expose the defendant to a sentence of imprisonment longer than the maximum prescribed by the statute under which he has been charged and convicted, but not exceeding twenty-five years, and that the essential function of a finding of dangerousness, under (F), is to determine whether and to what extent a sentence in excess of the maximum for the particular offense is appropriate.

Add ¶46: In the instant case, the defendant conceded his special offender status. Therefore, the Court reviewed only defendant's challenge to

the constitutionality of § 3575(F). The Court concluded:

The factors considered in determining dangerousness are not different from factors normally considered by a judge in the sentencing process, nor is the discretion vested in the trial court any greater than discretion usually exercised in sentencing. Many procedural protections applicable upon trial of guilt or innocence do not apply to the determination of sentence after conviction.

The Court did not find §3575(F) vague or overbroad, citing Stewart and Holt, supra.

Add ¶47: Title X contains a second sentence enhancement section, 21 U.S.C. §8489. This sister statute to 18 U.S.C. §3575 has been upheld on the strength of the §3575 challenges. See United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1976) and United States v. Sutton, 415 F. Supp. 1323 (D.C. 1976).

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CONTINUED

18 OF 20

Enjoining Illegality:
Use of Civil Actions
Against Organized Crime

Outline

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Summary

¶1 Civil actions, particularly those affording equitable relief, offer promise of being effective in combatting the economic activities of organized crime. Remedies can be tailored to attack the profit-making and distributing mechanisms directly. Civil actions have important procedural advantages over criminal prosecutions. Civil and criminal sanctions presently exist side by side in many situations. The general rule that equity will not enjoin a crime grew out of the self-imposed limits of equity jurisdiction and not out of the character of conduct as inherently criminal or tortious. Statutes significantly expand equity jurisdiction to control criminal conduct by declaring that in specified situations the requirements for equity jurisdiction are met. There is also room for expansion of the use of civil actions against crime under existing case law. A civil action cannot be a subterfuge, but when the intent and effect of a remedy is preventative and compensatory rather than retributive and punitive, the civil action is constitutional.

I. Introduction

¶2 Organized crime is a big business in America today; it operates from a profit motive just as legitimate business does. Perhaps, if the activities of criminal organizations can be made less profitable, their control by the criminal justice system will be facilitated. These materials explore how economic aspects of organized crime can be regulated by the same methods used to regulate legitimate economic activity. Emphasis is placed on constricting both the means of production of illicit wealth--the buildings, cover businesses, and positions of influence used by organized crime to make its profits--and the outlets for investment of illicit wealth--the legitimate businesses used to launder mob money, and the enterprises into which organized crime expands using coercive and monopolistic tactics.

¶3 The vehicle of such efforts is the civil suit, grounded either in statute or case law. The typical remedy requested is an injunction¹ aimed at preventing future conduct, rather than punishing or compensating for past conduct. Damages may also be requested; however, the party seeking relief--the prosecutor--is not the type of plaintiff-victim who can generally collect damages.

¶4 Historically, injunctions were issued only by courts of equity, and while law and equity have been merged in all

¹See generally D. Dobbs, Remedies ch. 2 (1973).

but a few states,² the traditional label is still used. Whether the power of the court to issue an injunction comes from case law developed by ancient courts of equity or is conferred by statute, injunctions are referred to as equitable remedies. In addition, several extraordinary writs,³ issued by law courts, but operating like injunctions, are termed equitable remedies.

¶5 An injunction is a coercive order of the court directing the defendant to do or not do some act. It is enforced by the contempt power; if the order is not obeyed, the defendant can be imprisoned.⁴ An injunction may be issued ex parte; such an order is called a temporary restraining order. It is normally effective for a few days only.⁵ Its purpose is to prevent actions of the defendant from rendering further litigation useless. A preliminary injunction may follow

²The exceptions are Tennessee, Delaware, Arkansas, and Mississippi. D. Dobbs, Remedies §2.6 Appendix (1973).

³The most useful of these writs for the prosecutor is quo warranto, now called "information in the nature of a quo warranto which, though in form a criminal proceeding, is in effect a civil remedy similar to the old writ, and is the method now usually employed for trying the title to a corporate or other franchise or to a public or corporate office [James v. Kansas, 111 U.S. 449 (1884)]. An extraordinary proceeding, prerogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted [Johnson v. Manhattan Ry. Co., 289 U.S. 479, 502 (1933)]" Black's Law Dictionary 1417 (4th ed. 1968).

⁴Contempt may be either civil or criminal and the distinction has important procedural consequences. See discussion in text, infra, at ¶¶8, 12 and 42.

⁵Fed. R. Civ. P. 65 (ten day limit on temporary restraining orders).

to preserve the status quo during litigation. A permanent injunction is a final adjudication of the controversy; it may have whatever duration the court thinks appropriate.

¶6 Because the controversy is brought into civil court, there are important procedural advantages over criminal proceedings. Generally, relief is faster, especially where a temporary restraining order or preliminary injunction is granted. Evidence is easier to obtain; there is no evidence-suppression rule; the privilege against self-incrimination has only limited impact; and pre-trial discovery may be granted to obtain relevant facts. The burden of proof is lower in a civil case. There is no right to a jury trial in cases where relief is equitable. Remedies are flexible because an injunction can be drawn to fit the facts of a particular case and the defendant can be ordered to do what "ought to be done." The court has power to continue to monitor compliance with its order.

¶7 These materials will focus on equitable remedies, asking two questions:

1. Why use civil actions?; and
2. How may civil actions be directed against organized crime?

II. Advantages of Civil (Legal & Equitable) Actions

A. Litigation Advantages

¶8 Civil actions, seeking equitable relief from the effects of crime, have important advantages over criminal prosecutions in the ease and speed with which relief may be

granted. A temporary restraining order prohibiting certain conduct or maintaining the status quo pending trial can usually be obtained ex parte or by default before a trial on the merits.⁶ In contrast, criminal sanctions are imposed following a complex or lengthy jury trial. An injunction, once granted, usually remains in force pending appeal; a criminal defendant on bail during trial is usually not imprisoned until his appeal is final. In a civil action, the government may appeal a denial of relief. The government is usually precluded from seeking appellate review in a criminal action. Injunctions and similar court orders can be readily and summarily enforced through the use of civil contempt.⁷ When a contempt sanction aims to coerce obedience rather than punish disobedience it is civil, and it may be imposed summarily by the court hearing the issue on the merits.⁸

⁶United States v. Cappetto, 502 F.2d 1351, 1356 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

⁷But see Bloom v. Illinois, 391 U.S. 174 (1968), giving a criminal contempt defendant in a non-petty case the right to jury trial.

⁸The Supreme Court has distinguished between civil and criminal contempt:

If [the sanction] is for civil contempt, the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.

Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1918). Civil contempt seeks to enforce compliance, criminal contempt seeks to deter future misconduct. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Nye v. United States, 313 U.S. 33 (1941). See also federal contempt statutes 18 U.S.C.A. §§401, 402 (1966).

119 To convict for a crime, the state must prove its case beyond a reasonable doubt.⁹ To prevail in a civil action, the state must prove its case merely by a preponderance of the evidence.¹⁰ The prosecution's evidentiary burden is further lightened by the broad discovery available in civil actions. Generally, all evidence relevant to the action may be discovered.¹¹ Evidence of the general reputation of an establishment is admissible in a civil suit to enjoin an activity conducted there.¹² The defendant may be called to testify in a civil suit, and his failure to testify is a proper subject of judicial comment and a factor for the fact-finder to weigh. Unlike an indictment, a civil complaint can normally be amended before or during trial to correspond to facts actually discovered or proved. Finally, where the relief sought is equitable (as it will be in the typical civil action brought by a prosecutor), there is no right of a jury trial. This increases the speed of litigation and has been said to provide a forum less sympathetic to "white collar"

⁹ Holt v. United States, 218 U.S. 245 (1910); In re Winship, 397 U.S. 358 (1970).

¹⁰ Davis v. Auld, 96 Me. 559, 53 A. 118 (1902) (liquor nuisance enjoined on petition of 20 voters of town).

¹¹ Fed. R. Civ. P. 26-37; especially rules 26(a) (scope of examination), 34 (production of documents and things), and 37 (refusal to make discovery; consequences).

¹² Gregg v. People, 65 Colo. 390, 176 P. 483 (1918); Balch v. State, 65 Okla. 146, 164 P. 776 (1917).

criminals.¹³

B. Strategic Remedial Advantages

¶10 Organized crime is an economic, profit-oriented activity.¹⁴ High level members are often insulated from prosecution because they do not themselves engage in visible crime, and low level members are typically processed through the criminal justice system in revolving-door fashion. Equitable remedies, by contrast, can be tailored to attack the means necessary to the continued operation of a criminal enterprise. For instance, the maintenance of brothels, bookmaking headquarters, and the like can be directly enjoined. Criminals may be forced to divest themselves of businesses used as covers for illegal activities. Activities which are not crimes per se, but can be demonstrated to be related to a criminal enterprise, can be enjoined. The threat of punishment too often seems to have little effect on the leaders of organized crime. Civil remedies aim to incapacitate these individuals by making it impossible for them to use legitimate businesses to channel illegal profits or as fronts for illegal activities. Essentially, injunctions work against activities as well as persons, so they may be appropriate

¹³ R. Leflar, "Equitable Prevention of Public Wrongs,"
¹⁴ Tex. L. Rev. 427, 460 (1936) (problems of jury trials of white collar crime).

¹⁴ National Association of Attorneys General, The Use of Civil Remedies in Organized Crime Control 2 (1975) (hereinafter Civil Remedies).

in dealing with organized crime's ability to protect itself by not being dependant on individual members.

¶11 Civil remedies are diverse. A defendant may be forced to pay damages far in excess of any fine the criminal law provides.¹⁵ This is especially true when class action suits allow private plaintiffs to join the government in claiming damages from organized crime's activities. The injunction is a flexible tool. When a business is syndicate-controlled, the corporate charter may be revoked, and divestiture of its assets ordered. Necessary business licenses may be cancelled or not granted at all. Illegal contracts, such as loan-shark debts, may be rescinded and their enforcement in the courts or in the streets enjoined. Organized crime elements can be forced to divest themselves of any interests they have in legitimate business. Finally, the court will normally retain jurisdiction of a case to see that the court's order is carried out; it may also require the defendant to submit periodic reports verifying his compliance.

¶12 Despite these advantages in litigation and in remedies, civil actions share many of the infirmities of criminal prosecutions. Persons willing to violate criminal laws are unlikely to be more intimidated by civil process. Contempt proceedings, if punitive in nature and non-petty, are criminal proceedings in which the defendant

¹⁵ Civil damages in a massive antitrust case, for instance, may reach hundreds of millions of dollars.

is entitled to all the protections guaranteed any criminal defendant.¹⁶ In some cases, too, the civil remedy itself may be found to be punitive;¹⁷ consequently, criminal standards of due process may be applicable. Ideally, courts, legislatures, and prosecutors will fashion their remedies and enforcement processes to preserve their civil character, retaining the advantages for which such actions were originally chosen. Other constitutional limitations, discussed below, will, however, restrict civil actions, especially in the area of enforcement by contempt citations.

III. Requirements for Equity Jurisdiction

¶13 Under the common law and during the formative era of American legal thought, injunctive relief in equity was seen as an "extraordinary remedy,"¹⁸ to be used with circumspection. Early cases reflect the maxim "equity will not enjoin a crime."¹⁹ This maxim, however, is little more than a generalization of the requirements for equitable jurisdiction applied to crimes. While equity will not

¹⁶Bloom v. Illinois, 391 U.S. 194 (1968).

¹⁷As was a forfeiture provision, labeled civil, but found to be criminal in Aztec Motel v. State ex rel. Faircloth, 251 So.2d 849 (Fla. 1971).

¹⁸Ex Parte Fahey, 332 U.S. 258 (1947).

¹⁹Gee v. Pritchard, 35 Eng. Rep. 670, 2 Swanst. 402 (Ch. 1818); In re Debs, 158 U.S. 564 (1895); Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938).

enjoin an action simply because it is a crime,²⁰ where there exists a personal or property right which equity will protect, such protection will not be denied simply because the conduct is also criminal.²¹ Thus, there are several classes of well-recognized exceptions to the maxim.

¶14 Equitable jurisdiction is normally discretionary, to be granted or withheld in conformity with settled equitable principles and considerations.²² Where it is clear that the "hard" law will not give a litigant adequate protection or relief, an injunctive remedy may become a matter of right. But equity will not right all wrongs; it is rarely available to enforce a complainant's political rights, or rights not peculiar to him. Further, equity does not punish bad acts; its remedies are mainly remedial and compensatory.

¶15 Despite the vagueness of equitable jurisdiction the American judiciary has developed a number of specific tests of the suitability of equitable remedies to a given controversy. Such tests are more specific in definition than in application, and are applied on a distinctly case-by-case

²⁰ . . . [I]t is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction

In re Debs, 158 U.S. 564 at 593 (1895).

²¹ Id.

²² State ex rel Ellis v. Creagh, 364 Mo. 92, 259 S.W.2d 372 (1953).

basis.²³ Generally, an enjoined action is one which meets the following requirements:

1. the conduct sought to be enjoined is capable of enjoinder;
2. the complainant has an interest equity will protect;
3. the plaintiff's legal remedy is inadequate;
4. the plaintiff has standing to assert his interest;
and
5. the plaintiff himself is "doing equity"--his action is timely and brought with clean hands.

¶16 To explain:

1. Conduct is not capable of enjoinder if it cannot be altered by an injunction; to save face, the courts will not issue a futile injunction. Beyond this, the defendant's conduct must be such that an injunction will operate on specific behavior, will be preventative not punitive, and will affect conduct which is noxious to specific personal or property rights, or to the public at large.²⁴

²³The very nature of equitable relief necessarily forecloses any extensive specificity in its application. Both at early common law and today, equity has been available only in those controversies which call for judicial intervention over and above any relief which the "hard law" could grant to an aggrieved party. Although the old common law distinction between courts of law and courts of equity has been generally abolished in the modern United States, equitable relief to a great extent, still exists apart from "law" in its technical forms and is molded, when applied, to bring forth an "equitable" result in a given controversy.

²⁴For a concise discussion of the use of equitable remedies in controlling crimes of vice, see J. Oliff, "Equitable Devices for Controlling Organized Vice," 48 J. Crim. L. C. & P. S. 623 (1958).

¶17 2. Interests equity will protect are generally property rights of the complainant.²⁵ Equitable jurisdiction has, in recent years, been expanded to protect the public welfare. In such an action the plaintiff must be a proper party to assert the public interest. This requirement is particularly important in the context of equitable actions against crime.

¶18 3. Inadequacy of the legal remedy is the cornerstone of equitable jurisdiction. With few exceptions, the existence of an effective remedy at law will bar a complainant from injunctive relief. Legal remedies are generally considered ineffective when a plaintiff will suffer irreparable injury despite the legal remedy. A person seeking an injunction must demonstrate that he has a clear legal right²⁶ which is being substantially impaired by the defendant's conduct. The impairment or threat of impairment must be real and material; equity courts will not step in to enforce rights only potentially threatened or insubstantial in nature.²⁷ The notion that criminal

²⁵ Recently, equity began protecting civil rights also, see Everett v. Harron, 380 Pa. 123, 127, 110 A.2d 383, 385 (1955).

²⁶ Equity will not step in to protect a right the existence or legality of which is uncertain. Russell v. Farley, 105 U.S. 433 (1881); Schubach v. McDonald, 179 Mo. 163, 78 S.W. 1020 (1904), error dismissed, 196 U.S. 644 (1904).

²⁷ McCombs v. McClelland, 223 Or. 475, 354 P.2d 311 (1960); Greenwood Lodge, No. 118, I.O.O.F. v. Hyman, 180 Miss. 198, 177 So. 43 (1937).

sanctions were inherently effective legal remedies²⁸ gave life to the maxim "equity will not enjoin a crime." Today, however, it is clear in many situations that the criminal law is not fully effective. The urban criminal court system which acts as a revolving door for petty criminals (bookmakers, prostitutes, and muggers for instance) is a prime example of the possible inadequacy of legal remedies.

¶19 4. Standing to seek injunctive relief is particularly important in the context of civil actions against crime. Standing requirements for private parties have been substantially lessened in recent federal law,²⁹ but the plaintiff must still show a direct threat of harm to a right personal to himself. In many states, the attorney general or district attorney is given standing by statute to seek relief protecting the public welfare. Even absent statute, however, most state attorneys general retain the common law powers and duties of that office.³⁰ These

²⁸ State ex rel. Turner v. United Buckingham Freight Lines, 211 N.W.2d 288 (Iowa, 1973).

²⁹ The relaxation of the standing requirement in federal law has generally occurred in the context of having standing to assert a constitutional question, see Eisenstadt v. Baird, 405 U.S. 438 (1972); or having standing to institute an action under a particular federal statute, see Coalition for Environment v. Volpe, 504 F.2d 156 (8th Cir. 1974).

³⁰ People v. Miner, 2 Lans. 396 (N.Y. Sup. Ct. 1868); Earl DeLong, "Powers and Duties of the State Attorney General in Criminal Prosecutions," 25 J. Crim. L. C. & P. S. 358 (1934).

generally include the power to bring writs of quo warranto, mandamus, and scire facias; ³¹ to protect the properties and revenues of the sovereign; to enforce trusts; and to prevent public nuisances. ³²

¶20 5. The plaintiff is otherwise entitled to equitable relief if he has "clean hands"; laches does not bar the action; and the decree is practically enforceable. Thus, a suit based on evidence procured through fraud or police illegality might fail. A suit brought after excessive delay will be dismissed. A court will save face by not issuing an ineffectual decree. Equity courts examine not only the factual and legal aspects of the controversy, but also the parties themselves, particularly the party seeking relief. ³³

IV. Present and Possible Uses of Equity in Organized Crime Control

¶21 This section sketches some of the presently recognized uses of equitable actions against criminal conduct, and suggests possible uses of equitable and administrative actions against organized crime as an economic, profit-oriented phenomenon. Presumably, if organized crime can be made unprofitable, its control by the criminal justice system

³¹D. Dobbs, Remedies, §2.10 (1973).

³²This list is not exhaustive. See People v. Miner, 2 Lans. 396 (N.Y. Sup. Ct. 1868); Civil Remedies 16-17.

³³D. Dobbs, Remedies ch. 2 (1973).

will be facilitated. The same type of decisional and statutory law which regulates legitimate economic activity should be available for use against illegitimate economic activity.

¶22 The general rule against injunctive relief from criminal activity does admit some exceptions--exceptions which are triggered when the requirements for equitable jurisdiction are met wholly apart from the criminality of the conduct. Presently recognized exceptions can be grouped under five major headings:

1. national emergencies;
2. widespread public nuisances, including threats and conspiracies to threaten public welfare, and situations where legal remedies are inadequate;
3. refusal to enforce rights illegally obtained;
4. disabilities placed on corporations and other publicly licensed businesses by reason of their ultra vires acts; and
5. use of existing regulatory and administrative law to restrain illegal businesses, and especially to abate the infiltration of organized crime into legitimate business.

¶23 The leading case on the use of injunctions in a national emergency is In re Debs,³⁴ arising out of Eugene V. Debs's Pullman Strike, which crippled rail transportation by shutting down the railroads in and out of Chicago. The government successfully sued for an injunction barring the union leaders or anyone conspiring with them from stopping trains, disrupting rail service, entering railroad property, or inducing others to engage in such conduct. When this did not end the strike, the court jailed

³⁴In re Debs, 158 U.S. 564 (1895).

Debs for criminal contempt. The case reached the Supreme Court on a writ of habeas corpus. The Court, sustaining the original injunction and the contempt citation, based its holding in part on the injunction remedy of the Sherman Antitrust Act, but went on to say it is within the inherent power of the federal government to protect public welfare and interstate commerce by an

appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation. . . .³⁵

Whether or not the activity of organized crime can be such a crisis, the Court expressly recognized that equity is not limited to non-criminal conduct. Presumably, if organized crime infiltrated an enterprise or industry, causing substantial harm to public welfare, the precedent of Debs would be applicable.

¶24 The power of the state to abate public nuisances and enjoin threats to, and conspiracies to threaten public

³⁵ Id. at 599.

welfare is widely recognized.³⁶ Criminal conduct must threaten such grave and irreparable harm that a punitive criminal sanction would not adequately protect the state's interests. This could be true either because the criminal process is too slow, because the conduct is ongoing, or because the harm threatened will not be put right by a punitive, "moral" vindication of the state's interests. Whether this exception is viewed as common law nuisance³⁷ or as an independent means of controlling anti-social conduct,³⁸ this exception to the no-injunction rule cannot

³⁶ See generally, Oliff, "Equitable Devices for Controlling Organized Vice," 48 J. Crim. L. C. & P. S. 623 (1958); R. Leflar, "Equitable Prevention of Public Wrongs," 14 Tex. L. Rev. 427 (1936).

³⁷ The state's power to enjoin a public nuisance has never been doubted. The criminality of the conduct enjoined is irrelevant. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938). Such conduct must be harmful to the health, safety, or morals of the community at large. State ex rel. Allan v. Thatch, 361 Mo. 190, 234 S.W.2d 1 (1950); Harvey v. Prall, 250 Iowa 1111, 97 N.W.2d 306 (1959) (collecting garbage without a permit enjoined as nuisance). Criminal conduct cannot be enjoined unless it threatens a civil or property right of the public. Southland Theaters, Inc. v. State, 254 Ark. 192, 492 S.W.2d 421 (1973); State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935 (1909). Standing to prosecute such a suit is reserved to the appropriate public official. Penna. S.P.C.A. v. Bravo Enterprises, 428 Pa. 350, 359, 237 A.2d 342, 348 (1968) (suit to enjoin bullfight dismissed).

³⁸ Basis for equitable jurisdiction found where there was a "high public interest which the state is entitled to have protected and [where] the criminal remedy is inadequate to protect it." State v. Holcomb, 245 S.C. 63, 138 S.E.2d 707 (1964). Injunction justified by flagrant and persistent violations of the law. State ex rel. Turner v. United Buckingham Freight Lines, 211 N.W.2d 288 (Iowa 1973); State v. House of Vision-Belgard-Spero, 259 Wisc. 87, 47 N.W.2d 321 (1951).

be applied, absent a statute, unless the requirements for equity jurisdiction, including inadequacy of the legal (i.e., criminal) remedy, are met.

¶25 When specific property is used for criminal activities, nuisance actions are available to enjoin such uses of property.³⁹ Thus, where property is used as a bawdy house, as a gaming house, or for storing and fencing stolen merchandise, the jurisdiction of civil courts to issue injunctions against the use of the property has been upheld. A decree may operate in personam or in rem.⁴⁰ If the operation of the premises threatens public morals or welfare, the prosecutor may sue, and if it damages neighborhood property values, private parties may sue.⁴¹

¶26 When criminal laws are repeatedly, openly, and intentionally violated (for example, the "revolving-door" processing of prostitutes, street pushers, and petty gamblers through an urban criminal court system), the legal

³⁹ See, e.g., City of Sterling v. Speroni, 336 Ill. App. 590, 84 N.E.2d 667 (1949) (gambling); State v. Brush, 318 Ill. 307, 149 N.E. 262 (1925) (liquor); Balch v. State, 65 Okla. 146, 164 P. 776 (1917) (prostitution).

⁴⁰ Although the owner's lack of knowledge may prevent him from being made a party to the injunction or being bound for the costs of the action, it will not prevent the issuance of a closing or removal and sale order. People ex rel. Bradford v. Barbieri, 33 Cal. App. 770, 778, 166 P. 812, 815 (1917); People ex rel. Crowe v. Lipschultz, 240 Ill. App. 411 (1926).

⁴¹ People ex rel. L'Abbe v. District Court of Lake County, 26 Colo. 386, 58 P. 604 (1899) (writ of prohibition issued to halt lower court proceedings to enjoin gambling house when private plaintiffs below had shown no special injury); Redway v. Moore, 3 Idaho 312, 29 P. 104 (1892) (complaint must allege facts sufficient to show special injury).

remedy is demonstrably inadequate to curb a widespread threat to public welfare.⁴² An injunction against such violations, treated as public nuisances, is more effective than light criminal penalties which are seldom imposed. An injunction can act on a large group of people and can remain effective indefinitely, thus controlling future conduct.

¶27 Conspiracies which threaten public welfare are enjoinable under the same conditions as other threats to public welfare. Equity can reach the inchoate crime of conspiracy in circumstances where the conspiracy itself may pose a threat to public welfare and may not be reachable by traditional criminal penalties. Because of lower standards for the admissibility of evidence and lighter burden of proof, conspiracies may be easier to prove in civil court than in criminal court. Negotiations between known gangsters and legitimate businessmen may well be conspiracies to threaten the public welfare.

¶28 The power to enjoin invasions of civil or property rights is generally invoked by the injured party, but the institution of injunctive actions by law enforcement officials who are not themselves injured, on behalf of a specified group of private individuals, is not unheard of. For instance, the Securities and Exchange Commission's use of injunctions directed at a particular issue of

⁴²City of Sterling v. Speroni, 336 Ill. App. 590, 599 84 N.E.2d 667, 672 (1949); Repass v. Commonwealth, 131 Ky. 807, 115 S.W. 1131 (1909); Stead v. Fortner, 255 Ill. 468, 474, 99 N.E. 680, 682 (1912). Compare State v. Vaughan, 81 Ark. 117, 98 S.W. 685 (1906).

securities is generally intended to protect the buyers or potential buyers of those securities.⁴³ Of course, such actions contemplate a public benefit over and above the protection of particular buyers. State and federal agencies like the Equal Employment Opportunities Commission and the Civil Rights Commission have the power to request restraints on conduct which violates the civil rights of individuals.⁴⁴ The distinction between public and private nuisance, dependent on who has been injured and who may seek relief, has been further blurred by the emergence of the "private attorney general" and the "citizen's suit."⁴⁵ But the same equitable principles apply to both private and public nuisance.⁴⁶ The criminality of the defendant's conduct is generally not

⁴³ See Frank v. United States, 384 F.2d 276 (10th Cir. 1967), aff'd, 395 U.S. 141 (1969).

⁴⁴ 42 U.S.C.A. §§1971, 2000a-3, 2000e-5, 2000e-6 (1974).

⁴⁵ Although public nuisances have traditionally been the sole province of public officials, the incorporation of what is termed a "private attorney general" right of action into various statutes at both the state and federal level, (in other words, an action against a threat to public welfare which a private citizen may bring) may engender a blurring of the distinctions. See, e.g., the "citizen's suit" provision of the 1970 Clean Air Amendments, 42 U.S.C.A. §1857h-2 (Supp. 1976). Section 1857h-2 has been read to require a showing by the plaintiffs of the equitable prerequisites for an injunction, Citizens' Ass'n of Georgetown v. Washington, D.C., 383 F. Supp. 136 (D.C.D.C. 1974); Wuillamey v. Werblin, 364 F. Supp. 237 (D. N.J. 1973).

⁴⁶ See Action v. Garron, 450 F.2d 122 (8th Cir. 1971); Lanvin Perfumes v. LeDans Ltd., 9 N.Y.2d 516, 174 N.E.2d 920, 215 N.Y.S.2d 257, cert. denied, 368 U.S. 834 (1961).

relevant to the decision to grant an injunction.

¶29 The notion that courts will not enforce a right acquired by criminal means is a corollary to the equitable principle that a person shall not profit by his own inequity. In the absence of a public interest in the right, this exception may be available only to private parties wronged by the person seeking enforcement. A prosecutor might, however, have standing to sue where a right under a state license (e.g. a liquor license) was obtained through bribery or corruption.⁴⁷ An individual indebted to a loan shark or gambler could bring a nuisance action to enjoin collection of the debt, an action for rescission of the contract, or defend an action for the debt (which may appear legal on its face) as a right illegally obtained.⁴⁸ The debtor may, however, be deemed to have an adequate legal remedy if, by statute, he can recover the excess interest or amounts paid as gambling debts.⁴⁹

¶30 Perhaps the greatest potential for affecting organized crime as an economic phenomenon lies in blocking the

⁴⁷ See, e.g., Sportservice Corp. v. Oregon Liquor Control Comm., 115 Ore. App. 226, 515 P.2d 731 (1973); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); Oregon Department of Justice, The Use of State Regulatory Action Against Criminal Infiltration of Legitimate Business, paper presented at the National Conference on Organized Crime, Washington, D.C., Oct., 1975.

⁴⁸ But see Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307 A.2d 85 (1973) (court enforced gambling debt contracted in a jurisdiction where gambling legal).

⁴⁹ N.Y. Gen. Oblig. Law §§5-421, 5-513 (Supp. 1976).

expansion of mob money, power, and tactics into legitimate business. This might be accomplished through common law restraints on the ultra vires acts of corporations, and through use of state regulatory administrative laws, and licensing procedures.

¶31 A corporation acting in violation of the law, or through the use of syndicate money, is arguably acting ultra vires and a writ of quo warranto may issue to remedy the situation. When a corporation has abused or misused its franchise or powers granted by the state, the attorney general may seek to have the corporation dissolved or its powers restricted.⁵⁰ The court may retain jurisdiction of the case to monitor compliance with its decree. It may require the corporation to submit reports of its activities, or allow law enforcement officials access to its books and records. It may appoint a receiver to manage the affairs of the corporation in accord with its decree.⁵¹

¶32 A business run as a cover for organized crime activities can be restrained in the civil courts through the use of writs of quo warranto, injunctions against stated persons conducting such businesses, and denials or revocations of necessary business licenses. For instance, a court might order divestiture or dissolution of an

⁵⁰ State ex rel. Landis v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); Attorney General v. Contract Purchase Corp., 327 Mich. 636, 642, 42 N.W. 2d 768, 771 (1950).

⁵¹ Cf. United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Bausch & Lomb Co., 321 U.S. 707, 726-28 (1944).

import-export business used for smuggling, or a pawnshop used for fencing. A known racketeer might be enjoined from engaging in businesses related to his past criminal conduct.⁵²

¶33 If a business is shown to be infiltrated by criminals, a necessary business license may be revoked or denied. State licensing schemes offer flexible hearing procedures, relaxed evidentiary rules, and often require that applicants complete detailed questionnaires demonstrating their honesty and good moral character.⁵³ Giving false information on such questionnaires is often a criminal offense. An administrative case may take only a fraction as much time as criminal trial.⁵⁴ Finally, racketeer expansion into legitimate business is often accomplished by use of coercive and collusive tactics prohibited by antitrust laws⁵⁵ and consumer fraud laws⁵⁶ presently in

⁵² Authority for this type of order is clearer under statutory grants of injunctive power, but is possible without additional authority.

⁵³ Civil Remedies at 9.

⁵⁴ United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) (parent corporation convicted of federal felony); Sportservice Corp. v. Oregon Liquor Control Comm., 155 Or. App. 226, 515 P.2d 713 (1973) (subsidiary denied liquor license for use at racetrack).

⁵⁵ National Association of Attorneys General, Prosecuting Organized Crime 45-47 (1974).

⁵⁶ Committee of State Officials on Suggested State Legislation, Council of State Government, Suggested State Legislation 141 (1970).

force in many states.

¶34 The above uses of equity to combat organized crime are only possibilities. The judiciary has been reluctant to apply them liberally. It is particularly difficult to demonstrate the inadequacy of the legal remedy.⁵⁷ Thus, statutory authority for the use of equitable actions is the most useful means of obtaining such relief on a regular basis.

V. Statutory Grants of Injunctive Power

¶35 Statutory grants of injunctive power are by far the most fertile means by which the prosecutor acquires the necessary legal tools to seek civil relief from crime. The Supreme Court has declared this avenue to be a constitutional exercise of state power.⁵⁸ Such statutes can obviate the need to show all the usual common law prerequisites for equitable jurisdiction. For instance, an express grant of power to seek an injunction is usually held to be a binding legislative determination that the legal remedy is inadequate.⁵⁹ The statute may establish

⁵⁷ See State ex rel. Turner v. United Buckingham Freight Lines, 211 N.W.2d 288 (Iowa 1973), where the court enjoined violations of criminal highway transportation laws because of persistent and open violations, despite repeated prosecutions. Cf. Sanvita v. Common Laborer's and Hod Carriers Union of America, Local 341, 402 P.2d 199, 202 (Alas. 1965) (repeated violence in union hall).

⁵⁸ Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Tigner v. Texas, 310 U.S. 141 (1940).

⁵⁹ Conceptually, an express statutory grant of injunctive power under explicit conditions results in the statutory injunction becoming a legal remedy.

per se the existence of the equitable requirements.⁶⁰

Standing to invoke such statutes is reserved to the state absent express grants of standing to private parties,⁶¹ which are common at the federal level.⁶²

¶36 Examples of statutory uses of civil remedies to control conduct also subject to the criminal law are numerous. Federal legislation in the antitrust, income tax, food and drug, and price control areas provides civil remedies along with criminal sanctions.⁶³ While the focus

⁶⁰ See, e.g., Cal. Pen. Code §11225 (West 1970) (red light abatement law; nuisance per se). Sometimes the nuisance label is not explicit but is clearly suggested by the terms of the statute. N.Y. Civ. Prac. §330 (McKinney 1975) (injunctions against sale of obscene prints and articles); 42 U.S.C.A. §1983 (1974) (Civil Rights Act--civil action for deprivation of rights).

⁶¹ See note 29, supra.

⁶² See, e.g., 21 U.S.C.A. §882 (1972) (narcotics); 15 U.S.C.A. §§4, 25 (1973) (antitrust); 18 U.S.C.A. §1964 (Supp. 1976) (racketeering in interstate commerce).

⁶³ See, e.g., antitrust provisions of 15 U.S.C.A. §4 (1973) (jurisdiction of federal courts to enjoin violations of Sherman Antitrust Act); 15 U.S.C.A. §6 (1973) (property of illegal trust then in transit forfeit to government); and 15 U.S.C.A. §21 (1973) (regulatory commissions given power to seek cease and desist orders and orders requiring divestiture of stock and ouster of corporate officers). While injunctions under these sections must be granted or denied in accordance with equitable principles (Appalachian Coals v. United States, 288 U.S. 344 [1933]), if a violation is found, the remedy will be upheld if it reasonably tends to restrain the prohibited conduct. (United States v. Bausch & Lomb Optical Co., 321 U.S. 707 [1944]). See also, 26 U.S.C.A. §§7402, 7403 (1967) (civil enforcement of income tax law); 21 U.S.C.A. §332 (1972) (civil enforcement of food and drug laws, providing that a violation of an injunction which is also a violation of the statute will be tried to a jury on demand of accused); and 12 U.S.C.A. §1904 note (Supp. 1976) (civil enforcement of price controls).

of these statutes is regulatory not criminal, they offer examples of how civil and criminal enforcement provisions might be combined in statutes directed specifically against organized crime. The federal government⁶⁴ and several states⁶⁵ have such statutes. In addition, several states have statutes declaring houses of prostitution, places where alcohol is sold illegally, gambling houses, and the like to be public nuisances and hence enjoinable. Such statutes are constitutional.⁶⁶ Whether acts declared by statute to be public nuisances can be

⁶⁴18 U.S.C.A. §1961 et seq. (Supp. 1976), discussed in text, infra at ¶¶37-41.

⁶⁵The Florida (Fla. Stat. §932.58 et seq. [1973]), Connecticut (Conn. Gen. Stat. Ann. §§3-129a, b [1971]), and Rhode Island (R.I. Gen. Laws Ann. §§7-14-1 to 7-14-3[1970]) statutes are substantially identical, giving the attorney general the power to seek, in civil court, revocation of a corporate charter or permit to do business, or an injunction against any non-corporate business, when: any official of the corporation is a racketeer or engages in racketeering activities in conducting corporate business, under circumstances where a majority of the board of directors should have known of such activity; or when any person actually in control of a non-corporate business has, in conducting such business, engaged in racketeering activities with intent to induce others to deal with the business; and where the civil remedy is necessary to prevent future illegal conduct. The Florida statute was declared unconstitutional by that state's highest court in Aztec Motel v. State ex rel. Faircloth, 251 So.2d 849 (Fla. 1971), discussed in text infra at ¶42. The Hawaii statute (Hawaii Rev. Stat. ch. 742 [1972]) combines the essentials of the above statutes with the provisions of RICO (18 U.S.C.A. §§1961 to 1968 [Supp. 1976]), discussed in text infra at ¶¶37-41.

⁶⁶Mugler v. Kansas, 123 U.S. 623 (1887); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938).

enjoined throughout the jurisdiction, without reference to a specific place, is an open question, unless the statute in question specifically authorizes such a decree.⁶⁷ The National Prohibition Act contained such a provision,⁶⁸ the validity of which was never settled. Lower federal courts were split on the question, and it never reached the Supreme Court.⁶⁹

¶37 An example of a statute explicitly directing civil remedies, and in particular injunctions, against organized crime is the Racketeer Influenced and Corrupt Organizations (RICO) section⁷⁰ of the federal Organized Crime Control Act of 1970, which provides civil and criminal remedies against the activities of racketeering enterprises in interstate commerce. RICO defines racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year;..."⁷¹ or any act indictable under a variety

⁶⁷ See, e.g., Cal. Pen. Code §11225 (West 1970) (gambling, prostitution); Ill. Ann. Stat. ch. 100-1/2, §1 (Smith-Hurd 1935) (prostitution); Me. Rev. Stat. Ann. tit. 141, §1 (1965) (liquor, drugs); Mass. Gen. Ann. Laws ch. 139, §6 (Supp. 1976), §16 (1972) (prostitution).

⁶⁸ National Prohibition Act, 41 Stat. 314, rendered inoperative by U.S. Const. Amend. XXI.

⁶⁹ See discussion in 5 J. Moore, Federal Practice §38.24[3] at 195-97 (2d. 1968).

⁷⁰ 18 U.S.C.A. §§1961-1968 (Supp. 1976).

⁷¹ 18 U.S.C.A. §1961 (Supp. 1976).

of federal criminal laws from bribery to extortion to gambling; or any act involving bankruptcy or securities fraud. A "pattern of racketeering activity" is two racketeering acts within ten years of each other.⁷² An "enterprise" is any "group of individuals associated in fact."⁷³ By this last definition, the Act brings within its ambit both legal and illegal enterprises.⁷⁴

¶38 Prohibited activities⁷⁵ under RICO are:

1. use of racketeering income to acquire an interest in an enterprise affecting interstate commerce;

2. use of racketeering income to maintain an interest in an enterprise affecting interstate commerce; and

3. conducting the affairs of any enterprise through a pattern of racketeering activities.⁷⁶

The Act provides stiff criminal penalties.⁷⁷

¶39 The civil remedies of RICO are found in section 1964.⁷⁸

⁷²Id.

⁷³Id.

⁷⁴United States v. Cappetto, 502 F.2d 1351, 1355 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). Contra, United States v. Moeller, 402 F. Supp. 49 (D.C. D.C. 1975).

⁷⁵18 U.S.C.A. §1962 (Supp. 1976).

⁷⁶These provisions are not unconstitutionally vague. United States v. White, 386 F. Supp. 882, 883 (E.D.Wisc. 1974). They should be read like a regulatory statute. United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973).

⁷⁷18 U.S.C.A. §1963 (Supp. 1976) provides up to 20 years imprisonment and/or \$25,000 fine, plus criminal forfeiture, held constitutional in United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973).

⁷⁸18 U.S.C.A. §1964 (Supp. 1976).

Part (a) gives district courts jurisdiction to prevent and restrain violations of section 1964 by ordering a person to divest himself of interests in an enterprise, restrain a person from engaging in similar enterprise and ordering dissolution or reorganization of an enterprise. The Attorney General may bring actions under RICO. The court may grant preliminary relief pending trial. Private parties may also sue, and recover treble damages. A final judgment in a criminal case has collateral estoppel effect in a subsequent civil suit.⁷⁹

¶40 The government is given broad civil discovery powers,⁸⁰ equivalent to the reach of a subpoena duces tecum in aid of a grand jury investigation.⁸¹ These powers may be enforced in a contempt proceeding.

¶41 The civil remedies section has, to date, been tested only once, in United States v. Cappetto.⁸² Defendants were operating an illegal gambling business out of a pool hall, with the knowledge of the owner. The government alleged violations of section 1962(b) in acquiring the gambling business through a pattern of racketeering activity; and of section 1962(c) in conducting the affairs

⁷⁹Id. (subsections a-d).

⁸⁰18 U.S.C.A. §1968 (Supp. 1976).

⁸¹See Universal Manufacturing Co. v. United States, 508 F.2d 684 (8th Cir. 1975).

⁸²United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

of the enterprise through a pattern of racketeering activity. Jurisdiction was alleged under section 1964, the civil remedy provision. The government sought injunctions against the conduct of the business, divestiture of the building, disclosure of the names of associates, and a ten year monitoring order. Defendants refused to appear for discovery, and the court entered a default judgement against them, held them in contempt of court, and ordered them jailed until they complied with the discovery orders. On review, the court, relying on In re Debs,⁸³ held that Congress had the power to restrain acts threatening interstate commerce which were also crimes. The court distinguished cases civil in name but criminal in substance and sanctions, and cases of forfeitures, holding that section 1964 relief is remedial rather than punitive. The act was meant to apply to illegitimate as well as legitimate business.⁸⁴ Neither irreparable injury nor inadequacy of the legal remedy need be shown. The statute is not unconstitutionally vague. Finally, the court held that a defendant who had been "use" immunized could not refuse to answer civil interrogatories, and the remedy for his silence was civil contempt. Whether a contempt proceeding against the defendants for refusing to obey the injunction would be civil or criminal was not decided. Use of the advantages of civil actions, discussed above (§§8-9) withstood constitutional attack.

⁸³ 158 U.S. 564 (1895).

⁸⁴ Accord, United States v. Parness, 408 F. Supp. 440 (S.D.N.Y. 1975).

VI. Problems and Limitations

¶42 There are both practical and legal limitations on the use of civil actions to control organized crime.

First, a person willing to violate criminal laws is unlikely to be awed by civil process. If contempt proceedings for violations of injunctions are criminal, then it will be just as difficult to get a contempt citation as to convict for the substantive offense,⁸⁵ since the government will have to prove, beyond a reasonable doubt, conduct equivalent to a violation of the underlying criminal offense.⁸⁶

¶43 If a civil action is found to be a criminal action in disguise, all the constitutional protections afforded any criminal defendant will apply. The Supreme Court has enunciated two tests of the criminal character of an action. The punitive intent test of Trop v. Dulles⁸⁷

⁸⁵ In light of Bloom v. Illinois, 391 U.S. 194 (1968) (requiring a jury trial for a defendant subjected to a "non-petty" criminal contempt proceeding for violating an injunction issued by the court) and in light of the line of Supreme Court cases extending the various protections of the Constitution to state criminal defendants by way of the Fourteenth Amendment (see, e.g., Mapp v. Ohio, 367 U.S. 643 [1961]), all the procedural safeguards of criminal prosecutions seem to be applicable to criminal contempt.

⁸⁶ See, e.g., United States v. Rastelli, 75 Cr. 160 (E.D.N.Y. 1975).

⁸⁷ Trop v. Dulles, 356 U.S. 86 (1958) (defendant voted in foreign election. Government in civil suit argued that he had forfeited citizenship. Supreme Court held forfeiture to be punitive and unrelated to a legitimate regulatory purpose, invalidating the civil judgment).

precludes resort to civil remedies where the intent of the legislature is punitive and no valid and substantial regulatory basis for the statute exists.⁸⁸ A statute with a real effect on public welfare or commerce would presumably pass this test. The balancing test of In re Gault⁸⁹ and In re Winship⁹⁰ bars the use of civil standard of proof by a preponderance of the evidence where the punitive effect of the remedy on the defendant outweighs the governmental interest in flexible procedure. On this ground, the Florida Supreme Court held that state's civil remedy statute⁹¹ invalid. Because the statute contained a forfeiture provision, it had to measure up to criminal standards of exactness. Since it did not give adequate notice of what acts by officers of a corporation would subject it to forfeiture of its charter, the statute was declared void for vagueness. In Gault and Winship, youngsters, being dealt with through the civil processes of the juvenile courts, faced loss of their liberty for a period of years. The evidence against Winship was

⁸⁸Comment, "Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for 'Criminal Activity'," 124 U. Pa. L. Rev. 192, 212 (1975) (hereinafter Infiltration of Legitimate Business).

⁸⁹In re Gault, 387 U.S. 1 (1966).

⁹⁰In re Winship, 397 U.S. 358 (1970).

⁹¹Fla. Stat. §932.58 et seq. (1973), declared unconstitutional in Aztec Motel v. State ex rel. Faircloth, 251 So.2d 849 (Fla. 1971).

convincing by a preponderance, but not beyond a reasonable doubt. The Supreme Court held that⁹² when a person faces imprisonment, the proof against him must be convincing beyond a reasonable doubt despite the label given the proceeding. In Gault the Court held that self-incrimination, notice, and counsel protections had to be given a juvenile as they would an adult criminal defendant.⁹³ Absent forfeiture or imprisonment remedies as part of the civil jurisdiction invoked, economic loss and injury to reputation are probably not enough to trigger criminal constitutional protections.⁹⁴

¶44 The government cannot use in a criminal prosecution testimony, privileged under the Fifth Amendment, obtained from the defendant in a civil proceeding where the options were to testify or default.⁹⁵ Thus, testimony unobtainable in a criminal action may not be elicited first in a civil action and then used in a subsequent criminal action. But, the defendant must raise his Fifth Amendment privilege in the civil action: if self-incriminating evidence comes in without objection in the civil suit, it can be used in a later criminal prosecution.⁹⁶ If the defendant raises a

⁹²In re Winship, 397 U.S. 358, 368 (1970).

⁹³In re Gault, 387 U.S. 1, 31-56 (1966).

⁹⁴United States v. DuPont, 366 U.S. 316, 326 (1961); see also Infiltration of Legitimate Business at 217.

⁹⁵United States v. Kordel, 397 U.S. 1 (1969).

⁹⁶Id. at 10.

valid privilege in civil court, the government can either forego his testimony or grant him "use" immunity from later prosecution,⁹⁷ as was done in Cappetto.

¶45 Records required by statute or by court order (as where the court seeks to monitor compliance with injunctions), cannot be the basis of a criminal prosecution or criminal contempt proceeding unless such records:

1. are of a kind the defendant normally keeps;
2. involve a "non-criminal and regulatory area of inquiry"; or
3. are records of a publicly licensed business.⁹⁸

Thus, while the government may legitimately require a wide range of records, which are not privileged under the Fifth Amendment, it cannot, under the guise of civil or regulatory record keeping requirements, force persons to record their own criminality. Thus, where gambling is illegal, the government cannot convict on the basis of records required by a wagering tax law which only imposed a tax on illegal gambling income. Where "... every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the

⁹⁷18 U.S.C.A. §6002 (Supp. 1976); note that, since a corporation has no Fifth Amendment privilege, Hale v. Herckel, 201 U.S. 43 (1905), it must have some agent who can testify to what it knows without fear of self-incrimination.

⁹⁸United States v. Marchetti, 390 U.S. 39, 57 (1968); Infiltration of Legitimate Business at 220.

application of the constitutional privilege to the entire registration procedure was in this instance neither 'extreme' nor 'extravagant'."⁹⁹ The record requirements under the gambling tax law passed none of the three tests above. Presumably, a grant of "use" immunity as to any records would remove all Fifth Amendment objections.¹⁰⁰

⁹⁹United States v. Marchetti, 390 U.S. 39, 49 (1968).

¹⁰⁰United States v. Cappetto, 503 F.2d 1351, 1356, cert. denied, 420 U.S. 925 (1975).





CIVIL REMEDIES AND CORRUPTION:
ALTERNATIVE OR SUPPLEMENT TO CRIMINAL PROSECUTION

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SUMMARY

¶1 Civil sanctions designed to remedy public corruption have developed in the case law with little legislative response. Governments have, for example, a choice of actions in equity--imposition of a constructive trust and rescission or cancellation of government commitments--and actions at law--recovery of illegal profits on tort actions for damages. In most cases, the Government need not show actual damage to uphold its claim because such restitutionary remedies are bottomed on fiduciary and agency relationships.

¶2 The federal government has enacted legislative remedies in conjunction with the criminal sanctions found in the bribery and corruption chapter of Title 18. State governments have also enacted a series of conflict of interest statutes the violation of which provides grounds for rescission and cancellation of contracts.

¶3 The issue of who has capacity to bring civil actions is unsettled. Most levels of government have the capacity to sue, and in certain jurisdictions, citizens may also bring remedial actions.

¶4 The statute of limitations or the doctrine of laches have application to civil remedies in most jurisdictions. They should not, however, begin to run until discovery of corrupt activities by the government. The statutes are tolled and laches made inapplicable due to the breach of fiduciary relationship inherent in political corruption. Doctrines

of fraud and fraudulent concealment also provide grounds for the tolling of time bars.

¶5 Serial litigation raises the issues of both claim and issue preclusion. Generally, previous criminal prosecution has no res judicata effect on subsequent civil litigation and vice versa. Previous criminal conviction may have a collateral estoppel effect on issues raised in subsequent civil litigation if the issue was distinctly put and necessarily decided. An acquittal in a criminal prosecution produces no collateral estoppel effect because of the greater burden of proof needed to obtain a criminal conviction. Previous civil litigation has no collateral estoppel effect on subsequent criminal prosecution, except in rare instances where issues are decided upon the same burden of proof in both actions.

I. INTRODUCTION

¶6 Criminal prosecution is, of course, the primary method of controlling corruption in government. Nevertheless, civil actions can supplement criminal prosecutions or serve as an alternative.¹ Civil actions are remedial--public

¹The rationale for supplementing criminal prosecution with civil actions is thoroughness. Criminal prosecution is directed at the corrupt official; civil action corrects the result of his wrongdoing.

servants can be forced to relinquish the fruits of corruption, contracts can be rescinded and leases cancelled. The broad scope and flexibility of civil actions make them, therefore, an attractive and invaluable, albeit seldom used, tool for the prosecutor.²

II. CIVIL ACTIONS BASED ON THE DOCTRINE OF RESTITUTION

¶7 Public servants hold positions of public trust.

They stand in a fiduciary relationship with the people whom they serve. In the exercise of their duty, they must serve the people with undivided loyalty and display good faith, honesty and integrity.³ A public servant may not engage

1 (continued)

The reasons for using civil actions as an alternative to criminal prosecution are:

1. The limited scope of criminal statutes in the area of official duty and corruption.
2. The limited scope of remedies in criminal prosecution.
3. The difficulty of meeting the requisite standard of proof in a criminal prosecution.
4. Loss of effectiveness due to constitutional protection.

²See generally S. Gardner, "Increasing the Effectiveness of the Criminal Prosecutor Through Creative Use of the Civil Courts," 10 The Prosecutor 293 (1974) [hereinafter cited as Gardner]; A. Lenhoff, "The Constructive Trust as a Remedy In Corruption in Public Office," 54 Colum. L. Rev. 214 (1954) [hereinafter cited as Lenhoff]; and National Association of Attorneys-General, "The Use of Civil Remedies in Organized Crime Control" (1975).

³See Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 475, 86 A.2d 201, 221-222 (1952) and authorities cited therein. See also County of Cook v. Barrett, 36 Ill. App.3d 623, 344 N.E.2d 540, 545-548 (1975) and authorities cited therein.

in activities that are incompatible with the duties of his office. He must be impervious to corruption and subordinate his self-interest to the public welfare.⁴ The fiduciary obligations of public servants

are not mere theoretical concepts of idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.⁵

¶8 Public servants also stand in an agency relationship with the government that they serve.⁶ As an agent, the public servant cannot use his office for his own benefit. The government, as principal, may force the public servant to surrender any unlawful personal benefits received under color of office. The principal may "trace" these benefits through the subsequent dealings of the corrupt agent.⁷ It has been aptly put: "The disloyal public servant can never safely count the illicit profit his own."⁸

¶9 The doctrine of restitution underlies the ability of the principal to force his agent to relinquish illegally obtained

⁴Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 475, 86 A.2d 201, 222 (1952).

⁵Id. See also City of Boston v. Dolan, 298 Mass. 346, 354-355, 10 N.E.2d 275, 281 (1937) and authorities cited therein.

⁶See United States v. Carter, 217 U.S. 286 (1910) and Lenhoff at 215.

⁷Lenhoff at 215.

⁸Id. at 215.

benefits; the law attempts to prevent unjust enrichment.⁹ The confusing development of restitutionary remedies in law and equity¹⁰ has, however, left the modern prosecutor an option. He may sue in equity for an accounting and a constructive trust. He may also sue at law under theories of tort or contract. The rationale behind the courts' rulings in suit at law or in equity are similar, but distinct.¹¹

A. In Equity

1. Constructive trusts

¶10 The constructive trust is a venerable remedy; it is best analyzed by beginning with a treatise definition:

Constructive trusts are created by courts of equity whenever title to property is found in one who in fairness ought not to be allowed to retain it. They are often based on disloyalty or other unconscionable conduct. The court merely uses the

⁹Restatement of Restitution §1 (1937):

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

This simple statement is clouded by determination of the scope of the fiduciary relationship. If a fiduciary is not acting under color of office he is not liable to his principal. See, e.g., Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115 (1935) (Court distinguished between excessive fees collected under color of office and money collected outside regular office hours).

¹⁰See Restatement of Restitution, Introductory Note (1937).

¹¹See County of Cook v. Barrett, 36 Ill. App.3d 623, 632, 344 N.E.2d 540, 548 (1975). Dobbs calls the constructive trust "an equitable parallel to the courts' quasi-contract." See D. Dobbs, Remedies 291 (1973).

constructive trust as a method of forcing the defendant to convey to the plaintiff. It treats the defendant as if he had been an express trustee from the date of his unlawful holding.

Plaintiff as the wronged party generally has one or more alternative remedies open to him, and must elect between them and a constructive trust. In order to secure a constructive trust he is not required to show the inadequacy of legal remedies, but he must do equity by performing such acts as the court in its discretion decides are necessary in order to do justice to the defendant.¹²

Historically, the constructive trust was imposed upon real property. Its modern scope has expanded: "The form of the property claim determined nothing, since a constructive trust will extend to reach real and personal property, choses in action and funds of money."¹³ The constructive trust is particularly well suited as a remedy to recover illegal profits and benefits from corrupt public officials. ¶11 In United States v. Carter,¹⁴ the Supreme Court, for example, affirmed the imposition of a constructive trust on behalf of the United States on the illegal profits garnered by an army captain from contracts let. The Court held that direct evidence of affirmative fraud or loss to the government was unnecessary for the imposition of the constructive

¹²S. Bogert, The Law of Trusts §77 at p. 287 (5th ed. 1973).

¹³County of Cook v. Barrett, 36 Ill. App.3d 623, 344 N.E.2d 540, 545 (1975).

¹⁴217 U.S. 286 (1910).

trust.¹⁵ The Court found the constructive trust to be predicated on the breach of a fiduciary relationship and the prevention of unjust enrichment.¹⁶

¶12 In City of Boston v. Santosuosso,¹⁷ the Supreme Judicial Court of Massachusetts also affirmed the imposition of a constructive trust on Mayor Curley of Boston who had compromised the city in an illegal agreement to settle outstanding litigation. The constructive trust was imposed even though an adequate remedy at law existed:

The right of the city of Boston as a cestui que trust is preeminently an equitable right, and it arose as soon as the agreement was made and the fund was received by its mayor. When the fund was received under the agreement by the mayor the defendants held the legal title in trust to pay it over to the city of Boston. The trust obligation was not performed by holding the fund, dissipating the fund or converting the fund into a substituted res. The right of the plaintiff is a pure equitable right, and it is immaterial that it may have also a plain, adequate, and complete remedy at law.¹⁸

¹⁵Id. at 306.

It would be a dangerous precedent to lay down as law that unless some affirmative fraud or less can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.

¹⁶Id. at 306-309.

¹⁷298 Mass. 175, 10 N.E.2d 271 (1937).

¹⁸Id. at 180, 10 N.E.2d at 274.

¶13 On the following day, the Supreme Judicial Court upheld the imposition of a constructive trust upon the city treasurer.¹⁹ The treasurer had invested city monies in securities purchased at outrageous prices through his own brokerage firm. The constructive trust included both the invested funds and the interest it generated.

2. Recission and cancellation

¶14 The government may rescind or cancel contracts and leases procured by fraud. The litigation that resulted from the Teapot Dome Scandal illustrates this proposition. In Mammoth Oil Co. v. United States,²⁰ the Supreme Court cancelled leases that were procured by fraud. In Pan American Petroleum and Transport Co. v. United States,²¹ the Supreme Court also disallowed credit for cash outlays, since the corporations had entered upon the reserves illegally.²² Both cases held that the government need not show bribery or that the United States suffered or would suffer any actual damages.²³

¶15 In City of Findlay v. Pertz,²⁴ the Sixth Circuit also

¹⁹City of Boston v. Dolan, 298 Mass 346, 10 N.E.2d 275 (1937).

²⁰275 U.S. 13, (1927).

²¹273 U.S. 456 (1926).

²²Id. at 500.

²³Pan American Petroleum and Transport Co. v. United States, 273 U.S. 456, 500 (1926); Mammoth Oil Co. v. United States, 275 U.S. 13, 53 (1927).

²⁴66 F. 427 (6th Cir. 1895).

refused to enforce a contract upon which an agent of the city received a commission:

Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law.²⁵

In addition, the Sixth Circuit addressed the issues of waiver and ratification, holding first that:

Upon this discovery of this improper inducement operating upon its agent, the city had a right to repudiate the purchase and return the property bought. This is without regard to any actual injury it had sustained, and without regard to the effect of the allowance of the commission upon the integrity of the agent.²⁶

The court then found that the City had the option of waiving the issue of fraud and ratifying the contract.²⁷

¶16 A contract may be held unenforceable when the principal is unaware of a corrupt agreement made by its agent. The Supreme Court, in Crocker v. United States,²⁸ held a contract unenforceable due to a secret agreement made between

²⁵Id. at 434.

²⁶Id. at 437.

²⁷ In that case, the city would have the right to hold the agent liable as for money had and received to its use. It might go still further, and sue the seller for the fraud, and recover all damages consequent upon an improper dealing with the buyer's agent.

Id. at 437.

²⁸240 U.S. 74 (1916).

agents of a corporation and the superintendent of the government mail delivery service.

¶17 A contract can be void as against public policy. In Dougherty v. Alentian Homes Inc.,²⁹ the District Court of Oregon held that a contract that provided for the mayor to receive a percentage payment of housing contracts with the United States was void and unenforceable.

B. At Law

¶18 Governments have successfully brought civil actions against corrupt public servants forcing surrender of illegal profits and gratuities. Breach of the principal-agent relationship between government and its employees and prevention of unjust enrichment are the rationales for the decisions. The government need not show damages.³⁰ The

²⁹ 210 F. Supp. 658 (D. Ore. 1962).

³⁰ See Jankowitz v. United States, 533 F.2d 538 (1976) (In a counter claim, the Government sought to recover all bribes, kickbacks, secret emoluments and other illegal payments allegedly made to plaintiff in connection with inflated appraisal of property while an employee of the Department of Housing and Urban Development); United States v. Drumm, 329 F.2d 109 (1st Cir. 1964) (Government sought to recover compensation received by a poultry inspector who also acted as a consultant for the poultry processor whose operations it was his duty to inspect); United States v. Bowen, 290 F.2d 40, 44 (5th Cir. 1961) (Government sought to recover secret profits and gratuities of civilian engineers employed by the United States) states:

It is the action of undertaking to act in self-interest while compelled to act solely for the master's interest which subjects the servant to the duty to account. Neither bad faith on the part of the servant or damage on the part of the master is essential to set it in train. The master as the party whose trust has been betrayed has the widest relief. He is entitled to all the fruits of the servant's dereliction.

government does, however, have the option of seeking damages.³¹

A choice of remedies also does not bar further civil or criminal actions.³²

¶19 The recent case of Continental Management v. United States³³ held that the government had a cause of action based on common law rights to set-off bribery payments in an action instituted by the briber.³⁴ The Court of Claims allowed the counterclaim, despite the existence of legislation governing bribery and penalties:

30 (continued)

See also United States v. St. Pierre, 377 F. Supp. 1063 (S.D. Fla. 1974) (Government sought to recover gratuities received by F.H.A. inspector); and United States v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969) (Government sought to recover secret profits and gratuities received by the Director of Livestock and Meat Products Division of the Foreign Agricultural Service). On the state level see Williams v. State, 83 Ariz. 34, 315 P.2d 981 (1957) (State of Arizona recovered profits garnered by the land commissioner when he acquired land for himself).

³¹See City of Boston v. Simmons, 150 Mass. 461, 23 N.E. 210 (1890) (the city recovered damages in the amount of the difference between what the city was forced to pay for land and what it would have paid if no conspiracy among the defendants existed).

³²See United States v. Drisko, 303 F. Supp. 858, 860 (E.D. Va. 1969):

The alternative tax and criminal remedies, if any, available to the Government in the premises do not bar the Government from recovering the secret profits and gratuities thus received via this civil action.

³³527 F.2d 613 (Ct. Cl. 1975).

³⁴The court rejected defendants' arguments that the Government must allege provable, measurable damages and a nexus between Sirotas' conduct and specific monetary harm to the Government:

A statutory remedy is not exclusive, and common law rights and remedies survive, unless Congress intended the legislative provision to be exclusive. The mere existence of statutes establishing bribery and fraud penalties (and other sanctions) detracts in no way from the Government's right to a civil remedy of the kind available to private employers. Rather, the passage of legislation enlarging the government's arsenal of remedies strengthens the Government's case, because it establishes a statutory standard of conduct and evidences a strong policy against actions like those taken by [defendant]. Our imposition of liability will implement that policy.³⁵

Recovery would be permitted upon a showing of the fact and amount of the bribe.³⁶

34 (continued)

Assuming (as we do) that the predicate for a non-statutory civil remedy is the probability that damage will flow from the giving of the bribe, we think it clear from common experience that such probability ordinarily accompanies the subversion of public officials. In normal course the briber deprives the Government of the loyalty of its employees, upon which the Government and the public must rely for impartial and rigorous enforcement of government programs Bribery of officials can also cause a diminution in the public's confidence in the Government, upon which the Government must also rely. The Government likewise incurs the administrative costs of firing and replacing the venal employees and the costs of investigation, all of which are compensable in fraud cases.

Id. at 618.

³⁵Id. at 620.

The court also found the civil action to be remedial and compensatory rather than penal.

³⁶Id. at 618.

III. STATUTORY REMEDIES

A. Federal

¶20 The federal government has statutory remedies for violations of bribery, graft and conflict of interest provisions contained in Title 18.³⁷ After a final conviction of an officer, employee or agent under the chapter, the government may void and rescind related government commitments. The government may also recover monies expended, materials transferred, or their value.³⁸ The creation of these statutory remedies does not extinguish any common law remedies available to the government.³⁹

³⁷18 U.S.C. §§201-224 (1970).

³⁸18 U.S.C. §218 (1970) reads:

In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of anything to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.

Research discloses no judicial interpretation of this statute.

³⁹Congress intended that alternative common law remedies remain available. See 1962 U.S. Code Cong. & Ad. News 3863.

¶21 In United States v. Mississippi Valley Generating Co.,⁴⁰

the Supreme Court, for example, held that a violation of the statute prohibiting conflicts of interest rendered a contract void, even though the statute did not explicitly provide for that remedy:

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as this respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.⁴¹

⁴⁰364 U.S. 520 (1961). Here the Government was represented in contract negotiations concerning the construction of a power plant to provide electric power to the Atomic Energy Commission by an unpaid consultant to the Budget Bureau who at the same time was an active officer in an investment banking firm which expected to profit from the project. This was the Dixon-Yates controversy.

Mississippi Valley Generating Co. was not allowed to recover nearly two million dollars in contract damages. Further, the court rejected possible common count recovery, as the United States received no benefit from the work. 364 U.S. at 566.

The agent was convicted under 18 U.S.C. §434, which has since been repealed and replaced by 18 U.S.C. §208. Today the statutory remedy in 18 U.S.C. §218 would be available to the government.

⁴¹364 U.S. 520, 563 (1961).

¶22 By statute, bribe monies received or tendered in evidence are deposited in the registry of the court⁴² to be disposed of by order of the court.⁴³ In United States v. Iovenelli,⁴⁴ the Seventh Circuit reversed a district court decision returning bribe money to the briber:

It is our opinion that a person seeking return of money deposited pursuant to §3612 must demonstrate a right to the return of the money to him.⁴⁵

The court cites Clark v. United States⁴⁶ as controlling:

Clearly this was bribery, and placed the claimants and the man they corrupted in pari delicto. They could not recover back from him the money they paid, neither can they from the United States after it has been taken from him.⁴⁷

¶23 Federal legislation also permits the Government to recover kickbacks paid by subcontractors to prime contractors with the Government.⁴⁸ Upon proof of the illegal payment, there is a conclusive presumption that the Government has

⁴²18 U.S.C. §3612 (1970).

⁴³28 U.S.C. §2042 (1970).

⁴⁴403 F.2d 468 (7th Cir. 1968).

⁴⁵Id. at 469.

⁴⁶102 U.S. 322 (1880).

⁴⁷403 F.2d 468 (7th Cir. 1968), citing 102 U.S. 322, 331-332 (1880). See also Annot., 60 A.L.R.2d 1273 (1958).

⁴⁸41 U.S.C. §51 (1970).

ultimately paid its cost.⁴⁹

B. State

¶24 Many states have enacted conflict of interest statutes, which prohibit public employees from having any interest in state contracts let. Violation of such a statute is a

⁴⁹ 41 U.S.C. §61 (1970) states:

Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States.

In United States v. Davio, 136 F. Supp. 423 (E.D. Mich. 1955) the court allowed the application of 42 U.S.C. §51, although the kickbacks predated the statute:

The meaning of the words 'heretofore or hereafter' are unmistakable. They clearly provide for retrospective, as well as prospective operation of the statute.

The defendants argue that if the Act operates retrospectively it is unconstitutional because it deprives them of vested property rights contrary to the due process clause of the Fifth Amendment of the United States Constitution, and is in effect an ex post facto law.

At the time the Act became effective, the defendants had no vested, constitutional right to withhold from the Government, and retain for themselves property to which the Government was entitled by virtue of the public policy of the Nation, and the application of well-known common-law principles.

136 F. Supp. at 427.

The statute has been construed to permit cancellation of contracts. See United States v. Lane Process Equipment Co., 385 U.S. 138 (1966) which states:

ground for cancellation and rescission.⁵⁰ Several states have codified the common law rule.⁵¹ Other states have included in their statutory formulations civil remedies for the recovery of monies received by public officials through conflicts of interest.⁵²

¶25 Two states have enacted forfeiture statutes dealing

49 (continued)

In United States v. Mississippi Valley Co., 364 U.S. 520, 563, 81 S.Ct. 294, 316, 5 L.Ed.2d 268, the Court recognized that 'a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment.' The Court there approved the cancellation of a government contract for violation of the conflict-of-interest statute on the ground that 'the sanction of non-enforcement is consistent with and essential to effectuating the public policy embodied in' the statute. Ibid. We think the same thing can be said about cancellation here.

385 U.S. at 145.

⁵⁰ See, e.g., Ark. Stat. Ann. §20-120 (1968) construed in Gantt v. Arkansas Power and Light Co., 189 Ark. 449, 74 S.W.2d 232 (1934); Ind. Code Ann. §35-1-101-7 (Burns 1975) construed in Nobel v. Davison, 177 Ind. 19, 96 N.E. 325 (1911); and Ky. Rev. Stat. Ann. §80.080 (Baldwin 1969) construed in Norrell v. Judd, 374 S.W.2d 192 (1964). Conflict of interest may be grounds for cancellation and rescission without the existence of a statutory prohibition. See, e.g., Githens v. Butler County, 350 Mo. 295, 165 S.W.2d 650 (1942).

⁵¹ See, e.g., Ariz. Rev. Stat. §38-503(D) (1974); Cal. Gov't Code §1092 (West 1966); Fla. Stat. Ann. §112.3175 (West Supp. 1977); Ill. Ann. Stat. ch. 102, §3 (Smith-Hurd Supp. 1977); Me. Rev. Stat. Ann. tit. 17, §3104 (West Supp. 1977); Md. Ann. Code art.19A, §5 (1973); Mass. Ann. Laws ch. 43, §27 (Michie/Law. Co-op 1973); Mass. Ann. Laws ch. 268A §§9, 15 and 21 (Michie/Law. Co-op 1968); N.Y. Gen. Mun. Law §804 (McKinney 1974); and Wis. Stat. Ann. §946.13 (West 1958).

⁵² See, e.g., Fla. Stat. Ann. §112.317 (West Supp. 1977) and Tern. Code Ann. §6-627 (1971).

directly with the fruits of political corruption.⁵³ One state has enacted a statute permitting a civil action to recover double damages.⁵⁴

IV. SELECTED PROBLEMS IN CIVIL PROCEDURE

A. Capacity to Sue

¶26 The issue of who has the capacity to bring a civil action against corrupt public officials is unsettled. Clearly, the government has capacity to bring the action-- but what level of government?⁵⁵ Generally, the Attorney General may bring a suit.⁵⁶ Sometimes, suit by others has been upheld. In Friendship Heights Citizens Committee v. Barlow, a limited public corporation was recognized to have capacity to sue a former elected official. In Fuchs v. Bidwell,⁵⁷ the Supreme Court of Illinois, however, held that

⁵³Haw. Rev. Stat. §710-1001 (1975) and Okla. Stat. Ann. tit. 21, §402 (West Supp. 1976).

⁵⁴R.I. Gen. Laws §11-7-6 (1970).

⁵⁵See Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952) brought in the name of the governor. A city has capacity to sue. See City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913) and Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 (1955). See also Bowes v. City of Toronto, 6 Grant. 1, 112-117 (Ont. 1856).

⁵⁶23 Md. App. 635, 329 A.2d 122 (1974).

⁵⁷359 N.E.2d 158 (1976). But see Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 476, 86 A.2d 201, 222 (1952).

a citizen and a not-for-profit corporation did not have capacity to sue for a constructive trust. The Illinois Supreme Court found the citizens' suit a usurpation of the power of the Attorney General. The court found that the funds in question were not public funds and distinguished other citizens' action on that basis.⁵⁸

B. Limitations of Actions

¶27 The application of statutes of limitation and laches defies meaningful general discussion. The topic must be addressed, however, because remedial civil actions generally will be affected by time bars.⁵⁹

¶28 The first consideration is the type of civil action brought. While actions of restitution usually are considered quasi-contractual, they may be looked upon as tort actions.⁶⁰

⁵⁸This distinction is weak given the focus of the constructive trust - breach of a confidential relationship and prevention of unjust enrichment. Public ownership of funds has not been a criteria for imposition of a constructive trust.

⁵⁹See Restatement of Restitution §148 (1937):

Laches and Statutes of Limitations

(1) In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring or, having brought has failed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit.

(2) A cause of action for restitution may be barred by lapse of time because of the provisions of a statute of limitations.

See also Restatement of Agency2d §421A (1958).

⁶⁰See Restatement of Restitution §148, Comment on subsection (2) (1937).

Actions seeking the imposition of a constructive trust or the rescission or cancellation of a government commitment, on the other hand, are generally held to be actions in equity, and they are affected by the equitable doctrine of laches, rather than a legal statutory limitation.⁶¹

1. The statute of limitations

¶29 The determinative question here is when does the statute begin to run. In cases of political corruption, it should be forcefully argued that the statute runs from the date when the principal has notice, or ought to have notice, of the illegal acts, rather than from the date of the occurrence of the illegal acts. The bases of this legal argument are equitable in rationale. Special exceptions have developed in cases of breach of fiduciary duties and in cases of fraud. A defendant's fraudulent concealment also may toll the statute.⁶²

2. Laches

¶30 Laches is a purely equitable defense. A court of equity will not permit an action to proceed in cases of unexplained and unexcused delay, when such delay would impose an unreasonable or prejudicial burden on the defendant. Corruption within a fiduciary relationship and fraudulent concealment of such acts from the principal pose a viable excuse for delay. Further, a court of equity generally

⁶¹Id.

⁶²See generally 63 Harv. L. Rev. 1177, 1214-1222 (1950) and Restatement of Restitution §148, Comment on subsection (2) (1937).

will not permit defendant to profit from his own wrongdoing.⁶³

C. Preclusion

¶31 Serial litigation often triggers claims of res judicata (claim preclusion) and collateral estoppel (issue preclusion).⁶⁴

The application of these doctrines depends solely on their treatment by particular jurisdictions. The preclusion effect of criminal prosecutions on civil actions and vice versa is a complex issue infrequently litigated and largely unsettled. General rules can be stated; they are, however, seriously undermined by multiple exceptions.

1. The res judicata effect of criminal adjudication on subsequent civil actions

a. Federal

¶32 The Supreme Court, in Stone v. United States,⁶⁵ held that an acquittal in a prior criminal prosecution does not bar a subsequent civil action:

We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime either forfeited its right of property . . . or

⁶³ See Restatement of Restitution §148, Comment on subsection (1) (1937).

⁶⁴ See generally A. Vestal, Res Judicata/Preclusion 366-393 (1969) and Annot., 18 A.L.R.2d 1287 (1951).

⁶⁵ 167 U.S. 178 (1897) (The Government sought the value of unlawfully cut trees after the defendant had been acquitted of criminal trespass charges).

its right in this civil action, upon a preponderance of proof, to recover the value of such property.⁶⁶

The court saw a clear distinction between civil and criminal actions:

In the criminal case, the Government sought to punish a criminal offense, while in the civil cases it only seeks in its capacity as owner of property illegally converted, to recover its value.⁶⁷

In Helvering v. Mitchell,⁶⁸ the Court discusses additional differences:

The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' Lewis v. Frick, 233 U.S. 291, 302 [(1914)] . . . [A]cquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.⁶⁹

¶133 The issue becomes somewhat clouded by defendant claims that the civil action is not merely remedial, but penal.

⁶⁶167 U.S. 178, 189 (1897). An acquittal as a matter of law rather than an acquittal by a jury may produce a res judicata effect. See United States v. Salen, 244 F. 297 (S.D. N.Y. 1917) where the granting of defendant's demurrer to a criminal indictment created a res judicata effect banning subsequent civil actions based on the same issue.

⁶⁷167 U.S. at 188.

⁶⁸303 U.S. 391 (1937). See also United States v. United States Gypsum Co., 51 F. Supp. 613, 614 (D.D.C. 1943). The dissent of Judge Stevens in this case presents a superb capsule summary of most issues involved in the res judicata effect of criminal prosecutions on civil actions. See id. at 615-618.

⁶⁹303 U.S. 391, 397 (1937).

Should the court find the civil action penal, then the previous acquittal may be barred through the doctrine of res judicata or a parallel doctrine, double jeopardy.⁷⁰

¶34 An issue not addressed in these cases that is also not vital in serial litigation concerning political corruption is the identity of the parties to the previous litigation.

In serial litigation concerning the prosecution of political corruption, the parties will usually remain the same throughout.

¶35 Conviction in a prior criminal prosecution does not bar subsequent civil litigation. The Sixth Circuit directly addressed that issue in United States v. Glidden,⁷¹ and it held that a civil proceeding was sufficiently distinct from a criminal prosecution to reject defendants' res judicata claim. Again, the distinction between remedial and penal civil litigation was important.

⁷⁰ See Coffey v. United States, 116 U.S. 436 (1886) (a civil action for forfeiture of a distillery that was a statutory in rem action was penal in nature and barred by a prior acquittal of the defendant in a criminal prosecution). See also United States v. Zucker, 161 U.S. 475, 482 (1896) (a statutory forfeiture action):

Of course, if the government had elected to prosecute the present defendants criminally for the offense defined in the ninth section of the act of 1890, a verdict and judgment of acquittal could have been pleaded in bar of an action to recover the value of the merchandise

⁷¹ 119 F.2d 235 (6th Cir.), cert. denied, 314 U.S. 678 (1941) (defendant pleaded nolo contendere to criminal charges stemming from the misuse of an alcohol license and paid \$10,000 in settlement. Government then brought a civil action to recover on a bond needed to secure the alcohol license. Defendant's res judicata claim was rejected on the authority of Stone v. United States, 167 U.S. 178 (1897)).

b. State

¶36 In general, states hold that neither an acquittal or a conviction in a previous criminal prosecution produces a res judicata effect in subsequent civil actions.⁷² Differing burdens of proof militate against claim preclusion. Those cases that deny preclusion because parties to the subsequent action are not identical to those in the criminal prosecution are not appropos to the analysis of state initiated civil actions.

2. The collateral estoppel effect of criminal adjudication on subsequent civil actions

a. Federal

¶37 The doctrine of collateral estoppel is important in serial litigation. Rather than dealing with the preclusion of a claim in toto, collateral estoppel precludes relitigation by the same parties⁷³ of a question of fact or law distinctly put in issue and directly and necessarily determined by

⁷²See, e.g., William Reilly Construction Corp. v. City of New York, 70 Misc.2d 651, 334 N.Y.S.2d 459 (Sup. Ct. 1964), aff'd, 25 App. Div.2d 953, 270 N.Y.S.2d 398 (2d Dep't 1966) and People v. One 1952 Chevrolet Bel Aire, 128 Cal. App.2d 414, 275 P.2d 509 (1st dist. 1954). Both of these cases rely on Helvering v. Mitchell, 303 U.S. 391 (1937). See also Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17 (1936) and Tucker v. Tucker, 101 N.J. Eq. 72, 137 A. 404 (1927). But see State ex rel. Hanrahan v. Miller, 250 Iowa 1358, 96 N.W.2d 474 (1959) and State ex rel Hanrahan v. Miller, 250 Iowa 1369, 98 N.W.2d 859 (1959) (rehearing).

⁷³But see Bernhard v. Bank of America National Trust and Savings Ass'n., 19 Cal. 2d 807, 122 P.2d 892 (1942). Judge Traynor in this widely quoted opinion abandoned the doctrine of mutuality which prevented the use of collateral estoppel by a party in subsequent litigation not present in prior legislation. Acceptance of Traynor's reasoning is widespread.

a court of competent jurisdiction.⁷⁴ For example, after a successful prosecution of a political figure for bribery, litigation of the existence of bribery in the subsequent civil case should be foreclosed.

¶38 In Emich Motors Corp. v. General Motors Corp.,⁷⁵ the Supreme Court construed section 5 of the Clayton Act, a statutory formulation permitting the introduction into evidence of materials from a prior criminal prosecution in a subsequent civil action. The Court found the formulation possessed of all aspects of the general doctrine of collateral estoppel. An application of that doctrine working in favor of the Government in civil litigation following criminal prosecution was found possible.⁷⁶ As authority for that proposition, Emich offers earlier cases describing the collateral estoppel effect of a guilty plea in prior criminal cases.⁷⁷ A guilty plea had been seen as an admission by the defendant; its collateral estoppel effect was based on that reasoning. Emich recognized that attaching a collateral

⁷⁴See Frank v. Mangrum, 237 U.S. 309 (1915) (the principle of collateral estoppel is as applicable to the decisions of criminal courts as to those of civil courts).

⁷⁵340 U.S. 558 (1950).

⁷⁶Id. at 568-569.

⁷⁷See United States v. Greater New York Live Poultry Chamber of Commerce, 53 F.2d 518 (S.D. N.Y. 1931), aff'd sub nom. Local 167 v. United States, 291 U.S. 293 (1932) (dealing with the collateral estoppel effect of a guilty plea rather than a conviction) and United States v. Warner, 211 F.2d 669, 671-672 (7th Cir. 1954) and authorities cited therein.

estoppel effect to jury verdicts introduced new and serious problems. It, therefore, introduced a series of guidelines. Jury determinations were to have a collateral estoppel effect only in regard to determinations of fact or fact mixed with law that were essential to the decision. The judge in the civil trial determines as a matter of law what issues had been previously adjudicated.⁷⁸

¶39 The Emich formulation was extended to actions not based on the Clayton Act. In Williams v. Liberty,⁷⁹ the Seventh Circuit permitted plaintiff to assert collateral estoppel on issues litigated in his previous criminal trial in the subsequent civil rights action for damages.

b. States

¶40 In general, states permit the disposition of previous criminal prosecutions to be introduced into evidence in subsequent civil litigation. The majority rule recognizes previous conviction as prima facie evidence of the crime.⁸⁰ Collateral estoppel, however, seems to represent the modern trend.

⁷⁸ 340 U.S. at 571-572. The judge is granted wide discretion and may review the record, pleadings and judgment of any antecedent cases.

⁷⁹ 461 F.2d 325 (1972) (plaintiff sought collateral estoppel on the issue of police officers acting under color of office. Plaintiff was previously convicted of resisting arrest and battery against a police officer).

⁸⁰ See In re Estate of Laspy, 409 S.W.2d 725 (Mo. Ct. of App. 1966) and authorities cited therein and Annot., 18 A.L.R.2d 1287 (1951).

¶41 New York is an excellent example of change in this area. Until 1973, New York permitted the fact of prior criminal conviction to be introduced into evidence as a "presumption of proof of the crime."⁸¹ In S.T. Grand, Inc. v. City of New York,⁸² the Court of Appeals permitted collateral estoppel on the issue of bribery in a city counterclaim seeking to void a contract with plaintiff.⁸³ The Court adopted the rule of Schwartz v. Public Administrator of the County of the Bronx:⁸⁴

New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.⁸⁵

⁸¹See Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 74 (1932).

⁸²32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973).

⁸³Plaintiff, S.T. Grand, Inc., sued defendant as a contract for the cleaning of a reservoir. The work was completed. Plaintiff and its president had previously been convicted in federal court of conspiracy to use interstate facilities with intent to violate New York bribery laws. The criminal conviction for bribery conclusively established the illegality of the contract. Defendant's decision on summary judgment was affirmed. Plaintiff was unable to recover on any theory.

⁸⁴24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969) (collateral estoppel effect of prior civil litigation on a subsequent civil action).

⁸⁵Id. at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

3. The preclusion effect of previous civil litigation on subsequent criminal prosecution

¶42 A rule of general application is: previous civil litigation has no preclusion effect--either res judicata or collateral estoppel--on subsequent criminal prosecutions.⁸⁶ Difference in burdens of proof is the moving rationale.⁸⁷ It is arguable that issues distinctly put and finally and necessarily decided could be given collateral estoppel effect if the burdens in both criminal and civil litigation were the same, i.e. insanity.⁸⁸

⁸⁶See People v. Goldstein, 79 Misc.2d 996, 361 N.Y.S.2d 994 (Crim. Ct. N.Y. 1974) and authorities cited therein. See also A. Vestal, Res Judicata/Preclusion, 366-368 (1969).

⁸⁷Vestal is troubled by language in Yates v. United States, 354 U.S. 298, 335-336 (1957):

We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character. United States v. Oppenheimer, 247 U.S. 85 [(1916)].

This broad language is easily limited. First, Oppenheimer analogized the collateral estoppel effect of serial criminal prosecutions to serial civil actions but did not address serial litigations involving both. Second, the court in Yates assumes equivalent burdens of proof, 354 U.S. at 336.

⁸⁸See A. Vestal, Res Judicata/Preclusion 367 (1969).

POLICE RIGHTS

RIGHTS OF POLICE OFFICERS

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SUMMARY

¶1 Policeman's lockers may be searched in every state except California where the court stated that policemen had a constitutionally justifiable expectation of privacy under the Fourth Amendment in these areas.

¶2 In every state, policemen and their relatives are required to reveal specific items of personal financial information. California law is that it is unconstitutional to single out policemen to disclose information. Yet, they have passed a financial disclosure statute where every public employee is required to reveal items of personal financial information. The statute makes California equal to the other states.

¶3 In every state, policemen have the rights generally afforded others when being officially questioned, where the questioning is done by special prosecutors, state and federal, or special municipal agencies.

¶4 In most states, the courts have upheld the right of police departments to administer polygraph tests to individual policemen during internal security investigations and have also held that refusal of an order to submit to a test is grounds for dismissal.

¶5 In most states, the courts have stated that counsel is not needed to protect policemen's due process rights until investigations reach the critical stages. In California, the courts hold that a policeman has the right to be represented

by counsel, who may be present at all times during an interrogation, when formal written charges are filed or whenever an interrogation focuses on matters that are likely to result in disciplinary action.

¶6 In every state except New York, a policeman adjudged corrupt, who is dismissed and convicted, does not forfeit his pension. In New York, however, his pension may be reduced depending on the seriousness of the crime.

I. INTRODUCTION

¶7 The examination of police corruption, especially during the investigative stage, raises serious questions about what rights policemen have under the Constitution.

¶8 One line of reasoning argues that the police must be held to a higher degree of accountability for their actions because they are in the unique position of enforcing the criminal law where a high premium is placed on public trust. To enforce this higher standard, policemen should not, therefore, be given the full panoply of rights usually afforded to those involved in a criminal investigation. To do so would impede effective prosecutorial efforts that are necessary to deter police corruption. Others feel that policemen should be afforded the same rights as other citizens who are charged with wrongdoing under the criminal law. This argument reflects the result of the extension of many procedural rights to criminal defendants by the United States Supreme Court during the 1960's.¹

¶9 Resolution of these conflicting views is crucial here because the approach taken will ultimately determine which individual legal rules will apply in specific cases.

¹See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

II. LEGISLATIVE RESPONSE

A. Policemen's Bill of Rights in Three States

¶10 In recent years, there have been several attempts to resolve these two conflicting interests. Collective bargaining contracts negotiated during 1971 in Rhode Island, California and New York State contained a number of provisions extending broad protections to police officers during internal investigation interrogations.

B. Proposals in the House of Representatives

¶11 A second effort occurred two years later when two bills were introduced in the House of Representatives to establish a law enforcement officer's bill of rights as part of the 1968 Omnibus Crime Control and Safe-Streets Act, 42 U.S.C. §733.

¶12 Upon introduction, the bills were referred to the House Judiciary Committee, and subsequently, to the Subcommittee on Immigration, Citizenship and International Law where hearings were held on July 25 and 26, 1973. The Justice Department's position on the matter, which ultimately prevailed, was that the rights contemplated in the bill be adopted voluntarily by law enforcement agencies at the state and local level, and that it was not a proper role for the federal government to impose such provisions as a condition for the receipt of LEAA funds in light of section 518 of the act.²

²See Proposed Amendments to the Omnibus Crime Control and Safe Streets Act of 1968: Hearings on House of Representatives 163 and 4598 Before the Subcommittee on Immigration, Citizenship and International Law. 93rd Congress, 1st Session (July 25 and 26, 1973).

C. California's Public Safety Officers' Procedural Bill of Rights ¶13 Nevertheless, California has acted where Congress did not by enacting the "Public Safety Officers' Procedural Bill of Rights Act,"³ making California the first state to deal comprehensively with this issue. The content of the statute is substantively the same as the 1971 collective bargaining agreements and the House bills.

¶14 The rights of policemen under these formulations may be summarized as follows:

1. Time of interrogation

The interrogation of an officer being investigated for a disciplinary violation must be at a reasonable hour, preferably while the officer is on duty and during daylight.

2. Identification of investigating officers

The officer under investigation must be informed of the officer in charge of the investigation and the officer who will be conducting the interrogation.

3. Information about the investigation

The officer must be informed of the nature of the investigation before interrogation commences. The information must be reasonably sufficient to apprise the officer of the nature of the investigation.

4. Length of interrogation

The length of an internal investigation must be reasonable, with rest periods being called periodically for personal necessities, meals, telephone calls and rest.

³California Gov't Code §3300 et seq. (West Supp. 1977).

5. Use of coercion

The officer cannot be threatened with transfer, dismissal or other disciplinary punishment as a means of obtaining information regarding the incident under investigation.

Also, the officer cannot be subjected to abusive language or promised a reward as inducement for answering questions.

6. Presence of counsel

The officer under investigation may have counsel or a representative of his employee organization present with him during an interrogation. This representation is usually confined to counseling and not actual participation in the interrogation.

7. Recording of interrogation

The interrogation must be recorded, either mechanically or by a stenographer. There can be no "off the record" questions.

8. Criminal rights warning

If the officer is a suspect in a criminal investigation, he must be advised of his Miranda rights.

9. Furnishing copy of interrogation

The officer under investigation has the discretion to request an exact copy of any written statement he has signed or a copy of the recording of the interrogation.

10. Refusal to answer questions

The refusal of an officer to answer questions concerning non-criminal matters may result in disciplinary proceedings. In addition, an officer cannot be ordered to submit to a polygraph test for any reason unless the officer requests it.

¶15 These provisions focus on the investigative stages of either a proactive or reactive police corruption investigation, dealing specifically with "independent" evidence-gathering techniques and "internal security" interrogations. Greater attention was given to this area than any other, probably because it was felt that during this stage of the prosecution the most egregious violations of a policeman's constitutional rights can or will occur.

D. Rights Accorded Police by Courts Compared to California Statute

¶16 The rights established by the California statute go well beyond those the courts have indicated policemen are entitled to under the Constitution. Of course, there should be no question that an interrogation be conducted at a reasonable hour⁴ or that the policeman under interrogation be allowed to attend to his own personal physical necessities when they arise.⁵ Such rights certainly come within the spirit of Miranda,⁶ if not its letter. In addition to these rights, the California statute requires that a policeman be informed prior to an interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation; that all questions directed to policemen under interrogation be asked by and through no more than two

⁴California Gov't Code §303(a) (West Supp. 1977).

⁵California Gov't Code §3303(d) (West Supp. 1977).

⁶Miranda v. Arizona, 384 U.S. 436 (1966).

interrogators at one time; that a policeman be informed of the nature of the investigation prior to any interrogation; and that the interrogating session be for a reasonable period, taking into account the gravity and complexity of the issue being investigated.⁷

III. RIGHTS ESTABLISHED BY CALIFORNIA STATUTE THAT CONFLICT WITH RULE FOLLOWED IN OTHER JURISDICTIONS

A. Search of Police Lockers or Storage Space Without a Warrant

¶17 Often a policeman will use his locker or assigned storage space temporarily to hide illegally seized evidence or other contraband. The Knapp Commission's investigation of corruption in narcotics law enforcement found that policemen would keep narcotics confiscated at the time of an arrest or raid, and store the drugs, needles and other drug paraphernalia in their lockers for eventual sale.⁸ Another common practice among policemen is to carry an extra, unregistered pistol on their person while on patrol so that should they become involved in a shooting incident where the victim turns out to be unarmed, they can surreptitiously place the so-called "throw away gun" near the victim and claim that the victim was armed, making the shooting appear to be in self-defense. These illegally possessed hand guns are usually kept in a policeman's locker while he is off-duty.⁹ Periodic un-

⁷California Gov't Code §3303(b), (c), (d) (West Supp. 1977).

⁸The Knapp Commission Report on Police Corruption §1 (1973).

⁹Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972).

announced searches of such areas are an effective evidence-gathering technique in corruption prosecution cases. In all jurisdictions (except California discussed infra) searches of these places may be conducted without a policeman's consent and without a warrant because he does not have a constitutionally justifiable expectation of privacy under the Fourth Amendment in these areas.¹⁰

¶18 In analyzing this issue, the courts have directed their attention primarily to the second, or objective part of Mr. Justice Harlan's two-prong test in Katz v. United States.¹¹ For example, most courts have held that there is no Fourth Amendment protection where a policeman is charged with a serious crime,¹² where the locker search was conducted as part of an investigation into that crime,¹³ and where the

¹⁰ Although the Supreme Court in Katz v. United States, 389 U.S. 347 (1967) made the general pronouncement that the Fourth Amendment protects people--and not simply "areas"--Id. at 361, thus changing the nature of the Fourth Amendment right from possessory to personal, the lower courts have relied upon the test set forth in Justice Harlan's concurring opinion to determine whether the Fourth Amendment applies to a given situation. See, e.g., United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974); Kroehler v. Scott, 391 F. Supp. 1114 (E.D.Pa. 1975).

¹¹ 389 U.S. 347, 361 (1967) (Harlan, J., concurring). summary, Harlan's test requires that a person exhibit an actual expectation of privacy, and second, that the expectation be one that society is prepared to recognize as "reasonable." See also United States v. White, 401 U.S. 745 (1971).

¹² See Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972).

¹³ Those surrounding circumstances were: first, department ownership of the lockers; second, existence of a police regulation stating that lockers could not be considered private; third, regular inspection of the lockers; and

surrounding circumstances were sufficient to notify the policeman that his locker could be examined by others without his consent.

¶19 A recent federal district court case, United States v. Speights, seems to indicate that the presence of all these factors is not a prerequisite to a finding of no Fourth Amendment protection and that the totality of circumstances should determine if a policeman had a reasonable expectation of privacy.¹⁴ The authority of this case as a valid precedent is presently uncertain,¹⁵ but even if the Court of Appeals were to reverse the district court's decision,¹⁶ it is clear that the substantive rule followed by all jurisdictions, except California, would remain intact.

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fourth, department access to all lockers by masters and/or combinations to all locks. Id. at 1003. See also United States v. Donato, 269 F. Supp. 92 (E.D. Pa. 1967). which is still good law, although decided before the Supreme Court's decision in Katz. United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975).

¹⁴In Speights, some policemen had put personal locks on their lockers which were not objected to by the department. The lockers had not been inspected for several years, and the department did not have master keys to all locks, and still the court found no Fourth Amendment violation, stating that in light of all the circumstances, petitioner did not have a reasonable expectation of privacy.

¹⁵No appeal from the district court's decision has been taken yet, but it should be noted that the judge in the case was Frederick Lacey, former U.S. Attorney for New Jersey, an extremely competent jurist whose opinions carry much weight in criminal matters. See P.H. Hoffman, Tiger in the Court (1973).

¹⁶The basis of reversal would probably be a finding that the district court overextended the existing rule in the light of the circumstances.

¶20 The investigation technique used in the other jurisdictions is not permissible in California because a policeman's locker or other assigned storage space may not be searched "except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted."¹⁷

B. Financial Disclosure

¶21 Recent revelations of police corruption have prompted a suggestion that policemen be required to disclose aspects of their financial affairs and business interests. The purpose of this recommendation is readily apparent, for if such disclosures were fully enforced, they would be an effective method of rooting out police corruption, of deterring future corruption, and ultimately, increasing public confidence in the police department.

¶22 Although the constitutional validity of financial disclosure statutes have been questioned in the state courts, all have withstood the challenge.¹⁸ The chief arguments

¹⁷ California Gov't Code §3309 (West Supp. 1977).

¹⁸ Goldtrap v. Askew, 334 So.2d 20 (1976); Lehrhaupt v. Flynn, 140 N.J. Super. 250, 356 A.2d 35 (1976); Nevada City v. MacMillen, 11 Cal.3d 662, 114 Cal. Rptr. 345, 522 P.2d 1345 (1974); Fritz v. Gordon, 83 Wash.2d 275, 517 P.2d 911 (1974), appeal dismissed, 417 U.S. 902 (1974); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901 (1976); Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409 (1972), appeal dismissed, 412 U.S. 925 (1973).

See also In re Kading, 70 Wisc.2d 508, 235 N.W.2d 419 (1975). Despite the U.S. Supreme Court's dismissals of the appeals in the Illinois, Washington and Maryland cases, the issue of the constitutionality of the disclosure statutes has

against these statutes are that they constitute an invasion of privacy,¹⁹ violate the privilege against self-incrimination,²⁰ result in discriminatory application of the law,²¹ or amount to an improper delegation of powers.²²

¶23 The courts answered these arguments by finding that the state's interest in having an impartial government²³ to

18(continued)

not been definitively settled yet, although the case law shows that disclosure statutes will probably be found valid if the issue is ever decided by the Court. Summary dismissal for want of a federal question is of ambiguous import, whereas in Stein, Fritz, and Walsh, the appeal is based on the claim that the state statute infringes on fundamental rights. The claim may fail to state a substantial federal question because there is no fundamental right or because a compelling state interest clearly outweighs the individual right.

Finally, executive orders requiring executive personnel to disclose similar information have withstood the same attacks. Illinois State Employees Association v. Walker, 57 Ill.2d 512, 315 N.E.2d 9 (1974), cert. denied sub nom. Troop Lodge No. 41 v. Walder, 419 U.S. 1058 (1975); Evans v. Carey, 53 A.D.2d 109, 385 N.Y.S.2d 965 (4th Dept. 1976); Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (1976).

¹⁹Griswold v. Connecticut, 381 U.S. 479 (1965).

²⁰The courts have rejected the Fifth Amendment claim holding that the privilege does not invalidate financial disclosure requirements, even if the privilege against self-incrimination could be invoked by an official whose disclosures would show that he has been engaged in illegal activity. United States v. Sullivan, 274 U.S. 259 (1927) (upholding conviction for willful failure to file income tax return despite claims that some information required by tax return was potentially incriminating; defendant should have filed and asserted Fifth Amendment privilege as to specific items of disclosure).

²¹Fritz v. Gordon, 83 Wash.2d 275, 517 P.2d 911 (1974).

²²Lehrhaupt v. Flynn, 129 N.J. Super. 327, 323 A.2d 537, (1974) aff'd, 140 N.J. Super. 250, 356 A.2d 35 (1976).

²³See, e.g., Goldtrap v. Askew, 334 So.2d 20 (1976).

maintain public confidence is strong enough to justify the consequent infringement on individual liberties, regardless of whether the state's infringement is to be measured by the compelling "governmental interest" test²⁴ or the "legitimate state purpose" test.²⁵ Yet the courts have required that the statute be narrowly drawn, so that there is no less onerous means of achieving the state purpose.

¶24 In California, a policeman may not be required to disclose any of his financial information unless it can be obtained or is required under state law and (1) tends to indicate a conflict of interest with respect to the performance of his official duties, or (2) is necessary for the department to ascertain the desirability of assigning the policeman to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.²⁶

¶25 At first glance, this provision may seem to prohibit disclosure because of its many, specific qualifications. California, like many other jurisdictions,²⁷ has, however, enacted a financial disclosure statute that either requires certain classes of public employees and their relatives²⁸ to

²⁴Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

²⁵Lehrhaupt v. Flynn, 129 N.J. Super. 327, 323 A.2d 537 (1974).

²⁶Cal. Gov't Code §3308 (West Supp. 1977).

²⁷See, e.g., Florida Statute Ann. §112.311 et seq. (West 1975).

²⁸Many state disclosure laws recognize that the state has a legitimate interest in disclosure of the financial affairs of family members and close associates of public employees. In the absence of disclosure by such parties,

reveal specific items of personal financial information or allows states or municipalities to pass regulations requiring such disclosure. Thus, the section 33.8 requirement that financial disclosure be allowed pursuant to state law is satisfied, leaving disclosure a viable method of investigating police corruption.

C. Scope of Questioning

¶26 Most corruption investigations eventually result in an interrogation where the policeman is either immediately confronted with a complaint alleging that he has engaged in corrupt activities or is confronted with evidence of his wrongdoing. Policemen, however, have not been known to be especially cooperative during such interrogations.²⁹

Local police rules or state laws have been enacted, therefore, authorizing dismissal or suspension of a policeman for refusing to answer questions about his official duties. Naturally, questions have arisen as to whether such firings and suspensions are constitutionally permissible.³⁰

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policemen could avoid disclosing additional income by transferring it to his spouse or children, thereby defeating the purpose of the statute. Cal. Gov't. Code §3700 (West Supp. 1973).

²⁹With the exception of the La Cosa Nostra, the police probably have a stronger code of secrecy than any other professional group in American society. The Knapp Commission Report on Police Corruption 6 (1973).

³⁰California Gov't. Code §3303(e) (West Supp. 1977) adopts the present status of the law in this area.

¶27 Supreme Court decisions have indicated that a policeman can be fired for refusing to answer questions about his official duties, as long as he is accorded immunity. In Gardner v. Broderick,³¹ a New York City policeman was subpoenaed before a grand jury where he was advised of his constitutional rights and asked to sign a waiver of immunity. The constitution of New York and the charter of New York City required a waiver of immunity if the public official wished to retain his position. The officer refused to sign the waiver of immunity and was discharged. In holding the discharge invalid, the court applied the Slochower rationale, stating that a policeman could not be penalized for refusing to waive a constitutional right, but that he could be discharged if he had refused to answer questions specifically, directly and narrowly relating to the performance of his duties without being required to relinquish any of his constitutional protections. Later Supreme Court discussions dealing with this issue have simply applied the Gardner approach.³²

³¹392 U.S. 273 (1968).

³²In Lefkowitz v. Turley, 414 U.S. 70 (1973), the Supreme Court considered the constitutionality of a New York statute which provided that if a public contractor refused to waive immunity or to testify concerning his state contracts, his existing contracts could be cancelled and he would be disqualified from doing business with the state for five years. In holding the statute unconstitutional, the Court applied the Gardner analysis, stating that ". . . given adequate immunity, the state may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." Id. at 84.

¶28 While the court has not squarely decided whether a policeman can be discharged for refusing to answer questions about his official conduct, the following questions appear to be settled: first, the McAuliffe doctrine³³ is applicable only in the area of public employment and is not valid for the private sector; second, a public employee may not be discharged for asserting or refusing to waive a constitutional right but may be discharged for refusing to answer specific questions about his official conduct³⁴ on the basis of insubordination or incompetency; and finally, Garrity v. New Jersey³⁵ acts as an exclusionary rule in a subsequent criminal proceeding if incriminating statements were obtained under threat of dismissal.³⁶

³³McAuliffe v. Mayor, 155 Mass. 216, 220 29 N.E. 517 (1892), where Justice Holmes, then writing for the Massachusetts court, said, "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

³⁴Questioning related to the performance of official conduct should be an effort to determine whether the policeman has violated a particular rule or policy of the department or a state or local law.

³⁵385 U.S. 493 (1967).

³⁶The exclusionary rule of Garrity will continue to operate even if a policeman is given his Miranda rights during an interrogation, when it is obvious that a criminal proceeding will eventually follow.

In light of this, some police departments (like Detroit) have made it a policy to recite the following rights prior to the commencement of an internal security interrogation:

I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your official duties.

¶29 Adept use of local police regulations or state laws authorizing dismissal of policemen for refusing to answer questions can be helpful to elicit testimony and cooperation in internal security investigations. But internal security itself is not the only unit which investigates police corruption. Often federal and state prosecutors or special municipal agencies³⁷ will conduct independent investigations, using the grand jury proceeding to interrogate policemen about alleged misconduct.

¶30 In light of the significance of what may occur before a grand jury, some mechanism had to be devised permitting local authorities to learn if a police officer did in fact refuse to answer questions during a supposedly secret

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You are entitled to all the rights and privileges guaranteed by the laws of the State of Michigan, the Constitution of the State and the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel present at each and every stage of this investigation.

I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to departmental charges which could result in your dismissal from the Police Department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

³⁷For example, New York City's Department of Investigation is authorized to conduct police corruption investigations independent of the five District Attorney offices.

proceeding,³⁸ particularly those local officials who have the power to effect discharges. While federal grand jury proceedings generally remain secret, Rule 6(e) of the Federal Rules of Criminal Procedure specifically provides that disclosure will be allowed "preliminary to or in connection with a judicial proceeding."³⁹ The use of this

³⁸The oft-cited reasons for keeping a grand jury proceeding secret are: to insure the grand jury freedom in its deliberations, to prevent any persons from annoying the grand juror, to prevent subornation of perjury with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it, to encourage free and untrammelled disclosures by persons who have some information with respect to the commission of crimes, and to protect the innocent person, who is accused but exonerated, from disclosure of the fact that he has been under investigation. In re Bullock, 103 F. Supp. 639, 642 (D.D.C. 1952).

³⁹The rule provides:

(e) Secrecy of proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Fed. R. Crim. P. 6(e). The first exception in Rule 6(e) is not applicable here because the courts have said that the

rule to uncover what occurred at the grand jury proceedings can be illustrated in the following way. In an investigation, subpoenas that are issued by the grand jury can be delivered to the police department, which will normally issue an order requiring the designated officers to appear before the grand jury. This information will also be turned over to the city's corporation counsel. After each appearance before the grand jury, the corporation counsel can interview the officers and ask them if they answered all the questions propounded by the grand jury through the federal prosecutor. Once this is accomplished, the corporation counsel can then file a motion with the federal district court seeking disclosure of whether the officer had in fact answered all the questions. At the hearing on the motion to disclose pursuant to court order, the government will read into the record any questions that the officer refused to answer. If the officer had refused to provide answers, the police department will then draw charges against the officer for failure to cooperate with the grand jury.⁴⁰ In designing this procedure, advantage is taken of the fact that once it becomes known to local officials that an

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phrase "attorneys for the government" refers only to federal government attorneys, and not state or city attorneys. In re Holovachka, 317 F.2d 834 (7th Cir. 1963). See also United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961).

⁴⁰ The charge will have to be for the officer's failure to answer questions about his official duties in the grand jury and not for failure to answer the inquiry by the corporation counsel.

officer refused to answer questions before the grand jury, there could be a subsequent administrative hearing and a later appeal to the courts by the officer that would satisfy the "preliminary to or in connection with a judicial proceeding" requirement under the federal rule. Numerous cases support the disclosure of grand jury testimony in this way.⁴¹

⁴¹See Special Feb. 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973). In Conlisk, the 7th Circuit gave an excellent analysis of the prior case law on this issue, explaining two very important, yet somewhat confusing cases.

The first one is Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958) where plaintiff, a former Internal Revenue Service employee and member of the New York Bar, was charged with corruption and other criminal activity in connection with his job. Although the grand jury failed to indict, it voted that plaintiff's activities be referred to the Grievance Committee of the New York Bar, which made recommendations to the Appellate Division of the New York Supreme Court as to what action should be taken on complaints of alleged misconduct. In holding that disclosure of the grand jury minutes to the Committee was proper, the court found that the possibility of a full disciplinary hearing before the Appellate Division satisfied the Rule 6(e) requirement that disclosure be made "preliminary to a judicial proceeding"

The impact of Rosenberry was clear until 1970 when an Ohio federal district court cited the case for the proposition that a police disciplinary hearing itself was a judicial proceeding within the meaning of Rule 6(e). In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970). The Court obviously ignored the distinction made in Rosenberry that it was the hearing before the Appellate Division which satisfied Rule 6(e), and not the preliminary hearing before the Grievance Committee.

The 7th Circuit reconciled these two cases by simply saying that the Ohio court misread Rosenberry, that a disciplinary hearing in and of itself is not a judicial proceeding within the meaning of Rule 6(e), and that it is the possibility of judicial review from a disciplinary board decision which satisfies Rule 6(e).

¶31 Finally, in the event that a policeman invokes the Fifth Amendment at a grand jury proceeding, and is granted immunity under 18 U.S.C. §6002(1)(1970)⁴² by a federal prosecutor, subsequent disciplinary sanctions may still be imposed since use immunity prohibits only later criminal proceedings⁴³ that the courts have said police disciplinary proceedings are not.⁴⁴

D. Polygraph Examinations

¶32 A mechanical supplement to an interrogation is the polygraph test, or so-called lie detector,⁴⁵ that can be

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At the state level, the majority of jurisdictions have adopted a more restrictive rule, which says that disclosure of grand jury transcripts will be allowed only to determine the consistency of a witness' testimony or when a witness has been charged with perjury. See, e.g., Cal. Penal Code §924.2 (West 1970). However, states which have recently revised their criminal procedure law have adopted the more liberal federal formulation: these jurisdictions include: Alaska, Illinois, Kansas, Kentucky, Montana, Nevada, Ohio, Rhode Island, Vermont and Wyoming.

⁴²After the decision in Uniformed Sanitation Men Assoc. Inc. v. Commissioner, 426 F.2d 619 (2d Cir. 1970), the Second Circuit again had occasion to deal with the issue after further disciplinary proceedings by the City of New York had occurred. The court held that "use immunity" suffices for the discharge of public employees for refusing to testify and noted that discharge may occur so long as the questions propounded relate to the performance of his duties and the official is advised of his options and the consequences of his choice.

⁴³Kastigar v. United States, 406 U.S. 441 (1971).

⁴⁴Grabinger v. Conlisk, 320 F. Supp. 1213 (N.D. Ill. 1970), aff'd per curiam, 455 F.2d 490 (7th Cir. 1972).

⁴⁵The polygraph test is premised on the theory that a person who consciously lies undergoes physiological reactions which can be measured. The instrument records various

helpful in interrogative situations, but against which deep-rooted suspicions exist.⁴⁶ Polygraph results have been held inadmissible for judicial⁴⁷ and quasi-judicial proceedings. In fact, several federal governmental agencies have voluntarily discontinued the use of the device,⁴⁸ one

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physiological responses, such as changes in pulse rate, blood pressure, respiration and electrodermal responses. The procedure entails comparing the individual's reactions upon being asked three types of questions:

1. Simple unrelated questions that should cause no stress.
2. Control questions which are unrelated but will cause a certain amount of nervousness.
3. Questions related to the crime.

"A Revised Questioning Technique in the Lie-Detector Tests," 37 J. Crim. L. and Criminology 542 (1947).

⁴⁶The constitutional objection most frequently made against its use on the individual is that it invades the constitutional right of privacy, recognized by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). Unrestrained use of the lie detector may also violate the Court's holding in Katz v. United States, 389 U.S. 347 (1967), while improper use may infringe upon the privilege against self-incrimination. See Schmerber v. California, 384 U.S. 757 (1966) when the Court said:

Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial to compel a person to submit to testing in which an effort will be made to determine his innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

Id. at 764.

⁴⁷Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

⁴⁸These agencies include: the Defense Department, the Commerce Department, the U.S. Postal Service and the Atomic Energy Commission. "The Lie Detector as a Surveillance Device," ACLU Reports, Feb., 1973, 47.

agency citing "intangible costs in employee morale" as the main reason for its decision.⁴⁹ Moreover, California says that a policeman cannot be compelled to submit to a polygraph examination against his will.⁵⁰

¶33 Yet, the courts of a majority of jurisdictions have upheld the right of police departments to administer the tests to individual policemen during internal security investigations,⁵¹ and they have held that refusal of an order to submit to a test is grounds for dismissal.⁵² The reasons for the rule are apparent; the importance of internal discipline and public confidence, and the overriding public

⁴⁹Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the Subcommittee of Foreign Operations and Government Information of the House Committee on Government Operations, 88th Congress, 2d Sess., pt. 1, 168 (1964).

⁵⁰California Gov't Code §3307 (West Supp. 1977).

⁵¹Dolan v. Kelley, 76 Misc.2d 151, 348 N.Y.S.2d 478 (Suffolk Co. Ct. 1973); Frey v. Dept. of Police, 288 So.2d 410 (La. App. 1973); Richardson v. City of Pasadena, 500 S.W.2d 175 (Tex. C. App. 1973), rev'd on other grounds, 513 S.W.2d (1974); Williams v. Police Board of City of Chicago, 8 Ill. App.3d 345, 290 N.E.2d 669 (Ill. App. 1972); Drech v. Dept. of Police, 266 S.2d 500 (La. App. 1972); Clayton v. New Orleans Police Dept., 236 So.2d 548 (La. App. 1970); Coursey v. Board of Fire and Police Comm'rs, 90 Ill. App.2d 31, 234 N.E.2d 339 (1967); Fichera v. State Personnel Board, 217 Cal. App.2d 613, 32 Cal. Rptr. 159 (1963); Frazer v. Civil Service Board of Oakland, 170 Cal. App.2d 333, 338 P.2d 943 (1959); McCain v. Sheridan, 160 Cal. App.2d 174, 324 P.2d 923 (1958).

⁵²Four states provide specific exemptions from tests given policemen in their anti-polygraph laws. See Alaska Stat. 23.10.037 (1964); Conn. Gen. Stat. Ann. §31-51g (1967); Pa. Stat. Ann. tit. 18, §4666.1 (1969); Wash. Rev. Code §49.44.120 (1965). Nebraska law contains a statute specifically requiring all sheriff's employees to submit to such examinations. Neb. Rev. Stat. §23-1737 (1969).

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duty of a policeman to uphold and defend the law requires any allegation of police corruption to be immediately investigated.

¶34 The two leading cases on this issue are Roux v. New Orleans⁵³ and Seattle Police Officers Guild v. City of Seattle,⁵⁴ both cases holding that policemen were properly dismissed for refusing to obey an order to take a polygraph test. The decision in these cases⁵⁵ and those in the majority of jurisdictions establish the following rules concerning use of the polygraph test: first, all questioning must be limited in scope to activities, circumstances and events which pertain to the policeman's conduct or acts which may form the basis for disciplinary action;⁵⁶ second, a policeman should be informed that the test results are not admissible in any criminal proceeding that might subsequently be brought against him;⁵⁷ third, a policeman must be notified

⁵³223 So.2d 905 (La. App. 1969), aff'd, 254 La. 815, 227 So.2d 148 (1969), cert. denied, 397 U.S. 1008 (1969).

⁵⁴80 Wash.2d 307, 494 P.2d 485 (1972).

⁵⁵Almost all the cases holding that policemen may be ordered to take a polygraph examination have stressed the following points: first, the issue is the policeman's refusal to take the test, rather than the accuracy of the results; second, the examination can be of great help in determining the proper scope of an investigation; and third, any statements or results obtained by means of a polygraph test are not admissible in a subsequent criminal proceeding under Garrity v. New Jersey, 385 U.S. 493 (1967), thus, the policeman does not run the risk of self-incrimination by taking the test.

⁵⁶See Scope of Questioning, infra ¶¶26-31.

⁵⁷Garrity v. New Jersey, 385 U.S. 493 (1967).

that he may be discharged for failing to obey an order to submit to a polygraph examination; and finally, if disciplinary action is to be taken against a police officer for his refusal to undergo an examination, the basis of the charge should be insubordination for refusing to obey a direct order of a superior.

¶35 The minority view on this question is represented by Molino v. Board of Public Safety,⁵⁸ Stage v. Civil Service Commission,⁵⁹ and Engel v. Woodbridge,⁶⁰ where the courts held such dismissals improper. Although some courts in the majority of jurisdictions have attempted to distinguish these cases to explain the holdings,⁶¹ a more honest analysis would simply accept these decisions as a manifestation of different policy considerations. The emphasis placed by the minority view on the unreliability of the polygraph test in support of its outcome may no longer be justified as the test gains greater sophistication.⁶² It may be that the minority view will not gain, but lose support.

⁵⁸154 Conn. 368, 225 A.2d 805 (1966).

⁵⁹404 Pa. 354, 172 A.2d (1961).

⁶⁰124 N.J. Super. 3-7, 306 A.2d 485 (1973). See also Borough of Elmwood Park v. Fallom, 128 N.J. Super. 51, 319 A.2d 72 (1974).

⁶¹See, e.g., Seattle Police Officers Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972); Dolan v. Kelley, 76 Misc.2d 151, 348 N.Y.S.2d 478 (Suffolk Co. Ct. 1973).

⁶²The instrument used on Frye v. United States, 293 F.1013 (D.C. Cir. 1923) registered only the systolic blood pressure,

E. Right to Counsel During an Interrogation

¶36 In the absence of a statutory provision, right to counsel contentions in disciplinary proceedings are usually based on the Sixth Amendment or the due process clause of the Fourteenth Amendment. While the courts have summarily dismissed the Sixth Amendment claims,⁶³ they have had to struggle with the due process contention⁶⁴ because it is such an amorphous right.⁶⁵

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whereas today's polygraphs, in addition to recording the reactions in blood pressure, likewise graph the pulse, the respiration, and the skin resistance to electric current i.e., galvanic skin response (G.S.R.). J. Reid and F. Inbau, Truth and Deception: The Polygraph (Lie Detector) Technique (1966).

⁶³Grabinger v. Conlisk, 320 F. Supp. 1213 (N.D. Ill. 1970), aff'd per curiam, 455 F.2d 490 (7th Cir. 1972). Other courts agree that "to extend the right of counsel to an individual who is concerned in a non-judicial and non-criminal proceeding would be an unwarranted extension of an individual's right to counsel." United States v. Sturgis, 342 F.2d 328 (3d Cir. 1965). See also Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), aff'd, 399 F.2d 638 (4th Cir. 1968); Nicherson v. United States, 391 F.2d 760 (10th Cir. 1968); Cassidy v. Hood, 304 F. Supp. 864 (E.D. Ma. 1969).

⁶⁴Grabinger v. Conlisk, 320 F. Supp. 1213 (N.D. Ill. 1970), aff'd per curiam, 455 F.2d 490 (7th Cir. 1972), Alder v. City of Greensboro, 322 F. Supp. 873 (M.D. N.C. 1971), aff'd, 452 F.2d 489 (4th Cir. 1971); Boulware v. Battaglia, 344 F. Supp. 889 (1972), aff'd, 478 F.2d 1398 (3d Cir. 1973).

⁶⁵See Hannah v. Larche, 363 U.S. 420, 442 (1960) where the Court said:

'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . .whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, are all considerations which must be taken into account.

¶37 The leading decision on the due process issue is Grabinger v. Conlisk,⁶⁶ where the court held that plaintiff policemen had not been denied due process, although their request for counsel had been refused. In Grabinger, an investigation had been initiated based upon a citizen's complaint charging the plaintiffs with excessive use of force. The investigation and subsequent hearing resulted in the imposition of a fifteen day suspension without salary on plaintiffs. Both policemen later brought an action against the superintendant of police, seeking money damages and other relief, alleging among other things that they had been unconstitutionally denied counsel.

¶38 In deciding that plaintiffs' due process rights were not violated, the district court found several factors to control. The first of these dealt with the severity of the penalty imposed. The Grabinger court found the proceedings to have "a relatively limited impact on any police officer,"⁶⁷ that the situation was one "where at most, some mild form of disciplinary action may occur,"⁶⁸ and that "the maximum punishment is relatively so little."⁶⁹ Thus the court concluded that a suspension of fifteen days without pay placed a negligible burden on due process rights.

⁶⁶Grabinger v. Conlisk, 321 F. Supp. 1213 (N.D. Ill. 1970), aff'd per curiam, 455 F.2d 490 (7th Cir. 1972).

⁶⁷Id. at 1219.

⁶⁸Id.

⁶⁹Id. at 1220.

¶39 The second factor concerned the importance of maintaining proper discipline among police officers and proper enforcement of departmental regulations.⁷⁰

¶40 The third factor relied on was the convenience consideration. The court said that allowing counsel to be present in cases involving infractions of departmental regulations would seriously disrupt the disciplinary procedures, and thus hinder an expeditious proceeding.⁷¹

¶41 The fourth and final factor involved the finding that the procedure in question was investigatory in nature, rather than adjudicative, and the conclusion was that counsel is not needed to protect plaintiffs' due process rights until the proceedings reach the adjudicative stage.

¶42 The analysis of the district court in Grabinger has been accepted in total,⁷² and later cases dealing with the issue have cited it extensively.

¶43 The final provision of the California statute that materially expands policemen's rights beyond what is

⁷⁰A law enforcement officer is in a peculiar and unusual position of public trust and responsibility, and by virtue thereof, the public body has an important interest in expecting the officer to give frank and honest replies to questions relevant to his fitness to hold public office. Id. at 1219. The high obligation owed by a policeman to his employer and his peculiar position in our society certainly must be taken into account in considering the nature and effect of disciplinary proceedings instituted by the employer. Id. at 1220.

⁷¹Id. at 1220.

⁷²"We fully agree with the opinion of the district court, and we adopt and incorporate that opinion in its entirety." Grabinger v. Conlisk, 455 F.2d 490, 491 (7th Cir. 1972).

required under the Constitution is section 3303 (h).⁷³

Applying the rationale of the Supreme Court's decision in Escobedo⁷⁴ to police disciplinary procedures, this section says that a policeman has the right to be represented by counsel who may be present at all times during an interrogation, when formal written charges have been filed or whenever an interrogation focuses on matters which are likely to result in disciplinary action.

IV. POLICEMEN'S PENSION RIGHTS

¶44 In every state a policeman adjudged corrupt does not have to worry about his pension rights until after the disciplinary proceeding and possible appeal.

¶45 In every state except New York a policeman dismissed and convicted of anything less than a felony does not have to forfeit his pension if he has been a member of the police force for a "required time."⁷⁵

⁷³Allen v. City of Greensboro, 322 F. Supp. 873 (M.D. N.C. 1971), aff'd, 452 F.2d 489 (4th Cir. 1971); Boulware v. Battaglia, 334 F. Supp. 889 (1972), aff'd, 478 F.2d 1398 (3d Cir. 1973). See also Kammerer v. Board of Police Comm'rs, 44 Ill.2d 500, 256 N.E.2d 12 (1970), which was decided before Grabinger, but arriving at the same result, using the same analysis.

⁷⁴California Gov't Code of §3303(h) (West Supp. 1977).

⁷⁵Escobedo v. Illinois, 378 U.S. 478 (1964). In Escobedo, the court held that when a police investigation shifts from investigatory to accusatory--that is, when its focus is on the accused and its purpose is to elicit a confession--the adversary system begins to operate and the accused must be permitted to consult with his lawyer.

¶46 So long as he is not convicted of a felony he will keep his pension. Many feel that this law is too lenient. Policemen have a truly special job. They are present to deter crime. Should they also commit crime, their effect then is truly minimal. Because of this, New York has been moving in a different direction.⁷⁶ They reduce a policeman's pension depending on the seriousness of the crime. The New York pioneers believe a public official's pension,

⁷⁶ In California, the requirement is twenty years. In New Jersey, it is ten. The law is the same, only the "required" time changes:

Age and Service Retirement; Order; Pension

When a member has obtained age 60 and had served in the police department for twenty years or more, in the aggregate, the board may order him retired from further service. From the date of the order the service of the member in the police department ceases and, during his lifetime, he shall be paid from the fund on annual pension equal to one-half of the annual salary attached to the rank he held for one year next preceding retirement.

California Gov't Code §50870 (West 1976).

Cessation of pension benefits; grounds.

Upon the occurrence of any of the following events, the payment of a pension or benefit to the recipient shall cease. The recipient is:

- a. convicted of a felony
- b. becomes a habitual drunkard
- c. becomes a non-resident of this state.
- d. fails to report for examination for duty unless excused by the board.
- e. disobeys the requirements of the board as to the examination or duty.

Cal. Gov't Code §50883 (West 1976). See also Dickey v. Retirement Board of City and County of San Francisco 1976, 129 Ca. Rptr. 289, 548 P.2d 689, 16 C.3d 745 (1976).

especially that of a policeman,⁷⁷ is potentially worth thousands, even hundreds of thousands of dollars to him upon his retirement. The fact that an official's pension can be jeopardized by proof of misconduct or corrupt acts is a strong deterrent to official corruption and an effective sanction for proven acts of corruption.

⁷⁷New York City's statute reads almost the same. The courts have taken it upon themselves to alter the law by modifying pension rights to fit the crime. Administrative Code of the City of New York, Sec. B18-40.0.

Retirement; Minimum Age of Period for Service Retirement

Any member in city-service who shall have attained the minimum eleven-year age of period of service retirement elected by him upon his own written application to and filed with the board setting forth at what time, not less than thirty days subsequent to the execution and filing thereof, he desires to be retired, shall be retired as of the date specified in said application, provided that at the time so specified for his retirement, his term of tenure of office, or employment shall not have terminated or have been forfeited, provided further that upon his request in writing the member shall be granted a leave of absence from the date of filing said application until the date of retirement becomes effective.

⁷⁸A policeman's pension is one-half his salary. See, e.g., California Gov't Code §50870 (West 1976).

Antitrust and Organized Crime

Outline

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Summary

¶1 In many instances, organized crime's licit and illicit enterprises are operated in direct violation of state and federal antitrust statutes. Largely unnoticed by prosecutors, these violations can be grounds for criminal prosecutions; convictions can bring stiff prison sentences and heavy fines.

¶2 These materials discuss antitrust theories applicable to organized crime, the evidentiary advantages of antitrust theory, the applicable antitrust criminal penalties, and illustrate antitrust prosecutions of organized crime activities.

I. Introduction

¶3 Our society is distrustful of concentrations of money and power. Antitrust laws were enacted out of this fear.¹ Organized crime is a classic illustration of a stronghold of economic and political power. Indeed, it is a combination of finances and influence particularly appropriate for antitrust prosecutions. Antitrust's investigative and procedural advantages, and its civil and criminal remedies, also seem appropriate for application to organized crime.

II. An Antitrust Outline

A. Basic Statutory Provisions

¶4 The basic federal antitrust statute, the Sherman Act,² has dominated all levels of antitrust law since its enactment in 1890. This act as amended, makes it a federal felony: 1) to contract, combine or conspire to restrain interstate or international trade or commerce,³ or 2) to monopolize, or attempt, or conspire to monopolize any part of interstate or international commerce.⁴ This

¹See discussion in text infra at ¶17.

²Sherman Act §§1, 2, 15 U.S.C.A. §§1, 2 (1973), as amended (Supp. 1976).

³Sherman Act §1, 15 U.S.C.A. §1 (1973), as amended (Supp. 1976).

⁴Sherman Act §2, 15 U.S.C.A. §2 (1973), as amended (Supp. 1976).

basic legislation was supplemented in 1914 by the more specific provisions of the Clayton Act⁵ which prohibits price discrimination⁶ and "tying,"⁷ and limits corporate ownership of competing corporations⁸ and interlocking directorates.⁹ Finally, the Federal Trade Commission Act¹⁰ gives the Federal Trade Commission (FTC) broad powers to prevent "unfair methods of competition" in interstate commerce. Most states have also adopted some form of parallel antitrust legislation.

¶5 New York's "Donnelly Act,"¹¹ for example, is substantively similar to the Sherman Act. It covers "the conduct of any business, trade or commerce or. . . the furnishing of any service. . . ." Every "contract, agreement, arrangement or combination" creating a monopoly or restraining "competition or the free exercise of any activity" is made a felony.¹²

⁵ Clayton Act §§12, 13, 15 U.S.C.A. §§12, 13, 14-21, 22-27 (1973), as amended (Supp. 1976).

⁶ Clayton Act §2, 15 U.S.C.A. §13 (1973).

⁷ Clayton Act §3, 15 U.S.C.A. §14 (1973).

⁸ Clayton Act §7, 15 U.S.C.A. §18 (1973).

⁹ Clayton Act §8, 15 U.S.C.A. §19 (1973).

¹⁰ Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C.A. §§41-58 (1973), as amended 15 U.S.C.A. §§41-58 (Supp. 1976).

¹¹ N.Y. Gen. Bus. Law §§340-47 (McKinney 1968), as amended N.Y. Gen. Bus. Law §§340-47 (Supp. 1975).

¹² N.Y. Gen. Bus. Law §340(1) (McKinney 1968).

The New York statute does not explicitly criminalize monopolization absent concerted (multi-party) action,¹³ or attempts or conspiracies to monopolize. The term "arrangement," however, is interpreted broadly to mean "a structure or combination of things in a particular way for any purpose."¹⁴ This definition could warrant action against the single-enterprise monopoly.

¶6 In 1970, New Jersey adopted an antitrust law¹⁵ closely modeled on the basic federal legislation. It essentially reproduces the substantive provisions of the Sherman Act; and includes prohibitions on corporate ownership of the stock of competing corporations,¹⁶ similar to the Clayton Act.

¶7 The Massachusetts statute,¹⁷ however, is quite narrow; the basic provision governs only "commodities in common use" and voids only those agreements and practices "in violation of the common law."¹⁸ Nevertheless, there are

¹³Van Dussen-Storto Motor Inn, Inc. v. Rochester Telephone Corp., 72 Misc.2d 34, 338 N.Y.S.2d 31 (Sup. Ct. Monroe County 1972), modified on other grounds, 42 App. Div.2d 400, 348 N.Y.S.2d 404 (4th Dept. 1973), aff'd mem., 34 N.Y.2d 904, 359 N.Y.S.2d 286 (1974).

¹⁴People v. American Ice Co., 120 N.Y.S. 443, 449 (Sup. Ct. New York County 1909), aff'd mem., 140 App. Div. 912, 125 N.Y.S. 1136 (1st Dept. 1910).

¹⁵New Jersey Antitrust Act, N.J. Stat. Ann. §56:9-1 to 9-19 (Supp. 1975).

¹⁶N.J. Stat. Ann. §56:9-4 (Supp. 1975).

¹⁷Mass. Gen. Laws Ann. ch. 93, §§1-14 (1975), as amended (Supp. 1976).

¹⁸Mass. Gen. Laws Ann. ch. 93, §2 (1975).

additional provisions concerning sales on condition that the buyer deal only in the seller's goods¹⁹ and price fixing agreements.²⁰

B. Exemptions

¶8 The Sherman Act itself is all-encompassing; exceptions are only specified in amending legislation. Organized labor is a major exception to the federal,²¹ New York,²² and New Jersey²³ statutes. Massachusetts has no specific labor provisions. Labor organizations are attractive fronts behind which to hide collusive practices; organized crime, too, has infiltrated labor unions to shield these kinds of illegal dealings.²⁴

C. Restraint of Trade: Rule of Reason and Per Se Rules

¶9 Restraint of trade is the essence of antitrust law. It is a familiar term, loosely used. No single definition can pin down the statutory meaning; the courts determine what the laws prohibit.

¹⁹Mass. Gen. Laws Ann. ch. 93, §1 (1975).

²⁰Mass. Gen. Laws Ann. ch. 93, §13 (1975).

²¹Clayton Act §6, 15 U.S.C.A. §17 (1973); Clayton Act §20, 29 U.S.C.A. §52 (1973); Norris-LaGuardia Act §5, 29 U.S.C.A. §105 (1973); Norris-LaGuardia Act §13(c), 29 U.S.C.A. §113(c) (1973).

²²N.Y. Gen. Bus. Law §340(4) (McKinney 1968).

²³N.J. Stat. Ann. §56:9-5(a), (b) (1) (Supp. 1975).

²⁴See discussion in text infra at ¶¶31-32.

¶10 The "rule of reason" is the basic approach to the Sherman Act. It is a vague, flexible rule emerging from case law. It is a commonsense doctrine which notes a distinction between restraints that restrict competition completely and those that, although restrictive, regulate matters incidental to competition rather than destroy it. This is a difference in kind of restriction. There is also a difference in degree of restriction. A de minimis rule may be appropriate to some cases; a crippling restraint may be evident in others. Traditionally, it has been a matter of judicial line-drawing.

¶11 Certain types of restraints, such as price fixing, however, have been found to have such a pernicious effect on competition without producing legitimate countervailing benefits²⁵ that they have been declared unreasonable per se. Once the existence of a practice, such as price fixing, is shown, an antitrust violation is made out.²⁶

III. Areas of Antitrust Application to Organized Crime

¶12 Organized crime's illicit enterprises are typically conducted as monopolies.²⁷

²⁵ Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

²⁶ See generally A. Neale, The Antitrust Laws of the U.S.A. (2d ed. 1970) and discussion in text infra at ¶¶20-25.

²⁷ See T. Schelling, "Economic Analysis and Organized Crime" in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime at 117-18 (1967).

Because of the obvious advantages that such a system would have when applied to the legitimate sector, it has been possible for organized crime to move, in a limited fashion, into the monopolistic control of certain industries which appear predisposed to this type of control. In cases where a monopoly has been established by organized criminals, it has been achieved by the removal of competitors and by the dissuasion of new entrants into the market. Sometimes, competitors are bought out. At other times, they are forced out through cut-rate prices of loan-shark operations that force competitors either into bankruptcy or a sell-out frame of mind. The most effective technique used by organized crime to establish a monopoly is the dual approach of gaining control of both the union and the employers by means of a fraudulent trade association.²⁸

A. Licit Commerce

¶13 Organized crime's infiltration of legitimate business is widely acknowledged.²⁹ The extent of infiltration is uncertain, but appears great. Internal Revenue sources indicate that 98 of the country's 113 major organized crime figures are involved in 159 businesses.³⁰ The validity of the precise figure is open to question, but a New York Times article has indicated that up to sixty percent of all organized crime's income flows from legitimate business.³¹

²⁸J. Jester, An Analysis of Organized Crime's Infiltration of Legitimate Business at 23 (1974).

²⁹McClellan, "The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?", 46 Notre Dame Lawyer 55, 141 (1970).

³⁰Id. at 142.

³¹N.Y. Times, July 26, 1970, §3 (Business and Finance), at 1, 13, col. 1.

¶14 Organized crime's attraction to legitimate enterprises is obvious. Legitimate businesses provide respectability. Second, they supply outlets for money from illicit enterprises. Third, they act as fronts to deceive the Internal Revenue Service. Fourth, these businesses are bases for illicit services and outlets for the sale of stolen goods. Last, the ability to control sections of legitimate industry is an additional source of power.³²

¶15 Although these legitimate businesses could be run legitimately, they commonly violate antitrust laws. Elimination of competition yields greater power and profits; organized crime's customary techniques of violence and intimidation secure control over markets. In certain trades, such as pornography distribution, organized crime supplies the only willing entrepreneurs; legitimate distributors fear arrests on pornography charges. The natural scarcity of competition allows for easy infiltration of the business and the subsequent enforced market control.³³

¶16 Organized crime has also demonstrated its ability to infiltrate and control labor unions. Despite specific exemptions for labor union activities, antitrust law can be successfully applied to certain aspects of labor racketeering, especially collusion between union leaders and entrepreneurial interests.³⁴ Organized crime may also

³²Jester, supra note 28, at 29.

³³N.Y. Times, Oct. 13, 1975, at 1, col. 7.

³⁴See discussion in text infra at ¶¶31-32.

engage in more ordinary kinds of anti-competitive behavior. For example, extensive syndicate investment in a particular industry could produce antitrust violations where a corporate front holds stock in two or more competing companies. Thus, the range of possible antitrust violations in legitimate commerce is wide.

B. Illicit Commerce

¶17 The Sherman Act is commonly thought of as the guardian of commerce and the promoter of competition.

A primary motivation behind the Act was to forestall the undesirable accumulation of economic and political power that monopolistic practices were thought to produce.³⁵

Since criminal syndicates are a major reservoir of power, antitrust laws are appropriate weapons against them.

Illicit enterprises, which lawmakers chose to criminalize because of their anti-social effect, can be an even worse social force when they are controlled by criminal syndicates. Antitrust prosecutions should then focus on these enterprises as well as monopolized licit businesses.

¶18 Illicit businesses are particularly vulnerable to forcible exclusion or control of competition because they are conducted outside the law. When a powerful syndicate begins to "muscle in" on an independent criminal enterprise, the independent outlaw cannot preserve his business by

³⁵ Letwin, "Congress and the Sherman Antitrust Law: 1887-1890," 23 U. Chicago L. Rev. 221, 232 (1956).

invoking the state's antitrust remedies. And the established syndicate, commanding an entrenched network of corruption, often manages to use selective law enforcement to suppress incipient competition.³⁶ When local monopolies are created through violence, extortion, and bribery they may be protected and made more profitable through regional and national cartelization. Criminal leaders at upper levels agree to divide markets, fix prices, and cooperate in the exclusion of competition, sometimes on a national or even international basis.³⁷

¶19 Even though the Sherman Act, like similar state legislation, is focused on legitimate business,³⁸ there are reasons why it, and similar state legislation, should be construed to encompass illicit operations. Although research has uncovered no judicial ruling on this particular issue, Congress's power to regulate illicit business has been explicitly upheld under the Commerce Clause.³⁹ Since Congress manifested no intention, either by the terms of the antitrust statute or its legislative history,⁴⁰ to limit its operation to legitimate trade

³⁶ President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime at 66-67 (1967).

³⁷ Id. at 6-7.

³⁸ E. Kinter, An Antitrust Primer, at 7-12 (1973).

³⁹ United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 549-50, reh. denied, 323 U.S. 811 (1944).

⁴⁰ See generally A. Walker, History of the Sherman Law (1910).

there would seem to be no reason why the judiciary should impose such a limitation.

IV. Advantages of Antitrust Application to Organized Crime⁴¹

A. Per Se Rules

¶20 Per se rules are rules of evidence; they govern what defenses an offender may introduce. The defendant will usually not be permitted to introduce evidence to show that the violative agreement caused no public injury, that it was necessary for the maintenance of the business or industry, or that it was reasonable. The presumption in favor of competition is, therefore, rarely rebuttable. The only truly viable defense is that an agreement did not actually exist; that the evident price uniformity, for example, was simply a natural result of a free market. Should the court allow a defense attempting to justify the agreement or demonstrate its beneficial effects, the burden remains on the defendant and the defense is likely to be met with skepticism.⁴²

¶21 The per se rule is of obvious benefit to the antitrust prosecutor. There are simply fewer elements to be shown because the government need not demonstrate the unreasonableness of the fixed prices or an undesirable

⁴¹See "Enjoining Illegality" in these materials for a discussion of procedural benefits of civil suits.

⁴²A. Neale, supra note 26, at 27-29.

effect on the market. As indicated by Mr. Justice Black, in Northern Pacific Ry. Co. v. United States:

[I]t also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken.⁴³

¶22 Price fixing in every form,⁴⁴ market allocations,⁴⁵ and concerted refusal to deal⁴⁶ are all per se violations of section 1 of the Sherman Act. "Tying" or the refusal to sell a product or service unless the buyer agrees to buy a second, different product, or at least agrees not to purchase it from another supplier, is held to be a per se unreasonable practice,⁴⁷ though apparently certain justifications are available.⁴⁸ The intentional elimination of competitors is also per se illegal.⁴⁹

⁴³356 U.S. 1, 5 (1958).

⁴⁴United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

⁴⁵United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

⁴⁶Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959).

⁴⁷Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958).

⁴⁸Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

⁴⁹United States v. General Motors Corp., 384 U.S. 127 (1966).

¶23 In New York, horizontal price fixing is held to be per se unreasonable. The court in People v. Wisch observed:

[T]he price fixed might be a reasonable one, it might be higher or lower than what it should be, yet there would be a violation of sections 340 and 341 of the General Business Law if the price was fixed on a horizontal level as the result of the unlawful combination and resulted in restraint of trade. Whether the price was reasonable, low or high is immaterial. . . .

Nor do the motives, intent or good faith of the parties to the combination which results in unlawful restraint of trade save it from the condemnation of the statute.⁵⁰

Price fixing is said to be the only per se violation under the Donnelly Act.⁵¹ Nevertheless, Supreme Court precedents may pave the way for the expansion of the per se doctrine at the state level. The First Department has indicated:

The Federal anti-monopoly law provides, in effect, that every contract or conspiracy in restraint of trade or commerce is illegal. Its purposes are quite similar to those of our state statute. While it is true that Federal cases interpreting Federal statutes relating to interstate situations are not necessarily controlling on state courts when interpreting their own statutes (Marsich v. Eastman Kodak Co., 244 App.Div. 295, 279 N.Y.S. 140, affirmed 269 N.Y. 621, 200 N.E. 27), great weight should be given to the views expressed by the highest court of the land in relation to disputes involving similar issues, particularly issues relating to economic questions. The public policy of our state like that of the nation is opposed to monopolistic practices such as price fixing. This policy has been expressed so often that

⁵⁰ 58 Misc.2d 766, 768, 296 N.Y.S.2d 882, 885 (Sup. Ct. New York County 1969).

⁵¹ Latorella, "Enforcement of New York's Donnelly Antitrust Act," N.Y. State Bar Ass'n Antitrust Law Symposium 21, 23 (1975).

there is no doubt that an agreement attempting to regulate prices, such as the present contract, would be held in violation of our statute, unless the presence of a labor union as a party exempts the agreement from the state law.⁵²

¶24 Per se violations under New Jersey law, too, are governed by federal decisions. In 1971, the state enacted a "Uniform Construction" act under which the New Jersey antitrust statute must:

be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.⁵³

¶25 Massachusetts follows the federal per se precedent for price fixing arrangements.⁵⁴ Despite the limited provisions of the Massachusetts statute, it has been held that:

In general, the purposes of the State and Federal laws are the same. Certainly that is true of our statute and the Sherman Act.⁵⁵

Such an interpretation of the law might, as in New York, allow for an extension of per se violations in Massachusetts.

B. Penalties

¶26 Antitrust law provides a variety of methods by which to attack organized crime. Statutorily authorized

⁵² Manhattan Storage and Warehouse Co. v. Movers and Warehousemen's Ass'n, 262 App. Div. 332, 28 N.Y.S.2d 594 (1st Dept. 1941), rev'd on other grounds, 289 N.Y. 82, 43 N.E.2d 820 (1942).

⁵³ N.J. Stat. Ann. §56:9-18 (Supp. 1975). See Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972).

⁵⁴ Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950).

⁵⁵ Id. at 265, 93 N.E.2d at 762.

equitable relief can be helpful in dismantling an organized crime enterprise.⁵⁶ Prison terms and fines can also have a crippling effect.

¶27 Penalties for violations of the Sherman Act were recently increased to up to three years imprisonment; New Jersey's prison sentences are the same.⁵⁷ Sections 1 and 2 of the Sherman Act define two distinct categories of felonies.⁵⁸ Among section 2 offenses, a successful attempt to monopolize merges with the resultant monopolization;⁵⁹ but monopolization and conspiracy to monopolize are separate,⁶⁰ thus allowing for multiple penalties. Violations of New York's Donnelly Act are punishable by up to four years imprisonment.⁶¹

¶28 Federal, New York, and New Jersey law also provide for fines in place of, or in addition to, prison sentences.

Federal and New York fines range up to \$100,000 per violation

⁵⁶ See "Enjoining Illegality" in these materials for a discussion of equitable remedies.

⁵⁷ 15 U.S.C.A. §§1, 2 (1973), as amended (Supp. 1976); N.J. Stat. Ann. §56:9-11(a) (Supp. 1975).

⁵⁸ United States v. National City Lines, 186 F.2d 562 (7th Cir.), cert. denied, 341 U.S. 916 (1951).

⁵⁹ United States v. Shapiro, 103 F.2d 775 (2d Cir. 1939).

⁶⁰ American Tobacco Co. v. United States, 328 U.S. 781, 783 (1946).

⁶¹ N.Y. Gen. Bus. Law §341 (Supp. 1975), amending N.Y. Gen. Bus. Law §341 (McKinney 1968).

for individuals, \$1 million for corporations;⁶² in New Jersey, up to \$50,000 for individuals and \$100,000 for corporations.⁶³

¶29 The Massachusetts penalties are categorized more distinctly. Price discrimination⁶⁴ and combinations for the purpose of creating a monopoly⁶⁵ are punishable by imprisonment up to one year, a \$5,000 fine, or both for individual offenders and by the fine if a corporate offender.

Arrangements for the purpose of evading these two sections⁶⁶ carry stiff penalties; up to five years in prison for individual offenders and for the authorizing directors, stockholders, or agents of corporate offenders. Collusive bidding on public works contracts or purchases is punishable by a \$5,000 fine or two and one half years in prison.⁶⁷

⁶² 15 U.S.C.A. §§1, 2 (1973), as amended 15 U.S.C.A. §§1, 2 (Supp. 1976); N.Y. Gen. Bus. Law §341 (Supp. 1975), amending N.Y. Gen. Bus. Law §341 (McKinney 1968).

⁶³ N.J. Stat. Ann. §56:9-11(a) (Supp. 1975).

⁶⁴ Mass. Gen. Laws Ann. ch. 93, §8 (1975).

⁶⁵ Mass. Gen. Laws Ann. ch. 93, §9 (1975).

⁶⁶ Mass. Gen. Laws Ann. ch. 93, §10 (1975).

⁶⁷ Mass. Gen. Laws Ann. ch. 93, §9A (1975). Sales on condition that buyer deal only in seller's goods carry up to a one year prison term, \$500 fine, or both for second offenders (§1). Price fixing for any necessity of life is a criminal conspiracy punishable by \$1,000 fine, imprisonment for up to two years, or both (§13).

V. Illustrative Cases

¶30 Antitrust laws have been used against organized crime-type practices.

¶31 The Supreme Court, in Los Angeles Meat and Provision Drivers Union v. United States,⁶⁸ upheld, for example, a civil injunction issued to dismantle a "yellow grease" (grease extracted from waste food) peddlers' conspiracy. The peddlers attempted to shield their unlawful association behind the labor union antitrust exemption;⁶⁹ the Court struck down the association as not being a bona fide labor union but an illegal association between union and businessmen to restrain commerce and effectuate a profit increase. The Court observed:

To accomplish this purpose, fixed purchase and sale prices were agreed upon and enforced by union agents through the exercise or threatened exercise of union economic power in the form of strikes and boycotts against processors who indicated any inclination to deal with grease peddlers who were not union members. The union's business agent allocated accounts and territories for both purchases and sales among the various grease peddlers, who agreed to refrain from buying from or soliciting the customers of other peddlers, and violations of this agreement could result in a grease peddler's suspension from the union, in which event he was, of course, prohibited from carrying on his business.

...[T]his basic plan of price fixing and allocation of business was effectively carried out by elimination of the few peddlers who had not joined the union, and by coercion upon the processors through threats of "union trouble" if they did not comply.⁷⁰

⁶⁸ 371 U.S. 94 (1962).

⁶⁹ Id. at 101.

⁷⁰ Id. at 97.

¶32 Since competition among the grease peddlers was suppressed only with the support and weaponry of the defendant union, the Court ordered dissolution of the grease peddlers' membership from the union.⁷¹

¶33 In United States v. Bitz,⁷² organized crime defendants were convicted and sentenced to jail terms⁷³ for an unlawful combination and conspiracy in restraint of trade. Involved was the wholesale distribution and sale of newspapers and magazines in the metropolitan New York area. The Second Circuit sustained an indictment charging the defendants with a conspiracy against distributors who refused to pay "financial tribute."

¶34 In United States v. Pennsylvania Refuse Removal Association,⁷⁴ the Third Circuit affirmed criminal convictions of conspiracy to restrain the refuse removal trade. The government introduced evidence of the defendants' agreements "to fix prices, allocate customers, rig bids and coerce other refuse removers to join the conspiracy."⁷⁵ The court also noted:

...evidence that the Association through its members agreed to raise prices by 25 to 50 percent. In connection with this there is evidence of further agreement of the Association by its members

⁷¹Id. at 98.

⁷²282 F.2d 465 (2d Cir. 1960).

⁷³See note 79 infra.

⁷⁴357 F.2d 806 (3d Cir.), cert. denied, 384 U.S. 961 (1966).

⁷⁵Id. at 807.

to coerce non members who were able to take business away from the Association group because of the latter's price rise. Proof was introduced that there was an agreement that the Association members were not to compete with each other and not to interfere with other members accounts. Sanctions were imposed on any member for so doing. Competition was eliminated between members on bidding for work.⁷⁶

¶35 In United States v. Rastelli,⁷⁷ three individual and one corporate defendant were convicted of conspiring to allocate markets and restrain competition of non-members of a mobile lunch truck association. Not only did the indictment include Sherman Act violations, it also alleged conspiracy to affect commerce by extortion in violation of 18 U.S.C. §§1951, 1952.⁷⁸

¶36 It is difficult to detect which antitrust cases involve organized crime. The opinions written make no actual references to the defendants' criminal associations.⁷⁹ The extent of antitrust prosecutions of organized crime is, therefore, always uncertain. These

⁷⁶ Id. at 807-08.

⁷⁷ United States v. Rastelli, 75 Cr. 160 (E.D. N.Y. 1975).

⁷⁸ 18 U.S.C. §§1951, 1952 (1970), as amended 18 U.S.C. §§1951, 1952 (Supp. 1976).

⁷⁹ The organized crime connection with Los Angeles Meat, supra note 68; Bitz, supra note 72; and Pennsylvania Refuse Removal, supra note 74 is indicated in Hearings on S.1623 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. at 557 (1969).

materials conclude, however, that antitrust can be a successful means of attack on organized crime. It would thus seem that there is room for the imaginative application of antitrust theory by federal, state, and local prosecutors to many of the activities of organized crime.

END