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# Criminal Procedure

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# CRIMINAL PROCEDURE

*Eulis Simien, Jr.**

## I. INVESTIGATORY PROCEDURE

### A. *Seizure of Persons*

#### 1. *In General*

In determining the reasonableness of the seizure of a person, courts must consider whether there is a sufficient justification to intrude upon one's "right to be let alone"[1] and whether the seizure was executed in a reasonable manner.[2] For a custodial arrest, probable cause is required[3]—for lesser seizures, articulable suspicion.[4] However, before these safeguards become applicable a court must determine if there is state action that in fact results in a seizure.[5] In *Brower v. County of Inyo*,[6] the Supreme Court shed some light on the question of when state conduct amounts to a seizure.

The plaintiff in *Brower*, the decedent's mother, alleged that, in order to stop the decedent who was fleeing police pursuit, the police had erected a roadblock, which created a substantial risk of significant injury or death.[7] The trial court dismissed the complainant's wrongful death action filed under 42 U.S.C. § 1983, for failure to state a cause of action. The Supreme Court held that these allegations set forth a claim sufficient to withstand the motion to dismiss.[8] In so doing, the Court

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1. Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J. dissenting).

2. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966).

3. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983).

4. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

5. Cf. Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1921) (fourth amendment protections only apply to governmental action); United States v. Koenig, 856 F.2d 843 (7th Cir. 1988) (private party action does not implicate the fourth amendment unless it is induced by some governmental action); Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 104 S. Ct. 1758 (1984) (not all citizen/police encounters where the citizen is delayed are seizures).

6. 109 S. Ct. 1378 (1989).

7. 109 S. Ct. at 1380, 1382.

8. 109 S. Ct. at 1383.

concluded that the police's lack of desire to have the decedent run into the road block was irrelevant, finding that for the purposes of the fourth amendment only an intentional termination of movement is necessary. It then went on to define intentional termination of movement as one where a person is "stopped by the very instrumentality set in motion or put in place" to achieve a stop even if the stop is not effectuated in the intended manner.[9] Rejecting the claims that the decedent's refusal to end the chase negated fourth amendment protections, the Court held that the stop by the roadblock in this case was a seizure and remanded for a determination of reasonableness.[10]

2. *Reasonableness of Seizure*

Once it is determined that a seizure has taken place, the focus shifts to the issue of whether the police have a sufficient factual basis to justify the seizure and whether they execute the seizure in a reasonable manner. A significant amount of the recent "reasonableness" debate has centered on the right of the police to stop a person because he fits a predetermined "drug courier profile." In *United States v. Sokolow*,[11] the Supreme Court diminished the legal significance of police reliance upon such profiles. In *Sokolow*, the defendant paid a large sum of money in small bills for airline tickets, used a false name on his tickets, stayed at his destination only forty-eight hours (the round trip was twenty hours), came from a drug source city, appeared nervous, and checked no luggage for his flight.[12] The Court concluded that these facts were sufficient to justify the police's articulable suspicion and an investigatory stop. In light of this determination, the fact that the defendant fit and the police relied upon a pre-determined drug courier profile did not alter the analysis.[13]

Even if the police have a sufficient factual basis to justify a custodial arrest, the warrant requirement of the fourth amendment prohibits an arrest in one's home without prior judicial approval.[14] However, in *United States v. Von Marschner*,[15] the court held that this protection

9. 109 S. Ct. at 1382.

10. The Court concluded, that for the purposes of determining whether the roadblock resulted in a seizure, it would not distinguish between a roadblock that was likely to cause injury (one around a curve) and one that was not (on a long straightway)—both constitute seizures. However, it also concluded that the nature of the roadblock is relevant to determining the reasonableness of the seizure. 109 S. Ct. at 1382.

11. 109 S. Ct. 1581 (1989).

12. 109 S. Ct. at 1583.

13. 109 S. Ct. at 1586, 1587.

14. Payton v. New York, 455 U.S. 573, 100 S. Ct. 1371 (1980). However if the arrest is made in a public place, no warrant is needed. United States v. Watson, 423 U.S. 411, 96 S. Ct. 820 (1976).

15. 849 F.2d 1477 (9th Cir. 1988) (unpublished), cert. denied, 109 S. Ct. 797 (1989).

does not apply when the defendant stepped outside his home pursuant to a *non-coercive* request by police and was there arrested. In affirming the district court, the court of appeals did not consider the issues raised by the fact that the police had to intrude onto the curtilage of the defendant's home to knock on the door. This issue was not raised at the trial level and therefore considered abandoned. However, it would not appear that entry into the curtilage would constitute a violation of the fourth amendment. The area leading up to the door is an area which is open to the general public. The fourth amendment is not generally implicated when, in the exercise of their investigative functions, police intrude into the same areas and engage in the same conduct as normally done by the general public.[16]

### B. *Searches of Persons and Things*

#### 1. *In General*

A search occurs when a state actor invades or intrudes upon an area in which the claimant has a legitimate expectation of privacy. Such expectations of privacy are expectations that are subjectively held and objectively reasonable.[17] A legitimate expectation will not be recognized in an area that is generally open to public inspection. In *Florida v. Riley*,[18] the police, flying in a helicopter four hundred feet overhead, intentionally observed marijuana growing inside a partially covered greenhouse. This greenhouse was within the curtilage of the defendant's home, and therefore protected by the fourth amendment's protections of his home.[19] A majority of the Court concluded that the police observations did not invade any of the defendant's legitimate expectations of privacy. A four member plurality reasoned that since the helicopter was flying within Federal Aviation Administration authorized air space, the defendant did not have a legitimate expectation of privacy. Justice O'Connor concurred but placed less reliance on the legality of the flight and more on the fact that the defendant had not shown that such flights were so infrequent that any expectation of privacy he might have had was reasonable.[20]

A defendant might also lose his legitimate expectations of privacy by sharing his dominion and control over an effect or information with

16. Cf. Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778 (1985) (the fourth amendment is not implicated where police observed obscene materials from the same vantage point and in the same manner as would be observed by the general public).

17. Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978).

18. 109 S. Ct. 693 (1989).

19. 109 S. Ct. at 696.

20. 109 S. Ct. at 698 (O'Connor, J., concurring).

others.[21] In *California v. Greenwood*,[22] the police obtained the cooperation of trash collectors in picking up garbage from the defendant's residence and turning it over to the police for inspection and search. The bags were considered outside the curtilage at the time they were collected.[23] The Supreme Court affirmed the searches of the bags, concluding that the defendant had no legitimate expectation of privacy in garbage placed in containers and brought to the side of the road for pick up.[24]

2. *Administrative Searches*

Administrative searches are searches conducted in order to advance an important government objective other than criminal investigation and are generally subject to less formality than searches aimed at discovery of evidence for a criminal prosecution.[25] Two administrative search cases from last term that drew substantial headlines dealt with the government's right to require and conduct mandatory drug testing. In *Skinner v. Railway Labor Executives' Association*,[26] the United States Supreme Court addressed the constitutionality of Federal Railroad Administration regulations that require the drug testing of railway employees involved in train accidents even when there was no particularized suspicion that the employees had consumed drugs. Employing a balancing test, most

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21. See Simien, The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 Ark. L. Rev. 487, 545-50 (1987).

22. 108 S. Ct. 1625 (1988).

23. 108 S. Ct. at 1627, 1628-29.

24. 108 S. Ct. at 1628-29. See also Trahan v. Nebraska, 428 N.W.2d 619 (Neb. 1988), cert. denied, 109 S. Ct. 561 (1988) (defendant had no legitimate expectation of privacy in garbage placed in a container located only four feet from his back door but in a spot designated for collection and accessible to the public). *Trahan* is an expansion of *Greenwood* on two points. First, the police had to enter the curtilage to get to the bags. However, it is consistent with other Supreme Court jurisprudence which allows police to intrude into protected areas to the extent that the general public normally is allowed to do so. Cf. Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778 (1985). Second, the police actually collected the bags (rather than the garbage collectors, who had consent of the owner). As to the effect of such consent, see Simien, supra note 21, at 545-50.

25. Cf. Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727 (1967). In many instances, administrative searches may be conducted without a warrant. See New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985) (upheld the search of high school student at school where the official had "reasonable grounds for suspecting that the search [would] turn up evidence that the student [had] violated or is violating either a law or the rules of the school"); Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981) (Secretary of Labor may make warrantless search of mines); United States v. Biswell, 406 U.S. 311, 92 S. Ct. 1593 (1972) (businesses subject to licensing requirements and heavy governmental regulations may be inspected without a warrant).

26. 109 S. Ct. 1402 (1989).

notably articulated (in a different context) in *Terry v. Ohio*,[27] the Court concluded that the need to detect drug use under these circumstances is sufficiently important to permit such testing without a warrant and without particularized suspicion.[28]

In *National Treasury Employees Union v. Von Raab*,[29] the Court faced a similar issue. In *Von Raab*, customs service regulations required employees seeking a promotion or transfer to a job directly involved in drug interdiction or exposure to classified information, or where the carrying of a firearm is required, to undergo urinalysis screening.[30] There were no provisions for a warrant, probable cause, or even particularized suspicion. The Court affirmed the regulations as they related to jobs directly involved in drug interdiction or which required the carrying of a firearm. It concluded that the fourth amendment interests of the employees were outweighed by the strong societal interests in preventing those who used drugs from holding these positions.[31] However, the Court remanded for further consideration that aspect of the regulation which allowed the testing of those seeking a promotion or transfer to a position where classified information is handled.[32]

In *Griffin v. Wisconsin*,[33] the Supreme Court ruled that a probation officer may, as one of the conditions of probation and for probation related reasons, conduct warrantless searches of the home of a probationer. The Ninth Circuit expanded upon this ruling in *United States v. Richardson*.[34] In *Richardson*, the court held that where the probation officer consents to the search for probation related reasons, a warrantless, non-probable cause search of a state probationer's home may be conducted by a police officer.[35]

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27. 392 U.S. 1, 88 S. Ct. 1868 (1968).

28. 109 S. Ct. at 1412, 1414.

29. 109 S. Ct. 1384 (1989). Justices Scalia and Stevens joined the majority in *Skinner* but refused to join in this opinion because, unlike *Skinner*, there was no "demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm."

30. 109 S. Ct. at 1388 (1989).

31. 109 S. Ct. at 1393, 1395, 1397.

32. The Court found that the term "classified information" was too broad and might include jobs where the societal interests in preventing those using drugs from holding the jobs were too weak to outweigh the fourth amendment protections. Without defining the term, however, the Court indicated that the regulation might be upheld as it related to jobs where the employee would have access to "sensitive information." 109 S. Ct. at 1396 (1989).

33. 483 U.S. 868, 107 S. Ct. 3164 (1987).

34. 849 F.2d 439 (9th Cir.), cert. denied, 109 S. Ct. 171 (1988).

35. But cf. United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975) (searches under the Federal Probation Act must be conducted "under the immediate and personal supervision of [] probation officers").

C. *Self Incrimination*

In *United States v. Vazquez*,[36] the court held that a police officer did not interrogate the defendants within the meaning of *Miranda v. Arizona*[37] when he placed them in the same room with the expectation that their spontaneous utterances might draw incriminating responses. This ruling does not appear to be consistent with the definition of interrogation as provided in *Rhode Island v. Innis*.[38] According to *Innis*, there is interrogation, for the purposes of *Miranda*, when the police ask questions or *engage in conduct* which they know or should know will illicit an incriminating response. Under the facts of *Vazquez*, it should have been fairly apparent to the officer that his action would illicit an incriminating response (he even expected that it would). However, *Vazquez* does appear to be consistent with later Supreme Court pronouncements on the subject. For example, in *Arizona v. Mauro*,[39] the Supreme Court found that there was no *Miranda* interrogation when the officer allowed the defendant's wife to speak to him and recorded, in plain view, the conversation being held. After *Mauro* there seems to be less reliance upon the *Innis* test and more upon whether the defendant would have felt coerced under the circumstances.[40]

It is not only the Constitution that limits the ability of the government to contact and interrogate a criminal defendant; so does the Code of Professional Responsibility. In *United States v. Hammad*,[41] the court concluded that a police informant who contacted the defendant, known to be represented by counsel at the time of the contact, was acting as the alter ego of the prosecutor.[42] As such, the contact was in violation of state ethical rules which prohibit contact by an attorney with one known to be represented.[43] The court concluded that the evidence obtained as a result of this violation should be excluded from a criminal defendant's trial.[44]

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36. 857 F.2d 857 (1st Cir. 1988).

37. 384 U.S. 436, 86 S. Ct. 1602 (1966).

38. 466 U.S. 291, 100 S. Ct. 1682 (1980).

39. 481 U.S. 520, 107 S. Ct. 1931 (1987).

40. Had the sixth amendment right to counsel attached in any of these cases, the analysis would have been different. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977) (interrogation occurs when the officer *intends* to illicit an incriminating response).

41. 858 F.2d 834 (2d Cir. 1988).

42. The court found that the informant was acting as the prosecutor's alter ego because he was acting with the cooperation and assistance of the prosecutor. The prosecutor had given the informant a phony grand jury subpoena in order to convince the defendant that he, the informant, was under investigation and therefore could be trusted. 858 F.2d at 840.

43. Cf., Louisiana Rules of Professional Conduct Rule 4.2 (1986).

44. However, the court only announced a rule for future cases and allowed the

## II. TRIAL PROCEDURE

### A. *Grand Jury Proceedings*

In *United States v. Mechanik*,[45] the Supreme Court held that where an alleged violation of Federal Rules of Criminal Procedure Rule 6(d)[46] was not raised until two weeks into trial, the jury's subsequent guilty verdict rendered the error harmless. In *Bank of Nova Scotia v. United States*,[47] the Court extended this rule to cases where the error in grand jury proceedings is asserted prior to trial. In *Bank of Nova Scotia*, the issue was whether an indictment should be dismissed for prosecutorial misconduct before the grand jury (presenting misinformation and mistreating witnesses), but the Court provided that its ruling was to have general application to other errors (such as those in *Mechanik*) in grand jury proceedings.[48] The Court relied upon Federal Rules of Criminal Procedure Rule 52(a), which states that an error "which does not affect substantial rights shall be disregarded," and held that the defendant would have to prove prejudice to such rights.[49] According to the Court, in order to prove this prejudice, a defendant would have to show that the violations "substantially influenced the grand jury's decision to indict" or that there is "grave doubt" that the decision was free from undue influence.[50]

The United States Supreme Court also recently addressed the interrelationship of the power of the government to compel attendance before and cooperation with the grand jury and the right against self

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admission of the evidence in *Hammad*. Since the rule it announced was a new one, it concluded that the police and prosecutor acted in good faith and exclusionary rule policies would not have been served by excluding the evidence. 858 F.2d at 840-42.

If the communication is by the police, alone, then the evidence is not excluded. Cf. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986) (police need not advise a suspect that counsel is attempting to see him and may continue to interrogate unless the defendant makes a request to see a lawyer).

45. 475 U.S. 66, 106 S. Ct. 938 (1986).

46. This rule proscribes which persons may be present during a grand jury proceeding. The Louisiana counterpart to this Rule is La. Code Crim. P. art. 433.

47. 108 S. Ct. 2369 (1988).

48. 108 S. Ct. at 2374.

49. 108 S. Ct. at 2374. But see Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986) (no need to prove prejudice if members of the defendant's race are intentionally excluded from the grand jury).

50. 108 S. Ct. at 2374. In State v. Revere, 232 La. 184, 94 So. 2d 25 (1957), the Louisiana Supreme Court held that where La. Code Crim. P. art. 433 was violated the indictment should be dismissed. The court did not engage in a harmless error inquiry. The issue remains as to whether this approach will be reexamined in light of the advent of the more recent acceptance of the propriety of the harmless error analysis.

incrimination. The defendant in *Doe v. United States*,[51] a target of the grand jury investigation, refused to sign consent directives. These directives did not disclose any information about the defendant, not even if he had accounts, but authorized foreign banks to disclose account information about him if such accounts existed.[52] The defendant refused to sign the directive and was held in contempt. The issue before the Supreme Court was the constitutional validity of this contempt charge. The Court concluded that although the defendant was compelled, the defendant was not entitled to fifth amendment protection since the directives contained no "testimonial communication."[53]

### B. *Pre-Trial Proceedings and Pleas*

In *United States v. Broce*,[54] the Supreme Court held that a counseled guilty plea to indictments alleging participation in multiple conspiracies foreclosed the later collateral attack, which was based on the contention that there was only one conspiracy and therefore conviction on more than one indictment violated double jeopardy protections. The Court distinguished *Menna v. New York*,[55] concluding that this case differed because in *Menna* no evidence was needed to prove the claim but in *Broce* additional evidence would be necessary.[56] The Court also rejected the defendants' claims that their pleas should be set aside as not being knowing and willing waiver of their double jeopardy rights since they did not consider the possibility of a double jeopardy claim when they made their pleas. The Court concluded that a knowing and willing waiver of double jeopardy claims is not necessary.[57]

### C. *Speedy Trial Rights*

The Federal Speedy Trial Act provides for the dismissal of the prosecution if the terms of the act are violated.[58] There was substantial debate in the courts of appeals over the appropriate standard for de-

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51. 108 S. Ct. 2341 (1988).

52. Id. at 2343.

53. Id. at 2346, 2352. Cf. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966). Only Stevens dissented, comparing the directive to forcing one to reveal the combination to a wall safe. 108 S. Ct. at 2352.

If a bank were aware that a directive had been compelled, it might refuse to honor it and presumably there would be no jurisdiction over a foreign bank to order compliance. One issue that *Doe* does not address is whether a court can prohibit a defendant from communicating to the bank that the directive was compelled.

54. 109 S. Ct. 757 (1989).

55. 423 U.S. 61, 96 S. Ct. 241 (1975) (defendant may have a guilty plea set aside if he pleads to a jeopardy barred offense).

56. 109 S. Ct. at 765-66.

57. Id.

58. 18 U.S.C. § 3161 (1982).

termining whether such dismissals should be with or without prejudice.[59] In *United States v. Taylor*,[60] the Supreme Court provided additional guidance to the lower courts on this issue. It stated that "courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy [for a violation of the Federal Speedy Trial Act], but, in order to proceed under the Act, must consider at least the three specified factors" in determining whether dismissal should be with or without prejudice.[61]

Hoping that the defendant would file a motion to compel, which would have tolled the running of the time periods under the Federal Speedy Trial Act, the prosecutor in *United States v. Hastings*[62] intentionally failed to comply with a local discovery rule. However, the defendant did not file the motion to compel. When the time period under the Act expired, the trial court considered the conduct of the prosecutor, in regards to the discovery rule, and dismissed the prosecution with prejudice. Following the lead of the Supreme Court in *Taylor*, the court of appeals in *Hastings* reversed the district court's dismissal with prejudice. It concluded that since the discovery violation did not have the desired effect, it was not causally related to the speedy trial violations and not relevant to determining whether the dismissal should be with or without prejudice.

D. *Discovery*

The defendant in *Arizona v. Youngblood*[63] claimed that his due process rights were violated when the police failed to preserve evidence *potentially* useful to him and failed to use the latest technology for performing tests on the evidence that had been destroyed before he could have other tests performed. The defendant claimed that the results would have been more accurate with the use of this technology. The Supreme Court held that in such cases a defendant's due process rights are not violated unless the police acted in bad faith in destroying the evidence or not using the latest technology. The Court distinguished *Brady v. Maryland*[64] and its progeny, where the good faith of the government is not relevant. The Court found a distinction because in *Youngblood* the evidence was only potentially exculpatory whereas the

59. See, e.g., United States v. Kramer, 827 F.2d 1174 (8th Cir. 1987); United States v. Caparella, 716 F.2d 976 (2d Cir. 1983); United States v. Bittle, 699 F.2d 1201 (D.C. Cir. 1983).

60. 108 S. Ct. 2413 (1988).

61. Id. at 2417.

62. 847 F.2d 920 (1st Cir.) (unpublished), cert. denied, 109 S. Ct. 308 (1988).

63. 109 S. Ct. 333 (1988).

64. 373 U.S. 83, 83 S. Ct. 1194 (1963) (government must provide defendant with all material exculpatory evidence and information within its knowledge and control).

*Brady* line of cases only applies to evidence already determined to be material and exculpatory.

Since the advent of criminal discovery, courts and commentators have wrestled with the question of the extent to which a defendant may forfeit his right to present evidence because of a discovery violation.[65] In *Taylor v. Illinois*,[66] the Supreme Court settled this debate. It held that a trial court may constitutionally refuse to allow an undisclosed witness' testimony as a sanction for the defendant's failure to identify a defense witness in response to a pretrial discovery request.

### E. *Right to Effective Assistance of Counsel*

In *Strickland v. Washington*,[67] the Supreme Court held that as a general rule a defendant may not obtain a reversal of his conviction on the basis of a claim of ineffective assistance of counsel unless he proves that he was prejudiced (no reasonably competent attorney would commit the error(s) and there is a reasonable probability that error(s) affected the outcome). However, in some circumstances this prejudice will be presumed. One such circumstance is where an attorney has an actual conflict which affects his decisions.[68]

The court in *Mannhalt v. Reed*[69] found such a conflict to exist where a key government witness at the trial accused the defense counsel of criminal conduct related to defendant's offenses. This conflict affected counsel's performance when he stayed in the case, he could not call himself as a witness, his cross examination of the witness accusing him could be impaired by personal concerns, he did not question the defendant about accusations, and he could not effectively discuss a plea bargain that might have called on defendant to testify against him.[70]

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65. See, e.g., Taliaferro v. Maryland, 461 U.S. 948, 103 S. Ct. 2114 (1983) (White, J., dissenting from denial of petition for writ of certiorari).

66. 484 U.S. 400, 108 S. Ct. 646 (1988).

67. 466 U.S. 668, 104 S. Ct. 2052 (1984).

68. See Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980). This presumption of prejudice applies in other contexts as well. See Penson v. Ohio, 109 S. Ct. 346 (1988). In *Penson* the Court held that when appointed defense counsel violates the rule of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967) (appointed counsel wishing to withdraw from representation on the basis that the appeal desired by his client is frivolous must submit a brief indicating which points *arguably* support an appeal), the *Strickland* and Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), analyses are not appropriate. See also United States ex rel. Thomas v. O'Leary, 856 F.2d 1011 (7th Cir. 1988) (complete failure to file brief in opposition to state's appeal to ruling granting defendant's motion to suppress is an error which is presumptively prejudicial); Missouri v. Presley, 750 S.W.2d 602 (Mo. App. 1988), cert. denied, 109 S. Ct. 514 (1988) (presumed prejudice when defense counsel failed to challenge for cause a juror that indicated on voir dire that crimes committed against him and his family would make him partial to the state).

69. 847 F.2d 576 (9th Cir. 1988), cert. denied, 109 S. Ct. 260 (1988).

70. Id. at 583.

In *Geders v. United States*,[71] the Supreme Court held that a defendant could not be precluded from consulting with his lawyer during an overnight recess in the middle of the defendant's testimony.[72] The Court addressed a similar issue this last term. In *Perry v. Leeke*,[73] the trial court prohibited the defendant from consulting with his counsel during a brief recess in the middle of the defendant's testimony. In deciding to deny the consultation, the trial court concluded that it was virtually certain that the consultation would relate entirely to the defendant's ongoing testimony.[74] In light of this finding and the brief nature of the recess, the Supreme Court concluded that the trial court's action did not violate the *Geders* rule.[75]

Until this last term, there was a conflict in the circuits as to whether funds needed to retain counsel were exempt from the forfeiture provisions of 21 U.S.C. § 853.[76] In *United States v. Monsanto*,[77] the Supreme Court held that unless funds are otherwise exempt they are subject to forfeiture under the terms of the statute.[78] The Court also concluded that the provision does not offend the due process clause or the sixth amendment if the forfeiture is made after a determination that there is probable cause to believe that the funds are subject to forfeiture.[79]

The Court specifically left open the question of what type of hearing would be necessary prior to the pre-conviction forfeiture. In determining that probable cause was a sufficient factual finding to warrant forfeiture, the Court made an analogy to cases holding that probable cause was sufficient to allow pre-trial restraint of the person.[80] Under those cases, an *ex parte* determination is sufficient.[81] However, in *United States v. Moya-Gomez*,[82] the court held that pre-trial forfeiture is only permissible after an adversarial proceeding. The court reasoned that due process warranted an adversarial hearing because although the forfeiture might

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71. 425 U.S. 80, 96 S. Ct. 1330 (1976).

72. Id. at 91, 96 S. Ct. at 1336.

73. Perry v. Leeke, 109 S. Ct. 594 (1989).

74. Id. at 596, 601.

75. Id. at 602. The Court did, however, confirm indications in *Strickland*, 466 U.S. 668, 104 S. Ct. 2052 (1984), that a violation of the *Geders* rule is presumptively prejudicial. Id. at 600.

76. Compare Caplin & Drysdale, Chartered v. United States, 837 F.2d 637 (4th Cir. 1988) (en banc) with United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) (en banc).

77. 109 S. Ct. 2657 (1989).

78. 109 S. Ct. at 2665 (1989). In addition, the Court held that the post-conviction provisions for return of assets transferred to third parties also apply to fees paid to attorneys. Id. at 2664-65.

79. Id. at 2666-67.

80. Id. at 2666.

81. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975).

82. 860 F.2d 706 (7th Cir. 1988).

only be temporary, the loss of the attorney of choice might be permanent.[83]

Another United States Supreme Court decision which affects the ability of a defendant to hire the counsel of his choice is *Wheat v. United States*.[84] The defendant in *Wheat* moved to replace his counsel or to enroll an additional counsel. The new counsel that sought to be enrolled was already counsel of record for two other defendants allegedly involved in the same crime as the defendant. One of the other defendants had already plead guilty and a plea agreement for the third was pending before the trial court. All three had agreed to waive their rights to conflict-free representation. The prosecutor objected, asserting two potential conflicts. He claimed that the client who plead guilty might be called as a witness against Wheat and that Wheat might be called to testify against the third client if that client's plea bargain was not accepted. The trial court agreed with the arguments of the prosecutor and denied the motion.[85] The Supreme Court affirmed, rejecting the claim that the waivers of conflict-free representation were sufficient. It reasoned that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[86] There is a presumption in favor of a defendant's counsel of choice. However, a trial court is afforded broad discretion in deciding

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83. Id. at 726.

84. 108 S. Ct. 1692 (1988).

85. 108 S. Ct. at 1694-95.

86. 108 S. Ct. at 1697.

Neither of these concerns would appear to justify the Court's holding. The representation of more than one individual where there is a potential conflict of interests does not necessarily result in a violation of ethical requirements. So long as "the lawyer reasonably believes the representation will not be adversely affected," a client may waive the potential conflict. See, e.g., Louisiana Rules of Professional Conduct Rule 1.7 (1986). As to the appearance of fairness, it would seem that observers would be more disturbed by a rule that prohibits a criminal defendant from proceeding with counsel of his choice than one that prevented him from proceeding with this counsel after waiving any potential conflict of interests.

In addition to these reasons in support of its holding, the Court also cited courts of appeals opinions, which allow defendants to assert ineffective assistance of counsel claims after a waiver of conflict free representation. 108 S. Ct. at 1698. Once again, this did not justify the Court's holding. In cases where the defendant has waived his right to conflict free representation, the Court could have established a rule that prevented ineffective assistance of counsel claims that were based on an alleged conflict of interest. Cf. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975) (allowing a defendant to waive the right to legal representation but prohibiting ineffective assistance claims if he did).

If the court's true concern was that the waiver might not be knowingly made, it could have formulated a rule that would have required an on the record waiver of the potential conflict.

whether to accept a waiver of conflict-free representation and its decision will not be reversed so long as there is a substantial potential for conflict.[87]

F. *Right to Trial by Jury*

The Supreme Court recently resolved two issues relating to a criminal defendant's right to trial by jury. The first centered on the scope of the right and the second on the procedural mechanisms in the jury selection process.[88]

The sixth amendment right to a jury only applies to serious offenses.[89] In *Blanton v. City of Las Vegas*,[90] the Supreme Court established a bright line rule for determining whether an offense is "serious"[91] for this purpose. It held that where the potential imprisonment is six months or less, the offense is presumptively petty. The presumption is overcome only if the potential sentence along with the other penalties is so severe that they clearly reflect a legislative determination that the offense is serious.[92] In *Blanton*, where the offense had a maximum penalty of six months imprisonment (minimum two days or forty-eight hours of community service in distinctive garb) plus a fine of $200-$1000, the presumption that the offense was petty was not overcome.[93]

Based upon statutory interpretation, a unanimous Supreme Court in *Gomez v. United States*[94] held that Congress did not intend to allow magistrates, without the consent of the defendant, to conduct jury selection.[95] The Court went on to reject the government's contention that the error was harmless. The Court reasoned that the harmless error analysis is inappropriate when, over the objection of the defendant, a federal officer exceeds his authority in selecting a criminal jury.[96]

Because *Batson v. Kentucky*[97] was decided under the equal protection clause of the fourteenth amendment, there is no significant debate but

87. 108 S. Ct. at 1699.

88. Blanton v. City of Las Vegas, 109 S. Ct. 1289 (1989); Gomez v. United States, 109 S. Ct. 2237 (1989).

89. Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886 (1970).

90. 109 S.Ct. 1289 (1989).

91. 109 S. Ct. at 1293.

92. Id.

93. 109 S. Ct. at 1293-94.

94. 109 S.Ct. 2237 (1989).

95. 109 S. Ct. at 2247, 2248. *Gomez*'s holding is limited to the interpretation of 28 U.S.C.A. §§ 631-639 (West 1968 & Supp. 1989). As a result it does not address the authority of states to conduct jury selection in the manner condemned in *Gomez*. Nor does it preclude Congress from legislatively overruling the Court's decision.

96. 109 S. Ct. at 2248.

97. 476 U.S. 79, 106 S. Ct. 1712 (1986) (reducing the burden of proof for a defendant attempting to prove that members of his race were intentionally excluded from the petit jury that tried him).

that its protections are limited to persons who are members of the group excluded from the jury. However, there is a split in the federal circuits as to whether a defendant who is not a member of the excluded group can still prevail in a challenge to the prosecutor's use of peremptory challenges which intentionally results in a significant underrepresentation of a cognizable group from the jury panel that tried the defendant.[98] In *Teague v. Lane*,[99] the Supreme Court could have settled this split. The Court rejected the *Batson* claim because the conviction had become final prior to its opinion in *Batson*.[100] It then refused to consider the possibility of a fair cross section claim. The Court concluded that even if the claim were meritorious it would not be appropriate to retroactively grant the relief to this, a habeas corpus, petitioner.[101]

In *Davis v. Warden, Joliet Correctional Institute*,[102] the black defendant proved that the state's practice of allowing jurors to volunteer for jury service at the courthouse closest to their residence resulted in an all white jury venire (which was a different result than if the venire had been drawn by a county-wide selection process). However, the court held that this proof was not sufficient to make out a *prima facie* case of systematic substantial underrepresentation of blacks on the venire.[103] The court in *Davis* did conclude that the "district and state" language of the sixth amendment placed some limitation upon the power of states to draw lines designating from where jurors were to be drawn. But, the court also concluded that this language (which is not directly applicable to the states) allowed legislatures and courts some flexibility.[104] Since the line drawn in this case was done by the jury supervisor rather than the legislature or courts, this flexibility was not allowed.[105] However, the defendant did not prevail in his claim because although the process

98. Compare Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989) (holding that a defendant has the right to the *possibility* of a fair cross-section on the petit jury) with United States v. Rodriquez-Cardenas, 866 F.2d 390 (11th Cir. 1989) (hispanics cannot assert the exclusion of blacks from the jury panel either under *Batson* or under a fair cross-section claim). All of the cases thus far have dealt with exclusion of members of a race. However, under a fair cross-section analysis, exclusion of other cognizable groups would also give rise to a claim. Cf. Daniel v. Louisiana, 419 U.S. 31, 95 S. Ct. 704 (1975) (women are a cognizable group for sixth amendment purposes).

99. 109 S. Ct. 1060 (1989).

100. See Allen v. Hardy, 478 U.S. 255, 106 S. Ct. 2878 (1986).

101. 109 S. Ct. at 1078. The Court has granted certiorari to review the decision in Holland v. Illinois, 520 N.E.2d 682 (1987), where it will once again have an opportunity to address this issue. See 58 U.S.L.W. 3042 (1989).

102. 867 F.2d 1003 (7th Cir. 1989).

103. Id. at 1006, 1014-15. Cf. United States v. Young, 618 F.2d 52 (8th Cir. 1980) (in federal prosecution, a jury drawn from division of district is permissible).

104. 867 F.2d at 1007.

105. Id. at 1009.

was suspect, he did not prove how significant of a disparity in representation the process created.[106]

G. *Defendant's Confrontation Rights*

A *per se* rule that allows a child witness in an alleged sexual abuse of juveniles case to testify behind a screen without a finding that the exposure to the defendant would be traumatic is a violation of the constitution's confrontation clause.[107] Justice Scalia, writing for the majority in *Coy v. Iowa*,[108] noted that "[m]ost of this Court's encounters with the Confrontation Clause have involved either the admissibility of [evidence] . . . or restrictions on the scope of cross-examination." However, he concluded that the right to come face to face with witnesses is at the core of the provision and within its "irreducible literal meaning."[109] Since the provision in question in *Coy* provided a *per se* rule, there was no individualized determination that the witness in that case would have been prevented from reasonably communicating due to the trauma of having to testify face-to-face with the defendant. In a case where such an individualized determination were made, the screening of a witness would probably withstand constitutional challenge.[110]

H. *Double Jeopardy*

In *Jones v. Thomas*,[111] the defendant was convicted of two offenses joined for trial. As the offenses did not each contain an element not contained in the other and there was no legislative intent to proscribe two punishments, the conviction and punishment for both offenses constituted double jeopardy.[112] While defendant had appeals pending, the governor commuted his sentence on one offense. After the defendant completed serving the term of the commuted sentence, an appellate court ruled that his conviction on the offense with the commuted sentence should be vacated because the conviction on both offenses violated his double jeopardy rights. The court then credited the time served on that conviction to the other offense. The Supreme Court held this remedy to be sufficient.[113]

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106. Id. at 1014.

107. Coy v. Iowa, 108 S. Ct. 2798 (1988). The screen obscured the witness's view of the defendant and the defendant's view of the witness.

108. 108 S.Ct. 2798 (1988).

109. Id. at 2800, 2803.

110. Cf. Id. at 2805 (O'Connor, J., concurring).

111. 109 S. Ct. 2522 (1989).

112. See Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673 (1983).

113. Justice Scalia wrote a critical dissent. He asserted that it has been long settled that once a sentence has been completed (as was the case for the commuted sentence), conviction on another offense that is double jeopardy barred is not permissible even if credit is given for the completed sentence (relying on In re Bradley, 318 U.S. 50, 63 S. Ct. 470 (1943)).

In *Lockhart v. Nelson*,[114] the state presented evidence of the requisite number of convictions to prove habitual offender status. However, under state law, one of the convictions that had been pardoned could not be used to establish this status. As a result, the conviction was reversed. After the reversal, the state held another trial and submitted the requisite number of *valid* convictions. The United States Supreme Court held that this procedure did not violate double jeopardy protections.[115] The reasoning of the Court is questionable. The double jeopardy clause prevents the retrial of a defendant if the prosecution fails to present sufficient evidence to meet its burden of proof.[116] In *Lockhart*, not only was the evidence of the pardoned conviction inadmissible (as the Court referred to it), the evidence submitted at the first trial was insufficient (not enough qualifying convictions were proved to establish habitual offender status).[117]

I. *Death Penalty*

The court of appeals in *Giarratano v. Murray*[118] had held that providing libraries to inmates on death row is not a sufficient protection of their right to adequate review on their habeas corpus claims. It ruled that the system must be supplemented with appointment of counsel through the state habeas corpus proceeding level but not through the federal level. The Supreme Court reversed.[119] Four members of the Court concluded that *Pennsylvania v. Finley*,[120] which held that appointment of counsel for collateral attacks is not required under the Constitution, applies to collateral proceedings following a capital conviction and death sentence. Two justices concurred, relying on the facts that the state law provided for appointment of counsel once a petition, which showed promise of merit, was filed and that no inmate had thus far been unable to obtain counsel to represent him in the death penalty post-conviction proceeding before state courts.[121]

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114. 109 S. Ct. 285 (1988).

115. Id. at 288-89.

116. Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970 (1981).

117. *Lockhart* is less questionable if it will be *strictly* limited to its facts. Proof of habitual offender status is different from proof of substantive offenses. This status is a condition that is subject to fluctuation. A defendant's status changes as he is convicted of additional offenses. As a result, courts will often be faced with a situation where the same underlying facts (e.g., the same previous convictions) might be insufficient to prove the status. However, when this evidence is joined with other, later developed facts there would be sufficient evidence. For that reason, the same evidence might be admissible in more than one proceeding aimed at proving habitual offender status.

118. 847 F.2d 1118 (4th Cir. 1988) (en banc).

119. Murray v. Giarratano, 109 S. Ct. 2765 (1989).

120. 481 U.S. 551, 107 S. Ct. 1990 (1987).

121. 109 S. Ct. at 2772-73.

Other issue settled by the Court in the last two terms is the extent to which the death penalty may be imposed on minors and mentally retarded persons. In *Thompson v. Oklahoma*,[122] four members of the Court concluded that the death penalty may not be constitutionally imposed on a person who was less than sixteen years old at the time of the commission of the offense. Justice O'Connor concurred.[123] She found that for the statute under review there had not been a specific legislative decision to impose the death penalty on persons below sixteen years of age at the time of the offense.[124] Without a specific legislative determination, Justice O'Connor would require a showing that there is a national consensus to allow the death penalty to be imposed on this group. She found no such national consensus.[125] In two other cases involving minors and the death penalty, the Court held that it is constitutional to impose the death penalty on persons who were ages sixteen and seventeen at the time of the commission of the offense.[126]

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122. 108 S. Ct. 2687 (1988).

123. Id. at 2706-11 (O'Connor, J., concurring).

124. However, she did not reach the issue of the constitutionality of a statute that specifically provided that the death penalty might be imposed on those persons.

125. 108 S. Ct. at 2706 (O'Connor, J., concurring).

126. Stanford v. Kentucky, 109 S. Ct. 2969 (1989) and Wilkins v. Missouri, 109 S. Ct. 2969 (1989). Nor is it unconstitutional to impose the death penalty on a mentally retarded adult with the reasoning capacity of a seven-year old. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). However, the death penalty was reversed in *Penry*. The Court found that the jury instructions prevented the jury from considering the defendant's insanity as a mitigating factor.