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RECENT TRENDS IN THE CRIMINAL LAW

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THE CHANGING FEDERAL STANDARD FOR JUDGING INEFFECTIVENESS OF COUNSEL

In *United States v. Easter,*[1] the Eighth Circuit Court of Appeals held that "trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."[2] In articulating this standard, the court in *Easter* appears to have rejected the standard announced seven years earlier in *Cardarella v. United States*[3] which allowed a charge of ineffective assistance of counsel to prevail only if the representation afforded the defendant by his counsel was such as to make the proceedings "a farce and a mockery of justice, shocking to the conscience of the Court."[4] If it has indeed adopted a new standard, the Eighth Circuit has joined the majority of United States courts of appeals. Over the last sixteen years, six other circuits have abandoned the "farce or mockery of justice" standard in favor of a more stringent standard for testing the effectiveness of counsel.

The newer standard has been phrased in various ways. The Fifth and Sixth Circuits have defined "effective counsel" as "counsel reasonably likely to render and rendering reasonably effective assistance."[5] The Third Circuit has defined it as "the exercise of the customary skill and knowledge which normally prevails at the time and place,"[6] or as "normal competency."[7] The Seventh Circuit has held that a criminal defendant must be provided with "legal assistance which meets a minimum standard of professional representation."[8] The Fourth Circuit has enumerated specific requirements and noted that an omission or failure to comply with the requirements constitutes a denial of

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[1] 539 F.2d 663 (8th Cir. 1976).

[2] *Id.* at 666. The Supreme Court has held that the sixth amendment right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). *See* Glasser v. United States, 315 U.S. 60, 76 (1942); Powell v. Alabama, 287 U.S. 45, 53 (1932). This right extends only to criminal matters. Taylor v. Sterrett, 532 F.2d 462, 472 (5th Cir. 1976). *See* Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

[3] 375 F.2d 222 (8th Cir.), *cert. denied,* 389 U.S. 882 (1967).

[4] *Id.* at 230 (quoting O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961)). This lenient standard for gauging ineffectiveness of counsel was common among the federal circuits at the time of *Cardarella. See, e.g.,* Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970) ("such as to make the trial a mockery, a sham or a farce"); Wright v. Craven, 412 F.2d 915, 918 (9th Cir. 1969) ("reduce the trial to a sham"); Johnson v. United States, 380 F.2d 810 (10th Cir. 1967); United States v. Bella, 353 F.2d 718, 719 (7th Cir. 1965). It was first enunciated in Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945), where the court said:

> We do not belive that allegations even of serious mistakes on the part of an attorney are ground for habeas corpus standing alone. The cases where the Surpeme Court has granted habeas corpus on the ground that there was no fair trial support this interpretation of the absence of effective representation. They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice.

[5] McDonald v. Estelle, 536 F.2d 667, 670 (5th Cir. 1976) (appeal pending); United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976); United States v. Goodwin, 531 F.2d 347, 348 (6th Cir. 1976); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *cert. denied,* 368 U.S. 877 (1961). *But see* Cavett v. United States, 545 F.2d 486, 488 (5th Cir. 1977); Akridge v. Hopper, 545 F.2d 457, 459 (5th Cir. 1977) ("within the range of competence demanded of attorneys in criminal cases") (quoting McMann v. Richardson, 397 U.S. 759 (1970)).

[6] United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), *cert. denied,* 425 U.S. 997 (1976) (quoting Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc)).

[7] Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc).

[8] United States *ex rel.* Spencer v. Warden, Pontiac Correctional Ctr., 545 F.2d 21, 22 (7th Cir. 1976); United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976); United States v. Merritt, 528 F.2d 650 (7th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975).

effective representation of counsel.[9] And the District of Columbia Circuit has both set forth specific duties owed by counsel to a client and adopted as a standard the principle that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[10]

The path which the Eighth Circuit has followed in moving from *Cardarella* to *Easter* is a path laced with contradiction, ambiguity and equivocation.[11] In *Cardarella,* the court considered an application for post-conviction relief in which the petitioner claimed that he was denied effective assistance of counsel because his attorney had failed to discover two police reports made by a government witness. The attorney had also failed to urge on appeal alleged error in permitting the jury to separate and various exceptions to the trial court's charge to the jury. Considering the issue of effective counsel as a due process question, the *Cardarella* court focused on whether the representation afforded the petitioner by his counsel, taken as a whole, was adequate and the trial fair. In concluding that the petitioner had received a fair trial, the court held that the test of fairness was met so long as "what was or was not done by the defendant's attorney for his client [had not made] the proceedings a farce and a mockery of justice, shocking to the conscience of the Court."[12] The alleged errors made by Cardarella's counsel did not constitute ineffective representation under this standard.

Two years later the court, in *Scalf v. Bennett,*[13] further developed the *Cardarella* standard:

> Habeas corpus relief on the ground of incompetency of counsel or denial of effective counsel will be granted "only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation."[14]

The *Cardarella* standard was applied again in 1971 in *Robinson v. United States.*[15] Rephrasing *Cardarella*'s "farce or mockery of justice" test, the *Robinson* court held that:

> In order to assert a Sixth Amendment infirmity on this ground [ineffective assistance of counsel], the circumstances must demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client. There must be such conscious conduct as to render pretextual an attorney's legal obligation to fairly represent the defendant.[16]

In neither *Scalf v. Bennett* nor *Robinson v. United States* was the attorney's conduct found to violate the "farce or mockery of justice" standard. The court in *Scalf* rejected the appellant's contention that his counsel did not effectively represent him in his appeal to the Supreme Court of Iowa. The petitioner in *Robinson* alleged that he was denied effective assistance of counsel because his counsel wrongfully recommended that he not take the stand to testify on his own behalf and refused to cause compulsory process to issue for two absent witnesses. The court refused to judge the attorney's trial tactics in hindsight. It noted that one of the absent witnesses had been interviewed and had stated that he could not help the petitioner, while the other absent witness could not be located.

From 1967 through 1971, the Eighth Circuit resolutely applied *Cardarella*'s "farce or mockery of justice" standard in assessing the validity of claims of ineffective assistance of counsel. By 1974, however, the "farce or mockery" standard was the subject of attack by various commentators,[17] and the Eighth Circuit showed

[9] Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).

[10] United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). United States v. Hurt, 543 F.2d 162, 165 (D.C. Cir. 1976).

[11] Only a month before the court of appeals decision in *Easter,* a district court judge maintained that the court of appeals had actually articulated several ineffectiveness standards. In a twenty-three page appendix to his opinion, entitled "Ineffective Assistance of Counsel: The Multiple Rules of the Eighth Circuit and the Increasing Need for Reconsideration and Guidance by the Court of Appeals en Banc," he urged the court of appeals to clarify its position. *See* Garton v. Swenson, 417 F. Supp. 697, (W.D. Mo. 1976).

[12] 375 F.2d at 230 (quoting O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961)). In *O'Malley* the appellant contended that he was denied the effective assistance of counsel because his attorney did not use witnesses whom the appellant claimed would have testified in his behalf.

[13] 408 F.2d 325 (8th Cir.), *cert. denied,* 396 U.S. 887 (1969).

[14] *Id.* at 327-28 (quoting White v. McHam, 386 F.2d 817, 818 (5th Cir. 1967)).

[15] 448 F.2d 1255 (8th Cir. 1971).

[16] *Id.* at 1256.

[17] *See, e.g.,* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeus Corpus,*

signs of sensitivity to the charge of permitting "inexcusably sloppy lawyering."[18] In *McQueen v. Swenson*,[19] the court explained that the "mockery of justice" standard was not as harsh a standard as might have appeared:

> Stringent as the "mockery of justice" standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the "mockery of justice" standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness.[20]

But the *McQueen* court was not yet ready to abandon its use of the "farce or mockery" standard. On the facts before the court, there was no need to consider a different standard. Defense counsel's failure to interview any of the prosecution's forty-one witnesses or call any defense witnesses other than the defendant constituted ineffective assistance of counsel even under the "farce or mockery" standard. The court therefore declined to decide "whether . . . to follow the trend set by the Third, Fourth, Fifth and District of Columbia Circuits and adopt a standard of 'reasonably competent' representation."[21] The court did, however, review at length the existing situation in the four circuits that had by then abandoned the old standard, suggesting that by 1974 the Eighth Circuit was giving serious consideration to the question of whether to retain the "farce or mockery of justice" standard.

The court concluded that evaluation of a habeas corpus petition alleging ineffective assistance of counsel involved a two-step process: First, a court must determine "whether there has been a failure to perform some [essential] duty . . . owed by a defense attorney to his client," and, second, "whether that failure prejudiced his defense."[22] Assuming a breach of duty by counsel, the court considered the issue of which party should bear the initial burden of establishing prejudice. After reviewing the position of other circuits that had expressed a view on this issue, the *McQueen* court adopted what it termed a "flexible approach" to the problem.[23] Under this approach, the defendant would normally have the burden of proving prejudice. But if changed circumstances since the original proceedings, or trial counsel's inadequate performance, have made it impossible for the defendant to prove prejudice, then the burden would shift to the state. Under the *McQueen* court's application of the "farce or mockery" test and its flexible approach to the issue of prejudice, the defendant still bore a heavy burden, but it was no longer as overwhelming as it appeared to be under the *Cardarella* test. Thus, although purporting to adhere to the *Cardarella* standard, the Eighth Circuit, in *McQueen*, actually took its first step toward abandoning that standard.

In *Garton v. Swenson*,[24] the court again emphasized that its "mockery of justice" language was merely an embodiment of the principle that an appellant shoulders the heavy burden of proving unfairness.[25] The petitioner in *Garton* alleged that his trial counsel failed to provide effective assistance because they were unaware of a state statutory procedure providing for compulsory attendance of out-of-state witnesses. As a result, petitioner's counsel failed to subpoena four out-of-state witnesses whose testimony would have substantially supported the petitioner's alibi defense. Although again explicitly declining to depart from the "farce or mockery" standard, the *Garton* court nevertheless reversed the district court's denial of a writ of habeas corpus and remanded for an evidentiary hearing, noting that:

> We have based our decisions concerning effectiveness of counsel upon the particulars of each case. The standard for effectiveness is not easily reduced to precise words capable of rigid application.[26]

This ad hoc approach, which was later applied in other Eighth Circuit cases,[27] seems a further indication of the court's movement away from the lenient *Cardarella* standard.

The decision in *Garton* was delivered only

59 VA. L. REV. 927 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

[18] McQueen v. Swenson, 498 F.2d 207, 214 n.10 (8th Cir. 1974).

[19] 498 F.2d 207 (8th Cir. 1974).

[20] *Id.* at 214.

[21] *Id.* at 214-15.

[22] *Id.* at 218.

[23] *Id.* at 220.

[24] 497 F.2d 1137 (8th Cir. 1974).

[25] *Id.* at 1139.

[26] *Id.* at 1140.

[27] *See* Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975); Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975). *See also*, United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), *cert. denied*, 425 U.S. 977 (1976).

one week after *McQueen*. Together, these two cases implied that a failure to make a reasonable investigation would amount to ineffective assistance of counsel under the then-existing standard of the circuit, a standard which, despite the implications of the court to the contrary,[28] seemed more stringent than that articulated in *Cardarella*.[29] But, five months later, in *Johnson v. United States*,[30] the court rejected the appellant's claim that he was denied effective representation of counsel because his trial counsel failed to fully investigate and prepare for trial and failed to spend sufficient time and effort during trial to convince the appellant to refrain from testifying. After reiterating *Garton*'s principle that "the standard for effectiveness is not easily reduced to precise words capable of rigid application," the court concluded that the complained-of conduct fell far short of meeting the ineffective assistance of counsel standard, however that standard might be phrased. Counsel for Johnson had fully discussed the case with his client, had thoroughly reviewed the government's file and, unlike counsel in *Garton*, had contacted all witnesses suggested by his client and used them where beneficial.

Chief Judge Gibson, speaking for the court, declared that the Eighth Circuit continued to adhere to the standard applied in *Cardarella* and, moreover, that the court had adhered to the *Cardarella* standard in *McQueen*. And yet, the Chief Judge went on to observe that: "A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar."[31] Once again, although claiming to adhere to the *Cardarella* standard, the court was apparently suggesting that a more stringent standard would be more appropriate.

Five months prior to the decision in *Easter*, two three-judge panels of Eighth Circuit judges issued inconsistent decisions which no doubt caused district court judges a great deal of consternation. In *Coney v. Wyrick*,[32] the circuit court explicitly relied on the "mockery of justice, shocking to the conscience" standard in rejecting a claim of ineffective representation. The petitioner, who was convicted of murder, claimed that he was denied the effective assistance of counsel because his attorney did not object to the admission of confessions, and did not request a new trial or make a direct appeal. After citing *McQueen* for the proposition that the "farce or mockery" standard was not to be taken literally, the court held that the petitioner had failed to shoulder that standard's heavy burden of proving unfairness. The court explained that it was not until four years after Coney's trial that the Missouri Supreme Court declared confessions such as Coney's to be inadmissible, and that counsel's decision not to request a new trial or make a direct appeal may have been a calculated decision designed to save his client from the death penalty. No mention was made of *McQueen*'s two-step process for determining ineffectiveness, *McQueen*'s "flexible approach" for determining who has the initial burden of establishing prejudice, *Garton*'s ad hoc approach or Chief Judge Gibson's remarks in *Johnson*.

One month later, the court issued a decision in the case of *Thomas v. Wyrick*.[33] The petitioner in *Thomas* had been denied habeas corpus relief by the district court, although his counsel had admittedly failed to interview any of the prosecution's witnesses or any witnesses who might have lent support to the petitioner's testimony that he was not present at the time when the crime was committed. The district court judge had reviewed Eighth Circuit decisions and had concluded that the circuit continued to adhere to the "farce or mockery of justice" standard. Applying this standard to what he characterized as a "close case,"[34] the district court judge denied relief, but stated that, were the applicable standard "reasonably competent assistance of counsel" the outcome would have been different.[35]

Admitting that there had been some variance in the language of its previous opinions and that the proper standard was important in determining this "close case,"[36] the court of appeals reviewed at length its prior decisions

[28] 497 F.2d at 1139-40.

[29] According to the court of appeals in *Garton*, the district court had erred by reading too narrowly prior decisions applying the "mockery of justice" standard. *Id.* at 1139.

[30] 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).

[31] *Id.* at 646.

[32] 532 F.2d 94 (8th Cir. 1976).

[33] 535 F.2d 407 (8th Cir.), *aff'g* 417 F. Supp. 508 (E.D. Mo. 1975), *cert. denied*, 97 S.Ct. 178 (1976).

[34] 417 F. Supp. at 512.

[35] *Id.*

[36] 535 F.2d at 411.

on the issue of ineffectiveness of counsel. It concluded that the case most similar to the present one was *McQueen*. The court interpreted *McQueen* not only as reaffirming the traditional "farce or mockery" standard, but also as emphasizing that the "farce or mockery" standard was not to be taken literally. It then applied the *McQueen* court's two-step process of first determining whether defendant's counsel had failed to perform some essential duty and then determining whether that failure prejudiced the defense. The *Thomas* court answered both of these questions in the affirmative. By failing to interview any witnesses, counsel had failed to perform an essential duty and this failure prejudiced the defendant. The court went on to explain that:

> [W]here the attorney's breach of duty has been serious, it is not necessary that the petitioner demonstrate by a preponderance of the evidence that adequate representation would have produced an acquittal. The petitioner need only shoulder the additional burden of showing that the alleged error itself sufficiently undercut the reliability of the trial process to have prejudiced the petitioner's right to a fair trial.[37]

Although the court implied that it was still applying the *Cardarella* standard, it is doubtful whether counsel's conduct here would have been grounds for reversal under that standard or the standard of other cases prior to *McQueen*.

Judge Henley, in dissent, discussed the confusing history of the ineffectiveness of counsel issue in the Eighth Circuit and questioned whether post-*McQueen* cases did not actually indicate that the circuit had returned to the "farce or mockery" standard of the older cases. In fact, Judge Henley questioned whether the circuit ever really departed from that standard. His principle concern, however, was that the court was not basing its decisions on any standard at all:

> I fear . . . that what we may really be doing is deciding cases of this kind by hindsight, on a purely ad hoc basis, and without any real reference to any particular standard of the quality of representation constitutionally required or relating to the extent of prejudice that will require a reversal if representation has been inadequate constitutionally. Such an approach, if it is being taken, is in my view undesirable and unfair to district judges, to state courts, and to lawyers who represent defendants in criminal cases.[38]

Judge Henley went on to urge the court to announce its adherence to a particular standard.

The court appeared to make such an announcement in *Easter*. Easter contended that he was denied the effective assistance of counsel because his court-appointed attorney had failed to file a motion to suppress evidence obtained in an illegal search of Easter's home and to object when the improperly obtained evidence was introduced at his trial. The court agreed, saying that counsel's inaction was so "derelict" that the claim of ineffective assistance of counsel would be sustained.[39]

In considering the standard to apply in cases where a claim of ineffectiveness of counsel is raised, the court said:

> As we perceive the standard established in our prior decisions it is that trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.[40]

And then, as though reluctant to fully abandon the "farce or mockery" standard, the court added:

> When he fails in the performance of this duty the proceedings may be said to have been reduced to a "farce" and "mockery of justice."[41]

The court did not admit that the standard it applied in *Easter* was a new one.[42] Yet an analysis of Eighth Circuit decisions indicates

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[37] *Id.* at 414.

[38] *Id.* at 419-20 (Henley, J., dissenting). At least one district court judge agreed that the lack of a single articulated standard was confusing:

> [U]nder present circumstances a federal district judge in this Circuit can have no "assurance as to how his decision will be reviewed on appeal," as Judge Henley put it, because no one can predict what panel of the Court of Appeals will draw his decision for review.

Garton v. Swenson, 417 F. Supp. 697, 720 (W.D. Mo. 1976).

[39] 539 F.2d at 665.

[40] *Id.* at 666.

[41] *Id.* It is not unusual for a court of appeals, in moving from the "farce or mockery" standard to the "reasonably competent" standard to form a hybrid of the two standards. *See, e.g.*, Beasley v. United States, 491 F.2d 687, 695 (6th Cir. 1974); Leano v. United States, 457 F.2d 1208, 1209 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965).

[42] 539 F.2d at 666.

that the standard announced in *Easter* was significantly different from the standard applied in prior cases. Unlike the "farce or mockery" standard of *Cardarella,* the "reasonable competence" standard of *Easter* focuses on the conduct of the defense attorney rather than on the fairness of the trial. A defense attorney renders ineffective assistance under the *Easter* standard when the quality of his performance falls below that of an attorney of reasonable competence. Under the standard enunciated in *Scalf* and in *Robinson,* an attorney's performance would have had to have been so incompetent as to have amounted to no representation at all before it would have been characterized as ineffective.

Despite the attempt of the court in *Easter* to tie the new standard to the old "farce or mockery" standard, it clearly abandoned its earlier attempts to ameliorate the impact of the old "farce or mockery" standard by explaining that it was not to be taken literally or that the standard could not be reduced to precise words capable of rigid application. No longer was the Eighth Circuit standard some amorphous concept to be applied on an ad hoc basis with inconsistent results.

In *Pinnell v. Cauthron,*[43] a panel of the Eighth Circuit applied the "reasonably competent" standard established in *Easter* to grant habeas corpus relief, finding the defendant's attorney to have been "grossly incompetent." The defendant's attorney had put in very little time preparing for trial, except for filing a few routine motions. There was no communication between counsel and client for at least thirty days prior to trial. Four days prior to trial, counsel attempted to withdraw from the case, but his letter of withdrawal did not arrive until after the trial had begun. After a call from the court on the morning of the trial, counsel arrived without the case file or even a note pad. Counsel permitted prejudicial evidence to be admitted when such evidence was clearly inadmissible. Counsel made no opening statement, no closing statement, no objections, and cross-examined only one witness in a perfunctory manner.

It is still too early to predict whether the enunciation of the "reasonable competence" standard in *Easter* and its application in *Pinnell* indicate that the Eighth Circuit has finally arrived at a definitive standard for gauging the effectiveness of counsel. The most recent Eighth Circuit decision in this area, *Harshaw v. United States,*[44] seems to indicate that the circuit still may not have settled upon a single standard. In *Harshaw,* a panel of Eighth Circuit judges headed by Chief Judge Gibson issued a per curiam opinion holding that:

> To support an allegation of ineffective counsel the record must contain some indication that counsel was or may have been incompetent, *i.e.* that counsel failed to perform some essential duty and that the defense was prejudiced thereby. *See* Thomas v. Wyrick, 535 F.2d 407 (8th Cir. 1976); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).[45]

Harshaw alleged that he was denied effective assistance because his counsel failed to conduct a pretrial investigation, failed to object to prejudicial prosecutorial statements, and failed to raise on appeal the points set forth in his motion for a new trial. The court rejected Harshaw's claim of ineffective representation, concluding that the record contained no evidence of what a pretrial investigation might have produced, no indication of how its omission was prejudicial, and some indication that such investigation would have been fruitless. The prosecutor's remarks were not found to be prejudicial and so failure to object to them did not indicate incompetency. Finally, the court relied on *Cardarella* for the proposition that counsel is not under a duty to assert on appeal every assignment of error embodied in a motion for a new trial.

The court's reliance on *McQueen* and *Thomas* is troublesome in that it indicates that the "reasonable competence" standard of *Easter* and *Pinnell* is not accepted by all the judges on the court of appeals. Equally troublesome is the denial of rehearing en banc in *Harshaw.* One is left wondering whether the Eighth Circuit actually does intend to adopt a new standard for judging ineffectiveness of counsel.

Express adoption of the "reasonable competence" standard would align the Eighth Circuit with the six circuits that have determined that this standard most clearly protects the defendant from the potentially devastating consequences of ineffective representation. Courts have increasingly come to realize the importance of effective representation and the obli-

[43] 540 F.2d 938 (8th Cir. 1976).

[44] 542 F.2d 455 (8th Cir. 1976).

[45] *Id.* at 456-57.

gation of judges to ensure that such representation is afforded defendants in criminal cases. They have also come to recognize that this vital right to effective assistance of counsel emanates not only from the due process clause of the fourteenth amendment, but also from the sixth amendment. The "farce or mockery of justice" standard originally developed when the courts were considering the issue of effectiveness of counsel solely within a due process, fundamental fairness framework.[46]

The Supreme Court first enunciated the right to effective assistance of counsel in *Powell v. Alabama*,[47] where it held that:

> [I]t is the duty of the court . . . to assign counsel for [an indigent defendant in a capital case] as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[48]

The trial court's failure to assign counsel who could provide the defendant with effective aid violated the due process clause of the fourteenth amendment.[49]

In *Glasser v. United States*[50] the Court made it clear that the right to effective assistance of counsel is also guaranteed by the sixth amendment. Throughout the 1960's and early 1970's, in a line of cases from *Gideon v. Wainwright*[51] to *Argersinger v. Hamlin*,[52] the Court gradually expanded the concept of right to counsel under the sixth amendment as applied to the states by the fourteenth amendment.[53] The courts of appeals, following these Supreme Court decisions, began to perceive the question of effective assistance of counsel as also a sixth amendment issue,[54] and they concluded that the "farce or mockery" standard was no longer appropriate.[55] A newer standard was required, a stan-

[46] Dunker v. Vinzant, 505 F.2d 503 n.1 (1st Cir. 1974), *cert. denied*, 421 U.S. 1003 (1975) ("[The 'farce or mockery'] test has been said to rest on the theory that the ineffectiveness claim is grounded in the due process clause."); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) ("The 'farce and mockery' standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment."). *See* Cardarella v. United States, 375 F.2d 222, 232 (8th Cir. 1967) ("Perfect or errorless counsel is not required as a prerequisite to a fair trial consonant with due process.").

[47] 287 U.S. 45 (1932). For a further discussion of the genesis of the right of effective assistance of counsel, see *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964).

[48] 287 U.S. at 71.

[49] *Id.* Lower courts read *Powell* narrowly to require only the effective *appointment* of counsel. *See* cases cited in Waltz, *supra* note 47, at 293 n.19. This reading of *Powell* seems to have been substantially repudiated by later Supreme Court decisions. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); United States v. Wade, 388 U.S. 218, 227 (1967).

[50] 315 U.S. 60, 76 (1942) ("We hold that the court . . . denied Glasser his right to have the effective assistance of counsel guaranteed by the Sixth Amendment."). *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); United States v. Wade, 388 U.S. 218, 227 (1967).

[51] 372 U.S. 335 (1963) (sixth amendment requires appointment of counsel for indigent defendants in felony cases).

[52] 407 U.S. 25 (1972) (sixth amendment requires appointment of counsel for indigent defendants in misdemeanor cases resulting in imprisonment).

[53] *See* United States v. Wade, 388 U.S. 218 (1967) (sixth amendment requires appointment of counsel for indigent at post-indictment lineup).

[54] *See, e.g.*, United States *ex rel.* Reis v. Wainwright, 525 F.2d 1269, 1273 (5th Cir. 1976) ("the right to effective assistance of counsel is safeguarded both by the due process clause of the Fourteenth Amendment standing alone and by the Sixth Amendment guarantee of effective representation"); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975) ("[P]etitioner was denied that effective legal assistance which constitutes the due process of law guaranteed by the due process clause of the Fourteenth Amendment, or, as is sometimes said, the assistance of counsel clause of the Sixth Amendment."); Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), *cert. denied*, 422, U.S. 1011 (1975); Dunker v. Vinzant, 505 F.2d 503 n.2 (1st Cir. 1974), *cert. denied*, 421 U.S. 1003 (1975) ("Although the [reasonable competence] standard has been articulated somewhat differently by the circuits which have adopted it, they all agree that the standard is based on the requirements of the Sixth Amendment."); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) ("The 'farce and mockery' standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment.").

The Eighth Circuit, in McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974), explicitly declined to resolve the question of whether the right to effective assistance of counsel derives solely from the due process clause, or whether it also derives from the sixth amendment.

[55] *See, e.g.*, Fitzgerald v. Estelle, 505 F.2d at 1336:

> Moving from the Fourteenth Amendment alone to the incorporated Sixth, our decisions establish that the standard of reasonably effective assist-

dard concomitant with the sixth amendment's "more stringent requirements."[56] The Third Circuit explained in *Moore v. United States*:[57]

> [W]e believe the increased recognition of the constitutional right to the assistance of counsel requires that the standard which prevails in federal cases under the Sixth Amendment should be applied equally to state convictions, to which the same guarantee is made applicable by the Fourteenth Amendment under Gideon v. Wainwright. The standard of normal competency applies equally in each case.[58]

Although clearly establishing that "the right to counsel is the right to the effective assistance of counsel,"[59] the Supreme Court has provided very little assistance to the circuits in their struggle to arrive at a constitutionally appropriate standard for judging ineffectiveness of counsel.[60] Certain language in *McMann v. Richardson*[61] gives a glimmer of insight into the Supreme Court's position. In a discussion of the standards to be applied for determining whether a guilty plea on advice of counsel was intelligently made, the Supreme Court recognized that the competence of the advice given by defense counsel is an important consideration:

> In our view a defendant's plea of guilty based on *reasonably competent advice* is an intelligent plea . . . . Whether a plea of guilty is unintelligent . . . depends as an initial matter . . . on whether that advice [of counsel] was *within the range of competence demanded of attorneys in criminal cases.* . . . [D]efendants facing felony charges are entitled to the effective assistance of competent counsel.[62]

The Court went on to admonish trial court judges as to the importance of ensuring that defendants in criminal cases are represented by competent counsel:

> [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel. . . . [J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.[63]

It was this language in *McMann* that apparently influenced some courts of appeals in their decision to abandon the old "farce or mockery" standard. The court of appeals in *Easter*,[64] for example, quoted from *McMann*, as did the Third,[65] Sixth,[66] and District of Columbia[67] Courts of Appeals in the cases in which those circuits adopted a new standard.

Chief Justice Burger's well-known view that not every person admitted to the bar is qualified to give effective assistance on every kind of legal problem may also have influenced some courts that have adopted the "reasonably competent" standard. The Chief Justice has openly criticized the legal profession for tolerating such a low calibre of proficiency among its courtroom practitioners, and has specifically proposed that the profession establish some system of certification for trial advocates.[68]

Perhaps the most helpful source for courts seeking to give substance to the term "effective representation" has been the Standards for the Defense Function promulgated by the American Bar Association.[69] These standards are

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ance of counsel . . . covers a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment.

[56] McQueen v. Swenson, 498 F.2d at 214; United States v. DeCoster, 487 F.2d at 1202. *See* Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970).

[57] 432 F.2d 730 (3d Cir. 1970).

[58] *Id.* at 737.

[59] McMann v. Richardson, 397 U.S. at 771 n.14.

[60] McQueen v. Swenson, 498 F.2d at 214.

[61] 397 U.S. 759 (1970).

[62] *Id.* at 770-71 (emphasis added). In Tollett v. Henderson, 411 U.S. 258, 266 (1973), the Court reaffirmed *McMann*'s holding that a plea of guilty on advice of counsel can be vacated on a showing that defense counsel's advice was not "within the range of competence demanded of attorneys in criminal cases."

[63] *Id.* at 771.

[64] 539 F.2d at 666 n.2. *See also* McQueen v. Swenson, 498 F.2d at 215 & n.11.

[65] *See* Moore v. United States, 432 F.2d at 737.

[66] *See* Beasley v. United States, 491 F.2d at 693.

[67] *See* United States v. Decoster, 487 F.2d at 1202.

[68] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

[69] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft, 1971). These standards, which have received the approval of the ABA's House of Delegates, are the product of a study conducted by a distinguished committee chaired by Chief Justice Burger. The Standards have been cited by a number of the courts of appeals that have considered the ineffectiveness of counsel issue. *See, e.g.*, United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); McQueen v. Swenson, 498 F.2d at 216 & n.12; United States v. DeCoster, 487 F.2d at 1203-04.

guidelines for the defense of criminal cases. They express the legal profession's opinion as to the calibre of service a defense attorney should render to his or her client. One court has incorporated these ABA Standards as general guidelines for the defense of criminal cases and has dictated specific duties owed by counsel to a client, referring to particular sections of the Standards.[70]

Unfortunately, until the Supreme Court makes a definitive pronouncement on the standard to be applied in judging ineffectiveness of counsel, the standard will continue to vary, not only among circuits, but also within circuits, as in the Eighth Circuit. There is clearly a need for the Supreme Court to dispel the uncertainty in this area by enunciating a constitutional standard for judging ineffectiveness of counsel. But the Court has repeatedly denied certiorari in cases in which the issue was raised.[71] As a result of this lack of guidance, the "reasonable competence" standard is applied in six circuits while the "farce or mockery" standard continues to prevail in the First, Second, Ninth, Tenth, and possibly in the Eighth Circuit.[72] The injustice of such a situation is evident when one realizes that the standard applied can be determinative of the outcome of a challenge to conviction on the ground of ineffectiveness of counsel.[73]

Surely it is time to end the disparity. Not only is it important that "some concrete content . . . be given the Sixth Amendment guarantee of effective assistance of counsel,"[74] it is imperative that there be an appropriate standard which will apply whenever and wherever the claim of ineffective assistance of counsel is raised in a criminal case.

Due Process Rights in Parole Revocation Proceedings

Atwood v. Nelson,[75] a Ninth Circuit Court of Appeals review of a parole revocation proceeding, is one in a series of recent cases which have focused on the rights of parolees and

[70] *See* United States v. DeCoster, 487 F.2d at 1203-04.

[71] *E.g.*, Thomas v. Wyrick, 535 F.2d 407 (8th Cir.), *cert. denied*, 97 S.Ct. 178 (1976).

[72] The Second and Tenth Circuits cling tenaciously to the "farce or mockery" standard. *See* Lunz v. Henderson, 533 F.2d 1322 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 136 (1977); Robinson v. United States, 474 F.2d 1085, 1089 (10th Cir. 1973); United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir.), *cert. denied*, 410 U.S. 917 (1973); Neal v. United States, 438 F.2d 301 (10th Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); Johnson v. United States, 380 F.2d 810 (10th Cir. 1967); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

The old standard also prevails in the First and Ninth Circuits, although there is some discussion indicating that a movement to the new standard may be imminent. *Compare* de Kaplany v. Enomoto, 540 F.2d 975, 987 (9th Cir. 1976) ("Whether we use the standard of performance so poor and incompetent as to make the trial a farce or mockery of justice . . . or of whether the circumstances show a denial of fundamental fairness . . . [or of] lack of counsel likely to render and rendering reasonably effective assistance . . . , the result is the same. Petitioner was not deprived of the effective assistance of counsel. Thus we need not choose between these standards.") *and* Leano v. United States, 457 F.2d 1208, 1209 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972) ("[A] conviction may not be set aside on grounds of ineffective representation of counsel unless service of counsel was of such a caliber as to amount to a farce or mockery of justice . . . . To demonstrate inadequacy of counsel, a petitioner must show that he had counsel who was not reasonably likely to render and did not render reasonably effective assistance.") *with* United States v. Stern, 519 F.2d 521, 525 (9th Cir. 1975), *cert. denied*, 423 U.S. 1033 (1976) ("so inadequate as to make his trial a farce, sham, or mockery of justice") *and* Wright v. Craven, 412 F.2d 915, 917 (9th Cir. 1969) ("farce or a mockery of justice"); and *compare* United States v. Madrid Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976) ("While we have considered adopting a more lenient standard requiring 'reasonably competent assistance of counsel,' appellant's contentions do not approach a violation of either standard.") *with* Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974) ("such as to make the trial a mockery, a sham or a farce.").

[73] The choice of standards did prove to be determinative in the decisions reached by the district court judges in Thomas v. Wyrick, 417 F. Supp. 508 (E.D. Mo. 1975), *rev'd*, 535 F.2d 407 (8th Cir.), *cert. denied*, 97 S. Ct. 178 (1976), and in Garton v. Swenson, 417 F. Supp. 697, 705 n.8 (W.D. Mo. 1976).

[74] Francis v. Henderson, 96 S. Ct. 1708, 1717 n.4 (1976) (Brennan, J., dissenting). In *Francis*, Mr. Justice Brennan argued that:

> [I]f the Court [intends] . . . to bind the accused by waivers by counsel, some concrete content should be given the Sixth Amendment guarantee of effective assistance of counsel and some explanation made of what actually constitutes action "within the range of competence demanded of attorneys in criminal cases."

Id. (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Although *Francis* did not involve a claim of ineffective representation, Mr. Justice Brennan nevertheless raised the ineffectiveness issue in his dissenting opinion.

[75] 19 Crim. L. Rep. (BNA) 2243 (9th Cir. May 14, 1976), *amended* 19 Crim L. Rep. (BNA) 2484 (9th Cir. July 12, 1976).

other individuals within the penal system.[76] At issue was whether the lack of a preliminary revocation hearing and the manner in which the parole board conducted the final revocation hearing violated minimum due process standards established by the United States Supreme Court in *Morrissey v. Brewer*.[77] Although its opinion is cryptic and without extensive citation, the *Atwood* court may have gone beyond prior cases and expanded the rights of parolees to procedural due process in the context of parole revocations.

The United States Supreme Court first recognized constitutionally guaranteed procedural rights for parolees in *Morrissey v. Brewer*.[78] Prior to that decision, various courts had used the right/privilege dichotomy[79] and the theories of contract,[80] *parens patriae*[81] and constructive custody[82] to deny parolees these safeguards. However, when parolee Morrissey petitioned for a writ of habeas corpus claiming that his parole had been revoked without a hearing, the Supreme Court rejected these earlier rationales and determined that revocation of parole without a hearing violated the due process clause of the fourteenth amendment.[83] The decision expanded earlier case law[84] which had made clear, in a different context, that a governmental procedure which potentially inflicts a "grievous loss" upon a citizen cannot be exercised without certain minimal procedural safeguards.[85]

The procedural safeguards suggested by the Court in *Morrissey* provide for both a preliminary revocation hearing and a final revocation hearing. According to the Court, the determination of a parole revocation involves two issues which need to be considered separately: whether there is probable cause that the parolee has violated conditions of parole; and whether the violation, after consideration of all mitigating circumstances, mandates a revocation of parole.[86] Each hearing is to be conducted with reference to a fairly detailed list of minimum safeguards, including written notice of claimed violations, disclosure of evidence

[76] Moody v. Daggett, 429 U.S. 78 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Enomoto v. Clucthette, *sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Baker v. Wainwright, 527 F.2d 372 (5th Cir. 1976); United States v. Tucker, 524 F.2d 77 (5th Cir. 1975); Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974); United States *ex rel.* LiPuma v. Gengler, 411 F. Supp. 948 (S.D.N.Y. 1976); MeGee v. Warden, U.S. Penitentiary, 395 F. Supp. 181 (M.D. Pa. 1975); Wells v. Wise, 390 F. Supp. 229 (C.D. Cal. 1975); United States *ex rel.* Dereczynski v. Longo, 368 F. Supp. 682 (N.D. Ill. 1973), *aff'd,* 506 F.2d 1403 (7th Cir. 1974); Brannum v. United States Bd. of Parole, 361 F. Supp. 394 (N.D. Ga. 1973), *aff'd,* 490 F.2d 990 (5th Cir. 1974).

[77] 408 U.S. 471 (1972).

[78] *Id.*

[79] The Supreme Court, speaking through Justice Cardozo, held that a probationer whose suspended sentence had been revoked had no constitutional right to a hearing or trial in any formal sense because "probation or suspension of sentence comes as an act of grace." *Id.* at 492. Numerous lower federal courts followed Cardozo's theory that parole and probation were privileges administered as a matter of grace by the executive branches of government. *See* Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied,* 392 U.S. 946 (1968); Curtis v. Bennett, 351 F.2d 931 (8th Cir.), *cert. denied,* 380 U.S. 958 (1965); Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967); Gonzales v. Patterson, 370 F.2d 94 (10th Cir. 1966).

[80] The contract theory developed from dictum in United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833), where Justice Marshall said that a pardon became effective only if the prisoner accepted its terms. *Id.* at 161. Thus, a violation of the pardon constituted a breach of the contract which the pardoned prisoner had accepted. *See* Rose v. Haskins, 388 F.2d 91, 100 (6th Cir. 1968) (Celebrezze, J., dissenting); Bowers v. Dishong, 103 F.2d 464 (5th Cir. 1939).

[81] The *parens patriae* theory was based upon the parole authorities' role in overseeing the successful rehabilitation of the parolee. Because the parolee was still a convicted prisoner who did not have the same rights as a "free man," he was subject to the Parole Board's guardianship. Chief Justice (then Judge) Burger stated that:

> In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege.

Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963), *cert. denied sub nom.* Thompson v. United States Bd. of Parole, 375 U.S. 957 (1963).

[82] Although not within the literal confines of prison, the parolee was constructively within the custody of the prison authorities and subject to their power. *E.g.,* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); McCoy v. Harris, 108 Utah 407, 410, 160 P.2d 721, 722 (1945).

[83] *Morrissey,* 408 U.S. at 482.

[84] Goldberg v. Kelley, 397 U.S. 254 (1970).

[85] In *Goldberg,* aid to welfare recipients had been terminated by state and municipal officials without notice and without an evidentiary hearing. The Court stated that the right/privilege dichotomy was an insufficient rationale to support the denial of due process. It indicated that whether procedural due process applied to the recipients was influenced by the extent to which they may be condemned to suffer "grievous loss."

[86] 408 U.S. at 485-88. In determining what mini-

against the parolee, the opportunity to be heard in person and to present witnesses and documentary evidence before a neutral and detached hearing body, the right to confront and cross-examine adverse witnesses (absent the hearing officer's specific finding of good cause for not allowing confrontation), and the requirement of a written statement of evidence relied on and reasons for the revocation.[87]

Atwood is one of numerous cases in the aftermath of *Morrissey* in which courts have grappled with the precise scope and meaning of this due process requirement in varying fact situations involving parole revocations.[88] Parolee Atwood's case reached the court of appeals following the district court's denial of his petition for a writ of habeas corpus. Atwood's parole had been revoked and he had been returned to prison after his parole officer filed a violation of parole report. The violation consisted of a conviction for drunk driving and the alleged possession of a gun and consumption of alcoholic beverages while on parole. The parole authority denied Atwood's request for a preliminary revocation hearing and returned him to jail. A final revocation hearing was held, but Atwood was not allowed to present his own witnesses or cross-examine adverse witnesses. The parole board revoked his parole, basing its decision principally on his misdemeanor conviction.

The *Atwood* majority held that the requirement of a preliminary revocation hearing is not automatically eliminated by a subsequent conviction. The *Morrissey* decision made clear that the purpose of a preliminary revocation hearing is to determine probable cause that a parole violation has been committed, but the need for such a hearing when the alleged violation is the conviction of a subsequent crime was qualified by other *Morrissey* language which stated that "[o]bviously a parolee cannot relitigate issues determined against him in other forums."[89] On the basis of this language, some courts have concluded that preliminary revocation hearings are not required as of right when the parole violation is based on a post-parole conviction. Not all courts agree, however, on the extent to which parolees may be deprived of a preliminary hearing when they have been involved in a post-parole crime.[90] The trend seems to be toward requiring some sort of preliminary hearing.

MeGee v. Warden, U.S. Penitentiary[91] seems to

mum safeguards would satisfy due process requirments in parole revocations, the Court was unwilling to consider a revocation hearing as an integral part of a criminal prosecution and therefore subject to the full panoply of rights guaranteed a defendant in a criminal proceeding. The Court made it clear that it did not intend unreasonably to burden state parole systems with an inflexible, formalized parole revocation process.

[87] The Court left open the question of the parolee's right to retain counsel. In his concurrence, Justice Brennan joined by Justice Marshall, stated that *Goldberg* had already determined that those suffering grievous loss must be allowed to retain counsel. Therefore, he asserted, the only unresolved issue was whether the indigent parolee had a right to court-provided counsel. 408 U.S. at 491. Justice Douglas would have provided the parolee with an unconditional right to confront and cross-examine adverse witnesses. *Id.* at 499 (Douglas, J., dissenting in part).

[88] *See, e.g.*, Carson v. Taylor, 19 CRIM. L. REP. (BNA) 2403 (2d Cir. July 22, 1976); Baker v. Wainwright, 527 F.2d 372 (5th Cir. 1976); Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974); United States *ex rel.* Dereczynski v. Longo, 368 F. Supp. 682 (N.D. Ill. 1973), *aff'd*, 506 F.2d 1403 (7th Cir. 1974). Additonally, courts have applied *Morrissey* requirements to other classes of individuals within the penal system at various stages of administrative adjudication. (1) Probation revocation: Gagnon v. Scarpelli, 411 U.S. 778 (1973) (qualified right to counsel); (2) Search and seizure of probationers: United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975) (supervision over probationer allowed only to the extent necessary for reformation and rehabilitation); Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975) (blanket search conditions invalid); Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976) (exclusionary rule applicable to probation revocation hearing); (3) In-prison disciplinary hearings: Enomoto v. Clutchette, 44 U.S.L.W. 4487 (April 20, 1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976); Lokey v. Richardson, 527 F.2d 949 (9th Cir. 1975), *vacated*, 44 U.S.L.W. 3748 (June 28, 1976); Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), *cert. denied sub nom.* Gutierrez v. Department of Public Safety of Illinois, 414 U.S. 1146 (1974); (4) Prison transfer: Meachum v. Fano, 427 U.S. 215 (1976); Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975).

[89] 408 U.S. at 490.

[90] This discussion does not deal with the rights of parolees incarcerated during the period between arrest and conviction of the post-parole crime. For cases reaching opposite results on the need for a preliminary hearing, compare United States v. Tucker, 524 F.2d 77 (5th Cir. 1975) with United States *ex rel.* Dereczynski v. Longo, 368 F. Supp. 682 (N.D. Ill. 1973).

[91] 395 F. Supp. 181 (M.D. Pa. 1975).

hold that neither *Morrissey* nor its progeny requires a preliminary revocation hearing where a parolee admits to committing parole violations. In *MeGee* a parolee, convicted of driving-under-the-influence in a state several hundred miles from the institution from which he was paroled, had an interview with a federal probation officer in the state of the driving conviction before he was returned to the paroling institution for a revocation hearing. At that interview the parolee was presented with a Revocation Hearing Election Form which stated that a parolee is not entitled to a preliminary revocation hearing if he admits he has violated any condition of his parole or if he has been convicted of violating a law while on parole. The parolee's initials appeared on that form near two statements: "I admit that I violated one or more of the conditions of my release" and "I have been convicted of violating the law while under supervision."[92]

Although the parolee argued that the form violated the due process standards of *Morrissey*, the court found "no language in *Morrissey* which [was] contrary to [the Revocation Hearing Election Form]."[93] However, as if unconvinced of its own interpretation of *Morrissey*, the court rested its decision that no due process violations had occurred on a determination that the parolee's interview with the probation officer constituted a preliminary revocation hearing.[94]

In contrast, a federal district court in Maryland has squarely held that a parolee's subsequent conviction does not eliminate the need for a *Morrissey* preliminary hearing. In *Younger v. Shields*,[95] the court interpreted dictum in an earlier Fourth Circuit case which said that the parolee's probable cause hearing after a conviction could be "held elsewhere . . . , usually at the prison"[96] to mean that use of a single revocation hearing violates due process even in post-parole conviction cases.[97] In light of this dictum, the court refused to grant the parole board's motion for summary judgment against the habeus corpus petition, and it indicated the need for further facts in order to determine whether a preliminary hearing had in fact been granted the parolee.

The California Supreme Court in *In re LaCroix*[98] interpreted *Morrissey* to allow a post-parole misdemeanor trial to serve as a preliminary revocation hearing. However, the court recognized that due process requires that the parolee be made aware of the dual purpose of the proceedings before the trial court decision can be dispositive of the parole violation issue.[99] Since considerably more than a misdemeanor conviction will be at stake, the parolee may wish to present a stronger defense in the misdemeanor trial.

Using the same common sense approach of the California court, the Ninth Circuit in *Atwood* held that the post-parole misdemeanor trial could serve as a preliminary revocation hearing if the parolee were made aware of the proceeding's dual purpose. Thus, the denial of a preliminary hearing to Atwood would not have been unconstitutional if he had been given notice that the trial for the drunk driving charge was also serving as a preliminary hearing. However, because the district court had not held an evidentiary hearing, the Ninth Circuit was unable to determine if Atwood had been given sufficient notice. In remanding the issue to determine if the parolee had been aware of the dual purpose of the trial or if a lack of such notice was prejudicial, *Atwood* has essentially brought the insight of the California court in *In re LaCroix* to the United States Court of Appeals.

In cases where the post-parole conviction results in incarceration of the parolee, appellate courts have split on the question of whether a parole revocation hearing may be delayed until the parolee has completed serving the sentence for the subsequent crime.[100] However, in *Moody v. Daggett*[101] the Supreme Court recently re-

[92] *Id.* at 183.

[93] *Id.* at 184.

[94] *Id.*

[95] 70 F.R.D. 698 (E.D. Va. 1976).

[96] *Id.* at 700 (quoting Gaddy v. Michael, 519 F.2d 669, 672-73 n.5 (4th Cir. 1975)).

[97] In *Younger* the parolee had been convicted of the unauthorized use of an automobile, but the parole authority waited three months to revoke his parole in a single revocation hearing.

[98] 12 Cal. 3d 146, 115 Cal. Rptr. 344, 524 P.2d 816 (1974); 12 Cal. 3d at 151, 115 Cal. Rptr. at 348, 524 P.2d at 820.

[99] The initial California Supreme Court case to require this notice was *In re* Law, 10 Cal. 3d 21, 109 Cal. Rptr. 573, 513 P.2d 621 (1973), *quoted in* 12 Cal. 3d at 151, 115 Cal. Rptr. at 348, 524 P.2d at 820. *In re Law* dealt with the issue of bail prior to any post-parole trial or conviction.

[100] *Compare* Jones v. Johnston, 534 F.2d 353 (D.C. Cir. 1976) (hearing cannot be delayed) *with* Reese v. United States Bd. of Parole, 530 F.2d 231 (9th Cir. 1976) (hearing can be delayed).

[101] 429 U.S. 78 (1976).

solved this issue. *Moody* allows a detainer warrant to remain unexecuted until sentence completion,[102] and it indicates that incarceration of a parolee for the conviction of a post-parole crime eliminates the need for a preliminary revocation hearing.

In *Moody* the parolee had been convicted and sentenced to two concurrent ten year prison terms for manslaughter and second degree murder. Both offenses had been committed while he was on parole from a rape conviction.[103] The parolee sought to have the detainer warrant executed immediately in order that a parole revocation determination could be made and the original and post-parole sentences could be served concurrently. The majority of the Court held that the issuance of a detainer warrant did not itself entitle the parolee to an immediate parole revocation hearing because the parole authority had the power to remedy all of the possible problems which the parolee had raised.[104] It could, for example, at the time of the eventual parole revocation hearing retrospectively decide that the parolee's original sentence had run concurrently with the post-parole sentence.

Since Moody had been convicted of and incarcerated for subsequent crimes, the Court stated in a footnote that a *Morrissey* preliminary hearing was not required[105] because the subsequent conviction "obviously" provided parole authorities with probable cause of parole violations and the detainer warrant did not immediatley deprive the parolee of liberty.[106]

This holding by the Court should not affect cases like *Atwood,* however. The cases may be distinguished because first, Atwood was subject to a possible loss of liberty while Moody, already in jail, was not. Second, the types of post-parole crimes committed by Atwood and Moody were significantly different. Moody's motivation to defend against charges of manslaughter and second degree murder was a fear of the serious consequences of conviction and not a fear of parole revocation. Thus, a preliminary parole revocation hearing would be superfluous after such conviction, because the parole board would be entitled to assume that all of the parolee's favorable evidence had been presented and considered at the felony trial.[107] On the other hand, Atwood was charged with misdemeanor drunk driving. Absent the parolee's knowledge that the misdemeanor trial was also serving as a preliminary revocation hearing, the parole board should not be able to assume a vigorous defense and that the conviction is credible evidence of a parole violation.

In addition to the preliminary hearing issue, the *Atwood* decision also focused on the procedure which the parole board followed at the final revocation hearing. Its treatment, or perhaps lack of treatment, of the issue of the presentation of witnesses favorable to Atwood is the most interesting aspect of this portion of the decision.[108] *Morrissey* requires that the parolee be given the opportunity to present witnesses and documentary evidence[109] although,

[102] When a parolee is incarcerated because of a post-parole conviction, the authority who granted the parole may lodge a parole detainer warrant with the incarcerating institution. This assures that the parolee will not be released from custody until the parole authority executes the warrant and makes a parole revocation determination. In practice, parole boards have not executed the detainer warrants until the parolee has completed the sentence for the post-parole conviction. Parolees, on the other hand, have sought to have the warrant executed and the parole revocation determined immediately. Parolees have alleged that unexecuted warrants subject them to numerous burdens, including not allowing the original and the post-parole sentences to run concurrently.

[103] All three crimes were federal offenses because they were committed on a Government Indian reservation. 18 U.S.C. §1153 (1966).

[104] For a discussion of these hardships, especially the lack of a speedy disposition, see the dissent by Justice Stevens. 429 U.S. at 89.

[105] *Id.* at 4019 n.7.

[106] *Id.*

[107] *See* Reese v. United States Bd. of Parole, 530 F.2d 231, 234 (9th Cir. 1976).

[108] The *Atwood* court mentioned two other issues: the parolee's right to confront and cross-examine adverse witnesses and the importance of mitigating circumstances in the parole board's determination of parole revocation. Its treatment of these issues would seem to add little to current judicial interpretations. *See generally* Baker v. Wainwright, 527 F.2d 372 (5th Cir. 1976) (remand of revocation of parole decision because *Morrissey* standards were violated on the "totality of the circumstances," including failure of parole board to specify why the parolee was not allowed to cross-examine an adverse witness); Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974) (where mitigating circumstances are complex, parolee is entitled to be represented by counsel).

[109] 408 U.S. at 489.

as the dissent in *Atwood* pointed out, *Morrissey* apparently does not require the state to "provide for the attendance" of the parolee's own witnesses.[110]

Prior to the final revocation hearing, Atwood requested the presence of three named witnesses on his behalf and two adverse witnesses. None of these witnesses appeared at the hearing, and the court of appeals noted that the "cryptic" entries of the parole board provided no reasons for their nonappearance. The court refused to dismiss these deficiencies as harmless error "because we cannot say on this record that the presentation and confrontation of the witnesses would not have persuaded the panel [of Atwood's innocence of the gun possession charge]."[111]

While the court may have simply been angered at the parole board's "cryptic record," the dissent read the court's opinion to require that the state provide for the attendance of the requested witnesses.[112] This reading significantly expands the rights of parolees at the final revocation hearing.

Acceptance of this interpretation implies that the parole board has the powers of compulsory process. However, compulsory process is guaranteed by the sixth amendment only for criminal trials,[113] and many states have not provided parole authorities with subpoena power to compel attendance of any witnesses at revocation hearings.[114] Nonetheless, at least one court has held in a sixth amendment context that lack of statutory authority is not necessarily determinative. *Rhodes v. Wainwright*[115] held that the state parole commission should provide the indigent parolee with counsel, even though the state argued that the commission had no authority to do so.[116] Similarly, the court in *O'Brien v. Henderson*[117] ordered the parole board to assist the parolee in obtaining the testimony of witnesses who would oppose the revocation. The court directed the parole board, if it lacked sufficient authority to secure such testimony, to assist the parolee in requesting the United States District Court to issue a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure.

While the *Atwood* majority's failure to mention the issue of the subpoena power of the parole board makes the expansive inference drawn by the dissent difficult to accept, it seems apparent that, at the very least, the majority has added a new due process requirement which obligates parole authorities to provide specific reasons for the denial of a parolee's request for the attendance of favorable witnesses. *Morrissey* requires specific reasons for refusing to allow parolees to confront adverse witnesses, but it provides no such protection for the parolee who is denied the opportunity to present a favorable witness.[118] Thus, in finding that Atwood's hearing "did not meet the *Morrissey* standards as to the *presentation* and confrontation *of witnesses*"[119] because the record did not indicate excuses for these deficiencies, the Ninth Circuit implied that the parole authority must issue a statement of good cause for the denial of the parolee's request to present *favorable* witnesses. Requiring parole boards to state why any requested witness is not allowed to appear seems entirely reasonable and in keeping with the philosophy of *Morrissey*. Such a requirement provides additional procedural safeguards for the parolee who will suffer a "grievous loss" if his parole is revoked, yet it does not place any great burden on the parole systems.

Since *Morrissey v. Brewer*,[120] commentators have predicted an increased recognition of par-

[110] 19 CRIM. L. REP. at 2244 (Kilkenny, J., dissenting).

[111] *Id.*

[112] The dissent attempted to remind the majority that nothing in *Morrissey "requires* the prison authorities to provide for the attendance of the appellant's own witnesses." *Id.* (Kilkenny, J., dissenting) (emphasis in original).

[113] U.S. CONST. amend. VI. *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1282 n.81. (1975).

[114] *See* Cassou, *The Morrissey Maelstrop: Recent Developments in California Parole and Probation Revocations*, 9 U.S.F.L. REV. 43, 75 (1975).

[115] 378 F. Supp. 329 (M.D. Fla. 1974).

[116] Noting that Gagnon v. Scarpelli, 411 U.S. 778 (1973), did not hold that it was constitutionally imperative that states provide counsel for indigents in all probation/parole cases, the court still held that the fact that the state commission may have neither the authority nor the funds to provide counsel for the indigent parolee was a legally insufficient reason for refusing to appoint counsel for the parolee, "for, if that were the case *Gagnon* would be rendered nugatory." *Id.* at 333.

[117] 371 F. Supp. 889 (N.D. Ga. 1974).

[118] 408 U.S. at 489.

[119] 19 CRIM. L. REP. at 2484 (emphasis added).

[120] 408 U.S. 471 (1972).

olee and prisoner due process rights.[121] Although the Supreme Court's recent decision in *Moody v. Daggett*[122] may have signaled a reemphasis by the Court of the discretion which parole authorities may constitutionally exercise, that case dealt with incarcerated parolees and should have no application to cases like *Atwood*. In cases which involve parolee misdemeanor convictions, the *Atwood* case clarifies the nature of the preliminary hearing requirement for parole revocations. It also possibly expands the due process rights of parolees during the final revocation hearing. However, the court was not explicit in its reasoning and it is difficult to define the intended scope of its decision.[123] In an area of the law that is undergoing dramatic change, such vagueness is extremely unfortunate.

Peremptory Challenges

The United States Supreme Court recognized in 1879 the right of blacks to participate equally with whites, as jurors, in the administration of the law.[124] Under the existing federal jury selection statutes,[125] however, there are three points in the selection process at which this right may be infringed.[126] First of all, voter registration lists or lists of actual voters are required to be used as the basic source of juror names.[127] It has been held that constitutional standards are not violated by such use of voter lists on which blacks are underrepresented, so long as names for jury duty are drawn through random selection based on *objective* criteria.[128] Secondly, the criteria for screening the initial list,[129] although intended by Congress to pro-

[121] Cohen, *A Comment on Morrissey v. Brewer; Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972); Fisher, *Parole & Probation Revocation Procedures After Morrissey and Gagnon*, 65 J. CRIM. L. & C. 46 (1974); Loewenstein, *Bringing the Rule of Law to Parole*, 8 CLEARINGHOUSE REV. 769 (1975); Loewenstein, *Accelerating Change in Correctional Law: The Impact of Morrissey*, 7 CLEARINGHOUSE REV. 528 (1974); Tobriner & Cohen, *How Much Process is "Due"?*, 25 HASTINGS L.J. 801 (1974); Note, *Due Process for Parolees and Probationers*, 25 HASTINGS L.J. 602 (1974); Note, *Procedural Due Process in Parole Release Proceedings—Existing Rules, Recent Court Decisions, and Experience in the Prison*, 60 MINN. L. REV. 341 (1976).

[122] 429 U.S. 78 (1976).

[123] The issue has not been raised in many cases, because, as one commentator found, most states allow parolees to present their own witnesses. Lowenstein, *Accelerating Change in Correctional Law: The Impact of Morrissey*, 7 CLEARINGHOUSE REV. 528, 531 (1974).

[124] Strauder v. West Virginia, 100 U.S. 303 (1879). The fourteenth amendment gives every citizen the right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color. A black defendant in the case challenged a state law which provided that "all white male persons . . . shall be liable to serve as jurors . . . ." The Supreme Court held that the statute violated the equal protection clause. *Id.* at 310.

[125] 28 U.S.C. §§1861-70 (1976).

[126] Potash, *Mandatory Inclusion of Racial Minorities On Jury Panels*, 3 BLACK L. J. 80 (1973).

[127] 28 U.S.C. §1863(2) (1976) provides that a written plan for random selection of grand and petit jurors shall "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division."

[128] United States v. Briggs, 366 F. Supp. 1356 (N.D. Fla. 1973).

[129] 28 U.S.C. §1865 (1976) which deals with the qualifications for jury service, provides that:

> (a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.
>
> (b) In making such determination the chief judge of the district court or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—
>
> (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> (3) is unable to speak the English language;
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

28 U.S.C. §1866 (1976), which establishes the procedure for selection and summoning of jury panels, provides that:

> (c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6) or (7) of

vide objectivity,[130] may be abused. The third opportunity to exclude blacks from juries is the peremptory challenge.[131] Peremptory challenges are, by definition, exercised without a reason stated, without inquiry and without being subject to the court's control.[132] Allegations of racially discriminatory use of peremptory challenges have been recently considered by the courts.

In *Swain v. Alabama,*[133] the Supreme Court considered the claim of a black person relating to the exercise of peremptory challenges to exclude blacks from serving on petit juries.[134] In that case, the six blacks available for jury service were excluded by the prosecutor during the jury selection process.[135] The Supreme Court declined to hold that the "striking of Negroes in a *particular* case is a denial of equal protection of the laws,"[136] or that "the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in *any given case.*"[137] Instead, there is a "presumption in *any particular case* . . . that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[138] The Court did nonetheless recognize that a different issue was raised by the claim that in criminal cases prosecutors in that particular county had consistently and systematically exercised their strikes to prevent all blacks from serving on the petit jury.[139] According to the Court:

> If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.[140]

The Court found the record in *Swain* to be insufficient to establish a violation of the fourteenth amendment,[141] but it suggested that a record which showed the "prosecutor's systematic use of peremptory challenges against Negroes over a period of time"[142] would establish a valid fourteenth amendment claim.

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section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided,* That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

[130] [1968] U.S. CODE CONG. & AD. NEWS 1792, 1803: [S]ection 1865(a) makes clear that for disqualifications, as is true for exemptions and excuses, subjective tests are prohibited. Thus, the disqualification criteria of section 1865(a) are purposely criteria that are capable of objective demonstration, in the sense that they are subject to proof by facts without any substantial possibility of distortion or interpretation of those facts by personal feelings or prejudices.

[131] 28 U.S.C. §1870 (1976) establishes that:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

[132] Lewis v. United States, 146 U.S. 370, 378 (1892).

[133] 380 U.S. 202 (1965).

[134] The applicable jury selection statute in *Swain* was ALA. CODE, Tit. 30, §§54, 60-64 (1958). In Alabama counties, petit jury venires of approximately 35 are drawn for criminal cases unless a capital offense was involved, in which case 100 are drawn. After excuses and removals for cause, the venire is reduced to about 75. The jury is then "struck"—the defense challenging two veniremen and the prosecution one in alternating turns, until only 12 jurors remain. This system is also available in civil cases. 380 U.S. at 210.

[135] *Id.*

[136] *Id.* at 221 (emphasis added).

[137] *Id.* at 222 (emphasis added).

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

[139] *Id.* at 223.

[140] *Id.* at 223-24 (citation omitted).

[141] *Id.* at 223.

[142] *Id.* at 227. With regard to the record in *Swain,* the Court stated:

> The difficulty with the record before us, per-

Recently, a United States District Court in Connecticut held in *United States v. Robinson*[143] that the defendants had established that blacks were being denied the right to participate equally with whites as jurors in criminal trials. Although there had been warnings in the past by other federal courts,[144] this case was the first which afforded defendants[145] relief for the prosecutor's misuse of peremptory challenges against black veniremen. The prosecutor in *Robinson* had struck all four of the blacks eligible for the final selection.[146]

To the extent the right sought to be protected is that of black citizens to participate equally in the jury process, a question of standing arises when the right is asserted by a criminal defendant rather than by an excluded juror. The court in *Robinson* noted the problem of standing,[147] but it decided that *Barrow v. Jackson*[148] applied in this situation to give standing to defendants to assert the rights of third persons. The *Robinson* court also cited *Peters v. Kiff*,[149] a case in which the Supreme Court held that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury on the ground that it arbitrarily excludes from service the members of any race and thereby denies him due process of law.

The jury selection system used in the Connecticut district is the "struck" jury system: after challenges have been allowed for cause, the clerk draws from the jury wheel a number of names equal to the jury of twelve plus alternates plus the number of peremptory challenges alloted to the prosecution and defense; names not challenged are replaced in the jury wheel for a final drawing of jurors.[150] In find-

haps flowing from the fact that it was made in connection with the motion to quash the indictment, is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels . . . .

Id. at 224.

[143] 421 F. Supp. 467 (D. Conn. 1976).

[144] In United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971), the court held that evidence of the prosecutor's conduct with regard to peremptory challenges made in trials held the *week before the trial involved here,* was insufficient to overcome the presumption that the prosecutor had discharged his duties in a constitutional manner. The court said however, that the "courts should be liberal in holding that defendants have established the claim of systematic exclusion *prima facie* if *Swain*'s approach to the problem is to be workable. The burden of proof faced by defendants is most difficult . . . . Nonetheless, the burden is not insurmountable." *Id.* at 1217-18 (footnote omitted).

In United States v. Carter, 528 F.2d 844 (8th Cir. 1975), the defendant presented evidence that in the fifteen cases involving black defendants during this particular year the Government had excluded 8.1% of blacks potentially available to serve on petit jury trial and in 47% of those cases the Government had used its peremptory challenges to remove all black jurors. The court found that a prima facie case had not been presented, but characterized the challenges to the prosecutor's practices in that district as raising a "serious question," and emphasized that the burden of proof of defendant was "not insurmountable." *Id.* at 850.

In United States v. Nelson, 529 F.2d 40 (8th Cir. 1976), the court took judicial notice of the statistical evidence presented in *Carter*. The court found the *Carter* decision dispositive, but added that the statistics caused them to "view with concern the allegations made here and in *Carter*." Moreover, the district judges were advised to scruitinize the prosecutors' practices and to use their discretionary power to ensure that "no potential juror is denied the privilege of serving upon a jury solely because of his race . . . ." *Id.* at 43 (citation omitted).

See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966). Finkelstein uses mathematical analysis to show the extreme improbability that nondiscriminatory selection occurred in situations (including *Swain v. Alabama)* in which courts have been unwilling to find a violation of the fourteenth amendment.

[145] One of the defendants in this case was black.

[146] *Id.* at 469.

[147] *Id.* at 470.

[148] 346 U.S. 249, 257 (1953). In that case plaintiffs (white) sued defendant (white) for damages for breach of a racially restrictive covenant the parties had entered into as owners of real estate in the same neighborhood. There was a question regarding whether the white defendant could raise the rights of blacks in his defense. The Court stated:

> [I]n the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

Id. at 257 (citation omitted).

[149] 407 U.S. 493, 504 (1972).

[150] The first twelve names drawn become the jury, and the remainder become alternates in the order drawn. United States v. Robinson, 421 F. Supp. at 468-69.

ing that the defendants had satisfied their burden of proving systematic exclusion of blacks for a two-year period, the court focused on the "exclusion rate," defined as the percentage of blacks in the final panel who had been peremptorily challenged by the prosecutors,[151] here 69.5%.

> The data show that 82 Negroes have been included in the final group eligible for jury selection, and that the prosecutors have exercised their peremptory challenges to strike 57 of these, or an exclusion rate of 69.5%. In cases involving White defendants, 49 Negroes were in the final group, and the prosecutors challenged 29, for an exclusion rate of 59.2%. In cases involving Black or Hispanic defendants, 33 Negroes were in the final group, and the prosecutors challenged 28, for an exclusion rate of 84.8%. Of the 72 trials analyzed, Blacks were seated as jurors in only 13 instances, or 18.1%, and in 10 of these, only one Black juror was seated.[152]

The court also considered the disparity between the actual and the expected rates for blacks sitting on juries:

> It is equally disturbing that in only 18.5% of criminal trials were Blacks, normally just one, seated as jurors or alternates. As a matter of statistical probability, if twelve jurors and two alternates were selected from a universe that included 5% Blacks (the adult Black percentage in Connecticut), at least one Black would be included in the 14 jurors selected approximately 50% of the time . . . .
>
> . . . .
>
> The disparity between the 50% expectation and the 18.5% actuality is the context in which the present claim of excessive use of peremptory challenges against Blacks should be considered.[153]

The relief fashioned by the *Robinson* court included an order disallowing the challenge of the four black veniremen and resuming the jury selection process with those four names included. Thus the names would be placed again in the jury wheel for the final drawing. The first twelve names drawn would constitute the jury, and, if all challenges have been exercised, the remainder would be alternates in the order drawn.[154] For the future, the court also ordered the United States Attorney's Office "to maintain a record for each criminal trial of the number of Blacks included in the final panels against which peremptory challenges are exercised and the number of Blacks challenged peremptorily by the prosecutor without explanation:"[155]

> It is not the purpose of this ruling to require the government to place on the record its reasons for exercising any peremptory challenge. The caveat "without explanation" is added simply to insure that the government is always free, if it so desires, to place on the record any non-racial reason it may have for challenging a Black veniremen, in which event such challenges, adequately explained, will not be counted in determining the ensuing pattern of Black peremptory challenges.[156]

In addition, records were ordered to be kept "of the number of all criminal trials, the number of such trials in which at least one black was included in the final panel, and the number of such trials in which at least one black was empaneled as a juror or alternate."[157] A summary report of these records must be furnished to the court, along with copies to the Federal Public Defenders in Connecticut.[158]

Robinson demonstrates that a federal court will grant relief to a defendant who can prove, as suggested in *Swain v. Alabama,* that blacks have systematically been denied their right to participate in the jury system. There are two possible methods of circumventing this decision, however. First, a prosecutor can allow a "token" black to sit on the jury, although this practice was condemned by the United States Supreme Court.[159] The other alternative is for

[151] *Id.*
[152] *Id.*
[153] *Id.* at 472.
[154] *Id.* at 474.
[155] *Id.* (emphasis added).
[156] *Id.* The court warned that if the pattern were to continue at an excessive rate, peremptory challenges of blacks may be disallowed in cases arising after such a pattern has been shown to have continued, or the validity of convictions may be placed in jeopardy.
[157] *Id.*
[158] *Id.*
[159] In Brown v. Allen, 344 U.S. 443 (1953), the Supreme Court held that petitioner, a black, was not denied due process or equal protection in violation of the fourteenth amendment by the method of selecting grand and petit juries from lists limited by state statute to taxpayers, although the lists had a higher proportion of white than black citizens. The Court, relying upon Smith v. Texas, 311 U.S. 128 (1940), noted that "token summoning of Negroes for jury service does not comply with equal protection." 344 U.S. at 471.

the prosecutor to state reasons, however true, for challenging blacks. This latter procedure contradicts the very definition of peremptory challenges; namely, that they are exercised without a reason stated, without inquiry and without being subject to the court's control.[160] It may be that peremptory challenges will be reevaluated in the face of this dilemma.

Surgical Searches and Seizures

Accused persons can be constitutionally compelled to submit to a surgical operation by the State in search of evidence of a crime according to a recent decision by the District of Columbia Court of Appeals in *United States v. Crowder*.[161] The court, sitting en banc,[162] in a case of first impression in the federal courts, held that the petitioner's fourth amendment rights were not violated when the trial court ordered the surgical removal of a bullet from his forearm. The majority rejected the argument that a nonconsensual surgical operation constituted an unreasonable intrusion into the body in violation of the fourth amendment.[163]

In December, 1970, Dr. James Bowman, a dentist, was murdered while working in his office. Death was caused by a gunshot wound in the heart. One .32 caliber slug was recovered from his body, and another was found in his underwear. Across the street the police found what later proved to be the murder weapon, a .32 caliber Smith & Wesson revolver, containing four expended rounds and two live rounds. The police established that the gun had been kept in the doctor's office and was registered in his wife's name.

Less than a week later the police arrested one Sandra Toomer and charged her with the murder. She in turn implicated Crowder. She confessed to the police that she and Crowder confronted the doctor with a toy pistol, a scuffle began, and she ran. A few moments later she heard gun shots. Upon rejoining her, Crowder told her that he had been shot in the arm and leg, but he thought that he had killed the doctor.

Acting on this information the police arrested Crowder. Observing that his right wrist and left arm were bandaged, they took him to D.C. General Hospital for x-rays. The x-rays disclosed metallic foreign bodies in both Crowder's right forearm and left leg which appeared to resemble .32 caliber bullets.

In February, 1971, an application for an order authorizing the surgical removal of the bullet from Crowder's arm was presented to the U.S. District Court for the District of Columbia. The application was supported by an affidavit narrating the facts set out above and, in addition, a medical affidavit was attached. The medical affidavit stated that the surgical removal of the bullet from Crowder's arm would not involve any harm or risk of injury, but that the removal of the bullet from Crowder's leg was medically inadvisable.[164]

A hearing on the proposed order was then held and the judge found, in accordance with uncontradicted medical testimony by the State, that the surgical removal of the bullet from Crowder's arm would not involve any harm or risk of injury to life or limb. On the basis of this finding, and citing *Schmerber v. California*,[165] the judge ordered the requested surgical operation to be performed according to certain prescribed medical procedures.[166] In April,

[160] Lewis v. United States, 146 U.S. 370, 378 (1892).

[161] 543 F.2d 312 (D.C. Cir. 1976).

[162] The majority opinion was written by Judge Robb, with Judges McGowan, Tamm, MacKinnon and Wilkey concurring. Judge McGowan filed a separate, concurring opinion. The dissenting opinion by Judge Robinson was joined by Chief Judge Bazelon and Judge Wright. Judge Leventhal filed a separate, dissenting opinion.

[163] U.S. Const. amend. IV provides: "The right of people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " (emphasis added). The fourth amendment was held applicable to the states through the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643 (1961), *rev'g* Wolf v. Colorado, 338 U.S. 25 (1949).

[164] 543 F.2d at 313.

[165] 384 U.S. 757 (1966). In *Schmerber* the defendant was injured in a car accident and taken to a hospital for treatment. While Schmerber was receiving treatment at the hospital the police arrested him for driving while intoxicated. Then at the direction of a police officer, a blood sample was involuntarily withdrawn from Schmerber's body without his consent by a hospital physician. The Supreme Court held that the involuntary blood sample removal was a reasonable search incident to a lawful arrest. *Id.* at 772. The *Schmerber* decision thus established that searches involving state intrusions beneath the surface of a person's skin did not constitute a per se violation of the fourth amendment.

[166] 543 F.2d at 314. The judge ordered:

1. That the Superintendent of the District of Columbia General Hospital, or his authorized representative or representatives, shall remove

1971, the bullet was successfully removed at D.C. General Hospital.[167]

Crowder argued on appeal that a non-consensual surgical operation by the State violated his fourth amendment right to be free from "unreasonable" searches and seizures. The argument was based upon the premise that a surgical operation into the human body in search of evidence of a crime went beyond the scope of intrusions constitutionally permissible under the fourth amendment.[168]

In its majority opinion, the court in *Crowder* initially relied upon the fourth amendment reasonableness standard laid down by the Supreme Court in *Schmerber v. California* which was used to support the argument that an unconsented-to needle puncture by the State was constitutional:

> [T]he fourth amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances or which are made in an improper manner.[169]

In attempting to apply this standard, however, the court declared four additional factors which led it to the conclusion that the surgical operation was reasonable and justified in the facts and circumstances of this case.[170]

In contrast, courts which have faced the constitutional issue of a surgical search and seizure prior to *Crowder* have relied on a different standard of reasonableness implicit in the *Schmerber* decision.[171] The effect of these decisions has been to sanction a surgical operation on the body of an accused person if the operation was characterized as a "minor intrusion" and to prohibit a surgical operation if the operation was characterized as a "major intrusion."

Prior to *Crowder*, the severity of the operation and the attendant risks of harm to life or limb have been the sole determining factors of whether a surgical operation is a minor or major intrusion and therefore whether it is constitutional. In 1972, in *Creamer v. State*,[172] the Supreme Court of Georgia became the first state court to affirm a non-consensual, surgical

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from the right forearm of James L. Crowder the foreign matter disclosed by x-rays and positively believed to be a .32 caliber slug;

2. That such removal is to be done at the District of Columbia General Hospital with accepted medical procedures, with due regard given to the health and preservation of the life of James L. Crowder;

3. That if at any time during the course of the removal procedures danger to the life of James L. Crowder develops, such removal procedures shall cease and such other steps as may be necessary shall be taken to protect the health and life of James L. Crowder; and

4. That after removal of the foreign matter, such matter shall be turned over to an authorized representative of the Metropolitan Police Department, who is to make a return to the Court in accordance with requirements of Rule 41 of the Federal Rules of Criminal Procedure.

5. The defendant shall not tamper with or disturb the wound in his right forearm, or remove, destroy or dispose of the bullet lodged therein.

Id.

[167] *Id.* At the trial a firearms identification expert testified that the bullet found in Crowder's forearm and the two bullets recovered from Dr. Bowman's person were all fired from the Bowman Pistol. *Id.* at 315–16. Crowder was subsequently convicted on all three counts of second degree murder, robbery and carrying a dangerous weapon. *Id.* at 312–13.

[168] *Id.* at 313. The fourth amendment protects only against unreasonable searches and seizures. Ker v. California, 374 U.S. 23, 33 (1963); Elkins v. United States, 364 U.S. 206, 222 (1960); Carroll v. United States, 267 U.S. 132, 147 (1925). The relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable. Cooper v. California, 386 U.S. 58, 62 (1967); United States v. Rabinowitz, 339 U.S. 56, 66 (1950). The Supreme Court has recognized that there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. United States v. Rabinowitz, 339 U.S. 56, 63 (1950); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

[169] *Id.* at 316 (quoting 384 U.S. at 768). In *Schmerber* the Supreme Court applied this standard by making two inquires: (1) Whether the police were justified in requiring the petitioner to submit to the blood test, and (2) whether the means and procedures employed in taking the blood respected relevant fourth amendment standards of reasonableness. 384 U.S. at 768.

[170] 543 F.2d at 316. See notes 185–90 and accompanying text *infra*.

[171] In *Schmerber* the Supreme Court stated:

> That we today hold that the Constitution does not forbid the States [*sic*] *minor intrusions* into an individual's body under stringently limited conditions in no way indicates that it permits more *substantial intrusions*, or intrusions under other conditions.

384 U.S. at 772 (emphasis added). The *Schmerber* court noted elsewhere in the opinion that "[b]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate." *Id.* at 767–68.

[172] 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. denied*, 410 U.S. 975 (1973).

operation by the State to remove a bullet from an accused person. At a hearing on the proposed surgical operation, a medical physician testified that the bullet could be removed in fifteen minutes, using a local anesthetic, and there would be no risk to the defendant in removing the bullet. Based upon this uncontradicted medical evidence, the Georgia Supreme Court held that the surgical operation fell within the scope of the *Schmerber* minor intrusion standard and was therefore constitutional.[173] A year later in *Allison v. State*[174] a lower Georgia court, applying the *Creamer* rule, held that the surgical removal of a bullet superficially lodged in the defendant's right side did not violate his fourth amendment rights because there was uncontradicted evidence by a medical doctor that the bullet could be surgically removed without danger to life or limb.[175]

Yet in *Bowden v. State*,[176] the Arkansas Supreme Court, when faced with a far more serious operation than the Georgia courts had encountered, stayed the execution of a search warrant order for a surgical operation. In *Bowden* the bullet was lodged in the petitioner's spinal canal and the surgical operation would require general anesthesia. At an evidentiary hearing on the proposed operation, two doctors testified that the surgical removal of the bullet could cause a worsening of the petitioner's condition including a possible risk of death. Both doctors described the operation as a "major intrusion" into the human body.[177] The *Bowden* court therefore held that the proposed operation could not be performed because it violated the *Schmerber* minor intrusion standard.[178]

In *People v. Smith*,[179] a New York trial judge reached the same conclusion as *Bowden* in denying an application for a search warrant to surgically remove a bullet from the defendant's body. Medical testimony at a hearing on the proposed operation disclosed a number of severe risks including a possibility of death. The bullet was lodged deep in the defendant's chest and the examining physician characterized the operation as major surgery. Based on this evidence, the trial judge held that the proposed operation would constitute a major intrusion into the body of the defendant that would involve trauma and pain and a possible risk of life and was therefore beyond the minor intrusion standard set down in *Schmerber*.[180]

Only the Supreme Court of Indiana in *Adams v. State*[181] has held that any surgical operation, regardless of its severity or the danger it presents to life or limb, is a per se violation of a person's fourth amendment rights. The Indiana Supreme Court majority reasoned that any surgical operation is an "intrusion of the most serious magnitude" which inherently contravened the *Schmerber* minor intrusion standard.[182]

Unlike these previous state court decisions, *Crowder* did not focus its inquiry solely on the issue of whether the operation constituted a minor or major intrusion into the human body. Instead the court engaged in the broader inquiry of whether, in light of all the facts and circumstances, the surgical operation was reasonable and justified.[183] Also instead of focusing solely on the severity of the operation and its attendant risks, the *Crowder* court identified four factors, mainly procedural in nature, that led it to the conclusion that the surgical operation did not violate the defendant's fourth amendment rights.

The first factor cited by the court is the failure of the State to make a prima facie showing that "the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it." The court does not define what it means by the concept of "relevant."[184] The weakness of this standard was the basis of a separate, dissenting opinion.[185]

[173] *Id.* at 515, 192 S.E.2d at 353.

[174] 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974).

[175] *Id.* at 365, 199 S.E.2d at 589.

[176] 256 Ark. 820, 510 S.W.2d 879 (1974).

[177] *Id.* at 824, 510 S.W.2d at 881.

[178] *Id.*

[179] 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974).

[180] *Id.* at 215, 362 N.Y.S.2d at 914.

[181] 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974).

[182] 260 Ind. at 668, 299 N.E.2d at 837.

[183] 543 F.2d at 316.

[184] *Id.*

[185] Judge Leventhal dissented on the ground that the prosecution had not made "a strong affirmative case that the surgical procedure is necessary in order to prevent a miscarriage of justice." *Id.* at 318. The judge noted that the admission in evidence of the surgically removed bullet only proved that Crowder was at the scene of the crime, a fact which the State could have established from Sandra Toomer's testimony. *Id.*

The second factor is that "the proposed operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal."[186] To this extent, then, it seems that the *Crowder* decision is in accord with previous decisions, even though the *Crowder* court did not rely explicitly on the minor intrusion language contained in *Schmerber*. The court defines what it means by minor surgery by way of illustration to Crowder's surgery:

> The bullet, which was small, close to the skin and easily felt, was extracted by gentle squeezing after an incision an inch long had been made. Less than five cc.'s of blood were lost, an amount smaller than may be taken in a premarital examination. The entire operation took ten minutes. In the opinion of the surgeon the risk was "neglible" and in fact there were no complications.[187]

Yet the court imposes a much higher medical standard on the State than prior decisions have done. The second factor requires that "every possible precaution was taken to guard against any surgical complications," so that "the risk of permanent injury was minimal."[188] This language seems to indicate that a surgical operation by the State can only be imposed upon an accused person if extraordinary medical precautions are taken.

The final two factors cited by the court suggest a set of legal procedures which must be followed in surgical search and seizure cases. In order to comply with the fourth amendment standard of reasonableness, a surgical operation can only be imposed if "before the operation the District Court held an adversary hearing at which the defendant appeared with counsel."[189] The fourth factor requires, that "thereafter and before the operation was performed, the defendant was afforded an opportunity for appellate review by this court."[190]

The decision in *United States v. Crowder* can be construed to imply that whether a surgical operation by the State will be constitutionally reasonable will depend upon strict compliance with all four factors enunciated by the court. The court does not state which, if any, factor is more important, but relies instead on the total context of the facts and circumstances presented in the case.[191]

Despite the majority holding in *United States v. Crowder* that a minor surgical operation which is performed in accordance with certain prescribed medical and legal procedures will not violate a defendant's fourth amendment rights, Judge Robinson's dissenting opinion raises a number of issues which remain unresolved. First, there is the very debatable question whether the United States Supreme Court would extend its decision in *Schmerber v. California* to surgical searches and seizures. The crux of the dissent's opinion in *Crowder* is that the Supreme Court would not make such an extension:

> [I]t seems incontrovertible that, with its marked intensification of risk, pain, scarring and indignity, a surgical invasion of the body cannot be

[186] *Id.*

[187] *Id.*

[188] *Id.* The operation was performed by Dr. Henry H. Balch who was the Chief Medical Officer in Surgery at D.C. General Hospital, Director of the Georgetown University Division at the hospital, and Special Professor of Surgery at Georgetown University Medical School. *Id.* at 314.

At a hearing on a motion to suppress the bullet as evidence, Dr. Balch testified that "maximum precautions" were taken and that "we bent over backwards" to make sure that Crowder had every protection. *Id.* at 315. For example, Dr. Balch testified that Crowder was kept in a "care ward" for four or five days after the operation even though a private patient would have been released immediately. *Id.*

[189] *Id.* at 316.

[190] *Id.* After the district court ordered the surgical removal of the bullet, Crowder was given an opportunity to file a petition for a writ of prohibition against the execution of the order in the D.C. Court of Appeals. The order was denied. *Id.* at 314.

It should be noted that this is not a case where the bullet in Crowder's arm would have had to be removed sooner or later for health reasons. In such a situation, the need for immediate appellate review would be self evident. Medical testimony established that the surgical operation on Crowder's arm was not medically necessary. *Id.* at 332 n.34 (Robinson, J., dissenting).

[191] *Id.* at 316. But Judge McGowan filed a separate, concurring opinion in order "to emphasize the degree to which, in my judgment, the Government's sensitivity to procedural orderliness and fair play contributed to the result we reach." *Id.* at 318. Furthermore, he stated:

> This case is something of a sport of its facts, and frequent recurrence of anything like it is hardly to be expected. But any future prosecutor confronted with a similiar problem would, in my view, be well advised to look to the procedural example set in this case.

Id. at 318 (McGowan, J., concurring).

likened to the needle puncture which *Schmerber* condones, or justified constitutionally by uncritical comparisons with it.[192]

In *Schmerber* the Supreme Court held that the blood sample test was a reasonable search procedure for three reasons: (1) the blood test was a highly effective means of determining legal intoxication; (2) such tests were commonplace, everyday occurrences; and (3) for most people, the blood test involved virtually no risk, trauma or pain.[193] The dissent in *Crowder* argued that *Schmerber* could not be extended to surgical searches and seizures because a surgical operation does not comply with these three criteria. Surgical operations, unlike blood tests are not indispensable to the detection and deterrance of a particular type of crime; secondly, surgical operations, unlike blood tests, are not commonplace, everyday occurrences that have become a routine part of everyday life; and thirdly, surgical operations, unlike blood tests, involve major risks, trauma and pain.[194] It is undisputed medical fact that all surgery, no matter how minor, is accompanied by some physical pain, some risk of infection and some chance of an adverse reaction to anesthesia whereas a blood sample test is virtually risk-free and painless.[195]

The Robinson dissent also questions the constitutionality of a non-consensual surgical operation based upon the balancing-of-interests approach to fourth amendment reasonableness. The Supreme Court has held that in order to determine whether a search and seizure is constitutionally permissible it is necessary "to focus upon the governmental interest which alledgedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[196] In *Schmerber* the Supreme Court recognized that there was a compelling state interest in obtaining a blood sample from the body of an injured driver because of the urgent need to curb the crime of driving while intoxicated.[197] But in *United States v. Crowder*, the dissent argues that there did not exist a comparable state interest because the extracted bullet merely proved only that Crowder was at the scene of the crime and no overriding state purpose was articulated. Therefore, the dissent concludes, that even though the Supreme Court condoned a state intrusion beneath the surface of a person's skin in *Schmerber*, the application of the *Schmerber* decision to the facts in *Crowder* is inapposite

[192] *Id.* at 322 (Robinson, J., dissenting). The dissent also cites Rochin v. California, 342 U.S. 165 (1952), for the proposition that the forcible removal of evidence from the body by means of a stomach pump is unconstitutional, and therefore, a surgical operation to remove evidence is likewise unconstitutional. *Id.* at 319. This is an inaccurate interpretation of the *Rochin* decision.

In *Rochin* three deputy sheriffs illegally entered the defendant's home without a search warrant and forcibly opened the door to his bedroom. Inside they found Rochin sitting partly dressed on the side of the bed upon which his wife was also lying. The deputies jumped upon Rochin but failed to prevent his swallowing of some capsules. Rochin was then handcuffed and taken to a hospital where, against his will, an emetic solution was forced through a tube into his stomach causing him to regurgitate two capsules which contained morphine. 342 U.S. at 166.

The Supreme Court held that the entire "course of proceeding," not the stomach pumping *per se*, violated the due process clause of the fourteenth amendment. Both the United States Supreme Court and other federal circuit courts have interpreted *Rochin* as a totality of circumstances case. *See* Breithaupt v. Abram, 352 U.S. 432, 435 (1957); Blefare v. United States, 362 F.2d 870, 875–76 (9th Cir. 1966). *See generally*, Comment, *Constitutionality of Stomach Searches*, 10 U.S.F.L. REV. 93, 107–14 (1975).

[193] 384 U.S. at 771.

[194] 543 F.2d at 321–22.

[195] Even minor surgery creates a greater risk of infection than a blood test because a larger opening must be made in the skin. Moreover, stitches which are used to close the wound create another source of infection. In addition, the patient may suffer from unpredictable reactions from anesthesia. Also the patient will be left with a permanent scar. *See* Note, *Surgery and the Search for Evidence*, 37 U. PITT. L. REV. 429, 436–37 (1975).

[196] Terry v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 534–35, 536–37 (1967)).

[197] 384 U.S. at 771. Earlier, in Breithaupt v. Abram, 352 U.S. 432 (1957), where the Supreme Court held that an involuntary blood sample test administered to an unconscious patient did not violate the fourteenth amendment, the Court stated:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road.

352 U.S. at 439.

because there was no compelling state interest in obtaining the surgically removed bullet.[198]

Finally, the dissenting opinion by Judge Robinson objects to the approval of a court-ordered surgical operation on policy grounds, arguing that judges are not equipped to determine the reasonableness of a surgical search and seizure because they lack the medical expertise that is necessary to evaluate the validity of medical testimony provided by the State.[199] Unlike other search and seizure contexts involving governmental encroachments on the privacy of homes, cars, papers and other effects, there are virtually no judicial precedents or prevailing medical principles which can help guide the court in determining the reasonableness of a surgical operation.[200] On this ground alone, the dissent in effect argues that there should be a per se rule against all court-ordered surgical operations.[201]

The *Crowder* decision has significantly departed from prior case law on the issue of fourth amendment reasonableness. Previous state decisions have held that a non-consensual surgical operation by the State is constitutionally reasonable, within the meaning of the fourth amendment, only if the operation is medically characterized as "minor surgery." But the *Crowder* decision admonishes the courts to look beyond the nature and the degree of risk involved in a surgical operation. The court holds that a non-consensual surgical operation by the State must appear to be reasonable and justified from the totality of facts and circumstances. The decision in *United States v. Crowder* is likely to encourage future efforts by prosecutors to surgically invade the body of an accused person in search of evidence of a crime.

Media Access to Prisons

In *Garrett v. Estelle*[202] the District Court for the Northern District of Texas held that an absolute ban on news media access to prisoners on death row and to executions of prisoners violated the first amendment's guarantee of freedom of the press. The Court of Appeals for the Ninth Circuit in *KQED, Inc. v. Houchins*[203] upheld an injunction which required news media representatives to be given greater access to prisons than that afforded the general public. Both of these cases are in apparent conflict with Supreme Court decisions governing the media's right to gather news within prison walls.

The Supreme Court first actively discussed the right to gather news as a corollary to the first amendment guarantee of freedom of the press in *Branzburg v. Hayes*.[204] The Court stated that "without some protection for seeking out the news, freedom of the press could be eviscerated."[205] Two years later in *Pell v. Procunier*[206] and in *Saxbe v. Washington Post Co.*[207] the Court attempted to delineate the scope of this right to gather news in the context of media access to prisons and prisoners.

Pell upheld the constitutionality of a California Department of Corrections regulation which provided that "press and other media interviews with specific individual inmates will not be permitted."[208] The Court reasoned that the rights of the press were not infringed because the regulation merely eliminated a special access privilege which had once been given to the press.[209] The general public, however, had never been allowed to walk in and interview prisoners absent some special relationship,[210] and the Court stated that as a

[198] The dissent stated that "the evidentiary significance of the bullet lay solely in its tendency to show that Crowder was present at the scene of the crime—a fact never in dispute at Crowder's trial." 543 F.2d at 322 (Robinson, J., dissenting).

[199] *Id.* at 322–23.

[200] *Id.* at 323.

[201] *Id.* Furthermore, the dissent states:

> [D]espite the judge's best effort to conduct a full and fair adversary hearing on the medical characteristics of a surgical search, it cannot realistically be assumed that access to medical experts is equal as between the prosecution and the defense. So, not only may the degree of genuine conflict in medical opinion not be uncovered but, where conflicts do emerge, the judge's lack of medical expertise may well make it difficult for him to resolve them.

Id. at 323–24.

[202] 424 F. Supp. 468 (N.D. Tex. 1977).

[203] 546 F.2d 284 (9th Cir. 1976).

[204] 408 U.S. 665 (1972). *See also* Comment, *The Right of the Press to Gather Information after Branzburg and Pell*, 124 U. Pa. L. Rev. 166 (1975).

[205] 408 U.S. at 681.

[206] 417 U.S. 817 (1974).

[207] 417 U.S. 843 (1974).

[208] 417 U.S. 817, 817 (quoting California Department of Corrections Manual § 415.017).

[209] 417 U.S. at 831.

[210] Family, clergy, prior acquaintances and lawyers were permitted to talk to specific inmates. *Id.* at 830–31. The Court noted that if this relationship existed between a member of the press and an inmate, he

matter of law "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[211] Therefore, a regulation which in effect imposed an absolute ban[212] on media interviews with individually designated inmates was not unconstitutional.

This limitation on the press' right of access was reiterated the same day in *Saxbe,* a case involving substantially the same arguments as *Pell* but dealing with a Policy Statement of the Federal Bureau of Prisons.[213] The policy prohibited personal interviews in all federal medium and maximum security facilities.[214] The Court noted that aside from face-to-face interviews "members of the press are accorded substantial access to the federal prisons."[215]

In neither *Pell* nor *Saxbe* did the Court rely on the traditional balancing approach to first amendment questions in determining the media's access rights.[216] In *Pell* the Court treated prisoners' rights of free speech and the media's right of access in separate portions of its opinion. The Court did balance the prisoners' rights of free speech against the government's penal objectives of isolation of prisoners, rehabilitation and prison security.[217] But in its analysis of the media's rights, rather than expressly balancing those rights against competing governmental interests, the Court focused on the fact that the challenged regulation eliminated a special privilege. In *Saxbe* the Court explicitly rejected the need to balance media first amendment rights against governmental interests.

> In this case, however, it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment. For it is apparent that the sole limitation imposed on newsgathering . . . is no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate.[218]

In spite of the approach and explicit language of *Pell* and *Saxbe,* the district court in *Garrett v. Estelle*[219] ruled that the Texas Department of Corrections ban on news media access to prisoners on death row and to executions of prisoners violated the first amendment.[220] The

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would not be precluded from interviewing the prisoner. *Saxbe,* 417 U.S. at 847.

[211] 417 U.S. at 834.

[212] *Id.* at 836 (Justice Douglas used the phrase "absolute ban" in his dissent).

[213] Bureau of Prisons Policy Statement 1220.1A ¶ 4b(6) states:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, a conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

417 U.S. at 844 n.1.

[214] The regulation was applicable to approximately 75% percent of all federal prisons. 417 U.S. at 844.

[215] *Id.* at 847. According to the Court the press was permitted to tour and photograph prison facilities. Media members could also carry on unlimited correspondence with inmates, interview randomly selected prisoners and obtain information from prison officials. *Id.* at 847–48.

[216] In dealing with first amendment rights the Court traditionally has tailored restrictions to meet specific governmental interests. For example, in Procunier v. Martinez, 416 U.S. 396 (1974), which involved censorship of prisoners' mail, the Court stated, "First, the regulation . . . must further an important or substantial governmental interest unrelated to the suppression of [speech]. . . . Second, the limitation . . . must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413.

[217] 417 U.S. 817, 822–23 (1974).

[218] 417 U.S. 843, 849 (1974).

[219] 424 F. Supp. 468 (N.D. Tex. 1977).

[220] The Texas Code of Criminal Procedure governs access to prisoners:

> *Visitors*
>
> Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arrives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

TEX. CODE CRIM. PROC. ANN. art. 43.17 (Vernon 1966). Article 43.20 states:

> *Present at Execution*
>
> The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Corrections, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections

court sought to distinguish *Pell* and *Saxbe* on factual grounds. First, in *Pell* and *Saxbe* the press sought to report on the daily activities of the prison, whereas the reporters in *Garrett* sought coverage of a controversial matter of public importance—capital punishment.[221] The court stated that, "[t]he people through these representatives must have access to the dungeons and the 'death rows' so that the people remain aware of the workings of their government. If there is any subject about which the people have a 'right to know,' surely it is this."[222] Second, in *Pell* and *Saxbe* the press was free to go on tours of the prison facilities and to interview inmates if encountered. Members of the press could also talk to recently released prisoners. No such substantial public access to the prisoners existed in *Garrett,* according to the court. Since the prisoners on death row were not likely to be released, the press was limited to gathering news by means of correspondence with inmates or by means of interviews with family, friends, clergy or lawyers permitted to see the prisoners.[223] Finally, the court stated that the Supreme Court in *Pell* and *Saxbe* was concerned with the prospect that press interviews might diminish the deterrent and rehabilitative value of imprisonment. Since the prisoners in *Garrett* were sentenced to death, rehabilitation was not a consideration.[224]

This attempt to distinguish *Garrett* from *Pell* on the facts is less than satisfactory. While the public interest has focused on capital punishment recently, concerns about prison conditions or particular crimes and criminals which were raised in *Pell* are also matters of public interest. There is no sound reason to distinguish these cases on the public's passing fancy. Certainly first amendment guarantees should not flicker so capriciously. Concededly, with regard to the court's other points, *Pell* did express concern about rehabilitation and the possible negative effects media exposure might have on the deterrence of crime, but these arguments were used primarily to justify curtailment of *prisoners' rights* to solicit interviews. While related to media access, these considerations were largely irrelevant to the *media's freedom* to initiate interviews. Thus, these considerations do not advance the argument favoring media access in *Garrett.*

The California regulation upheld in *Pell* and the federal prison policy sustained in *Saxbe* prohibited interviews with specific inmates except by family, prior friends, clergy and lawyers. The Texas regulations also provided for interviews by these categories of individuals.[225] However, the Texas regulations also denied *any* public access to death row prisoners and executions. Consequently no media members, unless they happened to fall within the exempted catagories, could interview a prisoner or witness an execution. The Supreme Court in *Pell* and *Saxbe* was not confronted with the question of an absolute ban on both public and media access to prisons. Yet under the logic of *Pell* since the general public was denied access to the prisoners, the press would also face complete denial of access.[226]

The court's conclusion that "[t]o permit such a ban on access to a public institution, where there is no need or justification for it, would be to permit arbitrary, capricious and unreasonable restraints to be placed upon the right of the people to know what their own government is doing"[227] is in essence based on a balancing of interests. The government had argued that the interests of human dignity and taste justified the ban. The court rejected this argument as both ironic and beyond the scope of judicial consideration. "Unless there is some

is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

TEX. CODE CRIM. PROC. ANN. art. 43.20 (Vernon 1966).

[221] 424 F. Supp. at 471.

[222] *Id.*

[223] *Id.*

[224] The court also noted that unlike the situation in *Pell,* media interviews had never jeopardized prison security nor had they created disciplinary problems. Additionally there was no evidence that the interviews permitted prior to the promulgation of the Texas regulation caused administrative inconvenience. *Id.*

[225] See note 220 *supra.*

[226] This situation is precisely what prompted Justice Powell to dissent to that portion of *Pell* dealing with media rights. Justice Powell explained his position fully in *Saxbe* when he stated, "From all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large." 417 U.S. at 857 (Powell, J., dissenting).

[227] 424 F. Supp. at 472.

substantial factual basis for denying access to public proceedings, it is for the news media itself to determine what governmental activities are sufficiently tasteful, dignified, or acceptable to be reported. . . . In addition, the people themselves are the final masters of what they consume. . . ."[228] This focus on the question of whether the media's right to gather news on a controversial topic of public interest outweighed the government's expressed concerns of taste and human dignity implicitly rejects the Supreme Court's approach in both *Pell* and *Saxbe*.

In *KQED, Inc. v. Houchins*,[229] a three-judge panel of the Court of Appeals for the Ninth Circuit considered media access in light of an Alameda County general policy which excluded members of the media from its jail facilities and limited public access to the facilities to tour groups of twenty-five people booked long in advance. The use of cameras, sound equipment and all conversations with inmates were prohibited on such tours.[230] The panel in three separate opinions upheld a district court injunction prohibiting the county jailor from banning the media from jail facilities.[231] Judge Pregerson[232] writing the opinion of the court recognized that on its face the injunction granted the media greater access than the public to the jail. However, he saw no conflict with *Pell*, which he felt stands for the proposition that the media's right of access is coextensive with the public's right. It does not, however, compel identical implementation of the media's and the public's right of access since, "[t]he access needs of the news media and the public differ. . . . Moreover, the administrative problems inherent in public and media access differ."[233] He therefore concluded that "[a]lthough both groups have an equal constitutional right of access to jails, because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights not be identical."[234]

Judge Hufstedler, concurring specially,[235] agreed with Judge Pregerson that the court's decision was consonant with *Pell*. Crucial to her opinion that neither *Pell* nor *Saxbe* compelled the use of the same standards of access for the public and the press was her belief that *Pell* merely dealt with the *type* of information the public had a "right to know." If the public was entitled to access to a certain type of information, the media had equal right to the information. In contrast to *Pell's* focus on the type of information sought, Judge Hufstedler pointed out that the issue before the court in *Houchins* was the limitation that can be imposed on the *means* to gather the information. Thus, *Pell* and *Saxbe* were not directly on point.[236]

Judge Hufstedler noted that media and public access to prisons posed different administrative problems which she felt justified different access restrictions in gathering news which the public is entitled to know.[237] She also recognized that public tours and news media access do not serve identical purposes, although both are in pursuit of information which the public has a "right to know." The function of the press is to disseminate the information to a wide public audience. This function would not be performed adequately by a group of individuals on tours because "it would be rare that the

[228] *Id.* at 473.

[229] 546 F.2d 284 (9th Cir. 1976).

[230] 97 S. Ct. 773, 774 (1977) (Rehnquist, J., in chambers).

[231] The injunction issued by the United States District Court for the Northern District of California prevented the Alameda County jailor:

> From excluding as a matter of general policy plaintiff KQED and responsible members of the news from the Alameda County Jail facilities . . . or from preventing . . . full and accurate coverage of the conditions prevailing therein. . . . From denying KQED . . . access . . . at reasonable times and hours.
>
> . . . From preventing KQED . . . from utilizing photographic and sound equipment or from utilizing inmate interviews . . . [the jailor] may, in his discretion, deny KQED . . . access . . . for the duration of those limited periods when tensions in the jail make such media access dangerous.

97 S. Ct. 773, 773–74 (1977). The district court granted the preliminary injunction on November 20, 1975. A two-judge panel of the Court of Appeals for the Ninth Circuit stayed the district court order on December 24, 1975. A different panel of the Ninth Circuit heard the appeal. *Id.* at 774.

[232] The Honorable Harry Pregerson, United States District Court Judge for the Central District of California, sitting by designation.

[233] 546 F.2d at 286.

[234] *Id.*

[235] *Id.* at 295 (Hufstedler, J., concurring specially).

[236] *Id.*

[237] Judge Hufstedler noted, for instance, that while it would be burdensome for groups of citizens to examine the preparation of prison food, a small group of reporters would create little administrative inconvenience. *Id.* at 296.

combination of training and the means of transmission enjoyed by the news media would be found in a tour group."[238] Furthermore, she asserted that conducted tours do not serve to give "an adequate view" of prison conditions.[239]

Regardless of Judge Hufstedler's ingenuity in interpreting *Pell,* the result she sanctions seems to conflict with the holding of that case. Judge Duniway,[240] while concurring, recognized this conflict, "I concur, but I confess to having serious doubts about the result, not because I think that it is wrong in principle, but because I have great difficulties in reconciling the results with . . . [*Pell* and *Saxbe*]."[241] He expressed the belief that the press in our complex society should have a preferred right of access to discover facts about the public's business and that the law should recognize the differing administrative burdens present in media and public access.[242] He candidly admitted, however, that *Pell* and *Saxbe* do not recognize these differences and in fact "expressly disregard" them.[243]

Both *Garrett* and *Houchins* implicitly consider the rule of law announced in *Pell* to be overbroad. Both appear to utilize the traditional first amendment approach of balancing rights and interests rejected by *Pell* and *Saxbe.* Yet arguably the holding of each case can be reconciled with *Pell* and *Saxbe.* Although the Supreme Court did not emphasize the importance of substantial access to prisons and prisoners, it did mention that substantial access other than specific interviews existed in *Pell* and *Saxbe.*[244] In contrast, *Garrett* involved an absolute ban on media and public access to death row prisoners and executions, and the Alameda County general policy in *Houchins* allowed only extremely limited access. If the doctrine of *Pell* is impliedly limited to situations where substantial access already exists, then *Garrett* and *Houchins* are not necessarily in conflict.

Sheriff Houchins raised this issue in making application to Justice Rehnquist to stay the district court injunction.[245] Justice Rehnquist granted the stay because of the likelihood that the Court would grant certiorari "if for no other reason than that departure from unequivocal language in [*Pell*]. "[246] He did, nevertheless, suggest that the question of substantial access might be the key to resolving the apparent conflict with the prior Court decisions.[247] It should be noted, however, that the use of substantial access as a standard for judging the constitutionality of restrictions on media access to prison will force courts to consider each particular fact situation and to examine the reasonableness of any challenged restriction. This approach would clearly be a retrenchment from *Pell's* rigid language which focused purely on equality of access.

Both *Garrett* and *Houchins* reflect dissatisfaction with the flat rule of law announced in *Pell.* This malcontent has placed the nature of media access to prisons and prisoners in doubt. The Supreme Court now has the opportunity to elucidate the first amendment standard applicable to media access to prisons and prisoners.[248]

[238] *Id.*
[239] *Id.*
[240] 546 F.2d at 294 (Duniway, J., concurring).
[241] *Id.*
[242] *Id.* at 294–95.
[243] *Id.* at 295.
[244] See note 215 *supra* and accompanying text.

[245] 97 S. Ct. 773, 774–75 (1977) (Rehnquist, J., in chambers).
[246] *Id.* at 775.
[247] Justice Rehnquist stated that "if 'the no greater access' doctrine of *Pell* and *Saxbe* applies . . . the Court of Appeals and the District Court were wrong . . . . If on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there is already substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive." *Id.*
[248] The Supreme Court granted certiorari in *Houchins* on May 23, 1977. 97 S. Ct. 2630 (1977).