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Procedure: Habeas Corpus: Davis v. United States, 411 U.S. 233 (1973)

prosecution to produce such photographs.[44] If counsel is not required at the photographic identification, and if the State is under no absolute duty to produce the pictures used, the defendant is left with no basis from which to launch a due process attack.

The Supreme Court on June 21, 1973, handed down a decision in *United States v. Ash* which purports to follow the historical line of cases in defining what is and what is not a critical stage. In actuality, the opinion is likely to lead to more confusion in the already muddled area of the right to counsel at critical stages of a prosecution. In all possibility, the Court, for the sake of consistency, may find itself with a Hobson's choice between its own construction and the pre-existing law of both its own jurisdiction and that of at least one state. In effect, the decision leaves both the legal scholar and the legal practitioner wondering where we will go from here.

[44] People v. Jackson 299 N.E.2d 142 (Ill. App. 1973). The victim of a robbery was shown a group of photographs seven months after the crime took place. The victim picked defendant's picture. Police retained neither the photographs nor a list of the people pictured in the photo display. Defendant claimed the lack of photographs violated his right to due process. While the court did say that good police procedure and proper prosecutorial care would require retention of the photographs, it relied on "the totality of the circumstances" clause in *Simmons*, and stated that there was sufficient bases to believe the victim's in-court identification. The point remains, however—how can the defendant attack an in-court identification possibly tainted by a poorly handled photo display when counsel is not required at the photographic identification and the absence of the photographs is not an absolute bar to prosecution? The result is that the defendant claims his rights have been violated, and instead of examining the facts of the situation, the judge makes what is tantamount to a ruling on the credibility of the claim.

See People v. Camel, 295 N.E.2d 270 (Ill. App. 1973) (failure to furnish defendants with the photographs shown to the victim of a rape for attempted, but unsuccessful, photographic identification was not error when sufficient basis is apparent for the reliability of the in-court identification); *cf.* People v. Newbury, 53 Ill. 2d 228, 290 N.E.2d 592 (1972) (defendant need not be granted leave to inspect photographs of scene of the crime when the prosecution does not use them at trial).

PROCEDURE

Habeas Corpus: Davis v. United States, 411 U.S. 233 (1973)

In *Davis v. United States*,[1] the United States Supreme Court held that a federal prisoner's failure to object before trial to an alledgedly unconstitutional grand jury array constituted a waiver of his right to raise that objection through a post-conviction writ of habeas corpus. Furthermore, under the circumstances of this case, petitioner had failed to show sufficient "cause" to warrant relief from application of the waiver.

A federal grand jury indicted Davis, a Negro, and two white men for entry into a federally insured bank with intent to commit larceny.[2] Petitioner, represented throughout by appointed counsel was convicted and sentenced to fourteen years in prison. Almost three years after his conviction he filed a motion in the federal district court to vacate sentence under 28 U.S.C. § 2255.[3] He alleged in his petition that the indictment against him was invalid because the grand jury had been selected by the "key man" system.[4] Petitioner claimed that this system resulted in systematic exclusion of Negroes from the grand jury in violation of his rights under federal statutes[5] and the Federal Constitution.[6] Davis had not

[1] 411 U.S. 233 (1973).

[2] A violation of 18 U.S.C. § 2 (1948) and § 2113(a) (1940).

[3] 28 U.S.C. § 2255 (1948) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed sentence to vacate, set aside or correct the sentence.

The purpose of § 2255 is to provide federal prisoners with the equivalent relief which habeas corpus provides state prisoners. Hill v. United States, 368 U.S. 424 (1962); United States v. Hayman, 342 U.S. 205 (1952).

[4] Under a "key man" system, jury commissioners ask persons who are thought to have wide contacts in the community to supply the names of prospective jurors. 411 U.S. at 246, n.2, (Marshall, J., dissenting).

[5] 28 U.S.C. §§ 1861, 1863 (1968). The former section declares it to be the policy of the United States to assure all litigants the right to a fair grand and petit jury; the latter section establishes procedures for preventing discrimination in the selection of the grand and petit juries.

[6] U.S. CONST. amend. V:

previously raised this objection in pretrial, trial or appellate motion.

The district court denied Davis' motion. It held that Davis had waived his right to object to the grand jury's composition under Rule 12(b)(2) of the Federal Rules of Criminal Procedure,[7] and that the facts did not show the requisite "cause" to warrant relief from the waiver provision of the Rule. The Court of Appeals affirmed,[8] and the Supreme Court granted certiorari.[9]

Mr. Justice Rehnquist, speaking for a majority of six justices, affirmed. He began with the premise that Rule 12(b)(2) applies to § 2255 motions.[10] Rule 12(b)(2) provides that objections to "defects in the institution of the prosecution or in the indictment" must be raised, (and presumably adjudicated), before trial. Clearly the grand jury forms an integral part of the institution of the prosecution and the indictment. Objections to the grand jury array are therefore within the purview of Rule 12(b)(2). Since failure to follow the Rule's procedure constitutes a waiver, one who pleads to an indictment and goes to trial without objection, waives any right to object to the grand jury thereafter. Relief from this waiver standard, however, may be granted for "cause shown." By its terms the Rule applies to constitutional as well as procedural defects.[11]

The Court's opinion asserted that *Shotwell Mfg. Co. v. United States*[12] controlled the instant case. In *Shotwell*, the petitioners had been convicted of federal income tax evasion. Four years later, they raised a § 2255 motion, contending that the grand and petit jury arrays had been illegal because the jury commissioner had failed to utilize a selection procedure likely to produce a representative cross section of the community. During a hearing on the motion, while petitioners conceded that Rule 12(b)(2) applied to their petition they believed that "cause" for relief from the waiver provision existed because they had only recently been apprised of the facts supporting the motion. The Court, however, found that "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence."[13] For this reason and because the petitioners were not prejudiced by the alleged illegalities, the Court concluded that there was insufficient "cause" to warrant relief from the waiver. Rehnquist concluded that "*Shotwell* thus confirms that Rule 12(b)(2) precludes untimely challenges to grand jury arrays even when the challenges are on constitutional grounds."[14]

Another case involving waiver of a claim raised in a § 2255 motion arose in *Kaufman v. United States*.[15] Kaufman had been convicted of armed robbery. At trial and on appeal his sole defense was insanity. Later, he brought a § 2255 motion alleging an unlawful search and seizure. The Supreme Court held that although a § 2255 habeas corpus petition is not a substitute for appeal, relief cannot be denied to one alleging a violation of constitutional rights solely on the ground that he should have appealed.[16] The Court did, however, indicate that relief would be denied to one who deliberately bypassed orderly procedures in raising his objection.[17]

Rehnquist distinguished *Kaufman* because it did not involve a statutory waiver provision comparable to Rule 12(b)(2). Kaufman apparently had not complied with another procedural rule, 41(e),[18] but 41(e) unlike 12(b)(2) does not make noncompliance a *per se* waiver. Therefore, because Rule 41(e) is silent, the Court could properly apply its own "different standard"[19] of waiver in

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .

[7] FED. R. CRIM. P. 12(b)(2). This Rule provides that: defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may by raised only by motion before trial,

and that failure to present such defenses or objections constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

[8] 455 F.2d 919 (5th Cir. 1969).

[9] The Supreme Court granted certiorari because the decision was contrary to two Ninth Circuit decisions, Chee v. United States, 449 F.2d 747 (9th Cir. 1971); and Fernandez v. Meier, 408 F.2d 974 (9th Cir. 1969). Both decisions held that when a petitioner in a § 2255 motion alleged facts sufficient to constitute a violation of his constitutional rights, a hearing must be granted unless it affirmatively appeared from the record that he had knowingly waived his right to object.

[10] 411 U.S. at 237. This assertion really was not challenged in the dissent. Rather, Justice Marshall agreed that rule 12(b)(2) applied, but disagreed on whether "cause" existed to relieve Davis of application of the waiver provision.

[11] 411 U.S. at 236.

[12] 371 U.S. 341 (1963).

[13] *Id.* at 363.

[14] 411 U.S. at 238.

[15] 394 U.S. 217 (1969).

[16] *Id. Accord*, Townsend v. Sain, 372 U.S. 293, 311 (1963); Hill v. United States, 368 U.S. 424, 428 (1962).

[17] 394 U.S. at 227, n.8.

[18] FED. R. CRIM. P. 41(e) provides that a motion to suppress the use of the evidence obtained in an unlawful search "shall be made before trial . . . , but the court in its discretion may entertain the motion at the trial . . . ."

[19] Although the majority opinion at no point acknowl-

Kaufman. However, when one like Davis, fails to object before trial to an allegedly unconstitutional grand jury array, he runs afoul of Rule 12(b)(2). This latter rule is not silent on the issue of waiver, but rather mandates that noncompliance is a *per se* waiver of the right to later raise the claim. Any judicial tampering with this legislatively pronounced waiver standard would be improper.[20]

The majority examined two factors in determining whether "cause" had been shown to relieve Davis of the waiver. First, the Court could not discover any justification for petitioner's failure to make a timely objection. Davis had not offered any such justification. The method objected to was long-practiced and well-known,[21] and there was no evidence that petitioner was unaware of the use of the key man system before his trial. Secondly, Rehnquist could not see how the alleged constitutional violation could have prejudiced the petitioner.[22] The same grand jury indicted Davis' two white accomplices,[23] the case had no racial overtones, and the government's case against petitioner was a strong one. The Court thus concluded that "cause" had not been shown to warrant relief from the waiver provision.[24]

The Court also discussed a policy reason for strict enforcement of Rule 12(b)(2). It argued that if the courts allowed defendants to disregard legislatively pronounced procedures, defendants would be encouraged to bypass those procedure, for tactical advantages. A defendant, aware of both a valid constitutional objection and the proper procedure for raising it, might, nevertheless, withhold the objection, hoping that it might provide grounds in a habeas corpus proceeding to upset a possible conviction. The Court claimed that the costs to society in allowing such a defendant that choice were too great. It maintained that procedural rules like 12(b)(2) do not deprive defendants of their right to raise constitutional objections, but merely require that they be raised and adjudicated before the government incurs the expense of a possible illegal trial.[25]

Mr. Justice Marshall wrote the dissenting opinion in which Mr. Justice Douglas and Mr. Justice Brennan concurred. The dissenters immediately asserted that in light of the purposes served by Rule 12(b)(2) and the modern scope and purposes served by habeas corpus relief,[26] a prisoner claiming that his constitutional rights have been violated, should be granted a hearing if he shows that his failure to make a timely objection was not an effective waiver.

Marshall rejected the majority's distinction of *Kaufman.*[27] That case involved Rule 41(e) of the

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edges the source of this "different standard" of waiver, it is clearly that which was enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938):

> An intentional relinquishment or abandonment of a known right or privilege.

The Supreme Court has stated that "the classical definition of waiver enunciated in *Johnson* furnishes the controlling standard" for judicial discretion in denying habeas corpus relief. Fay v. Noia, 372 U.S. 391 (1963).

[20] 411 U.S. at 240.

[21] This reason was based upon the apparent analogy with *Shotwell.* But the similarity between the cases is superficial. The alleged illegalities in the jury system in *Shotwell* were not as basic as the racial exclusion alleged by Davis. In *Shotwell* petitioners did not allege that they had been ignorant of their rights at the proper time for objection, but that they had been unaware of certain facts supporting their claim. In *Shotwell* petitioners were granted a hearing on their motion; in *Davis* the district court denied the motion without a hearing, ruling only on the petition, the records and the additional briefs on waiver. In *Shotwell* the defendants were corporate executives represented by retained counsel; Davis was indigent and represented by appointed counsel.

[22] Rehnquist asserted that *Shotwell* approved consideration of prejudice to a petitioner in determining whether relief from the waiver provision was warranted. 411 U.S. at 244. He concluded:

> The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

411 U.S. at 245, (Rehnquist, J., citing Peters v. Kiff, 407 U.S. 493 (1972)).

[23] This allegedly shows that even if there were a violation of Davis' constitutional rights, this violation was not prejudicial.

[24] 411 U.S. at 244.

[25] *Id.* at 241.

[26] In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that a state prisoner's failure to meet state procedural requirements for appealing his constitutional objection did not bar a federal habeas corpus hearing. Under the circumstances, Noia had not made an intelligent and understanding waiver to justify withholding federal habeas corpus relief. The Court, however, cautioned that an applicant who deliberately bypassed state judicial remedies could be denied relief on the grounds of an implied waiver. In Sanders v. United States, 373 U.S. 1 (1963), the Court considered the problem of waiver in a federal prisoner's petition for habeas corpus under § 2255. Under the circumstances the Court could not find a waiver. It held that a petitioner who alleges facts sufficient to support his claim for relief must be granted a hearing on his motion, unless the motions and the records of the case "conclusively show that the claim is without merit." Regarding strict adherence to procedural rules, the Court said:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.

Id. at 8.

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

Federal Rules of Criminal Procedure, governing the timeliness of constitutional objections to the use of certain evidence.[28] He believed that Rule 41(e) like Rule 12(b)(2) required that certain motions be made at specified times, and failure to do so may be excused for cause. The purpose of Rule 41(e) is similar to the purposes of Rule 12(b)(2), and the absence of an explicit waiver provion should not control the validity of a § 2255 motion.[29]

The dissenters did, on the other hand, distinguish *Shotwell*. There, petitioners contended not that they had been unaware of their right to be indicted by a representative grand jury, but that the facts supporting their objection had not come to their attention until four years after their trial. The Court found, however, that these facts were well-known, even "notorious," before petitioners' trial. Hence, due diligence on their part would have made petitioners aware of the facts at the proper time for raising the objection. Marshall agreed with the *Shotwell* Court that one who fails to exercise due diligence to discover evidence supporting a known claim, has waived his right to later raise that claim.[30] Here, however, Davis had been represented by appointed counsel and he alleged solely that he had not waived his right to object. *Davis*, compared to *Shotwell*, presented a much more serious situation,[31] and Marshall believed Davis should be granted a hearing for the opportunity to prove his claim.

The dissent pointed out that the majority did not urge strong policy reasons for their holding. Mr. Justice Rehnquist gave only cursory attention to one policy ground, preventing tactical evasion of procedures by defendants. Marshall did not find this reason compelling. First, such tactics need not impose tremendous judicial costs upon society, as the majority opinion suggested. If, after a trial was completed, a habeas corpus hearing determined that the array of the indicting grand jury was unconstitutional, it would only be necessary to convene a proper grand jury. This cost would be incurred even if the question were resolved at a pre-trial hearing according to Rule 12(b)(2). Then, if a proper grand jury nevertheless indicted the petitioner, a re-trial could be conducted largely upon the testimony of the first trial, and thus the costs minimized.[32] Secondly, a flexible application of Rule 12(b)(2) need not result in the tactical abuse which the majority feared. If a hearing reveals that tactical advantage is the purpose of a petitioner's failure to timely object, then relief should be denied.[33]

The dissenting Justices believed that more important policy considerations militate for a flexible application of Rule 12(b)(2). An open system of collateral relief, especially habeas corpus, insures a fairer criminal justice system, by providing periodic checks against unconstitutional abuses. It assures that constitutional rights have a greater chance of being protected. It probably makes prisoners more amenable to rehabilitation since they know that they have a fair opportunity to raise valid claims.[34] Finally, and most importantly, broad collateral opportunities for remedying constitutional violations may not only be desirable but in fact constitutionally mandated.[35]

The dissent concluded that although Rule 12(b)(2) applied to Davis' motion, the petitioner was entitled to a hearing to show the requisite "cause" to warrant relief from the waiver. Marshall's interpretation of "cause" included failure to make a timely objection because of ignorance or misunderstanding of the procedural rule. *Johnson v. Zerbst*[36] had declared that knowledge and understanding were necessary elements of a valid waiver. This "different standard" as the majority called it, need not subvert the purposes of a procedural rule like 12(b)(2). Marshall believed that absolutely no social interests are promoted by foreclosing judicial avenues of recourse to one who is ignorant of his rights.[37]

Davis may be less significant for its holding, than for the atmosphere of the Court revealed in the dicta of the opinions. The holding was quite narrow: under the circumstances of this case, petitioner failed to show "cause" to be relieved of the

[28] *See* note 18 *supra*.

[29] Marshall said:

> I had not thought that words were quite so magical as that distinction makes them.

411 U.S. at 248 (Marshall, J., dissenting).

[30] *Id.* at 256.

[31] The dissent did not claim that Davis was unaware of his right to be indicted by a representative grand jury, but this is clearly the problem which they suspected. Although it may be proper to expect a defendant to be aware of common facts which might support a known constitutional right, it probably is less acceptable to expect a defendant to be aware of all of his constitutional rights.

[32] 411 U. S. at 250 (Marshall, J., dissenting).

[33] *Id.*

[34] *Id.* at 253.

[35] *Id.* at 254, n.10. (Marshall, J., citing Fay v. Noia, 372 U.S. 391, 406; and Sanders v. United States, 373 U.S. 1, 11–12.).

[36] 304 U.S. 458 (1938).

[37] 411 U.S. at 254 (Marshall, J., dissenting).

waiver provision as required by Rule 12(b)(2). The majority held that the facts known to the district court were sufficient to conclude that "cause" was not present. The dissent believed that despite the apparent facts, Davis, having alleged deprivation of a constitutional right and having claimed that he had not waived his right to object to the grand jury array, should have been granted a hearing at which he might have shown "cause." [38]

The opinions may, however, indicate a new majority attitude toward waiver of constitutional rights. Justice Rehnquist suggested that waivers may have two bases, legislative or judicial. When the legislature establishes a waiver standard such as Rule 12(b)(2), the Courts may not apply another standard.[39] Justice Marshall, on the other hand, discussed the judicial standard of waiver as a minimum test which any legislative waiver provision must meet at least when it is a constitutional right that has allegedly been waived.[40] However, *Davis* was not determined on this issue, and it is unwise to attempt to predict what these same justices might decide if the issue of a constitutional minimum standard of waiver were more directly and deliberately presented to the Court.

The most certain effect of *Davis* is that in the future, prisoners who wish to raise collateral objections should be well prepared to show the courts that dubious past conduct did not constitute a waiver of the right to raise the objection. *Davis* does not imply that the courthouse doors are being closed to meritorious petitions for habeas corpus, but rather, that petitioners (and counsel) will have to carry better prepared credentials to get through those doors.

[38] *Id.* at 255.
[39] *See* text accompanying note 20 *supra*.
[40] *See* text accompanying note 35 *supra*.

Murch v. Mottram, 409 U.S. 41 (1972)

In *Murch v. Mottram*,[1] the Supreme Court ruled that a subjective test could not be used to determine if a petitioner for a writ of habeas corpus had knowingly by-passed state appellate remedies.

After being convicted of larceny and as a habitual offender,[2] Mottram was paroled in 1963. Parole, however, was revoked two years later. At the hearing on parole revocation, the state judge warned Mottram and his retained counsel that under Maine law,[3] Mottram would irrevocably waive his right to appeal any issues not raised at that hearing. After consulting with his client, Mottram's counsel chose to argue only that the revocation of parole was invalid. No issues concerning the original conviction were raised.

When the attack on the parole revocation failed,[4] Mottram petitioned the federal district court for a writ of habeas corpus on an issue never before raised—that the jury in his original trial was selected by unconstitutional means. The district court determined that Mottram had been specifically warned by the state judge that he was waiving future appeals and that Mottram, a man of at least average intelligence, conferred with a competent lawyer before making his decision. Because Mottram was "fully aware of these consequences," the district court denied his petition for a writ of habeas corpus.[5]

In a *per curiam* decision, the Supreme Court held that the petition for habeas corpus had been properly denied. The Court based its decision on *Fay v. Noia*,[6] which held that

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits.[7]

[1] 409 U.S. 41 (1972).
[2] Mottram failed in an appeal based on issues other than the one raised eventually in his petition for a writ of habeas corpus. State v. Mottram, 158 Me. 325, 184 A.2d 225 (1962).
[3] ME. REV. STAT. ANN. ch. 14, § 5507 (1963):
All grounds for relief claimed by a petitioner under this remedy must be raised by a petitioner in his original or amended petition, and any grounds not so raised are waived . . . .
[4] Mottram v. State, 232 A.2d 809 (Me. 1967).
[5] Mottram v. Murch, 330 F. Supp. 51, 57 (S.D. Me. 1971).
[6] 372 U.S. 391 (1963). *Noia* is one of three cases which greatly broadened the availability of habeas corpus. *See also* Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963).
[7] 372 U.S. at 439. *Noia* incorporated the previous

The Supreme Court accepted the district court's findings that, based on objective evidence, Mottram had knowingly by-passed the appeal procedures of the State of Maine. According to *Noia*, therefore, Mottram was not entitled to federal relief through a writ of habeas corpus.

The Court refused to consider the subjective evidence provided by Mottram's self-serving testimony before the district court in which he claimed to have been unaware that he was by-passing state procedures. Because Mottram's counsel had died before the hearing, it was impossible to corroborate Mottram's testimony or to discover why his counsel had not raised all possible issues of appeal when challenged by the state judge.[8] The Court reasoned that to allow the consideration of such subjective evidence would make state enforcement of post-conviction procedures impossible.[9] A state prisoner could purposefully ignore state appeals procedure and petition immediately for a writ of habeas corpus in federal court, claiming that he had not understood he had waived his right to further appeals. To safeguard the integrity of state post-conviction procedures, the Supreme Court endorsed the objective findings of the district court.

The Court also noted that the Maine statute served a legitimate state interest by avoiding a fragmented appeals procedure whereby prisoners continuously could write new appeals after the previous appeals failed. In a past case, the Supreme Court had decided that a prisoner's right to federal relief cannot be waived by by-passing state procedures which are frivolous or harassing.[10]

Rather than writing a separate opinion, the dissent in *Mottram* relied entirely on the holding of the court of appeals[11] which had reversed the district court. The Court of Appeals for the First Circuit gave credence to Mottram's subjective testimony that he did not realize he was waiving future appeals. The court also gave weight to the disagreement between Mottram's lawyer and the state judge over the effect of the Maine post-conviction statute. If Mottram's lawyer was unsure of Maine's law on waiver, then Mottram could not have knowingly by-passed state appeals procedure.

The effect of *Mottram* is to quash the attempt of the First Circuit to introduce a subjective test into the well-established rule that relief by habeas corpus can be denied to a prisoner who consciously circumvents state appeal procedures.[12] *Mottram* can also be viewed as part of a recent policy on the part of the Supreme Court to stop the trend toward the broadening of habeas corpus as a remedy for defects in state criminal procedure.[13] In the recent case of *Davis v. United States*,[14] the majority limited the rights of federal prisoners to writs of habeas corpus. The Court strictly interpreted Rule 12(b)(2) of the Federal Rules of Criminal Procedure to the effect that a failure to raise before trial any errors in the indictment process permanently waives the right to seek relief on the basis of those errors. Both *Mottram* and *Davis* serve to insure that "jailhouse lawyers" do not barrage the federal courts with one appeal after another. The fact that the dissent in *Mottram* was composed of the same justices as in *Davis*[15] is further evidence that the progressive growth of habeas corpus as the ultimate protection of the constitutional rights of state prisoners has ended.

standard on waiver that denial of habeas corpus was possible only by "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

[8] In some waiver cases, an issue absent here arises over the relationship between a client and his lawyer. *See* White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67 (1972).

[9] 409 U.S. at 46:

> If a subjective determination not to waive or to abandon a claim were sufficient to preclude a finding of a deliberate by-pass of orderly state procedures, constitutionally valid procedural requirements, such as those contained in the Maine statute requiring the joining of all bases for attack in one proceeding, would be utterly meaningless.

[10] Henry v. Mississippi, 379 U.S. 443, 447 (1965).

[11] Mottram v. Murch, 458 F.2d 626 (1st Cir. 1972).

[12] *Mottram* is more lenient than the Third Circuit which held that a state prisoner lost his right to petition for habeas corpus even when he had not been specifically warned by the state judge. United States *ex rel.* Bolognese v. Brierly, 412 F.2d 193 (3d Cir. 1969).

[13] *See* LaVallee v. Delle Rose, 410 U.S. 690 (1973).

[14] 411 U.S. 233 (1973).

[15] Justices Marshall, Brennan, and Douglas.

LaVallee v. Delle Rose, 410 U.S. 690 (1973)

In *LaVallee v. Delle Rose*,[1] the Supreme Court dealt with the question of when a district court may hold an evidentiary hearing upon a petition for a writ of habeas corpus to determine if a state court properly applied constitutional standards in making a factual determination.

The respondent was convicted in 1963 of the murder of his wife. Two confessions made by Delle Rose were admitted in evidence and considered by the jury. On appeal, the trial court was directed to hold a hearing on the question of whether the confessions were voluntarily made.[2] Testifying at the special hearing, Delle Rose alleged that he was interrogated without rest all night, that he was not warned of his constitutional rights, that he was threatened with physical abuse and that he was subjected to macabre indignities.[3] Delle Rose spoke little English and claimed to have been suffering from a back injury during the interrogation. The state's evidence contradicted most of this testimony. The trial court ruled that Delle Rose's confession was voluntary and the New York Court of Appeals confirmed his conviction.[4]

Respondent Delle Rose then petitioned the United States district court for a writ of habeas corpus,[5] alleging in his petition that his federal constitutional rights had been violated by the admission in evidence of an involuntary confession. The district court ruled that an evidentiary hearing was necessary because it was unclear from the record whether the trial court had erred in applying constitutional law to the issue of voluntariness.[6]

In a *per curiam* decision, the Supreme Court reversed, holding that where the allegations of coercion are blatant constitutional violations, the fact that the state court declared the confessions voluntary means that the court disbelieved the defendant's claims and properly applied constitutional standards, even though these standards were not explicitly discussed. Since the constitutional rights of the respondent were implicitly considered by the state court, the district court need not hold an evidentiary hearing.

In deciding whether a confession is voluntary, a state court must combine questions of fact and law. The court must first sort out the allegations made to determine exactly what pressures, if any, were applied to the suspect in order to make him confess. After deciding upon the facts, the court must then consider the facts in light of prevailing constitutional law to determine if the confession was voluntary in a constitutional sense.[7] In the instant case the state court concluded that the confessions were voluntary,[8] but the court failed to explain what constitutional standards it applied in reaching this conclusion. Thus the court's determination of the voluntary nature of the confession could have concealed a mistaken application of constitutional law.

The Supreme Court's decision in *Delle Rose* interpreted *Townsend v. Sain*,[9] a Warren Court decision which established guidelines for district courts to follow in determining when evidentiary hearings need be held.[10] The Court reasoned that

[1] 410 U.S. 690 (1973).

[2] Subsequent to the trial, the Supreme Court ruled in Jackson v. Denno, 378 U.S. 368 (1964), that the judicial body considering the question of guilt or innocence may not also decide whether a confession was voluntary. The New York procedural response to this ruling was People v. Huntley, 15 N.Y.2d 72, 225 N.Y.S.2d 838, 204 N.E.2d 179 (1965). In accordance with this new development, Delle Rose was given a special hearing to determine voluntariness.

[3] The respondent made his first confession after viewing his wife's dead body at the morgue. Respondent was also forced to stick his hand through a hole in a car seat which was still wet with his wife's blood.

[4] People v. Delle Rose, 27 N.Y.2d 882, 317 N.Y.S.2d 358, 265 N.E.2d 770 (1970), *cert. denied*, 402 U.S. 913 (1971).

[5] United States *ex rel.* Delle Rose v. LaVallee, 342 F. Supp. 567 (S.D.N.Y. 1972).

[6] At the conclusion of the evidentiary hearing, the district court found that both confessions were involuntary. *Id.* at 574. The court of appeals affirmed both the need for an evidentiary hearing and the finding of fact. United States *ex rel.* Delle Rose v. LaVallee, 468 F.2d 1288 (2d Cir. 1972).

[7] Because Miranda v. Arizona, 384 U.S. 436 (1966), was not applied retroactively, previous federal case law governs the question of voluntariness in *Delle Rose*. There is no single guideline on the subject, but rather a host of cases setting forth criteria in specific types of coercion. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960) (irrational mental state of the suspect); Spano v. New York, 360 U.S. 315 (1959) (deception); Ashcroft v. Tennessee, 322 U.S. 143 (1944) (long interrogations); Brown v. Mississippi, 297 U.S. 278 (1936) (physical abuse).

[8] 410 U.S. at 691:

> On all the evidence, both at the trial and at the hearing, and after considering the totality of the circumstances, including the omission to warn defendant of his right to counsel and his right against self-incrimination, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trial . . . .

[9] 372 U.S. 293 (1963).

[10] *Id.* at 313:

according to *Townsend*, the state court should be presumed to have correctly applied constitutional standards in the absence of any evidence to the contrary.[11] More specifically, the Court explained in *Townsend* that:

> [I]f third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.[12]

The Supreme Court felt that the instant case was one in which it should be presumed that the state court had properly applied federal constitutional standards, even though they were not articulated. The Court reasoned that because the coercion alleged by Delle Rose was so *obviously* unconstitutional, in order to conclude that the confessions were voluntary the state court must have thought that his allegations were false. Had the state court thought the allegations true, it certainly would have declared the confessions involuntary. Therefore, the fact that constitutional standards can be easily applied to the facts in the instant case allows the presumption that the state court properly applied these standards, thus obviating the need for an evidentiary hearing by the district court.

The point of disagreement made by Mr. Justice Marshall, writing for the dissent,[13] is that the facts in this case are not comparable to the blatant case of coercive third-degree tactics referred to in *Townsend*. Rather than being a case in which obviously unconstitutional pressures are alleged, *Delle Rose* involves a complex factual situation which raises both subtle and difficult constitutional questions. Instead of claiming common third-degree interrogation tactics, the allegations of Delle Rose show a weakened physical and mental condition, threats of physical abuse, and gruesome psychological pressures. The dissent argued vigorously that the decision in *Townsend* would be perverted if the district court accepted the state court's factual determination in such a complex case when the state court had failed to explain its reasoning as to the difficult constitutional questions involved.[14] The state court might have believed some part of the respondent's story, yet have incorrectly thought that the type of coercion involved was not unconstitutional.[15] To insure that the state prisoner is not being held in violation of his constitutional rights, the dissent concluded that the district court acted properly in holding an evidentiary hearing to determine voluntariness.

The effect of *Delle Rose* is to check the trend toward broadening the rights of state prisoners in federal habeas corpus suits. Since a series of decisions on habeas corpus were handed down by the Warren Court in 1963,[16] the number of habeas corpus petitions has soared.[17] One purpose of 28 U.S.C. § 2254 was to decrease the number of hearings held under habeas petitions by encouraging state courts to elaborate their legal reasoning behind factual determinations involving constitutional rights.[18] Whether *Delle Rose* will serve to reduce the number of hearings granted is unclear.

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

For a comparison between the *Townsend* guidelines and their codification in 28 U.S.C. § 2254(d) (1966), *see* Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1141 (1970).

[11] 372 U.S. at 314–315:

> [W]e think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied.

[12] *Id.* at 315.

[13] Three of the dissenters in *Delle Rose* served on the Court that decided *Townsend* (Justices Douglas, Brennan, and Stewart). Of the majority in *Delle Rose*, only Mr. Justice White was involved in *Townsend*.

[14] *Townsend* also contains language supporting the dissent's view that the state court's presumption of correctness is limited:

> The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

372 U.S. at 315–16.

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

[16] Townsend v. Sain, *supra* note 9; Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963).

[17] The number of habeas corpus petitions from state prisoners has increased from 2,106 in 1963 to 9,063 in 1970. 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 121.

[18] S. REP. 1797, 89th Cong., 2d Sess. (1966).

However, in cases where complex fact situations raise subtle constitutional questions which are not articulated by the state courts, district courts will probably be more likely to accept state court determinations without holding an evidentiary hearing. Consequently, another result of *Delle Rose* may be increased laxness by state courts in explicating their legal analysis since the likelihood of de novo hearings on the federal level has been decreased.

Speedy Trial: Strunk v. United States, 93 S. Ct. 2260 (1973)

In *Strunk v. United States*,[1] the Supreme Court firmly established that the only constitutionally permissible remedy for a violation of the sixth amendment right to a speedy trial is to set aside the conviction and to dismiss the charges.

The petitioner was convicted on federal charges and sentenced to five years in prison after his pretrial motion to dismiss the charges for a violation of his right to a speedy trial was denied. In reversing the district court's holding on this issue, the court of appeals held that the ten month delay in trying Strunk was not justified by the claim that the government lacked sufficient personnel to proceed more expeditiously, or the fact that the petitioner was already in jail on other charges and had confessed his guilt to the current charges. The court also concluded that the delay could not be solely attributed to the petitioner because he notified the government that he intended to proceed under Rule 20.[2] In determining what remedy should be applied in this case, the court of appeals noted that the traditional remedy for a sixth amendment violation of the right to a speedy trial was dismissal of the charges, but concluded that this result was too severe since the petitioner's guilt was not questioned. Instead the court elected to reduce the petitioner's sentence by the amount of time occasioned by the illegal delay.[3] In so holding, the appellate court apparently relied on *Barker v. Wingo*,[4] which it characterized as establishing flexible standards based on practical considerations in analyzing violations of the right to a speedy trial.

On certiorari to the Supreme Court, the government did not appeal the finding that petitioner was deprived of a speedy trial under the sixth amendment. Thus the only issue confronting the Court was whether or not the remedy fashioned by the court of appeals was adequate. In discussing the appellate court's reliance on *Barker*, Chief Justice Burger, writing for a unanimous court in *Strunk*, noted that the application of flexible standards discussed in *Barker* related to the question of whether the right had in fact been infringed, not to the issue of what remedy should be applied once a violation was found.[5] Furthermore, Mr. Justice Powell in *Barker* expressly concluded that a violation of the right to a speedy trial could only have one result, the dismissal of the indictment.[6]

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[1] 93 S. Ct. 2260 (1973).

[2] FED. R. CRIM. P. 20:
(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held . . . .

[3] United States v. Strunk, 467 F.2d 969, 973 (7th Cir. 1972). The court reasoned as follows:
The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of the evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment.

[4] 407 U.S. 514 (1972).

[5] 93 S. Ct. at 2263.

[6] 407 U.S. at 522 (footnote omitted):
The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

The rationale for the imposition of such a severe remedy is rooted in the nature of the right. The purpose of the sixth amendment guarantee to a speedy trial is to avoid subjecting an accused to the emotional stress of facing trial for a long period of time, the loss of family and work ties during this period if he is incarcerated, or in the case of an accused already serving a sentence, to preserve the opportunity of serving a concurrent sentence and his prospects for rehabilitation.[7] Thus, as Chief Justice Burger noted, the denial of the right to a speedy trial, unlike other sixth amendment guarantees such as the right to a public trial, to an impartial jury or to notice of charges, cannot be cured by a subsequent trial.[8]

In virtually all prior cases where a deprivation of the right to a speedy trial was found, the remedy applied was dismissal of the charges or vacation of the sentence.[9] Thus, *Strunk* appears to add little to the law in this area. However, its significance may lie in clarifying what was largely assumed, since no previous case has held that dismissal is the *only* possible remedy. This clarification takes on added significance in light of the congested state of the courts today and the serious backlog of criminal cases,[10] and the consequent increase in the number of defendants pressing the issue of deprivation of the right to a speedy trial.[11] It has been suggested by commentators,[12] and the temptation to the courts has no doubt been great, that alternative remedies to dismissal could be applied to cope with the problem of increasingly delayed criminal trials without sacrificing society's interest in seeing that those accused of crime are tried. However, *Strunk* now makes it clear that no such practical considerations can bear on the preservation of this constitutional right through the remedy of dismissal.

Another factor which has in the past left the question of a remedy in some doubt is the fact that many states have statutory requirements for a speedy trial,[13] which do not necessarily incorporate constitutional standards and therefore may apply alternate remedies without running afoul of the sixth amendment. In addition, many of the federal speedy trial cases have been decided on a motion to dismiss under Rule 48(b)[14] for want of prosecution, a standard which, again, does not necessarily equate with the deprivation of the right to a speedy trial under the sixth amendment.[15] Even where statutory dismissal was founded on a sixth amendment violation, the fact that the remedy was statutorily defined meant that these cases gave no real guidance as to what remedy was *constitutionally* required.[16] Thus, until *Strunk*, it has never been entirely clear that the constitutional right itself requires dismissal.

The clear implication of the Supreme Court's reasoning in *Strunk* is that the defendant cannot be retried on remand since the charges must be dismissed. However, the possibility that the government could re-indict the defendant if the statute of limitations has not expired still may exist. The general rule is that jeopardy does not attach after a reversal for legal error,[17] including error of

[7] 93 S. Ct. at 2263.

[8] *Id.*

[9] *See, e.g.*, Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972); United States v. Rucker, 464 F.2d 823 (D.C. Cir. 1972); United States v. Dunn, 459 F.2d 1115 (D.C. Cir. 1972); Ward v. United States, 346 F.2d 423 (D.C. Cir. 1965); Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957).

[10] As of June 30, 1970, more than 6,000 federal district court criminal cases (30% of all pending cases) had been awaiting trial for one year or more. JUDICIAL CONFERENCE OF THE UNITED STATES, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT 1970, at 155-57 (1971).

[11] A review of the reporters shows that the number of federal cases alone where a defendant has raised the issue of a deprivation of the right to a speedy trial has substantially more than doubled in the past ten years over the volume in the previous twenty.

[12] Comment, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 866–67 (1957); Note, 64 YALE L. J. 1208, 1211 n.20 (1955).

[13] *See, e.g.*, CAL. PENAL CODE § 1382 (West 1970); ILL. REV. STAT. ch. 38, § 103-05 (1970); IOWA CODE ANN. § 795.2 (Supp. 1972); NEV. REV. STAT. § 178.556 (1969); UTAH CODE ANN. § 77-51-6 (1953); WASH. REV. CODE ANN. § 10.46.010 (1961); WIS. STAT. ANN. § 971.10 (1971).

[14] FED. R. CRIM. P. 48(b):

> Rule 48. Dismissal
>
> . . .
>
> (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[15] Mann v. United States, 304 F.2d 394 (D.C. Cir. 1962) (case dismissed for want of prosecution pending government search for missing evidence, could be reinitiated without violating defendant's constitutional right to a speedy trial).

[16] *E.g.*, United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973); United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955); United States v. Provoo, 17 F.R.D. 183 (D. Md. 1955).

[17] United States v. Tateo, 377 U.S. 463, 473–74 (1964); United States v. Ball, 163 U.S. 662, 671–72 (1896).

constitutional dimension. However, the real issue here is not whether jeopardy has attached, but whether re-indictment and re-trial would be consistent with securing the right of the accused to a speedy trial.

It has been held that no denial of the right occurs due to delay involved in re-trying a defendant after a reversal of his conviction for error.[18] And, in *United States v. Ewell*,[19] the Supreme Court held that no deprivation of the right to a speedy trial occurred where a defendant's conviction was set aside because of a defective indictment, and the defendant was subsequently re-indicted within the applicable period of the statute. However, this case is distinguishable from the situation in *Strunk* where the *original* error requiring dismissal was the denial of a speedy trial. Even though the total delay could be the same in both cases, in one it would be the result of an orderly judicial process and in the other the result of the accused having been denied a constitutional right to a prompt trial.

The American Bar Association has taken the position that dismissal following a violation of the right to a speedy trial should operate as an absolute discharge,[20] and the rationale for this result has been aptly stated by the Court of Appeals for the District of Columbia in *Mann v. United States:*

> We accept appellant's premise that the constitutional right to a speedy trial is properly enforced by dismissal of the charge when there has been prejudicial delay in bring (sic) the case to trial. . . . We also agree that a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense. While there appears to be no express articulation of this rule in the reported decisions, it is the unspoken premise of all the cases involving the Speedy Trial Clause. It is, moreover, a necessary rule if the Constitutional Guarantee is not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands.[21]

Again, while the Court in *Strunk* does not expressly bar any future prosecution, the Court's concern over the seriousness of the remedy of dismissal and its observation that dismissal means in practice that a guilty defendant may go untried,[22] suggests that this result was assumed.

The consequence of *Strunk* will be to focus attention on the criteria for assessing whether or not a defendant has been deprived of the right to a speedy trial. The Supreme Court, in *Barker v. Wingo*,[23] made an attempt to set out standards for making this judgment through the use of a balancing test, setting off society's interests against harm to the accused.[24] But much critical comment has been lodged against this test which is largely subjective and difficult to apply.[25] Both the limitations of the *Barker* test and Mr. Chief Justice Burger's apparent dissatisfaction with the government's failure to appeal the issue of whether the petitioner was denied a speedy trial in *Strunk*,[26] may well suggest that the nature of the right will receive further definition in the foreseeable future.

[18] United States v. Ewell, 383 U.S. 116, 124 (1966); United States v. Mills, 434 F.2d 266 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).

[19] 383 U.S. at 122.

[20] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL, APPROVED DRAFT, 1968, at 1:

> 4.1 Absolute discharge. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offenses required to be joined with that offense.

[21] 304 F.2d 394, 396–97 (D.C. Cir. 1962) (footnotes omitted).

[22] 93 S. Ct. at 2263.

[23] 407 U.S. 514 (1972).

[24] *Id.* at 529–30 (footnotes omitted):

> We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.
>
> A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

[25] *See, e.g.*, Uviller, *Barker v. Wingo: Speedy Trial gets a Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 164 (1972); Comment, *Constitutional Law—Standards for the Right to Speedy Trial*, 51 N.C.L. REV. 310 (1972); Comment, *Criminal Procedure—The Right to Speedy Trial*, 40 TENN. L. REV. 104 (1972); Comment, *Constitutional Law—Right to Speedy Trial*, 26 VAND. L. REV. 171 (1973).

[26] Mr. Chief Justice Burger was not entirely content to limit his consideration to the question of the appropriate remedy, and devoted part I of his opinion to review the facts involved in the delay. He notes that:

> [I]t seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that petitioner neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. 93 S. Ct. at 2262.

Double Jeopardy: Illinois v. Somerville, 410 U.S. 458 (1973)

In *Illinois v. Somerville*[1] the United States Supreme Court further explained the permissible circumstances under which a trial judge may declare a mistrial after impaneling a jury, without barring the retrial of the defendant on grounds of double jeopardy. The defendant was brought to trial under an indictment charging him with theft. After the jury was impaneled, but before any evidence was presented, the prosecutor advised the court that the indictment was fatally deficient because it failed to allege that the defendant intended to deprive the owner of his property as required by Illinois law.[2] Since the defect could not be cured by amendment and could be asserted on appeal to overturn a final judgment of conviction, the trial judge declared a mistrial over the defendant's objection.[3] After the grand jury returned a second indictment alleging the requisite intent, the defendant was retried and convicted, and his conviction was upheld in the Illinois court of appeals.[4]

The defendant then sought federal writ of habeas corpus, alleging that his second trial violated the double jeopardy clause of the fifth and fourteenth amendments.[5] The Seventh Circuit affirmed the district court's denial of habeas corpus,[6] but the United States Supreme Court remanded the case for further consideration in light of two of its recent decisions interpreting the double jeopardy clause.[7]

On remand, the Seventh Circuit decided that habeas corpus should have been granted on the grounds that the trial judge had improperly terminated the first trial.[8] In a five-to-four decision, the Supreme Court reversed the court of appeals, and held that under the circumstances of this case the state could retry the defendant without violating the prohibition against double jeopardy.[9]

Writing for the majority, Mr. Justice Rehnquist argued that the trial judge had not abused his discretion in terminating the first trial. He concluded that the judge had properly applied the test of "manifest necessity," [10] which the Court had previously established as the standard for determining the circumstances under which a trial judge can declare a mistrial once jeopardy has attached,[11]

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[1] 410 U.S. 458 (1973).

[2] ILL. REV. STAT. ch. 38, § 16-1(d) (1) (1971).

[3] See ILL. CONST. art. II, § 8 (1870), which is now art. I, § 7. ILL. CONST. art. I, § 7 (1970). This section provides in part that no person shall be held to answer for a criminal offense unless indicted by a grand jury, except in cases in which the punishment is by fine or imprisonment other than in the penitentiary. The Illinois statutes further provide that only formal defects in indictments may be cured by amendment. See ILL. REV. STAT. ch. 38, § 111-5 (1971). Since the defect here affected a substantive part of the charge against the defendant, the only way to cure it was to have the grand jury reindict the defendant.

[4] People v. Somerville, 88 Ill. App. 2d 212, 232 N.E.2d 115 (1967).

[5] U.S. CONST. amend. V, which provides in part: "... nor shall any person be twice put in jeopardy of life or limb...." The Supreme Court made the fifth amendment applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969). Most states have similar clauses within their constitutions. See SIGLER, DOUBLE JEOPARDY 33–34 (1969). The origin of the constitutional protection against double jeopardy is found in the common law pleas of *autrefois acquit* and *autrefois convict*. See Comment, *Double Jeopardy and the Necessity Rule*, 14 U. PITT. L. REV. 583 (1953).

[6] 429 F.2d 1335 (7th Cir. 1970).

[7] See United States v. Jorn, 400 U.S. 470 (1970); Downum v. United States, 372 U.S. 734 (1963). Both Downum and Jorn upheld a claim of double jeopardy after the state attempted to retry the defendant following the declaration of a mistrial. See notes 16–17 *infra*.

[8] 447 F.2d 733 (7th Cir. 1971).

[9] 410 U.S. 458, 471 (1973).

[10] That test was first enunciated by Justice Story in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), in which the Supreme Court held that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar the retrial of the defendant:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests in this case, as in other cases, upon the responsibility of the Judges, under their oaths of office.

Id. at 580.

[11] The Supreme Court has held that for the purposes of the double jeopardy clause, jeopardy attaches when a criminal trial commences before a judge or jury. Green v. United States, 355 U.S. 184, 188 (1957); Wade v. Hunter, 336 U.S. 684, 688 (1949). The Court has subsequently assumed that this takes place when the jury has been selected and sworn. *See* Downum v. United States, 372 U.S. 734 (1963).

The Illinois courts argued that jeopardy had not attached in this case because the defendant was brought to trial under an invalid indictment. People v. Somerville, 88 Ill. App. 2d 212, 216-17, 232 N.E.2d 115, 117

without barring the retrial of the defendant on grounds of double jeopardy.[12] According to Mr. Justice Rehnquist, under the "manifest necessity" test, the trial judge must balance the interests of the state in seeking public justice against the policy considerations underlying the double jeopardy clause in determining whether it is permissible to declare a mistrial:[13]

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impanelled is itself a weighty one . . . Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration . . . But where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.[14]

Mr. Justice Rehnquist concluded by stating that a declaration of a mistrial under the circumstances of this case would be improper only when the prosecutor had used the state procedure to harass the defendant.[15]

In arguing that the double jeopardy clause precluded his second trial, the defendant relied heavily on *Downum v. United States*[16] and *United States v. Jorn*,[17] which were cited by the Seventh Circuit as requiring the reversal of his conviction.[18] In *Downum*, after the defendant's case was called to trial and a jury was impaneled, the prosecutor advised the court that two of his key witnesses were unavailable.[19] The trial judge then dismissed the first jury to allow the prosecutor time to secure the presence of his witnesses. At the second trial, the defendant was convicted over his claim of former jeopardy. The Supreme Court reversed his conviction, and held that the trial judge had abused his discretion in terminating the first trial.[20]

In *Jorn* the trial judge declared a mistrial after he determined that the government's witnesses were not properly advised of their privilege against self-incrimination before testifying.[21] The case was

(1967). This argument was rejected by the Seventh Circuit which held that the time when jeopardy attaches must be determined by the federal standard. Somerville v. Illinois, 447 F.2d 733, 735 (7th Cir. 1971). *See also* Benton v. Maryland, 395 U.S. 784 (1969); United States v. Ball, 163 U.S. 662 (1896).

[12] Since Perez v. United States, 22 U.S. (9 Wheat.) 529 (1824), the Supreme Court has applied the "manifest necessity" test in a number of situations to uphold the propriety of the declaration of a mistrial. *See, e.g.*, Gori v. United States, 367 U.S. 364 (1961) (jury discharged because of potentially prejudicial testimony about defendant's previous criminal record); Wade v. Hunter, 336 U.S. 684 (1949) (military court-martial discharged due to tactical necessity in the field); Lovato v. New Mexico, 242 U.S. 199 (1916) (jury discharged because of possible irregularities in pleadings); Keerl v. Montana, 213 U.S. 135 (1909) (jury discharged after three days of deliberation for failure to reach a verdict); Dreyer v. Illinois, 187 U.S. 71 (1902) (jury discharged after one day deliberations for failure to reach a verdict); Thompson v. United States, 155 U.S. 271 (1894) (jury discharged because one juror had served on grand jury indicting defendant); Logan v. United States, 144 U.S. 263 (1892) (jury discharged after forty hours for failure to reach a verdict); Simmons v. United States, 142 U.S. 148 (1891) (jury discharged because letter published in newspaper made jurors' impartiality doubtful).

In Gori v. United States, 367 U.S. 364, 368 (1961), the Court intimated that in situations where the mistrial is declared for the benefit of the defendant, the state can retry the defendant under the "manifest necessity" test. This rule was specifically rejected in United States v. Jorn, 400 U.S. 470, 483 (1971).

[13] *See* Green v. United States, 355 U.S. 184, 187–88 (1957), where the Court explained the policy considerations underlying this provision:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See generally SIGLER, DOUBLE JEOPARDY 155–69 (1969); Comment, *Double Jeopardy: Its History, Rationale and Future*, 70 DICK. L. REV. 377 (1966); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1274 (1964).

[14] 410 U.S. at 471.

[15] *Id.* at 469.

[16] 372 U.S. 734 (1963). For discussions of this case, see Note, 28 ALBANY L. REV. 162 (1964); Note, 16 ALA. L. REV. 133 (1963).

[17] 400 U.S. 470 (1971). For discussions of this case, see Note, 26 RUTGERS L. REV. 682 (1973); Note, 32 LA. L. REV. 145 (1971).

[18] *See* Somerville v. Illinois, 447 F.2d 733, 734–35 (7th Cir. 1971).

[19] Subpoenas for all of the prosecutor's witnesses had been delivered to the United States marshall, but he waited until the day before trial to discover that the subpoenas had not been served. The prosecutor allowed the jury to be selected and sworn even though he knew his witnesses had not been found. Downum v. United States, 372 U.S. 734, 735 (1963).

[20] *Id.* at 736–37.

[21] In *Jorn* the defendant was charged with violations of the Internal Revenue Code. Five of the government's witnesses were taxpayers whom the defendant had aided in the preparation of their income tax returns. After the first of these witnesses was called to testify, defense counsel suggested that they be warned of their constitutional rights. After further inquiry, the trial judge decided that all of the witnesses should be given a

set for retrial before another jury, but on the defendant's pretrial motion, the judge dismissed the case on the grounds of former jeopardy. In a plurality opinion, the Supreme Court agreed with the trial judge and held that the grounds for declaring a mistrial were insufficient to override the defendant's interests under the double jeopardy clause.[22]

In response to the defendant's claim that these cases were controlling, Mr. Justice Rehnquist distinguished *Jorn* by describing the actions of the trial judge there as erratic and, under the circumstances of that case, wholly unnecessary.[23] In *Somerville*, on the other hand, the mistrial served a legitimate state interest and was the only effective way to cure the defect in the indictment. Mr. Justice Rehnquist also felt that *Somerville* was distinguishable from *Downum* since the mistrial in *Downum* was declared to allow the prosecutor time to strengthen his case and might result in great delay to the defendant.[24] Here the delay was minimal and did not give the prosecutor an unfair advantage.

Justice White, joined by Justices Brennan and Douglas, dissented on the grounds that *Downum* and *Jorn* were controlling, and that, in any case, the prosecutor's failure to inspect the indictment before trial should not serve to deprive the defendant of his rights under the prohibition against double jeopardy.[25] Mr. Justice Marshall also filed a dissenting opinion in which he concluded that the majority opinion had abandoned the tradition of previous cases by adopting a new balancing test,

> whose elements are stated on such a high level of abstraction as to give judges virtually no guidance in deciding subsequent cases.[26]

While the Court's application of the "manifest necessity" test under the circumstances of this case has some support in previous cases,[27] its decision does lend considerable uncertainty as to the continued application of certain principles enunciated in *Downum v. United States*[28] and *United States v. Jorn*.[29] First, in both cases the Court stressed the paramount importance of protecting the defendant's interest in settling his case because of his exposure to the embarrassment, anxiety and expense of trial.[30] In *Downum*, for example, the absence of the prosecutor's key witnesses would have resulted in the acquittal of the defendant on certain counts in the indictment, but the Supreme Court felt that this was insufficient justification for declaring the mistrial without barring the retrial of the defendant on grounds of double jeopardy.[31] The *Somerville* Court, on the other hand, enunciates a balancing test in which it places the interests of the state in securing an error-free conviction above the interests of the defendant in

chance to consult with an attorney. He then declared the mistrial. United States v. Jorn, 400 U.S. 470, 472–73 (1971).

[22] Justice Harlan, joined by Chief Justice Burger and Justices Douglas and Marshall, upheld the trial judge's ruling on the grounds that the double jeopardy clause had been violated. Justices Black and Brennan agreed that the trial judge's decision should not be reversed but felt that the Court had no jurisdiction. Justices Stewart, White and Blackmun dissented on the grounds that the retrial of the defendant would not have violated the double jeopardy clause.

[23] 410 U.S. at 469.

[24] *Id.*

[25] According to Mr. Justice White:

> Apparently the majority finds "manifest necessity" for a mistrial and the retrial of the defendant in the 'state's policy of preserving the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury' and the implementation of that policy in the absence from Illinois procedural rules of any procedure for the amendment of indictments. Conceding the reasonableness of such a policy, it must be remembered that the inability to amend the indictment does not come into play, and a mistrial is not necessitated, unless an error on the part of the State in the framing of the indictment is committed. Only when the indictment is defective—only when the State has failed to properly execute its responsibilities to frame a proper indictment—does the State's procedural framework necessitate the mistrial.

Id. at 475.

[26] 410 U.S. at 483.

[27] *See* Lovato v. New Mexico, 242 U.S. 199 (1916), where the jury was discharged after the prosecutor realized that the defendant had not pleaded to the indictment. *See also* Wade v. Hunter, 336 U.S. 684 (1949), in which the absence of witnesses due to combat conditions was held sufficient to justify the declaration of a mistrial without barring the retrial of the defendant.

It has been suggested that there are two rules discernible from the cases. See Note, 26 RUTGERS L. REV. 682, 685, n.34 (1973). The first is that absent a showing of abuse of discretion, there is an assumption that a mistrial does not bar retrial. *See* Gori v. United States, 367 U.S. 364 (1961); Brock v. North Carolina, 344 U.S. 424 (1953); Keerl v. Montana, 213 U.S. 135 (1909). The second rule is that absent a showing of substantial justifying circumstances, a mistrial precludes retrial. *See* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963); Simmons v. United States, 142 U.S. 148 (1891); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931). The decision in Somerville can be interpreted as following the first line of cases.

[28] 372 U.S. 734 (1963).

[29] 400 U.S. 470 (1971).

[30] *See* note 13 *supra*.

[31] *See* note 19 *supra*.

having his fate determined by the first jury. It also indicates its willingness to allow various state procedural rules to override the constitutional protection against double jeopardy:

> Since this Court's decision in *Benton v. Maryland* ... federal courts will be confronted with such claims that arise in large measure from the often diverse procedural rules existing in the 50 states. Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy.[32]

Secondly, while the cases applying the "manifest necessity" test have not established rigid rules for trial judges to follow,[33] both *Downum* and *Jorn* indicated that trial judges should exercise their discretion in declaring mistrials only in the most extraordinary and striking circumstances.[34] While the *Somerville* Court does emphasize that trial judges must weigh the interests of the competing parties,[35] the majority, as Mr. Justice Marshall points out, elevates the "manifest necessity" test to a new level of abstraction.[36] While this approach may give trial judges more flexibility in administering criminal trials, it provides virtually no guidance for the protection of the defendant's rights under the double jeopardy clause.[37]

Finally, in both *Downum* and *Jorn* the Supreme Court expressed its dissatisfaction with the trial judge's determination that prosecutorial error could justify the declaration of a mistrial under the circumstances of those cases. In *Jorn*, for example, the plurality opinion stated:

> Unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of professional conduct in the clash of an adversary criminal process ... The trial judge must recognize the lack of preparedness by the government ... directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee.[38]

The *Somerville* Court, though not clearly countenancing prosecutorial negligence, indicates that only prosecutorial manipulation can justify the application of the double jeopardy clause when a procedural error would provide the defendant with grounds for reversal on appeal.[39] Even limited to those situations where reversal would be certain, the decision still overrides a policy often stated in the cases that the prosecutor must come prepared for trial and take his chances once the jury is impaneled.[40] To the extent that *Somerville* can be used to justify the retrial of a defendant in situations where the prosecutor has made an error in judgment at some point before verdict, which may not automatically result in reversal on appeal, the decision clearly reverses a policy enunciated in prior cases.[41]

In conclusion, the decision in *Somerville* is objectionable because it prescribes a vague balancing test and accepts prosecutorial oversight. While the decision has potentially far-reaching implications for the judicial administration of criminal trials, it lends considerable uncertainty as to the vitality of both *Downum* and *Jorn*, and may further serve to dilute the constitutional guarantee against double jeopardy.

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[32] 410 U.S. at 468. See also Duncan v. United States, 405 U.S. 127 (1972), in which the Court dismissed a writ of certiorari as improvidently granted in a case involving the dismissal of an indictment under the rules of criminal pleading peculiar to a particular state followed by a retrial under a proper indictment.

[33] *See* notes 10, 12 *supra*.

[34] In *Downum* the Court stated:

> The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances'.

372 U.S. at 736. *See also* United States v. Watson, 28 Fed. Cas. 499, 500–01 (1856); United States v. Shoemaker, 27 Fed. Cas. 1067 (1840).

[35] 410 U.S. at 471.

[36] *Id.* at 483.

[37] *See* note 27 *supra*.

[38] 410 U.S. at 475.

[39] *See* note 15 *supra*.

[40] *See, e.g.*, United States v. Ball, 163 U.S. 662 (1896), where the Court stated:

> This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly put in issue on the first ... If this be tolerated, when are trials of the accused to end?

Id. at 667–68. *See also* United States v. Jorn, 400 U.S. 470, 485 (1971); Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931).

[41] In *Jorn* the plurality opinion stated:

> The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching.

400 U.S. at 484.

Voir Dire Examination: Ham v. South Carolina, 409 U.S. 524 (1973)

In *Ham v. South Carolina*,[1] the United States Supreme Court faced an issue involving the scope of the *voir dire* examination.[2] The Court unanimously held that a defendant must be permitted to quiz the veniremen as to possible racial prejudice. The majority also held, with Justices Douglas and Marshall dissenting, that a refusal to inquire about specific bias against beards, subsequent to the trial judge's general inquiry as to any forms of impartiality, did not constitute a violation of a constitutional right.

The petitioner in *Ham* was convicted of possession of marijuana and sentenced to 18 months imprisonment. Petitioner, a young bearded Negro, who had no previous criminal record, contended during trial that he was framed on the drug charge because of his well publicized civil rights activities.

On *voir dire* petitioner's counsel requested the court to ask the veniremen four questions relating to possible prejudice against the defendant. The first two dealt with potential racial prejudice; the third probed for a bias against beards; and the fourth aimed at possible pre-trial publicity. The trial judge refused to ask any of the proposed questions, but instead submitted three general questions required by state law.[3] They inquired about the existence of prejudice of any sort against the defendant or the existence of preconceived notions of guilt or innocence. On appeal to the South Carolina supreme court the resulting conviction was upheld.[4] In discussing the issue of the scope of the *voir dire* examination the majority of the court concluded that the trial judge did not abuse his discretion. The majority reasoned that the prescribed questions had sufficiently covered the requested area. The dissent, however, argued that *Aldridge v. United States*[5] was controlling and required that petitioner's question be submitted to the panel of prospective jurors.[6] That case involved a Negro defendant who was denied on *voir dire* the opportunity to question the prospective jurors for racial prejudice. Chief Justice Hughes, speaking for the Court, said that the "essential demands of fairness," as expressed by the due process clause of the fourteenth amendment, required that such an examination be permitted.[7] The Supreme Court granted certiorari on the issue of whether the trial judge's refusal to ask the suggested questions violated petitioner's constitutional rights.[8]

In reversing petitioner's conviction Justice Rehnquist's majority opinion relied heavily on *Aldridge* and the constitutional prohibitions against racial discrimination. He pointed out that the purpose behind the adoption of the fourteenth amendment was to insure that the states treat all of their residents equally, irrespective of their race or color.[9] The "constitutional stature" [10] of racial prejudice required, in the majority's view, that questions probing for bias of this nature must be allowed.

On the other hand, the question aimed at detecting a prejudice against beards was found by Justice Rehnquist not to be entitled to a similar treatment. Although he acknowledged the possibility of such a bias, it was "constitutionally [impossible to] distinguish possible prejudice against beards from a host of other similar prejudices." [11] Implicit in this candid admission was an apprehen-

[1] 409 U.S. 524 (1973).

[2] The *voir dire* examination in this case was conducted by the trial judge as authorized by statute. However, the statute also provided that the court may submit additional questions proposed by a defendant or a prosecutor at its discretion. S. C. CODE § 38-202 (1962).

This procedure is suggested also by the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, § 2, 4, at 66-67 (Approved Draft 1968). In federal courts, Rule 24(a) of the Federal Rules of Criminal Procedure provides that the trial judge may conduct the *voir dire* or permit counsel to quiz the prospective jurors directly, although the former has been preferred. However, the rule is silent as to the scope of the *voir dire* examination. FED. R. CRIM. P. 24(a).

[3] S. C. CODE § 38-202 (1962).

[4] 256 S.C. 1, 180 S.E.2d 628 (1972).

[5] 283 U.S. 308 (1931).

[6] It is interesting to note that the dissenting justices did not distinguish between questions relating to racial prejudice and questions relating to a bias against beards. In their view *Aldridge* required both.

[7] 283 U.S. at 310.

[8] The Court was unanimous in agreeing that the record before it did not substantiate charges of pretrial publicity. Therefore the Court did not discuss the merits of the issue whether the last question posed by the defendant should have been included on the *voir dire* examination. 409 U.S. at 528 (majority opinion); *Id.* at 531 (Marshall, J., dissenting); *Id.* at 529-530 (Douglas, J., dissenting) (sub silentio).

[9] He cited the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), where it was argued unsuccessfully that the fourteenth amendment is not limited to problems of ex-slaves and racial discrimination.

[10] 409 U.S. at 528.

[11] *Id.*

sion that by giving the posed question a constitutional imprimatur, a legal precedent would be set requiring that all questions submitted by defendants be asked, irrespective of their relevancy and significance. It would be extremely difficult, in Justice Rehnquist's judgment, for a trial judge or the appellate courts to justify on some rational basis the distinction between questions relating to a possible prejudice against beards and questions probing for biases against other physical traits. Nevertheless, he qualified his disallowance:

> The trial judge's refusal to inquire as to a particular bias against beards, *after his inquiries as to bias in general*, does not reach the level of constitutional violation.[12]

Moreover, the narrow reading of *Aldridge*, restricting the required questions to racial prejudice only, served to establish a dual-level classification of prejudices. Although *Aldridge* raised the issue of possible racial prejudice, the holding was not explicitly limited to its factual circumstances and it has not been interpreted so by other courts.[13] Where the credibility of a defendant or some other witnesses was at stake, various questioning has been allowed. Thus, in *United States v. Napoleone*,[14] the defendant was entitled to question the veniremen whether their objectivity in rendering the verdict would be affected by their ethical and moral views toward lying or liars. The court cited *Aldridge* for the proposition that the essential demands of fairness control the trial judge's discretion as to the scope of the *voir dire* examination. The concept of fairness, as propounded in *Aldridge*, was not, in the court's view, restricted to elimination of jurors harboring racial prejudice only.

The *Ham* holding is inconsistent with the other decisions of the Court. Since *Irwin v. Dowd*[15] held that an impartial jury was constitutionally mandated in state courts, a defendant's request to examine for possible bias must clearly be without merit in order for the trial judge to refuse inquiry of veniremen. Petitioner here was charged with possession of marijuana, a crime associated customarily with young and non-conforming elements of society. In light of his defense at the trial, bias against beards becomes a factor of greater significance for the jury in arriving at their verdict. There was a great likelihood that petitioner's testimony was given less credibility because of his non-conventional appearance and the possible assumption of guilt arising from the association of drug use with non-conformity.

Furthermore, the dual level approach of the majority is subject to logical infirmities. If the concern and the goal is to secure an impartial jury, then, in reality, the differences in the source and the nature of the prejudices are irrelevant. By being denied an opportunity to have his questions submitted to the prospective jurors, a defendant is in either case deprived of his constitutional privilege to be judged by an unbiased jury.[16] The issue at stake is his ability to secure a fair trial, not the nature of the prejudice against him, constitutional or otherwise. The faulty reasoning is evident further in the majority's distinction between general and specific examinations. If the general inquiry was deemed to be sufficient to elicit all types of biases, including one against beards, then no specific inquiry for racial prejudice should be required since such a prejudice is only one of many forms of partiality. By allowing one type of questioning and denying the other, the Court implicitly recog-

[12] *Id.* (emphasis added).

[13] *See, e.g.*, United States v. Gassaway, 456 F.2d 624 (5th Cir. 1972), involving a failure to ask whether any of the jurors were inclined to give more weight to testimony of a police officer, because of his position than to any other witness in the case was not an error; United States v. Poole, 450 F.2d 1082 (3d Cir. 1965), where the trial judge refused to allow a question pertaining to a juror's prior experience as a victim of crime was error; Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964) (Burger, J.), where the failure to ask whether any of the jurors were inclined to give more weight to testimony of a police officer than to any other witness in the case was reversible error; Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), involving a failure to ask the same question as in *Brown* was not necessarily an error; Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959), where failure to ask the same question was an error; Phenious v. State, 11 Md. App. 385, 274 A.2d 658 (1971). *But see* United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); United States v. Gore, 435 F.2d 1110 (4th Cir. 1970); Commonwealth v. Foster, 293 A.2d 94 (Pa. Super. 1972).

[14] 349 F.2d 350 (3d Cir. 1965).

[15] 366 U.S. 717 (1961). In *Irwin* a state conviction was set aside because newspaper publicity prevented a fair trial. Although each juror expressed his belief that he could remain fair and impartial, the Court thought that the likelihood of the verdict being affected by the prejudice was substantial enough to require a reversal.

[16] It has been argued that a true neutrality is not a realistic goal since every individual has some views which do affect his thinking. The purpose of the *voir dire* examination, then, becomes to insure a certain degree of impartiality, not absolute impartiality. The jurors who hold a specific and identifiable bias, which may prevent them from being objective, are to be eliminated from the panel. Yet, it is quite likely that some of the unconscious personal beliefs, capable of prejudicing one's thinking will not be discovered. *See* Levit, *et al.*, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 925 (1971).

nized that general inquiry fails to elicit impartiality.[17]

Moreover, the Court has frequently intervened to insure the impartiality of the jury, not limiting its action, however, only to racial prejudice. Where the jury selection process resulted in a jury inclined to impose capital punishment more readily, the Court reversed the conviction.[18] In *Groppi v. Wisconsin*,[19] state law imposing restriction on change of venue, thought necessary by the defendant, a white civil rights activist, to avoid jury prejudice was invalidated. Similarly, in *Morford v. United States*,[20] defendant's alleged ties with the Communist Party were held to be a proper subject of inquiry during the *voir dire* examination.

The *Ham* holding represents a departure from the Court's previous willingness to safeguard the right to an impartial jury. That stance in situations of alleged jury misbehavior[21] has been replaced by the attitude of "presumptive reasonableness" [22] of juries. In adopting this new posture the Court shows more concern with needs of expediency than with the rights of an accused.[23]

The opinion of Justice Douglas, concurring in part and dissenting in part, agreed with the majority about the need to question for racial prejudice[24] but departed from the interpretation given to *Aldridge* and the import of bias against beards. First, Justice Douglas pointed out that *Aldridge* was not restricted only to inquiry as to racial prejudice but included all prejudices of a "serious" [25] character. He argued that in light of the current importance attached to the length of one's hair,[26] a possible bias against beards was sufficiently "serious" to be added to the special category created by the majority. Where defendant's appearance is especially reflective upon his credibility and presumption of innocence the danger of a biased jury is too great to preclude a defendant from his inquiry.

Justice Marshall adopted a more flexible approach. While challenging the dubious distinction created by the majority of the Court, he pointed out that the right to an impartial jury was never restricted to one group in the population. He noted:

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[17] The proponents of an extensive *voir dire* examination contend that only specific questions posed by the accused's counsel, who customarily is most aware of the issues and the evidence to be presented to the jury, are capable of bringing out hidden prejudices since they are aimed at a specific end. Moreover, it is said that the examination by the Court is mechanical and formal, failing to elicit any truthful responses from the prospective jurors. The veniremen, when questioned by the court, may feel capable of disregarding their biases and will keep silent when requested to divulge them. This is especially true where the prejudices are held almost on an unconscious level. Since it is impossible to reenact the atmosphere of the trial and the impact of the questioning upon the jurors cannot be truthfully assessed, the appellate courts are not capable of fully protecting the right of the accused. Therefore, the argument concludes, counsel with personal knowledge and interest must be permitted to question the jurors if the *voir dire* examination is to be effective in securing an impartial jury. *See* Comment, *Voir Dire In Southern California: Where Is It Going? Where Should It Go?*, 10 SAN DIEGO L. REV. 395, 401–403, 406 (1973).

[18] Witherspoon v. Illinois, 391 U.S. 510 (1968).

[19] 400 U.S. 505 (1971). In *Groppi*, Justice Stewart said for the Court:

> There we are concerned with the methods available to assure an impartial jury in a situation where because of prejudicial publicity *or for some other reason* the community from which the jury is to be drawn may be already permeated with the hostility toward the defendant.

Id. at 509 (emphasis added).

The Court's concern is also evident later in the opinion:

> Another way is to provide a method of jury qualification that will promote through the exercise of challenges to the venire—peremptory and for cause—the exclusion of prospective jurors infected with prejudices from which they come.

Id. at 509–10.

[20] 339 U.S. 259 (1950).

[21] *See, e.g.*, Groppi v. Wisconsin, 400 U.S. 505 (1971); Sheppard v. Maxwell, 384 U.S. 333 (1966) (where the decision provided protection from inflammatory press coverage and disruptive influences in the courtroom); Irwin v. Dowd, 336 U.S. 717 (1960).

[22] Johnson v. Louisiana, 406 U.S. 356, 398 (1972) (Stewart, J., dissenting). In *Johnson*, Justice Stewart criticized the majority's premise that "each juror will faithfully perform his assigned duty." *Id.* at 379. The majority insisted that the jurors will disregard their biases and prejudices in rendering their verdict. Justice Stewart challenged this presumption of regularity by pointing to a number of cases where the Court held a different attitude.

[23] Chief Justice Burger commented on this critical problem at the National Conference on the Judiciary at Williamsburg, Virginia, on March 12, 1971, stating that selection of a jury has "become in itself a major piece of litigation consuming days or weeks." L.A. Times, March 13, 1971, § 7, at 17, col. 1. It is not the purpose of this note to deal in depth with the abuses of the *voir dire* examination. *See generally* Levit, *et al.*, *supra* note 16; Comment, *supra* note 17. *See also* State v. Manley, 54 N.J. 259, 255 A.2d 193 (1969), discussing the failure of trial judges to exercise proper control over *voir dire*.

[24] 409 U.S. at 529 (separate opinion of Douglas, J.).

[25] The right to examine jurors on *voir dire* as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race and in relation to religious *and other prejudices of a serious character.*

283 U.S. at 313 (emphasis added).

[26] He cited cases where the controversy between the litigants stemmed from the disagreement as to proper and socially accepted appearance. *See, e.g.*, Olff v. East Side Union High School, 404 U.S. 1042 (1973) (Douglas, J., dissenting).

"It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair." [27] In elaborating upon the various techniques of securing an impartial jury that the Court has allowed for, he stressed the importance of the *voir dire* examinations in achieving this goal.[28] To him, the right to challenge, which a defendant is admitted to have,[29] is meaningless unless a relevant inquiry as to possible prejudices of the veniremen is permitted.[30] Yet he would not allow all questions, irrespective of their significance and relevancy. Unlike the majority of the court, he would require a defendant to make a preliminary showing of the significance and pertinence of his proposed questions, "where the claimed prejudice is of a novel character," [31] before propounding them to the prospective jurors.[32]

However, he emphasized throughout the opinion that at minimum an opportunity to show actual bias must be preserved.[33] The apparent absolute ban, reached by the majority, upon questions deemed to be non-serious, represented, in his view, an improper "balance between competing demands of fairness and expedition." [34]

Although Justices Douglas and Marshall differed as to the proper approach to be taken, they agreed on two points. First, both interpreted *Aldridge* as not being restricted to questions relating to racial prejudice. Second, they reached the same conclusion that in the factual circumstances of *Ham* the inquiry as to bias against beards had a substantial bearing upon the jury's verdict and should have been allowed.

The result in *Ham* represents a further erosion of the right to a jury trial.[35] By developing a bi-level categorization of prejudices the Court is diluting the constitutional requirement of an impartial jury. The position taken by the majority emphasizes the nature of the prejudice rather than its functional effect upon the jury's verdict. The issue, according to them, is whether the partiality is of a "constitutional stature" [36] and, therefore, of a serious character—not whether there is a greater likelihood of convicting an innocent person. Although the Court addressed itself in *Ham* only to racial prejudice, the dual standard established there will undoubtedly be put to use to classify other types of partialities. The categorization "serious" and "non-serious" will most likely be aligned with protections traditionally afforded by the fourteenth amendment. This formalistic approach will prevail even though in *Ham* the majority's opinion was careful to recite the historical standing of racial prejudice as a motivating force behind the fourteenth amendment, since the Court has not, at least until now, limited the protection of this amendment to racial groups.[37]

Thus where the possible prejudice might be based on national origin, sex, religion or other classification found previously to be inherently "suspect," [38] the Court will most likely intervene to

[27] 409 U.S. at 531–32 (separate opinion of Marshall, J.).

[28] *See* Swain v. Alabama, 380 U.S. 202 (1965), where it was acknowledged that extensive and probing *voir dire* has been accepted in American trials as a matter of practice, and that it is a proper tool, almost a necessary pre-requisite, for the intelligent exercise of the peremptory charges.

[29] *See, e.g.*, Pointer *v.* United States, 151 U.S. 396, 408, 412 (1894); Lewis *v.* United States, 146 U.S. 370 (1892).

[30] 409 U.S. at 532 (separate opinion of Marshall, J.).

[31] *Id.* at 533. Justice Marshall thus replied to Justice Rehnquist's fear that irrelevant questions would have to be tolerated.

[32] *Id.*

[33] *Id.* at 534.

[34] *Id.*

[35] The *Ham* ruling is compounded by the recent decisions of the Court in Williams v. Florida, 399 U.S. 78 (1970), sustaining juries with fewer than twelve members and Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), sustaining the constitutionality of nonunamious jury verdicts in state criminal trials. In light of *Ham's* limitation of the scope of the *voir dire* examination, the reduction of number of jurors per case becomes very significant. With the introduction of smaller juries, the likelihood of a biased jury is very real. This critical problem is even further aggravated by the dilution of the requirement that guilt be determined beyond reasonable doubt. Undoubtedly, these factors will enter a defendant's mind when demanding a jury trial and may cause him to waive a jury trial altogether.

[36] 409 U.S. at 528.

[37] The fourteenth amendment has been used to invalidate many state laws, not only discriminating against the Negro populace but encompassing every aspect of our society. *See, e.g.*, Roe v. Wade, 409 U.S. 817 (1973), where the Court held that a state abortion law violated the due process clause of the fourteenth amendment; Fuentes v. Shevin, 407 U.S. 67 (1972), where a state replevin statute was found to be in conflict with due process clause; Morrissey v. Brewer, 408 U.S. 471 (1972), where procedural safeguards were required by the fourteenth amendment when a state seeks to revoke parole.

[38] The term inherently "suspect" classification which apparently had its genesis in cases involving racial discrimination symbolizes a classification which is based on a forbidden criteria and, therefore, demanding a compelling state interest to be upheld. Wealth, race, creed or color were held to be included in the above category. *See generally* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). Also in Reed v. Reed, 404 U.S. 71 (1971), the unanimous Court invalidated an Idaho probate provision giving men mandatory preference over women when persons of the

allow such a *voir dire* examination. Such prejudices *are* of a "serious" character.[39]

However, the suggested distinctions will be permissible only if a general inquiry, similar to the one in *Ham*, is allowed. Where such an inquiry is denied, the Court would require that a certain minimum opportunity be provided to secure a fair trial. This result can be anticipated from Justice Rehnquist's qualifying remark when he said that the refusal to permit questioning relating to prejudice against beards was not a constitutional violation.[40] The breakdown of the *voir dire* examination into general and specific questioning and the reasoning that the former may elicit some types of prejudice but not all, is illustrative of the logical default propounded by the Court in *Ham*.

same priority class applied for appointment to administer deceased's estate although the sex-as-a-suspect classification issue was not expressly reached. However, that classification may become prohibited by an explicit constitutional requirement if the pending equal rights amendment is adopted.

[39] They are serious enough to be given constitutional dimensions. *See* note 38 *supra*.

[40] In order to deny even the most general inquiry, the Court would have to overrule *Irwin* which made an impartial jury a constitutional requirement.

Rules of Evidence: Chambers v. Mississippi, 410 U.S. 284 (1973)

In *Chambers v. Mississippi*,[1] the Supreme Court examined two Mississippi common law rules of evidence to determine whether their joint application denied the accused a trial in accord with due process. The two rules in question were Mississippi's voucher rule which states that one may not impeach his own witness and the hearsay rule excluding declarations against penal interest. The Court held that under the facts of this case, the joint application of these evidentiary rules deprived Chambers of a fair trial.[2] The Court thus cast a shadow over the continued vitality of these evidentiary rules, taken individually and in circumstances other than those facing Chambers.

Leon Chambers was convicted of murdering a policeman. At his trial, Chambers advanced two defenses. He first claimed that he never shot the policeman. His other defense was that Gable McDonald shot the officer. Before Chambers' trial, McDonald had confessed to the murder, but later repudiated that confession.[3] Chambers' claim that McDonald did the killing was supported at trial by two witnesses: one, a man who saw McDonald shoot the officer, the other, a man who saw McDonald, gun in hand, just after the shooting.

Chambers' defense that McDonald was the murderer was thwarted by the trial court in two ways. First, the court denied Chambers' request to cross-examine McDonald as an adverse witness.[4] This denial evoked the voucher rule issue. Second, the trial court held inadmissible the testimony of three friends of McDonald, to whom McDonald separately admitted the crime.[5] This ruling of inadmissibility of McDonald's friends' testimony initiated Chambers' attack upon the rule excluding declarations against penal interest.

Chambers objected to these two rulings immediately on non-constitutional grounds. In his motion

[1] 410 U.S. 284 (1973).

[2] *Id.* at 302. The Court took care to point out that its holding established no new principles of constitutional law or implied any incursion by the Court into state control over state trial rules and procedure.

[3] *Id.* at 288. McDonald's reason for repudiation lay in his claimed disillusionment with a Reverend Stokes who had convinced the impressionable McDonald that he would share in a large tort recovery from the city and not go to jail if he confessed.

[4] *Id.* at 291–92. Chambers' pretrial motion requested the trial court to order McDonald to appear and allow Chambers to call McDonald as an adverse witness if the state refused to call McDonald. The trial court granted the former, but reserved ruling on the latter. During the trial, the state never called McDonald as their witness. Chambers was behooved to call McDonald, whose confession and repudiation of the murder for which Chambers was on trial was, indeed, harmful to Chambers. After Chambers introduced McDonald's confession, the state cross-examined and McDonald told the reasons for his repudiation. This testimony was in McDonald's interests and harmful to Chambers. Chambers then renewed his motion to examine McDonald as an adverse witness. The trial court denied, reasoning, "He [McDonald] may be hostile, but he's not adverse in the sense of the word. . . ." This trial court ruling was upheld by the Mississippi supreme court which felt McDonald's testimony not adverse to the appellant as "[N]owhere did he point the finger at Chambers." 252 So. 2d 217,220 (Miss. 1971). Hence, Chambers was not allowed to impeach his own witness.

[5] Mississippi adheres to the common law rule that the extrajudicial declarations against penal interest are hearsay. *See e.g.*, Brown v. State, 99 Miss. 719, 55 So. 961 (1911).

for a new trial after the guilty verdict was returned and in his appeal to the Mississippi supreme court, Chambers claimed these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law under the fourteenth amendment.

Before deciding the merits of the case, the United States Supreme Court had to face a jurisdictional question. The question lay in two parts. The first part was steeped in the Mississippi state procedural requirement of contemporaneous objection to the admission of evidence. The Court in *Henry v. Mississippi*[6] said that if a state procedural rule served a valid state interest at trial as decided by the Supreme Court, a federal question, arising from the use of this state procedural rule, could not be reviewed in a federal court.[7] This same contemporaneous objection rule was indicated to be a valid state interest by *Henry*,[8] thus clouding Chambers' constitutional challenge because he waited until his motion for retrial to make his constitutional challenge to the evidentiary rulings. The second part of the jurisdictional question arose from the Mississippi supreme court's silence on the constitutional questions related to the trial court's evidentiary rulings. *Street v. New York*[9] stated that if the highest state court did not answer a federal question, it would be assumed that this silence was due to improper presentation of the issue in the state courts.[10] This being the case, it would be unnecessary for the Supreme Court to decide the merits.

Justice Powell, writing for the majority, quickly disposed of the jurisdictional question. Justice Powell claimed jurisdiction for two reasons. First, the state never made any challenges before the Mississippi supreme court that Chambers' constitutional challenges were improperly presented in the lower state courts. Also, the Mississippi supreme court raised no question as to the propriety of Chambers' constitutional claims. Therefore, Justice Powell concluded that the issue was properly before the Mississippi supreme court although silently rejected by it.

Second, Justice Powell felt that unlike *Henry*, this case did not involve the state procedural rule of contemporaneous objection to evidence. Chambers' constitutional claim, made after the verdict on a motion for retrial, was not of the same sort as his non-constitutional objections made to the same evidentiary rulings at trial. Only at trial did the contemporaneous objection rule loom significant. The post-trial constitutional objections related to the detrimental cumulative effect of the trial court's rulings upon Chambers' defense. Indeed, it was only after Chambers' defense that he could sensibly make constitutional objections caused by the cumulative impact of the trial court's evidentiary rulings.[11] Chambers' situation was distinguishable from that in *Henry* as the *Henry* Court dealt with a late objection during the trial when the state contemporaneous objection rule applied. Since the state suggested no other procedural ground blocking consideration of the merits of Chambers' case, the Court could consider theses merits unimpeded.

The majority first examined the Mississippi common law voucher rule which forbade the impeachment of one's own witness. The Court held that the voucher rule, in conjunction with the inadmissibility of declarations against penal interests, rendered Chambers' trial unfair. The majority recognized the right of cross-examination to be implicit in the sixth amendment right of the accused to confront witnesses against him[12] and a "fundamental requirement for the kind of fair trial which is this country's constitutional goal." [13] Chambers was not allowed to cross-examine his own witness McDonald, whose testimony was quite harmful to him. The Court noted, however, that the right to confront is not absolute and may be overridden by competing interests of the criminal law process.[14] The competing interest here was Mississippi's voucher rule.

Mississippi's present day voucher rule had its roots in primitive English trials where people who appeared on behalf of the parties were not witnesses, but oath-helpers. The function of an oath-helper was partisan because they were only to support the cause of those calling them. This differs from the present day witness' function of neutrally testifying to questions of both sides to ascertain facts. The oath-helper's partisanship made it inconceivable that one would impeach his own witness.[15] Today, the main argument against the

[6] 379 U.S. 443 (1965).
[7] *Id.* at 447.
[8] *Id.* at 449.
[9] 394 U.S. 576 (1969).
[10] *Id.* at 582.

[11] 410 U.S. at 290 n.3.
[12] *Id.* at 294–95.
[13] *Id.* at 295, *citing* Pointer v. Texas, 380 U.S. 400, 405 (1965).
[14] The right of confrontation was overridden when trustworthy evidence was given by one outside the state's jurisdiction. *See*, Mancusi v. Stubbs, 408 U.S. 204 (1972).
[15] 3A J. WIGMORE, EVIDENCE § 896, at 658–60 (Chadbourn ed. 1970).

voucher rule lies in the rule's archaic foundation which serves no present purpose. Instead, the voucher rule may hinder the evidentiary process by not allowing full examination of witnesses.[16]

The main argument of proponents of the voucher rule is that a party ought not to have the power to coerce his own witness.[17] The fear is that if it were possible to impeach one's own disappointing witness, that witness may be induced, against his beliefs, to testify favorably for the party calling him. The major authorities[18] contend that this fear is speculative at best because a witness can undergo the same impeachment from the opponent, equalizing his fear of not testifying favorably for the party calling him. More important, to forbid the calling party this attack leaves him at the mercy of his witness and opponent. If the truth rests with the calling party and the witness lies, the adversary will not attack that witness and the calling party would be precluded from doing so.[19] The Court pointed out that under the circumstances, the rule was doubly harmful to Chambers because he was precluded from cross-examining McDonald. Also, Chambers was restricted in the range of his direct examination due to the voucher rule's corollary "that the witness is bound by anything he might say." [20]

Mississippi's sole defense of the voucher rule was that there was no conflict between the rule and Chambers' rights. This was because the right of confrontation only existed in relation to those witnesses adverse to the accused. The trial court and the Mississippi supreme court refused to rule McDonald an adverse witness in relation to Chambers because McDonald was not openly hostile toward Chambers.[21] McDonald's testimony was, however, undoubtedly detrimental to Chambers' case because it contradicted Chambers' defense that McDonald did the killing.

The Court, discounting technical definitions of what is adverse in determining if a witness could be impeached,[22] pointed out the importance of McDonald to Chambers' case due to the state's theory that one man committed the murder. Due to the state's theory, McDonald's repudiation of his confession had a direct negative effect on Chambers. The Court favored a rejection of the narrow, unrealistic interpretation of adverse witness given by the trial court when such an interpretation affected the right of confrontation. In holding that "the 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the States' charges,"[23] the Court showed its sympathy, as have statutes[24] and commentators,[25] for the repudiation of such voucher rules.

In the second half of its holding, the Court dealt with an application of the hearsay rule. The reasons behind the inadmissibility of hearsay are that these out of court statements are not made under solemn oath and the declarant is not available for cross-examination or observation by the trier of fact. Thus, the hearsay rule is premised on the idea that untrustworthy evidence should not be presented to the triers of fact.

One exception to the hearsay rule is a declaration against one's own interests. Admission of those declarations rests on two grounds. First, the declaration must have "circumstantial probability of trustworthiness." [26] Indeed, one would not

[16] The general view by the authorities is summed up in E. MORGAN, BASIC PROBLEMS OF EVIDENCE 70–71 (1961):

> The fact is that the general prohibition if it ever had any basis in reason, has no place in any rational system of investigation in modern society. And all attempts to modify or qualify it so as to reach sensible results serve only to demonstrate its irrationality and to increase the uncertainties of litigation.

[17] 3A J. WIGMORE, *supra* note 15, at 663–64. Other defenses of the voucher rule—that a party is morally bound by his witnesses and a party guarantees his witness' credibility—are no longer seriously espoused.

[18] 3A J. WIGMORE, *supra* note 15, at 658–60; C. MCCORMICK, EVIDENCE § 38, at 75–78 (2d ed. 1972); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 70–71 (1961).

[19] C. MCCORMICK, *supra* note 18, at 75.

[20] 410 U.S. at 297.

[21] Chambers v. State, 252 So. 2d 217, 220 (1971). This was affirmed by the Mississippi supreme court as McDonald "did . . . [not] point the finger at Chambers."

[22] 410 U.S. at 297–98. The Court stated that the right to confront and cross-examine those whose testimony is harmful to the accused has never depended on whether the witness was initially put on the stand by the accused or by the state.

[23] *Id.* at 298.

[24] For statutes requiring an adversity ruling in order to abandon the voucher rule, see FLA. STAT. ANN. § 90.09 (1960); N.M. STAT. ANN. § 20-2-4 (1953); VA. CODE § 8-292 (1950); 12 VT. STAT. ANN. § 1642 (1973).

For those holding an adversity ruling unnecessary in order to abandon the voucher rule, see ALASKA R. CIV. P. 43 (g) (11) (a) (1962); ARK. STATS. § 28-706 (1962); IDAHO CODE § 9-1207 (1948); IND. BURNS ANN. ST. 2-1726 (1933); KY. R. CIV. P. 43.07 (1970); ORE. REV. STAT. § 45-590 (1953); TEXAS, VERNON'S ANN. C.C.P. art. 38.28 (1935); WYO. STAT. § 1-143 (1957); N.Y. C.P.L.R. 6.035 (1964); WIS. STAT. ANN. 885-35 (1957) (limited to criminal cases).

Total abandonment of the voucher rule is proposed in UNIFORM RULES 63(1); PROPOSED FED. R. OF EV. 607(d) (2).

[25] *See, supra* n. 17.

[26] 5 J. WIGMORE, EVIDENCE § 1422, at 204 (1940).

readily lie if to do so would be in the individual's own worst interest. The second ground lies in the necessity principle, which makes admissible, due to the justified unavailability of the declarant, trustworthy evidence which would otherwise be lost.[27]

Not all declarations against interest are admissible exceptions to the hearsay rule. The leading case of *Donnelly v. United States*[28] held that while declarations against pecuniary and proprietary interests were admissible exceptions to the hearsay principle, declarations against penal interests were inadmissible as hearsay. The *Donnelly* Court followed the British *Sussex Peerage Case*[29] which similarly held declarations against penal interest inadmissible "for general caution and care not to extend the hearsay rule." [30] The *Donnelly* Court, like the *Sussex* court feared a loss in trustworthiness of such testimony due to their belief that one would be more likely to lie against penal interests than against pecuniary or proprietary interests.[31]

In *Chambers*, the Court's main concern with the exception was its trustworthiness. In the circumstances of *Chambers*, the Court, breaking from the strict *Donnelly* rule, placed the trustworthiness of the declarations against penal interest on par with that of declarations against pecuniary or proprietary interests. The Court justified this parity of trustworthiness because of several facts of the case. All McDonald's admissions were made to close friends within a day of the murder. Each admission was corroborated by other evidence.[32] These admissions were obviously against McDonald's interests, as McDonald had nothing to gain by them.[33] Finally, if there were questions as to the validity of such declarations, McDonald was in the courtroom and was under oath.[34]

In its disapproval of the inadmissibility of declarations against penal interests under the circumstances of this case, the Court followed the lead of numerous statutes,[35] court decisions,[36] and commentators[37] which also disapproved or modified the common law rule. The Court, giving great weight to the trustworthiness of the declarations against penal interest in *Chambers*, dispensed with the requirement that the declarant be unavailable. This requirement was previously necessary to the admissibility of any declaration against interest. The unavailability of the declarant as a prerequisite for use

[27] 5 J. WIGMORE, EVIDENCE § 1421, at 204 (1940).

[28] 228 U.S. 243, 272–73 (1913).

[29] 8 Eng. Rep. 1034 (1844). In this case, George III tried to show the lawfulness of his parents' marriage by the admission of a deceased minister's declaration that he married the couple in a Roman Catholic church. Such a marriage was a felony at the time, making the declaration against the minister's penal interests.

[30] *Id.* at 1045.

[31] Justice Holmes, joined by Justices Hughes and Lurton, dissented in *Donnelly*, arguing that no earlier Supreme Court case compelled such a decision. The dissenters considered the general declaration against interest exception well-taken. However, they considered it contrary to common sense to give declarations against penal interests less weight than that of pecuniary or proprietary interests. 228 U.S. at 277–78. 5 J. WIGMORE, EVIDENCE § 1476–1477, at 281–90 (1940), described the *Sussex* case as poorly argued and against all past precedent. Wigmore further discredited *Sussex* because it absurdly and indiscriminately rejected all declarations against penal interest.

[32] The corroborating evidence included McDonald's sworn confession; testimony of an eyewitness to the shooting; testimony of another eyewitness that McDonald held a gun after the shooting and proof that McDonald previously owned the type of gun used in the murder. 410 U.S. at 300.

[33] In establishing the Mississippi rule of inadmissibility of declarations against penal interest, Brown v. State, 99 Miss. 719, 55 So. 2d 961 (1911), is distinguishable from Chambers' case. In *Brown*, the declarant was motivated in his admission to save his own brother. In *Chambers*, McDonald had no such impetus. 410 U.S. at 300–01 n.20.

[34] This point is also distinguishable from *Donnelly* and *Brown* in which the declarant was unavailable at the trial. 410 U.S. at 300–01 n.20.

[35] For statutes holding the unavailability of the declarant unnecessary, see N.J. STAT. ANN. § 2A: 84 A, Rule 63 (10) (Supp. 1969); KAN. STAT. ANN. 60–460(j) (1964); V.I. CODE ANN. § 932 (10) (1967); C. Z. CODE 5, 2962 (10) (1962); UNIFORM RULES OF EVIDENCE 63(10) (1953); A.L.I. MODEL CODE OF EVIDENCE, Rule 509 (1942); PROPOSED FED. R. OF EV. 8-04(b) (4) (1969). For one holding the unavailability of the declarant necessary, see CAL. EVID. CODE § 1230 (West 1965).

[36] *See, e.g.*, People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377 (1964) (Traynor, J.). The testimony of a nonparty to have possessed heroin for which Spriggs was tried was admissible because 1) declarations against penal interest are no less trustworthy than proprietary and pecuniary declarations; 2) penal consequences are an adequate deterrent to assure trustworthiness; 3) convictions mean economic loss, so such declarations against penal interset mean pecuniary loss. Although unavailability is unnecessary here, the codification made it necessary. *See* CAL EVID. CODE § 1230 (West 1965).

See also Brennan v. State, 151 Md. 265, 134 A. 148 (1926) (The testimony of an oral declaration of guilt by one not party to bastardy prosecution, later committing suicide, was admissible); State v. Sejuelas, 94 N.J. Super. 576, 229 A. 2d 659 (1967) (The New Jersey statute admitting declarations against penal interest was upheld); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16 (1970) (Declarations against penal interest are admissible if material and the person making the statement is unavailable); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (Ct. of App. 1950) (The testimony concerning the declaration by one admitting a murder for which his brother was tried was admissible).

[37] 5 J. WIGMORE, EVIDENCE §§ 1476-77, at 281–90 (1940).

of the exception was recommended by Wigmore[38] and is required by a significant minority of cases and statutes.[39] Viewing availability of the declarant as a cross-check against any alleged untruthfulness of witnesses, the *Chambers* Court necessarily rejected the rationale requiring unavailability.[40] The requirement that the declarant be unavailable was premised on the assumption that if such trustworthy evidence existed and the declarant was available to testify at trial, testimony by a third party as to the declaration would be too remote. If, however, the declarant was unavailable, it would necessarily be in the best interests of justice to admit the testimony of a third person which otherwise would be lost. The *Chambers* Court felt it important to have no requirement as to the availability of the declarant binding the evidentiary process. Since the declarant was available in *Chambers*, the trier of fact could weigh different accounts of an alleged declaration. If the declarant were unavailable, the declaration would still be admissible.

In a concurring opinion, Justice White dealt with the question of the Court's jurisdiction in a different manner. Justice White conceded that if the highest state court failed to pass on a question, the Supreme Court would presume this silence was due to improper presentation before the state courts.[41] However, Justice White recognized that on occasion, the Court would investigate state law to determine if a federal question, to which the state supreme court was silent, was properly raised under state procedure. This investigation would be most appropriate here, because the state conceded the Court's jurisdiction and that the issues were properly raised in state courts.

Justice White pointed to Mississippi cases where the contemporaneous objection rule was not enforced and where the Mississippi supreme court considered an issue for the first time.[42] Such cases were exceptions because fundamental constitutional rights were involved. *Henry v. Mississippi*[43] construed this contemporaneous objection rule strictly, but on remand, the Mississippi supreme court interpreted it to be flexible enough so that despite its non-compliance, a Mississippi appellate court could review the issue "to enforce constitutional rights in the interest of justice." [44] Thus, much of the pre-*Henry* exception to protect fundamental constitutional rights was preserved.[45] Therefore, Justice White allowed jurisdiction as Chambers' fundamental constitutional challenge to the trial court's evidentiary rulings was properly made to the Mississippi supreme court and the state did not contend the issue was not properly considered by the Mississippi high court.

Justice Rehnquist dissented because he did not think the Court had jurisdiction.[46] Justice Rehnquist cited *Street v. New York*[47] which demanded that a federal claim "be brought to the attention of the state court with fair precision and in due time." [48] According to Justice Rehnquist, Chambers, by making his constitutional evidentiary objections at motion for retrial, did not object to the constitutional issue in due time. This tardiness of objection denied the court "the opportunity to reconsider . . . [Chambers'] evidentiary ruling in the light of the constitutional objection." [49] Such an opportunity for the trial court was a valid state interest.[50] To object timely to the ruling, but in non-constitutional terms, did not satisfy the contemporaneous objection rule.[51] Unlike the majority, Justice Rehnquist did not consider Chambers' constitutional objection to be the cumulative sum of the trial court's rulings, which could only have been totaled up and presented after the formal trial. Assuming such an objection was made in due time, Chambers' broad assertion of unfairness un-

[38] 5 J. WIGMORE, EVIDENCE § 1421, at 204 (Chadbourn ed. 1970).

[39] *See, e.g.*, People v. Brown, 26 N.Y. 88, 257 N.E.2d 16 (1970); CAL. EVID. CODE § 1230 (West 1965); PROPOSED FED. R. OF EV. 8-04(b)(4).

[40] 410 U.S. at 301.

[41] 410 U.S. at 303–04, citing Street v. New York, 394 U.S. 576, 582 (1969).

[42] 410 U.S. at 304–05, citing Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945); Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

[43] 379 U.S. 443 (1965).

[44] Henry v. State, 253 Miss. 263, 287, 174 So. 2d 348, 351 (1965).

[45] *See* Wood v. State, 257 So. 2d 193, 200 (Miss. 1972) (The Mississippi supreme court considered the constitutional question of unfair state cross-examination despite the failure to object at trial); King v. State, 230 So. 2d 209, 211 (Miss. 1970) (A request for a peremptory instruction was allowed despite the failure to object at trial to alleged illegally obtained evidence).

[46] 410 U.S. at 308 (Rehnquist, J., dissenting). As to the merits, Justice Rehnquist related, "I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law of evidence."

[47] 394 U.S. 576 (1969).

[48] *Id.* at 582.

[49] 410 U.S. at 310.

[50] *Id.*, *citing* Henry v. Mississippi, 379 U.S. 443, 448 (1965).

[51] A post-trial objection on constitutional grounds to a condemnation award was ruled not timely as the objection made at trial was made on non-constitutional grounds in Bailey v. Anderson, 326 U.S. 203 (1945).