by law in the absence of any terms in the writing to the contrary.[21] In all of these cases, the terms presumed by law were used to fill in gaps in the writing because the parties had omitted necessary terms. An option clause in a deed, however, leaves no gap as to the assignability of the option, since options on their face are freely alienable. Thus, the alleged oral agreement in *Masterson* did not merely rebut a term presumed by law in the absence of any terms in the writing to the contrary; rather, it directly contradicted an unambiguous, statutorily recognized incident of the option, implied by the written terms of the deed. Therefore, a reading of *Masterson* in terms of what the court did, rather than what it said, suggests that this decision permits proof of an oral agreement even when the "directly contradictory" test which the court articulated is not satisfied.

There is little doubt that the *Masterson* court significantly liberalized the parol evidence rule in California. But until the court answers the important questions which it left unresolved, the nature and scope of this liberalization will remain unclear.[22]

## V

## CRIMINAL PROCEDURE

### *A. Arrest Warrants*

*People v. Sesslin.*[1] The court made more stringent the requirements for securing an arrest warrant, holding that such a warrant is invalid under the fourth amendment unless accompanied by a complaint which alleges underlying facts upon which a magistrate can independently determine whether probable cause exists to arrest the accused.

A police officer signed a felony complaint alleging, on

21. *E.g.*, American Indus. Sales Corp. v. Airscope, Inc., 44 Cal. 2d 393, 282 P.2d 504 (1955) (parol evidence used to rebut presumption of place of payment); Mangini v. Wolfschmidt, Ltd., 165 Cal. App. 2d 192, 331 P.2d 728 (1958) (parol evidence used to rebut presumption of duration of an agency contract). *See* RESTATEMENT OF CONTRACTS § 240, comment C (1932).

22. Assuming the supreme court did adopt the *Restatement* test, the court will have to decide whether to adopt what will probably be a new approach taken by the *Restatement (Second)*. Although the new counterpart of section 240 has not yet been published, it appears that the test will be liberalized to eliminate the "natural" standard. *See* Calamari & Perrilo, *supra* note 4, at 353. In other areas, the supreme court has been willing to replace old *Restatement* rules with new ones. In O'Keefe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966), the court adopted the child trespassing rule of the *Restatement (Second)*, replacing the *Restatement* rule adopted eight years earlier.



1. 68 A.C. 431, 439 P.2d 321, 67 Cal. Rptr. 409 (1968).

information and belief, that the defendant had made and passed forged checks. The allegations were framed in the conclusory language of the applicable statute. At the end of the complaint was a list of names labeled "Witnesses." On the basis of this complaint, a municipal court judge issued a warrant for the defendant's arrest, and the officer, acting pursuant to this warrant, arrested the defendant in his office. Both at the time of his arrest and later at the police station the defendant acceded to the officer's request to prepare handwriting exemplars.

On the basis of expert testimony that the handwriting on the exemplars and the forged checks was that of the same person, the defendant was convicted of forgery. The supreme court reversed, holding that the arrest was made pursuant to a constitutionally invalid warrant, and that the exemplars introduced into evidence were therefore inadmissible as the fruit of an illegal arrest.[2]

The fourth amendment provides that, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation . . . ."[3] Relying on three United States Supreme Court decisions, *Giordenello v. United States*,[4] *Aguilar v. Texas*,[5] and *Barnes v. Texas*,[6] the California court held that a complaint which merely states the affiant's conclusions couched in the words of the statute cannot

2. Under the United States Supreme Court's test, "evidence . . . come at by exploitation of . . . illegality" is "fruit of the poisonous tree" and inadmissible at trial. Wong Sun v. United States, 371 U.S. 471, 488 (1963). California courts must apply this test. People v. Bilderbach, 62 Cal. 2d 757, 401 P.2d 921, 44 Cal. Rptr. 313 (1965). Applying this test, *Sesslin* held that the exemplars were obtained under the compulsion of the illegal arrest and therefore should not have been admitted into evidence.

An exception to the "fruit of the poisonous tree" doctrine renders admissible evidence which was discovered as a result of illegal police activity if the prosecution proves at trial that it would have been discovered through legal means had the illegal police conduct not occurred. *See* People v. Ditson, 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1963); People v. Chapman, 261 A.C.A. 167, 67 Cal. Rptr. 601 (1968); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 313-17 (1964). In *Sesslin* the police presumably would have easily obtained samples of the defendant's handwriting from such sources as motor vehicle files and bank signature cards had the officer not secured the exemplars after the arrest. The court's opinion does not reveal whether the prosecution attempted to prove this at trial. Inasmuch as the trial court did not hold the arrest illegal, the prosecution undoubtedly felt that there was no reason to offer such proof.

3. U.S. CONST. amend. IV.

4. 357 U.S. 480 (1958). *Giordenello* held that under the federal rules of criminal procedure, the complaint must set forth sufficient underlying facts upon which the magistrate can determine whether probable cause to arrest the accused exists.

5. 378 U.S. 108 (1964). In *Aguilar* the Supreme Court stated that the *Giordenello* rule was grounded in the fourth amendment.

6. 380 U.S. 253 (1965). In a per curiam decision the Court reversed a Texas conviction involving an arrest warrant with a supporting complaint which merely set forth the terms of the statute allegedly violated. The Court cited *Giordenello* and *Aguilar* as the sole basis for reversal.

constitutionally support a valid arrest warrant. Rather, the complaint accompanying an arrest warrant must state not only the underlying facts supporting the complainant's belief that the accused committed the crime as alleged, but also the underlying facts relating to the identity and credibility of the source of the complainant's information. Together, these facts must provide the magistrate with enough information to independently determine whether probable cause exists to arrest the accused.

Although holding the arrest warrant invalid, the court ruled that the California statutory scheme authorizing the issuance of arrest warrants does not violate the fourth amendment. The relevant sections[7] do not expressly require,[8] nor had they ever been interpreted to require,[9] the inclusion in the complaint of any underlying facts. Nevertheless, the court held that if construed in light of constitutional standards, these sections require such information.

*Sesslin* enhances the judicial role in the issuance of arrest warrants. Since prior to this decision the police could usually secure an arrest warrant on the basis of a complaint which merely couched the complainant's allegations in the conclusory language of the applicable statute, the magistrate exercised virtually no control over its issuance.[10] By requiring the complaint to allege underlying facts relating to both the commission of the crime and the source of the complainant's information, *Sesslin* now provides the magistrate sufficient data with which to conduct a meaningful inquiry as to whether probable cause exists to arrest the accused.

Insofar as arrest warrant procedure prior to *Sesslin* resulted in the issuance of warrants where facts sufficient to warrant a finding of probable cause to arrest without a warrant—a reasonable belief that effective check against such abuses.[11] However, it is not clear that

7. CAL. PEN. CODE. §§ 806, 813, 952 (West 1956).

8. The principal Penal Code provision provides only that the magistrate must issue a warrant if he "is satisfied from the complaint . . . that there is reasonable ground" to arrest the accused. CAL. PEN. CODE § 813 (West 1956).

9. *Cf.* People v. Henshaw, 194 Cal. 1, 8, 227 P. 156, 159 (1924).

10. The judge could supplement the allegations in the complaint by informally interrogating the complainant. The dissent argued that such interrogations were not "uncommon." 68 A.C. at 444, 439 P.2d at 330, 67 Cal. Rptr. at 418. Unfortunately, there is no statistical data revealing how often they occurred. However, because prior to *Sesslin* a complaint framed in conclusory language met the statutory requirements, it would seem doubtful that many magistrates conducted such interrogations.

11. While the mere availability to the magistrate of the underlying factual data required by *Sesslin* constitutes no guarantee that he will in fact exercise his independent judgment on the issue of probable cause, it will probably substantially reduce whatever temptation previously existed to "rubber stamp" the determination made by the complainant. The magistrate desiring to ascertain the facts upon which the complaint was based will no longer have to take the

such abuses were prevalent. On the contrary, although reliable data on arrest warrant procedure in California is unfortunately lacking,[12] there is good reason to believe that such factors as the limited time and resources of prosecutors, who by and large are ultimately responsible for deciding whether or not to seek a warrant, militated against requests for warrants where the requisite probable cause was absent.[13]

Although under *Sesslin* an arrest warrant is invalid if the accompanying complaint does not contain underlying facts sufficient to permit the magistrate to independently determine whether probable cause exists, the failure of the complaint to so allege these facts will not necessarily result in an illegal arrest. In a companion case, *People v. Chimel*,[14] the supreme court upheld a felony arrest even though the complaint was insufficient under *Sesslin*, on the ground that the prosecution had established at trial that the arresting officer had probable cause to arrest without a warrant—a reasonable belief that the person to be arrested had committed a felony[15]—at the time of the accused's apprehension.[16] The court reasoned that a reversal on the ground that the warrant was invalid would deter police from securing warrants, subverting the preference for arrests made pursuant to warrants.[17]

While this reasoning appears to be sound, *Chimel* significantly reduces the impact of *Sesslin* in felony cases. The accused cannot rely solely on the fact that the arrest warrant's supporting complaint fails to allege underlying facts in order to invalidate the subsequent arrest. In misdemeanor cases, however, an arrest made pursuant to a warrant that is invalid under *Sesslin* will not be saved by *Chimel*, because a warrant is required to effect a legal misdemeanor arrest unless the arresting officer both has reasonable cause to believe that the accused has committed a crime in his presence[18] and promptly arrests him.[19] If

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initiative and interrogate the complainant—a procedure which some magistrates may have considered antagonistic or simply distasteful. Furthermore, the fact that such supporting data will henceforth be a matter of record should give the magistrate more of a stake in insuring that warrants signed by him are in fact issued on probable cause.

12. *See* Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 26 (1962).

13. *See* Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1, 12 (1964).

14. 68 A.C. 448, 439 P.2d 333, 67 Cal. Rptr. 421 (1968).

15. CAL. PEN. CODE § 836 (West Supp. 1968).

16. In *Sesslin* the record contained no evidence that the arresting officer had probable cause to arrest the defendant. The supreme court might have appropriately remanded the case for factual hearing to determine whether he did have probable cause. *Cf.* Jackson v. Denno, 378 U.S. 368 (1968).

17. *Cf.* People v. Castro, 249 Cal. App. 2d 168, 174-75, 57 Cal. Rptr. 108, 113 (1967).

18. CAL. PEN. CODE § 836(1) (West Supp. 1968).

19. Jackson v. Superior Court, 98 Cal. App. 2d 183, 219 P.2d 879 (1950).

an officer, with grounds to arrest without a warrant, nonetheless secures one and then makes the arrest, he will not have effected the arrest promptly. Therefore, the prosecution cannot argue that at the time of the accused's apprehension the officer could have legally arrested him without a warrant. It would seem unlikely, however that an officer with a reasonable belief that a misdemeanor has been committed in his presence would forego making the arrest and seek a warrant.

In principle, the *Sesslin* court reached the correct result. The probable cause requirement for securing an arrest warrant has little meaning if the magistrate does not make an independent determination of whether the requisite probable cause exists. Insofar as prosecutors have been reluctant to seek warrants where probable cause to arrest was absent, however, it would appear doubtful that *Sesslin* will provide individuals with significantly greater protection against illegal arrests. In addition, because of the court's decision in *Chimel*, *Sesslin's* importance as a defensive weapon is substantially reduced.

### *B. Probable Cause for Entry*

*People v. Gastelo*[1] and *People v. Rosales.*[2] These two cases substantially restrict the range of situations in which police may lawfully enter a suspect's home unannounced and by force for the purpose of making a search or an arrest. In the first case the police suspected Max Gastelo of selling narcotics from the apartment of his mistress. They obtained a search warrant, went to the apartment on a Saturday morning, and made an unannounced forced entry through both the front and back doors. Proceeding to the bedroom where the couple was asleep, they pulled Gastelo from the bed. In the course of the ensuing search, the officers found heroin between the mattress and the box springs of the bed.

This rather typical law enforcement situation clearly illustrates the dilemma created by the conflict between the right to privacy and the need for effective police work. The police had probable cause to search the premises inhabited by Gastelo, a suspected felon.[3] Gastelo,

1. 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).
2. 68 A.C. 307, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).
3. People v. Hughes, 240 Cal. App. 2d 615, 49 Cal. Rptr. 767 (1966), held that there can be no unannounced forcible entry by the police in misdemeanor cases.

on the other hand, had a statutory[4] and common law[5] right protecting him[6] from the unannounced fôrcible entries by the police. That right was further protected by the constitutional rule against unreasonable searches and seizures, which includes a prohibition of unreasonable methods of entry.[7] Had Gastelo been warned of the impending police entry, however, he could have disposed of the incriminating evidence in a few seconds by flushing it down a toilet,[8] or could have begun to escape or to resist.

The predicament in which such a situation places the police is obvious. If they announce their authority, explain their purpose, and demand admittance as the statutes require, they risk losing the evidence by means of destruction or disposal. If they make a surprise entry, they run the risk of losing the evidence by operation of law through the exclusionary rule. The exclusionary rule applies in surprise entry cases because the success of the search may well depend upon whether the police obey the law.[9] "[T]he government must not

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4. CAL. PEN. CODE § 1531 (West 1955) governs the execution of search warrants: "The officer may break open any outer or inner door or window of a house . . . if, *after notice of his authority and purpose*, he is refused admittance." (Emphasis added.)

CAL. PEN. CODE § 844 (West 1955), which governs arrests, is substantially identical: "To make an arrest . . . a peace-officer, may break open the door . . . of the house in which the person to be arrested is . . . *after having demanded admittance and explained the purpose for which admittance is desired*." (Emphasis added.) *Cf.* CAL. PEN. CODE § 855 (West 1955).

5. For summaries of the common law development of the law of unannounced forcible entry by police see Ker v. California, 374 U.S. 23, 47-52 (1963); People v. Stephens, 249 Cal. App. 2d 113, 115-116, 249 Cal. Rptr. 66, 67-68 (1967); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 500-504 (1964).

6. Decisions have also indicated concern for the privacy of persons within the dwelling other than the defendant. *e.g.*, People v. Arellano, 239 Cal. App. 2d 389, 391 (1966): "[T]he actions of the police [in breaking into a hotel room] resulted in a flagrant intrusion on the privacy of the [woman sleeping with the defendant]."

7. "Since the petitioner's federal constitutional protection from unreasonable searches and seizures by police officers is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." Ker v. California, 374 U.S. 23, 38 (1963).

8. *See, e.g.*, People v. Merino, 151 Cal. App. 2d 594, 312 P.2d 48 (1957) (defendant kept his heroin above the toilet bowl apparently in anticipation of a possible police raid). In a different case a policeman testified: "[M]y main purpose was getting in there and getting to this particular defendant before he could get to the bathroom and flush whatever evidence he had down the toilet, which is quite common. We meet that quite often. By the time we get to the defendants they are usually near a bathroom and they go to a bathroom and flush it down the toilet." People v. Sayles, 140 Cal. App. 2d 657, 659-60, 295 P.2d 579, 581 (1956); *cf., e.g.*, People v. Shelton, 151 Cal. App. 2d 587, 311 P.2d 859 (1957) (analogous problem with bookmaking cases where incriminating "scratch sheets" can be burned quickly).

9. People v. Maddox, 46 Cal. 2d 301, 305, 294 P.2d 6, 8-9 (1956).

be allowed to profit by its own wrong and thus be encouraged in the lawless enforcement of the law."[10]

The courts face a difficult task: to preserve the constitutional and statutory right to privacy, and yet not to create a constitutional right to destroy evidence or to avoid arrest. Since the statutes in question are codifications of the common law,[11] the courts have adopted common law exceptions to excuse police compliance with the statutes in certain exigent circumstances: (1) When compliance with the statute would imperil the officers or others within[12]—as when the suspect is known to have a gun; (2) when compliance with the statute would facilitate the suspect's escape;[13] (3) where the officers reasonably believe that the suspect is within and intentionally not responding to their knocking;[14] (4) to prevent the destruction of evidence;[15] (5) where it reasonably appears that the suspect is already aware of the presence, identity, and purpose of the officers, as when the suspect has broken parole and sees his parole officer outside the door with the police,[16] or when the officers are in fresh pursuit of the suspect;[17] and (6) to aid a person in distress.[18]

The most frequently used of these exceptions, because it arises in virtually all narcotics and bookmaking cases, is the one relating to the destruction of evidence. The court adopted this exception in 1956 in *People v. Maddox*[19] with these often quoted words:

> Suspects have no constitutional right to destroy . . . evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would had he complied with [the statute].[20]

Although *Maddox* dealt with a case in which there was not only

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10. People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 859 (1955); *cf.* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

11. *See, e.g.*, People v. Maddox, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956).

12. *E.g.*, People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966); People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

13. *E.g.*, People v. Gallup, 253 Cal. App. 2d 922, 61 Cal. Rptr. 709 (1967); People v. Fritz, 253 Cal. App. 2d 7, 61 Cal. Rptr. 247 (1967); People v. Garcia, 187 Cal. App. 2d 93, 9 Cal. Rptr. 493 (1960).

14. *E.g.*, People v. Carswell, 51 Cal. 2d 602, 335 P.2d 99 (1959).

15. *E.g.*, Ker v. California, 374 U.S. 23, 40 (1963) and cases cited note 21 and note 22 *infra*.

16. People v. Limon, 255 A.C.A. 615, 63 Cal. Rptr. 91 (1967).

17. *E.g.*, People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966); People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965); *see* Ker v. California, 374 U.S. 23 (1963) (depended in part upon allegedly elusive acts by the defendant which indicated that he knew that he was being pursued).

18. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956).

19. 46 Cal. 2d 301, 294 P.2d 6 (1956).

20. *Id.* at 306, 294 P.2d at 9.

easily disposable evidence but also furtive acts by the suspect which indicated an attempt to destroy evidence or to escape, it was immediately[21] cited by lower courts as approving surprise entries in cases in which there was nothing more shown than that the police believed that easily disposable evidence was within the house. This line of lower court cases[22] developed unchallenged by the supreme court, and the Attorney General argued in *Gastelo* that the court should approve the blanket rule. He contended that surprise entries are always reasonable in narcotics cases because narcotic offenders usually attempt to destroy evidence quickly at the first sign of an officer's presense.[23] The court unanimously rejected this contention on constitutional grounds:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.[24]

*Gastelo* does not hold that the prevention of the destruction of evidence is no longer grounds for excusing police noncompliance with the statutory notice and demand requirements; it does hold that the officer's belief that evidence will be destroyed must be based on the facts of the particular case—not on the characteristics of narcotics violators as a class. This holding should be contrasted with the cases

21. *E.g.*, People v. Barnett, 156 Cal. App. 2d 803, 320 P.2d 128 (1958); People v. Shelton, 151 Cal. App. 2d 587, 311 P.2d 859 (1957); People v. Sayles, 140 Cal. App. 2d 657, 295 P.2d 519 (1955); see also note 22 *infra*.

22. People v. La Peluso, 239 Cal. App. 2d 715, 49 Cal. Rptr. 85 (1966) (narcotics); People v. King, 234 Cal. App. 2d 423, 44 Cal. Rptr. 500 (1965) (marijuana); People v. Aguilar, 232 Cal. App. 2d 173, 42 Cal. Rptr. 666 (1965) (narcotics); People v. Manriquez, 231 Cal. App. 2d 725, 42 Cal. Rptr. 157 (1965) (narcotics); People v. Holloway, 230 Cal. App. 2d 834, 41 Cal. Rptr. 303 (1964) (narcotics); People v. Samuels, 229 Cal. App. 2d 351, 40 Cal. Rptr. 290 (1964) (narcotics); People v. Russell, 223 Cal. App. 2d 733, 36 Cal. Rptr. 27 (1963) (bookmaking); People v. Aguilar, 217 Cal. App. 2d 260, 31 Cal. Rptr. 893 (1963) (bookmaking); People v. Gauthier, 205 Cal. App. 2d 419, 22 Cal. Rptr. 888 (1962) (narcotics); People v. Montano, 184 Cal. App. 2d 199, 7 Cal. Rptr. 307 (1960) (narcotics); People v. Fisher, 184 Cal. App. 2d 308, 7 Cal. Rptr. 461 (1960) (narcotics); People v. Covan, 178 Cal. App. 2d 417, 2 Cal. Rptr. 811 (1960) (narcotics); People v. Williams, 175 Cal. App. 2d 774, 1 Cal. Rptr. 44 (1959) (narcotics); People v. Miller, 162 Cal. App. 2d 96, 328 P.2d 506 (1958) (marijuana); cases cited note 21 *supra*.

23. 67 Cal. 2d 586, 588, 432 P.2d 706, 708, 63 Cal. Rptr. 10, 12 (1967).

24. *Id.* at 588-89, 432 P.2d at 708, 63 Cal. Rptr. at 12.

which permit surprise entries on a blanket basis where the police have reason to believe that the suspect has a gun.[25] The overriding value of preserving the lives of the officers and innocent bystanders excuses the police from showing facts which caused them to believe that a particular suspect was actually preparing to use the gun to resist entry. When, however, the only risk is that narcotics (or bookmaking) evidence may be destroyed,[26] the value of privacy requires that the police have reason to believe that the particular suspect is attempting to destroy evidence before a surprise entry is permitted.

The focus of future litigation should shift to the question of what facts in a particular case are sufficient to support the police belief that the suspect is trying to destroy evidence—a question which *Gastelo* does not directly answer. The cases which it cites with approval[27] as having sufficient "specific facts" involved situations where there were suspicious sounds or furtive movements following a knock at the door.[28] Much more emphasis will probably be placed, therefore, on the "furtive act" concept, around which there already exists a substantial line of decisions.[29]

The "furtive act" concept is an awkward attempt by the courts to compromise between the conflicting dictates of privacy and effective law enforcement in fact situations which are not susceptible to compromise. For example, the movements of a person who is

25. Cases cited in note 12 *supra*.

26. *But see* Blakey, *supra* note 5, at 556, who emphasizes the seriousness of gambling and narcotics because of their link with organized crime, and reasons accordingly that a blanket rule may be appropriate.

27. People v. Carrillo, 64 Cal. 2d 387, 412 P.2d 377, 50 Cal. Rptr. 185 (1966); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956).

28. Most cases subsequent to *Gastelo* have interpreted it to require furtive sounds, People v. Hamilton, 257 A.C.A. 328, 64 Cal. Rptr. 578 (1968); People v. Marshall, 257 A.C.A. 423, 64 Cal. Rptr. 690 (1968), or such "exigent circumstances as hot pursuit . . ., activity inside suggesting the destruction of evidence, or apparent danger to life and limb." People v. Rivera, 256 A.C.A. 423, 426, 64 Cal. Rptr. 46, 48 (1967) (conviction affirmed on other grounds). *But see* People v. DeSantiago, 257 A.C.A. 934, 65 Cal. Rptr. 252 (1968), which reads *Gastelo* very narrowly.

29. *See, e.g.*, People v. Carrillo, 64 Cal. 2d 387, 412 P.2d 377, 50 Cal. Rptr. 185 (1966) (rapid movement through kitchen seen from back door); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956) (voice called out "wait a minute" followed by the sound of retreating footsteps); People v. Honea, 257 A.C.A. 285, 64 Cal. Rptr. 628 (1967) ("running" noises); People v. Fernandez, 255 A.C.A. 992, 63 Cal. Rptr. 778 (1967) (shadow moving rapidly away from door); People v. Magdelena, 238 Cal. App. 2d 613, 48 Cal. Rptr. 33 (1965) (scurrying steps); People v. Finn, 232 Cal. App. 2d 422, 42 Cal. Rptr. 704 (1965) (flushing water noise); People v. Lindogen, 212 Cal. App. 2d 466, 27 Cal. Rptr. 905 (1963) (detected odor of burning paper from suspected bookmaker's room); People v. Fisher, 184 Cal. App. 2d 308, 7 Cal. Rptr. 461 (1960) (large commotion and running toward bathroom); People v. Williams, 175 Cal. App. 2d 774, 1 Cal. Rptr. 44 (1959) (suspect rushed toward bathroom); People v. White, 167 Cal. App. 2d 794, 334 P.2d 963 (1959) ("walking" noise).

surprised in a state of dishabille by a knock at his door, and walks swiftly away from the door to put on a robe—an act which the statute is designed to permit—are the same movements which a narcotics violator makes as he attempts to destroy incriminating evidence.

Some lower court decisions have gone to extreme lengths to find furtive conduct justifying a surprise entry by the police. For example, in one case the police, who had defendant's apartment under surveillance, saw a salesman knock at the door, heard a voice call out from within, and then watched the salesman depart without having gained entry. The court held that the suspect's apparent refusal to open the door to the salesman gave reasonable cause to the police to believe that they also would be denied entry, and therefore justified their breaking in.[30] If such a case is good law, *Gastelo*'s requirement of specific facts leading to a reasonable belief that evidence is being destroyed can be easily satisfied. However, the fact that the early furtive act cases were decided at a time when no furtive act was required to justify a surprise entry makes them doubtful authority after *Gastelo*.

*Gastelo* leaves open the question of whether a specific showing by the police that a particular suspect is known to be constantly on the alert to destroy evidence justifies a surprise forced entry. A showing of such facts logically overcomes the fourth amendment hurdle which *Gastelo* established—the lack of particularity—but practical considerations should render it insufficient. If such a showing were held sufficient to justify a surprise entry, the police would have only to assert that an informer had told them that the defendant was constantly on the alert to destroy evidence. The defendant could never effectively challenge such testimony, because in narcotics cases the police need not disclose the identity of informants when the issue is probable cause.[31] In contrast, when the police allege a "furtive act" by the suspect, they do so with the knowledge that this assertion can be fully examined by defense counsel at trial.

In *People v. Rosales*[32] the supreme court applied the rationale of

30. People v. Villanueva, 220 Cal. App. 2d 443, 33 Cal. Rptr. 811 (1963); *see* People v. Morris, 157 Cal. App. 2d 81, 320 P.2d 67 (1958) (court apparently thought that the sound of squeaking bedsprings from a hotel room constituted a furtive noise).

31. CAL. EVID. CODE § 1042(b) (West 1966) permits nondisclosure of the identity of an informer in all cases in which the warrant is valid on its face; *id.* § 1042(c) permits nondisclosure of the identity of an informer whose information justified a non-warrant arrest in narcotics cases. The latter section was upheld as constitutional in Martin v. Superior Court, 66 Cal. 2d 257, 424 P.2d 935, 57 Cal. Rptr. 351 (1967) largely because of United States Supreme Court approval of a like provision in McCray v. Illinois, 386 U.S. 300 (1967).

32. 68 A.C. 307, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).

*Gastelo*—that compliance with the notice and demand statutes cannot be excused on the basis of a general assumption about a class of defendants—to the case of a parole violator. Rosales was the subject of an all-points bulletin for arrest for parole violation, and he was also suspected of selling heroin. Four officers went to his home to arrest him on the former charge. Two went to the front door; two covered the rear of the house. Recognizing Rosales through the unlocked front screen door, they opened the door, entered, and arrested him. As the officers entered, they told a girl whom they passed in the front doorway that they were police, but they did not announce their purpose or demand entry. Their search following the arrest turned up some narcotics, and Rosales was convicted of possession of heroin.

The police claimed—and the lower courts agreed[33]—that the danger of the defendant escaping justified their noncompliance with the statutory[34] notice and demand requirements: "Rosales and [the codefendant] were already parole absconders and what could be more natural than that they would continue in desperate flight if provided with any avenue of escape . . . ."[35] In a four-to-three decision, the supreme court disagreed, holding that neither the parole violator's legal status as "an escapee and fugitive from justice,"[36] nor any other "general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest,"[37] is sufficient to support a reasonable belief by the police that compliance with the statute would frustrate the arrest.[38] "Such a belief . . . must be based on the facts of the particular case."[39] Looking to the facts of *Rosales*, the court noted that the police had the exits covered, and that the police saw the defendants before the entry and observed no suspicious activity.[40] Since compliance with the statute would have afforded Rosales "a few seconds at most to take evasive action,"[41] the court held the entry unlawful. Consequently the search was illegal and the heroin was excluded from evidence.

In *Rosales*, the Chief Justice observed that the notice and demand statutes not only protect the privacy of a suspect and others within the dwelling but also serve "to preclude violent resistance to

33. People v. Rosales, 253 A.C.A. 209, 61 Cal. Rptr. 170 (1967).
34. Authorities cited note 4 *supra*.
35. People v. Rosales, 253 A.C.A. 209, 213, 61 Cal. Rptr. 170, 172 (1967).
36. CAL. PEN. CODE § 3064 (West 1956).
37. People v. Rosales, 68 A.C. 307, 313, 437 P.2d 489, 493, 66 Cal. Rptr. 1, 5 (1968).
38. *Accord*, People v. Stephens, 249 Cal. App. 2d 113, 57 Cal. Rptr. 66 (1967); People v. Arellano, 239 Cal. App. 2d 389, 48 Cal. Rptr. 686 (1966).
39. 68 A.C. at 313, 437 P.2d at 493, 66 Cal. Rptr. at 5.
40. *Id.*
41. *Id.*

unexplained entries and to protect the security of innocent persons"[42] who may also be within. This rationale is particularly convincing in cases where the police are wearing civilian clothes.[43] Although it is arguable that the police—not the courts—are best qualified to choose means of entry designed to minimize violence when their own safety is at stake, common law judges have long made such "safety" decisions.[44] The justification for their doing so is that the police may tend too often to risk a suspect's violent defense of his home in their zealous desire to seize evidence and their confidence in their skill in subduing violent people.

The Attorney General argued[45] that since the police in *Rosales* only pushed open an unlocked screen door there was no "breaking"[46] within the meaning of the statute. The court rejected this contention, and held that "breaking" includes "at the very least" all entries that would be considered breaking under the common law concept of burglary—which includes the opening of any door or window even if unlocked.[47]

The court expressly reserved judgment on whether *any* entry without permission is a "breaking" within the statutory notice and demand requirement.[48] If the court persists in using common law burglary concepts to define a "breaking," police who enter by pushing open wider a door already slightly ajar must announce themselves,[49] while those passing through an open door or window without opening it wider need not do so.[50] By the same token, the cases which have permitted entry by subterfuge[51] would then demand overruling, since under the common law an entry gained by "trick or artifice" is considered a "breaking."[52]

42. *Id.* at 312, 437 P.2d at 492, 66 Cal. Rptr. at 4.

43. The supreme court did not know whether the arresting officers in *Rosales* were in uniform. *Id.* at 309, 437 P.2d at 491, 66 Cal. Rptr. at 3; *cf.* Miller v. United States, 357 U.S. 301, 311 (1958).

44. Ker v. California, 374 U.S. 23, 58 (1963); Ratcliffe v. Burton, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 126-27 (C.P. 1802).

45. 68 A.C. at 310-11, 437 P.2d at 491-92, 66 Cal. Rptr. at 3-4.

46. CAL. PEN. CODE § 844 (West 1955), quoted in note 4 *supra*.

47. 68 A.C. at 311, 437 P.2d at 492, 66 Cal. Rptr. at 4; *accord*, Sabbath v. United States, 391 U.S. 585, 590 (1968) (citing *Rosales* with approval); People v. Hamilton, 257 A.C.A. 328, 64 Cal. Rptr. 578 (1968). *But see* People v. Feeley, 179 Cal. App. 2d 100, 3 Cal. Rptr. 529 (1960); People v. Cahill, 163 Cal. App. 2d 15, 19, 328 P.2d 995, 998 (1958).

48. 68 A.C. at 311 n.4, 437 P.2d at 492 n.4, 66 Cal. Rptr. at 4 n.4.

49. At common law, opening an already ajar door is a "breaking." REST. (SECOND) OF TORTS § 206 comment b, at 386 (1965); R. PERKINS, CRIMINAL LAW 150 (1957).

50. At common law, passing through an open door or window without opening it wider is not a "breaking." PERKINS, *supra* note 49, at 149-50.

51. *E.g.*, People v. Scott, 170 Cal. App. 2d 446, 339 P.2d 162 (1959); People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957).

52. PERKINS, *supra* note 49, at 151-52.

It seems inappropriate to limit or measure the right to privacy in the arrest and search context by the obscure subtleties of common law burglary. Even though both are based on the "man's home is his castle" rationale, a modern court should develop more substantial criteria[53] to protect a man's privacy than whether his door (or window) is closed, open slightly, or wide open. A man should not waive his limited right to privacy—the right to an explanation of purpose and demand for entry by the police before they enter—merely because he left his door or window open on a warm day or night.

The *Rosales* court held that the officers' identification of themselves to the girl in the doorway did not meet the requirements of the statute:[54] "There is nothing in the record to show that any of the occupants or even the girl knew that the officers' purpose was to arrest the defendant or understood that they were demanding admittance."[55] The court does not insist that the police couch their announcement in any particular language;[56] but it does require that the surrounding circumstances—when taken together with what is said—must make the officers' purpose clear to the occupants or show that a demand for admittance would be futile.[57]

The *Gastelo* and *Rosales* decisions represent a major turning point in the law of probable cause for making a search or arrest in the manner chosen by the police. By placing a higher burden on the police to justify surprise forced entries, these decisions evidence a growing concern for the right to privacy and bring California law much closer to the United States Supreme Court's view of the issue as arises under a similar federal statute:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.[58]

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53. *Cf.* Sabbath v. United States, 391 U.S. 585, 590 (1968): "The protection afforded by, and the values inherent in [the Federal notice and demand statute] must be 'governed by something more than the fortuitous circumstance of an unlocked door.' Keiningham v. United States, 109 U.S. App. D.C. 272, 276, 287 F.2d 126, 130 (1960)."

54. *But see* People v. Cockrell, 63 Cal. 2d 659, 408 P.2d 116, 47 Cal. Rptr. 788 (1965) (held substantial compliance despite failure of police to state purpose); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (same); People v. Miller, 193 Cal. App. 2d 838, 14 Cal. Rptr. 704 (1961) (same).

55. 68 A.C. at 310, 437 P.2d at 491, 66 Cal. Rptr. at 3.

56. Indeed, even if all the right words are said by the officers their entry can be illegal if, for example, it follows the warning too closely. Munoz v. United States, 325 F.2d 23, 26 (9th Cir. 1963).

57. 68 A.C. at 310, 437 P.2d at 491, 66 Cal. Rptr. at 3; *accord*, People v. Limon, 255 A.C.A. 615, 63 Cal. Rptr. 91 (1967).

58. Miller v. United States, 357 U.S. 301, 313 (1958).

### *C. Discovery of Informer's Identity*

*People v. Garcia.*[1] The court expanded the criminal defendant's right to discover the identity of informers whose testimony might be helpful to his defense.

In *Garcia*, the police obtained a search warrant based upon confidential information from two informers who had purchased narcotics from the three suspects named in the warrant. When the police raided the suspects' apartment, they found the three named suspects and also Abraham Garcia, whom they had no reason to believe would be there. Because the police allegedly found narcotics under a mattress on which he was lying, Garcia was charged with possession of marijuana and possession of heroin for sale. His defense—which failed at trial—was that he was a heroin addict who had come to the apartment only to get a "fix," that he had never been in the apartment before, and that he did not own any of the narcotics found therein.

Garcia claimed on appeal that the trial court erred in denying his motion to discover the identity of those persons whose information led to his arrest. He sought disclosure of the informers' identities not for the purpose of arguing that the warrant was issued without probable cause, but on the theory that the informers might support his defense on the merits. The supreme court—in a four-to-three decision—reversed, holding that the trial court should have ordered disclosure of the informers' identities.

Law enforcement officials depend heavily upon the use of informers to detect violations of certain laws—particularly narcotics laws.[2] Unlike crimes against persons and property, narcotics offenses involves acts which are not directed toward any particular individual. All aspects of a narcotics offense—sale, purchase, possession and use—occur secretly and between consenting individuals[3] who normally have no incentive to report the crime. The police attempt to remedy this situation by providing an incentive—usually in the form of

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1. 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967).

2. "We are advised by the attorney general that . . . the great majority of narcotic arrests resulted from the use of informers for the purpose of initiating, developing or substantiating the investigation." People v. Durazo, 52 Cal. 2d 354, 358, 340 P.2d 594, 597 (1959) (dissenting opinion of Shenk, J.); *accord*, Lewis v. United States, 385 U.S. 206, 210 (1966); J. SKOLNICK, JUSTICE WITHOUT TRIAL 120 (1966).

3. "[I]n the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. . . ." MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959). *See generally* E. SCHUR, CRIMES WITHOUT VICTIMS (1965); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

money[4] or leniency[5]—to encourage a flow of information concerning narcotics violations. Because of the danger of violent reprisals,[6] and because an informer is useful only so long as his identity and activities remain secret,[7] the legislature has provided a statutory[8] privilege of nondisclosure to assure the anonymity of informers.

Informers are classified into two categories, each of which has its own standard for application of the nondisclosure privilege.[9] The first category is composed of those informers whose identity is sought by the defense in order to attack a search or arrest as being without probable cause. The second category is composed of those informers whose identity and testimony might support the accused's defense on the merits—commonly referred to as informers who are material witnesses on the issue of guilt. *Garcia* is principally concerned with the standards for nondisclosure of informers on the issue of guilt, but it will be seen that the decision also has an effect upon probable cause informers.[10]

The "informer's privilege" clashes with the defendant's right to a fair trial with all material witnesses.[11] The courts have therefore

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4. Often the person who becomes a paid informer is in need of funds because he himself is a drug addict. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1094 (1951).

5. J. SKOLNICK, *supra* note 2, at 124-127.

6. "The hazardous position of the informer is dramatically called to our attention in [citing case] . . . where it was held that inadequate protection had been furnished to an informer who was set upon and murdered . . . . It is apparent that the need to protect the informer's name, and his life as well, is a factor to be given considerable weight in the balance determining whether the state must reveal the source of its information." People v. Durazo, 52 Cal. 2d 354, 358-59, 340 P.2d 594, 597 (1959) (dissenting opinion of Shenk, J.). In McCray v. Illinois, 386 U.S. 300, 303 n.4 (1967) the prosecutor argued: ". . . I see no reason why the officer should be forced to disclose the name of the informant, to cause harm or jeopardy to an individual who has cooperated with the police. The City of Chicago have [sic] a tremendous problem with narcotics. If the police are not able to withhold the name of the informant they will not be able to get informants. They are not willing to risk their lives if their names become known."

7. Roviaro v. United States, 353 U.S. 53, 67 (1957) (dissenting opinion of Clark, J.); People v. McShann, 50 Cal. 2d 802, 806, 330 P.2d 33, 35 (1958); People v. Lawrence, 149 Cal. App. 2d 435, 450, 308 P.2d 821, 830 (1957); *The Narcotic Problem*, 1 U.C.L.A.L. REV. 405, 512 (W. Prosser, ed. 1954).

8. CAL. CIV. PRO. CODE § 1881(5) (West 1955), under which Garcia was tried, provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." This section has subsequently been supplanted by CAL. EVID. CODE § 1041 (West 1966) which permits nondisclosure of the informer's identity when ". . . there is a necessity for preserving the confidentiality of his identity that outweighs the necessity of disclosure in the interest of justice . . . ."

9. McCray v. Illinois, 386 U.S. 300, 305-11 (1967), discusses these categories.

10. See text accompanying notes 35-47 *infra*.

11. "[S]ince the Government which prosecutes an accused also has the duty to see what justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." United States v. Reynolds, 345 U.S. 1, 12 (1953).

developed exceptions to the statute, utilizing the statutory language which makes the privilege applicable "when the public interest would suffer by the disclosure," to read into the law the due process[12] principle that a fair trial is more important to the "public interest" than the protection of informers. The common expression of this principle is as follows: "When it appears from the evidence . . . that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial."[13] If the court decides, therefore, that the confidential informer is a material witness on the issue of guilt, and not one who "simply points the finger of suspicion"[14] toward the defendant, the prosecution must reveal his identity or suffer dismissal of the case.[15]

Rather that rely on the rather vague "material witness on the issue of guilt" language to find exceptions to the privilege, California courts have employed mechanical categories to delineate those informers whose identities could be discovered by the defense: First, an informer whom the police claim participated in the crime,[16] or whom the defendant convincingly claims was a participant;[17] second, an informer who was an eyewitness to the crime;[18] and third, an informer whose information was used by the prosecution as evidence against the defendant, even though he was neither a participant nor an eyewitness.[19]

12. *See, e.g.*, People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

13. People v. McShann, 50 Cal. 2d 802, 808, 330 P.2d 33, 36 (1958), citing Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

14. People v. Lawrence, 149 Cal. App. 2d 435, 450, 308 P.2d 821, 830 (1957); *see* People v. Hicks, 165 Cal. App. 2d 548, 552, 331 P.2d 1003, 1005 (1958).

15. Roviaro v. United States, 353 U.S. 53, 61 (1957); People v. McShann, 50 Cal. 2d 802, 809, 330 P.2d 33, 37 (1958).

16. *E.g.*, People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957); People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957).

17. *E.g.*, People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965); People v. Montano, 244 Cal. App. 2d 555, 53 Cal. Rptr. 145 (1966).

18. *E.g.*, People v. Montano, 244 Cal. App. 2d 555, 53 Cal. Rptr. 145 (1966); People v. Diaz, 174 Cal. App. 2d 799, 803, 345 P.2d 370, 372 (1959). This category also includes cases in which the informer saw the defendant commit a previous crime at which time the police allegedly established the defendant's identity and the defendant claims mistaken identity as his defense to the later charge. People v. Durazo, 52 Cal. 2d 354, 340 P.2d 594 (1959); People v. Williams, 51 Cal. 2d 355, 333 P.2d 19 (1958).

19. "The prosecution made him such a witness by introducing evidence of his telephone call to make a purchase of heroin and by playing a recording of the telephone conversation before the jury." People v. McShann, 50 Cal. 2d 802, 809, 330 P.2d 33, 37 (1958) (Count II). On this same principle People v. McMurray, 171 Cal. App. 2d 178, 183-84, 340 P.2d 335, 338-39 (1959), denied defendant discovery of his informer's identity on facts very similar to *McShann*, *supra*, distinguishing it on grounds that in *McMurray* the prosecution did not rely on the informer's telephone call as evidence. Instead, the police testified as to the call on cross examination.

*People v. Garcia*[20] is the first case in which the court gave independent content to the material witness on the issue of guilt requirement[21] rather than limiting its meaning to the mechanical categories. By so doing, it required disclosure of the identities of informers whose relationship to the accused was much more tenuous than that in any previous case in which the "informer's privilege" was defeated.[22]

*Garcia* required discovery of an informer who was not a participant, not an eyewitness to the crime, and not a source of prosecution evidence on the issue of guilt. Instead of trying to place the informer in some categorical relationship to the defendant, or even asking whether the informer was truly an informer as to this defendant,[23] the court looked to the totality of facts surrounding the case—including the information in the police affidavit for the warrant and the warrant itself—to decide whether the defendant demonstrated "a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in the defendant's exoneration."[24]

Applying this principle to the facts, the court noted the consistency of Garcia's defense—that he was only at the scene for a "fix"—with the facts in the affidavit and warrant which implicated only the named suspects in previous sales at the apartment.[25] Despite the facts that, first, there was "no indication in the record that the informers knew or had ever heard of this defendant,"[26] second, the informers had not been to the apartment for several days before the arrest, and third, it was questionable whether they had ever been inside the apartment,[27] the court held that if the informers testified

20. 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967).

21. See text accompanying notes 11-15 *supra*.

22. *Compare* the facts of *People v. Garcia with* the facts of the cases cited in notes 16-19 *supra*.

23. The dissenters felt that the fact that the informers "did not even reach a 'mere informer' status as to this case" and "were insulated a full second step" from Garcia's alleged crime was of major significance. 67 Cal. 2d 830, 844, 434 P.2d 366, 375, 64 Cal. Rptr. 110, 119.

24. *Id.* at 840, 434 P.2d at 372, 64 Cal. Rptr. at 116. It had already been established that defendant need not prove that the informer will give testimony favorable to his defense, People v. Perez, 62 Cal. 2d 769, 773-74, 401 P.2d 934, 936, 44 Cal. Rptr. 326, 328 (1965); it is sufficient to show that the informer might aid the defense. People v. Montano, 244 Cal. App. 2d 555, 564, 53 Cal. Rptr. 145, 150 (1966); People v. Castiel, 153 Cal. App. 2d 653, 659, 315 P.2d 79, 82 (1957).

25. 67 Cal. 2d at 839, 434 P.2d at 372, 64 Cal. Rptr. at 116.

26. *Id.* at 844, 434 P.2d at 375, 64 Cal. Rptr. at 119 (dissenting opinion of Mosk, J.).

27. The arresting officer thought that the informants had told him that they had never been inside the apartment, but was not sure. *Id.* at 839 n.9, 434 P.2d at 372 n.9, 64 Cal. Rptr. at 116 n.9.

that the three suspects named in the warrant were the only residents of the apartment, and that they kept narcotics in the place where they were in fact found, such evidence would directly support the accused's contention that he was merely a visitor at the apartment.[28]

Although Garcia was tried before Evidence Code section 1041 replaced Code of Civil Procedure section 1881(5),[29] the supreme court held that the new section's "weighing" of the competing policies[30] cannot constitutionally defeat disclosure of the informer's identity once a defendant shows that the informer is a material witness on the issue of guilt: "In such cases, it is clear that the 'balance' is struck in favor of the defendant . . . . Any other conclusion would be at variance with due process provisions of the state and federal Constitutions."[31] The court refused to regard section 1041 as "a fundamental legislative disagreement with the decisions of this court."[32] Thus, both sections—as construed by *Garcia*—require the trial courts to construe the facts in the defendant's favor, and compel disclosure whenever there is a "reasonable possibility" that the informer could provide exculpatory evidence—regardless of the state's interest in preserving confidentiality.[33]

*Garcia's* rule on disclosure of witnesses on the issue of guilt can be understood only in relation to the "informer's privilege" on the probable cause issue. In 1958 the California supreme court held in *Priestly v. Superior Court*[34] that disclosure of the informer's identity was necessary to a fair determination of the issue of probable cause. The legislature subsequently abrogated—in narcotics cases—this right of the defendant to challenge effectively the truth of the officer's testimony[35] and the reasonableness of his reliance on the informer by

28. See note 8 *supra*.

29. 67 Cal. 2d at 839, 434 P.2d at 372, 64 Cal. Rptr. at 116. However, the dissenters felt that even if the informants could testify as to all of these factors it would be "of no probative value whatever on the issue of possession at another time, by another person, of other narcotics." *Id.* at 844-45, 434 P.2d at 375, 64 Cal. Rptr. at 119.

30. CAL. EVID. CODE § 1041 (West 1966) permits nondisclosure of the informers identity when ". . . there is a necessity for preserving the confidentiality of his identity that *outweighs* the necessity for disclosure in the interest of justice . . . ." (Emphasis added).

31. 67 Cal. 2d at 842, 434 P.2d at 374, 64 Cal. Rptr. at 118.

32. *Id.*

33. *Cf.* People v. Montano, 244 Cal. App. 2d 555, 564, 53 Cal. Rptr. 145, 150 (1966) where the court phrased the relevant inquiry as follows: "[W]hat attorney, entrusted with [this] defense, would not want to know very badly what [the informers] knew about the crime?"

34. 50 Cal. 2d 812, 330 P.2d 39 (1958).

35. Police abuse of the "informer's privilege" is not unknown. *E.g.*, United States v. Pearce, 275 F.2d 318 (7th Cir. 1960), where F.B.I. agents misrepresented the source of their information, the information obtained, and the reliability of the informer. Such practices are apparently what Justices Douglas, Brennan, Fortas, and Chief Justice Warren had in mind when they sardonically referred to the typical secret police informer as "Old Reliable." McCray v. Illinois, 386 U.S. 300, 316 (1967).

enacting the forerunner of Evidence Code section 1042(c), which permitted the police to establish probable cause for a non-warrant search based solely on information allegedly received from an informer without disclosing the identity of that informer.[36] The supreme court acquiesced[37] in this legislative overruling of *Priestly*, under compulsion of the United States Supreme Court decision in *McCray v. Illinois*,[38] which discussed and approved section 1042(c).[39]

*People v. Garcia* employs the rubric of "material witness on the issue of guilt" to restore much of what section 1042(c) and *McCray*[40] took away from defendants in the probable cause area. Whether an informer is a witness on the issue of guilt, or merely a probable cause witness is only a function of how much he knows about the crime.[41] In greatly expanding the concept of "material witness on the issue of guilt" the court necessarily incorporated therein a large category of informers who previously were regarded as persons who merely "pointed the finger of suspicion"[42] toward the defendant, and who therefore were only probable cause informers and not discoverable.[43]

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36. For a discussion of Evidence Code § 1042 see Comment, *Disclosure of Informers' Identities*, 17 HASTINGS L.J. 99 (1965). People v. Kenner, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961) had limited the *Priestly* rule to searches made without a warrant, declining to compel disclosure of an informer whose alleged information led to the issuance of a warrant valid on its face; *Keener* is now codified in CAL. EVID. CODE § 1042(b) (West 1966). Thus, the supreme court combined its "informer's privilege" analysis with the policy of encouraging the use of warrants—its motivation being that there had been little abuse of the search warrant procedure by the police and, perhaps, an implicit fear of hindsight judgment influencing judicial approval of a successful search after the fact. *Cf.*, Beck v. Ohio, 379 U.S. 89, 96 (1964): "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes the far less reliable procedure of an after-the-event justification for the arrest and search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

37. Martin v. Superior Court, 66 Cal. 2d 257, 424 P.2d 935, 57 Cal. Rptr. 351 (1967).

38. 386 U.S. 300 (1967).

39. *Id.* at 305-06.

40. *McCray* and *Evid. Code* § 1042(c) (West 1966) offer the police an opportunity to evade the exclusionary rule: Officer No. 1 breaks into defendant's home without probable cause and finds incriminating evidence; he tells Officer No. 2 of his find; Officer No. 2 can honestly tell the court that a reliable informer who had visited the defendant's home told him of the incriminating evidence. Under *McCray* the defendant has no way of discovering who the informer is or how he found out about the evidence; all he can discover is what the informer told the police.

41. Whether an informer is a witness on the issue of guilt or a probable cause witness is also a function of how the defendant characterizes him. Thus, Garcia would have failed to get disclosure had he sought disclosure to challenge the warrant as being without probable cause because People v. Kenner, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961) and CAL. EVID. CODE § 1042(b) (West 1966) insulated probable cause informers from the *Priestly* rule in cases where a warrant was obtained by the police. See note 36 *supra*.

42. See note 14 *supra*.

43. *E.g.*, People v. Sanders, 250 Cal. App. 2d 123, 58 Cal. Rptr. 259 (1967), where the court sustained the informer's privilege on the probable cause issue because of section 1042(c)

*Garcia* will thus make it difficult for the police to use an informer's information to establish probable cause without also giving the defendant the opportunity to construct a defense about which the informer has displayed relevant knowledge.[44] Once this is accomplished and the privilege has been overcome on the issue of guilt, the informer is open to questions on the probable cause issue which might be the real issue for which the defense counsel wanted discovery of his identity.[45]

*Garcia* goes beyond restoring the practical effects of *Priestly*;[46] whereas *Priestly* provided the police with an incentive to uncover evidence to establish probable cause independently of the informer's evidence and thereby avoid disclosure, *Garcia* encourages the police to hide the informer's very existence. This is so because the rationale of *Garcia*—the defendant's right to discover material witnesses—may compel disclosure even if there is independent evidence upon which to base probable cause. In practical effect, therefore, *Garcia* may result in deception of the courts[47] when the police are faced with the choice between a false denial of the existence of an informer and the risk of either disclosure of the informer's identity or of dismissal of the case for nondisclosure.

In *People v. Garcia* the California supreme court, never a great defender of the informer's privilege, has regained much of the ground that it lost when the legislature overruled *Priestly*; and by doing so on due process grounds, it has insulated its ruling from legislative attack.

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and *McCray*, and sustained the informer's privilege on the issue of guilt because under pre-*Garcia* law an informer who was not alleged to have been present at the time of the crime and who had no communication or relationship with the defendant could not be considered a material witness. Under *Garcia*, however, these facts no longer are deemed dispositive of the issue; the fact that the informer in *Sanders* knew where the drugs were hidden and gave a sketchy description of defendants indicated that he might be able to give exculpatory evidence.

44. *See* People v. Montano, 244 Cal. App. 2d 555, 561, 564, 53 Cal. Rptr. 145, 149, 150-51 (1966), where the court assumed that the defendant was inventing a story to fit the known facts so as to justify disclosure, but still ordered disclosure.

45. An even more likely reason for the defense to seek disclosure is that the court's finding that the informer must be disclosed puts the prosecution in the uncomfortable position of either uncovering what may be a very valuable continuing source of information or of suffering a dismissal of the instant case. Discussed *supra* at note 15.

46. "Actually [Priestly's] effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communication from the informer to establish reasonable cause." Priestly v. Superior Court, 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).

Another implication of this interpretation of *Garcia* is to obtain disclosure of informers whose information led to the issuance of a warrant valid on its face. Such informers were previously protected by People v. Keener, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961) and EVID. CODE § 1042(b) (West 1966), both of which are discussed in note 36 *supra*.

47. J. SKOLNICK, *supra* note 2, at 133, claims that the police customarily omit all reference to informers when building an investigatory record and filling out arrest reports.

*D. Seizures*

*Flack v. Municipal Court.*[1] The court granted both a motion to suppress as evidence a motion picture seized at the time of an arrest for violation of California's criminal obscenity statute,[2] and also a writ of mandate ordering the return of the film. The decision is part of a trend toward requiring greater procedural safeguards in regard to the seizure of matter claimed to be obscene than for the seizure of other forms of alleged contraband in order to prevent first amendment violations by overzealous law enforcement officers.[3] In addition, the nature of the evidence seized indicates that insofar as first amendment rights are concerned, the supreme court is unwilling to treat motion pictures differently from other forms of expression.

Flack owned a movie theater, and each night for two weeks prior to his arrest he had exhibited the motion picture "Sexus." After viewing the picture, two police officers arrested Flack and an employee and seized the film. Neither search nor arrest warrants had been previously secured. Charged with violating the California Penal Code section which prohibits exhibiting obscene matter,[4] the petitioners moved that the evidence be suppressed and that the authorities be directed to return the film. The supreme court, reversing the trial court, granted both motions.

The court first disposed of the state's contention that mandate would not lie to compel the return of illegally seized property since a trial on the merits would provide the petitioners an adequate remedy for the recovery of their motion picture. Penal Code section 1540[5] provides that non-contraband property seized under an invalid warrant, or pursuant to an otherwise valid warrant which does not adequately describe the property in question, must be returned to the person from whom it was taken. Mandate is available to enforce this provision,[6] and the court held it to be equally available for recovery of non-contraband property illegally seized without a warrant.[7]

The second and more important issue was whether the film's seizure violated the first amendment. The appeal focused on the trial

1. 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967).

2. CAL. PEN. CODE § 311.2 (West Supp. 1967).

3. Examples of contraband—property, the possession of which is illegal—are burglar tools, obscene materials, or narcotics. 66 Cal. 2d at 989-90, 429 P.2d at 197-98, 59 Cal. Rptr. at 878.

4. CAL. PEN. CODE § 311.2 (West Supp. 1967).

5. CAL. PEN. CODE § 1540 (West 1955). Subsequent to this case the legislature enacted Penal Code § 1538.5 which prescribes the procedures concerning motions to return property or suppress evidence. *Id.* § 1538.5 (West Supp. 1967).

6. People v. Gershenhorn, 225 Cal. App. 2d 122, 126, 37 Cal. Rptr. 176, 178 (1964).

7. 66 Cal. 2d at 985, 429 P.2d at 194, 59 Cal. Rptr. at 874.

court's denial of the plaintiff's petition for a writ of mandate, and the supreme court was not called upon to rule whether the film was obscene.[8] Generally, a police officer can seize evidence incident to a lawful arrest. The court held, however, that the normal rules dealing with such seizures are not applicable to seizures of allegedly obscene material, because until a judicial determination of obscenity is made, such material occupies the same preferred position as does speech generally.[9] Therefore, a police officer's determination of obscenity immediately prior to an arrest and seizure of evidence is simply not a sufficient safeguard of first amendment rights:

> [O]nly the requirement that a search warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially and not ad hoc by police officers in the field.[10]

Although the courts have recognized that motion pictures come within the first and fourteenth amendments' free speech and free press guarantees,[11] many judicial statements have indicated that the protection afforded motion pictures is less than that provided other types of communications.[12] In *Flack*, however, the court declined to accept this view, arguing that for cinematic, as well as for other forms of expression, "limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."[13] In thus refusing to follow the United States Supreme Court's lead in sanctioning control of films through state or local licensing procedures,[14] the court demonstrated an apparent unwillingness to distinguish among the various forms of expression.

This reading of the case is strengthened by the fact that the court applied recent United States Supreme Court rulings concerning the procedural requirements for dealing with allegedly obscene materials other than motion pictures. In *Marcus v. Search Warrant*[15] the Supreme Court struck down a Missouri procedure for seizing allegedly obscene publications, primarily because the warrants for the publications' seizure were issued merely on the opinion of a police

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8. *Id.* at 983, 429 P.2d at 193, 59 Cal. Rptr. at 873.
9. *Id.* at 989, 429 P.2d at 197, 59 Cal. Rptr. at 877.
10. *Id.* at 992, 429 P.2d at 199, 59 Cal. Rptr. at 879.
11. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
12. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 60-61 (1965); Times Film Corp. v. Chicago, 365 U.S. 43, 49-50 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).
13. 66 Cal. 2d at 989 n.7, 429 P.2d at 197 n.7, 59 Cal. Rptr. at 877 n.7.
14. *See* Freedman v. Maryland, 380 U.S. 51 (1965); Times Film Corp. v. Chicago, 365 U.S. 43 (1961).
15. 367 U.S. 717 (1961).

officer. The Court said that in adopting procedures to deal with obscenity a state must consider the possible consequences on constitutionally protected speech.[16] Subsequently, a similar Kansas procedure was ruled unconstitutional even though the Attorney General had exceeded the statutory requirements by identifying 59 titles and including copies of seven of the books to be seized.[17] After a 45 minute ex parte hearing the magistrate had issued a warrant covering all books with the notation, "This is an original Night Stand Book." The Supreme Court ruled that, because the owner had not been offered an opportunity for a hearing before the warrant issued, the procedure was constitutionally deficient.[18] These cases both dealt with civil rather than criminal proceedings, and both dealt with publications rather than motion pictures; nevertheless, the California supreme court applied them to the present case and ruled that, with one exception, a seizure of allegedly obscene materials—including motion pictures—requires a search warrant granted on the basis of a judicial hearing on the obscenity question.[19]

The sole exception to this requirement is the situation in which there is a "legitimate emergency,"[20] as where there is a high probability that the evidence might be lost, destroyed, or spirited away—for example, the one-night showing of stag movies.[21] Where, as in *Flack*, the movies are being publicly shown at a theater, and there is ample opportunity for seeking a warrant, it must be obtained.

The court did not discuss either the procedures for obtaining, or the content of the warrant.[22] The primary procedural requirement, however, would seem to be an adversary hearing on the obscenity question prior to the issuance of the warrant.[23] If the California court continues to treat motion pictures like other forms of protected expression, it will not permit the establishment of a censor board to license motion pictures prior to their exhibition.[24] Instead, it will probably require procedures similar to those upheld by the United States Supreme Court in *Kingsley Books, Incorporated v. Brown*,[25] whereby the chief executive or legal officer of a municipality could seek an injunction to stop the sale of obscene matter. Although in

16. *Id.* at 731.
17. A Quantity of Books v. Kansas, 378 U.S. 204 (1964).
18. *Id.* at 210.
19. 66 Cal. 2d at 991-92, 429 P.2d at 198-99, 59 Cal. Rptr. at 878-79.
20. *Id.* at 991, 429 P.2d at 198, 59 Cal. Rptr. at 878.
21. *Id.* at 991 n.10, 429 P.2d at 198 n.10, 59 Cal. Rptr. at 878 n.10.
22. *Id.* at 993 n.13, 429 P.2d at 200 n.13, 59 Cal. Rptr. at 880 n.13.
23. See text accompanying note 19 *supra*.
24. *See* 66 Cal. 2d at 989 n.7, 429 P.2d at 197 n.7, 59 Cal. Rptr. at 877 n.7.
25. 354 U.S. 436 (1956).

that situation the court could grant an injunction pendente lite after a show cause hearing, once the issue was joined the trial had to begin within one day, and a decision was required within two days after completion of the trial.[26]

The key factor in any procedure likely to satisfy the California supreme court is an adequate judicial hearing on the obscenity question prior to issuance of the warrant. Although it may be administratively difficult for a magistrate to view an allegedly obscene motion picture and hold an adversary proceeding on its obscenity prior to issuing the warrant, it would appear that unless these requirements are somehow fulfilled, the motion picture cannot be legally seized or its exhibition prevented.

### *E. Lineups*

*People v. Caruso.*[1] The court reviewed police lineup procedures which allegedly violated the accused's right to due process. Caruso was convicted of robbery solely on the basis of identifications made at a police lineup and subsequently confirmed in court.[2] He appeared at the lineup without counsel, and none of the other participants even faintly resembled him.[3] Under these conditions, the two victims identified Caruso as the getaway car driver whom they had seen for five or six seconds while his masked accomplice robbed them.

The supreme court reversed the conviction holding that lineups conducted with participants who do not resemble the defendant are unconstitutional, being so unfairly suggestive as to violate his fourteenth amendment due process rights.[4] The court also held that evidence obtained through an illegal lineup must be excluded at trial, thus overruling its prior position that such evidence was admissible, the alleged unfairness going merely to the weight which should be accorded it.[5]

*Caruso* must be examined against the background of increasing United States Supreme Court attention to the constitutional aspects of the lineup problem. In *Escobedo v. Illinois*[6] the Supreme Court

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26. *Id.* at 438 n.1.

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1. 68 A.C. 181, 436 P.2d 336, 65 Cal. Rptr. 336 (1968).
2. *Id.* at 189, 436 P.2d at 341, 65 Cal. Rptr. at 341.
3. Caruso, a tall, heavy, very dark Italian with dark wavy hair, resembled the description of the driver given by the victims. None of the other four or five lineup participants were of his size, complexion, or had wavy hair. *Id.* at 185-86, 436 P.2d at 339, 65 Cal. Rptr. at 339.
4. *Id.* at 186, 436 P.2d at 339-40, 65 Cal. Rptr. at 339-40.
5. *Id.* at 188 n.3, 436 P.2d at 341 n.3, 65 Cal. Rptr. at 341 n.3.
6. 378 U.S. 478, 491 (1964).

held that the sixth and fourteenth amendments required counsel's presence to aid the accused at any "critical"[7] postarrest stage in the proceedings.

In the "lineup trilogy"—*United States v. Wade,*[8] *Gilbert v. California,*[9] and *Stovall v. Denno*[10]—the Supreme Court dealt specifically with the lineup problem for the first time. *Wade* held the lineup to be a "critical" stage,[11] requiring the presence of counsel, and *Gilbert* elaborated *Wade*'s application. But *Stovall* held that the expanded right to counsel applied only prospectively—to cases in which the lineup occurred after the *Wade* decision.[12] Since Caruso's lineup was pre-*Wade,*[13] the expanded right to counsel aspects of *Wade* and *Gilbert* are irrelevant to his case. The two decisions are important to *Caruso*, however, for the three-stage exclusionary rule[14] which they developed: First, it is error to admit in-court identification without first ascertaining that it is not tainted by an illegal lineup;[15] second, testimony derived from an illegal lineup on direct examination is prejudicial error;[16] and third, where there has been an illegal lineup,

7. *Escobedo* is an important link in a chain of cases including Hamilton v. Alabama, 368 U.S. 52 (1961), White v. Maryland, 373 U.S. 59 (1963), and culminating in Miranda v. Arizona, 384 U.S. 436 (1966), which define a "critical" stage as any point in the proceedings after arrest or significant deprivation of freedom when legal advice would help preserve valuable constitutional rights of the accused. *See* Comment, *The Right to Counsel During Police Identification Procedures*, 45 TEX. L. REV. 504, 511 (1967).

8. 388 U.S. 218 (1967).

9. 388 U.S. 263 (1967).

10. 388 U.S. 293 (1967).

11. 388 U.S. at 228-40.

12. 388 U.S. at 300-01. *See* Note, *Criminal Law—Right to Counsel at Pre-Trial Identification—Prospective Application*, 19 W. RES. L. REV. 410 (1968), for an analysis of the Supreme Court's "functional approach" to retroactivity.

13. Of course the California supreme court was free to go beyond the United States Supreme Court and give *Wade* a retroactive application. In fact, People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 293 (1967), in which the court had given a more retroactive application to *Escobedo* than had the United States Supreme Court, suggested that it might again go beyond the constitutional minima set down in *Stovall*. *See* People v. Feggans, 67 Cal. 2d 444,449, 432 P.2d 21, 24, 62 Cal. Rptr. 419, 422 (1967) (dissenting opinion of Peters, J.).

In People v. Feggans, *supra*, the California court gave *Wade* a strictly prospective application, denying pre-*Wade* defendants such as Caruso the expanded benefit of counsel, "for the same reasons" given by the *Stovall* court. 67 A.C. at 451, 432 P.2d at 24, 62 Cal. Rptr. at 422.

14. The great majority of courts have held, in the absence of flagrant abuse, that impropriety at lineup, being a matter of reliability of the evidence, goes only to the weight of the evidence and not its admissibility. *See* Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65, 67 (1967) [hereinafter cited as *Right to Counsel*]; Note, *Lawyers and Lineups*, 77 YALE L.J. 390, 391 (1967).

15. Gilbert v. California, 388 U.S. 263, 272 (1967).

16. *Id.* The only time the defendant would not get a new trial when the witness testified to an illegal lineup on direct examination is when the state court finds that the admission was harmless error. *See* Chapman v. California, 386 U.S. 18 (1967).

any in-court identification whatsoever is inadmissible unless the prosecution first establishes "by clear and convincing proof"[17] a basis for the identification independent of the lineup.

*Stovall* applies this exclusionary rule to any post-*Wade* case where counsel is not present at the lineup. In addition, *Stovall* held that the exclusionary rule also applies to pre-*Wade* cases like *Caruso* where the defendant can show an "unfairness" at the lineup which infringes his right to due process; an "unfairness" which was "unnecessarily suggestive and conducive to irreparable mistaken identification."[18]

The *Caruso* holding that lineups with dissimilar participants are "unfair" is significant in the emphasis it gives to unreliability as the standard for unfairness in lineup procedure. It strikes at a common cause of unreliable lineup identifications, since the most difficult police problem in staging a reliable lineup is that of obtaining people of similar physical appearance.[19] More importantly, however, *Caruso* indicates that other lineup procedures which tend to be unreliable may be held "unfair," with the resulting exclusion of the testimony derived therefrom.

*Caruso*'s interpretation of the *Wade-Gilbert* exclusionary rule[20] also merits examination by California practitioners. No identification is admissible unless it has a source independent of an illegal lineup. The "independent source" test is a compromise between either excluding all identification testimony of witnesses participating in illegal lineups[21] or, on the other hand, allowing any in-court identification so long as the witness refrains from any reference to the

17. United States v. Wade, 388 U.S. 218, 240-41 (1967). Procedurally, this means that where there is a conviction based on an in-court identification where the prosecution made no reference to the illegal lineup at the trial, the conviction is vacated pending evidentiary hearings. If the hearings find the admission to be harmless error under Chapman v. California, 386 U.S. 18 (1967), the conviction stands. If the hearings establish beyond a reasonable doubt an independent source for the in-court identification, the conviction stands. If, however, the prosecution fails to meet the almost impossible demands of the "independent source" test, defendant wins a new trial at which all tainted identifications are excluded.

18. 388 U.S. at 302.

19. *Right to Counsel*, *supra* note 14, at 80.

20. See text accompanying notes 14-17, *supra*. In *Caruso* the two victims testified to the lineup on direct examination. Record, vol. 1, at 49, vol. 2, at 220. In compliance with the rule in Gilbert v. California, 388 U.S. 263 (1967), therefore, there could be no mere vacation of the conviction pending a hearing to see if the identifications had an independent source. Reversal was required. The State could use the in-court identifications at a subsequent trial only by showing an "independent source."

21. This alternative would be too harsh where the lineup was truly incidental to the witness identification.

illegal lineup itself.[22] *Caruso*, while accepting the "independent source" compromise, implies that in most cases the "independent source" requirement will be so stringently interpreted as to exclude all identification by witnesses participating in illegal lineups.[23]

The crucial remaining question is whether the court will apply the standard of "unfairness which infringes due process" suggested in *Stovall* and made concrete for California in *Caruso*, to post-*Wade* cases where counsel is present, as well as to pre-*Wade* cases. Two alternatives faced the United States Supreme Court upon entering the field of lineup regulation. It could have simply laid down detailed rules for the conduct of lineups similar to those established for interrogations in *Miranda v. Arizona*.[24] Alternatively, it could have adopted the more tentative approach of focusing attention on the lineup problem by expanding the right to counsel. The Court adopted the latter option in *Wade*;[25] yet it left the role of the lawyer at the lineup ambiguous,[26] inviting one of two interpretations. On the one hand, the Court may regard the mere presence of counsel at lineup, and his subsequent ability at trial to attack the reliability of the lineup evidence, as a sufficient protection of the accused's rights. In that case the separate "unfairness" standard and its exclusionary rule suggested in *Stovall* and illustrated by *Caruso* would not apply to post-*Wade* cases where counsel was present at the lineup.

On the other hand, the Court may regard the expanded right to counsel as a vehicle by which to gain experience with lineup issues and focus attention on the sort of unreliability at the lineup which infringes the accused's constitutional rights. By the latter interpretation, the Court would indirectly be establishing explicit standards for lineups, inviting state courts, legislatures, and police to

22. This is the solution offered by Justice Black in United States v. Wade, 388 U.S. at 247-48. It allows so little penalty for illegal lineup procedure as to bring virtually no force to bear on unreliable identification procedures.

23. 68 A.C. at 188-89, 436 P.2d at 341, 65 Cal. Rptr. at 341. The court emphasizes that the "clear and convincing evidence" with which the prosecution must prove an independent source for in-court identifications must be strong enough to leave no substantial doubt so that every reasonable mind must give unhesitating assent. The court suggests that this is a burden almost impossible for the prosecution to overcome.

24. 384 U.S. 436 (1966).

25. Black's dissent in *Wade* would suggest that the Court balked at the rigidity of detailed rules cast as constitutional requirements. *See* 388 U.S. at 245-50; Note, *Lawyers and Lineups*, 77 YALE L.J. 390, 398-99.

Another suggestion is that the court preferred a more tentative approach because it lacked experience with linup issues. *See Right to Counsel*, *supra* note 14, at 67.

26. *See* Note, *Lawyers and Lineups*, 77 YALE L.J. 390, 396 (1967).

participate in the process. The ultimate test of local suggestions would remain the Court's sense of fundamental fairness.[27]

On balance, it seems likely that the Supreme Court will apply fourteenth amendment standards to post-*Wade* cases. Even with counsel present, lineup procedure can be "unnecessarily suggestive and conducive to irreparable mistaken identification."[28] Such procedure violates the accused's constitutional rights no less when he is represented by counsel. The right to counsel at the lineup would be a hollow right if it robbed the accused of the protection of standards of constitutional unreliability otherwise available.

Nevertheless, the ambiguity present in *Wade* gives the California court at least temporary maneuvering room in deciding whether it will apply the liberal fourteenth amendment standard represented by *Caruso* to post-*Wade* cases. The considerations given above seem to indicate that the court will use the *Caruso* standard even where counsel is present at lineup.

### *F. Change of Venue*

*Maine v. Superior Court.*[1] The court held that mandate lies to review a denial of a motion to change venue, and prescribed liberalized standards to guide trial and appellate courts in assessing the merits of such motions.

Maine and a codefendant, strangers to the area, were charged with kidnaping, murder, and rape in a small Mendocino County community. Sympathy for the victims—a popular teenage couple—resulted in a successful fundraising campaign, aided by the local newspaper, to help defer the medical expenses of the paralyzed survivor. Although the police refused to divulge details of the crime, the community press published news of a confession, released by an official of the State of Washington, where the defendants were also wanted for murder. The trial judge denied without prejudice defendants' venue change motions, which were based on allegations of prejudicial pretrial publicity.[2] Maine then applied for a writ of

27. *See* Comment, *The Right to Counsel During Police Identification Procedures*, 45 TEX. L. REV. 504, 519 (1967). *But see* Black's dissent in *Wade* cautioning against replacing clear constitutional standards with the Court's sense of "fairness." 388 U.S. at 245-46.

28. Stovall v. Denno, 388 U.S. 293, 302 (1967).

1. 68 A.C. 386, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

2. The motion had been made under CAL. PEN. CODE § 1033 (West 1956), which provides: "A criminal action pending in a superior court may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county. . . ."

mandate to review the trial court's order and to direct a venue change.

The supreme court rejected the state's argument that appeal—which required the defendant to await final judgment[3] before challenging the denial of his motion for venue change[4]—was adequate, and mandate therefore unnecessary. The court noted that trial judges commonly reserve ruling on the merits of a venue motion until after voir dire;[5] and that, if a jury meeting the prevailing lax[6] standards of acceptability is impaneled, some courts are reluctant to grant a venue change, and thereby admit that the effort has been wasted. Furthermore, the supreme court recognized a defense attorney's dilemma when limited to the appeal procedure for challenging the denial of a venue change motion: Unless he is prepared to show on appeal that the denial resulted in specific prejudice, rather than the mere possibility of prejudice, he must exhaust his peremptory challenges in order to have any hope of successfully attacking the denial.[7] Yet exhaustion of his peremptories might leave him with a worse panel than otherwise, and still fail to sustain his challenge of the denial. *Maine* cited evidence[8] that appellate courts are even more reluctant to order the entire case retried than are trial courts to writeoff the voir dire; appellate courts reverse because of an erroneously denied venue motion only where they are prepared to find that the trial judge abused his discretion.[9] The court concluded that mandate should be available to test a denial of a pretrial venue motion.[10] This holding introduces a new procedural weapon into the

3. Pretrial orders—exeept where the defendant is committed before final judgment for sexual psychopathy, insanity or narcotics addiction—are not appealable until after final judgment. *See* CAL. PEN. CODE § 1237 (West Supp. 1967).

4. *See* People v. Suesser, 132 Cal. 631, 64 P. 1095 (1901); People v. Yoakum, 53 Cal. 566 (1879); People v. Lee, 5 Cal. 353 (1855).

5. *E.g.*, People v. Kromphold, 172 Cal. 512, 157 P. 599 (1916).

6. See text accompanying notes 14-16 *infra*.

7. People v. Modesto, 66 Cal. 2d 695, 705, 427 P.2d 788, 794-95, 59 Cal. Rptr. 124, 130-31 (1967).

8. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 127 (1966) [hereinafter cited as REARDON REPORT]. Of 66 cases in California's history which have involved a venue issue on appeal, only four were reversed. Maine v. Superior Court, 68 A.C. at 393 n.6, 438 P.2d at 377 n.6, 66 Cal. Rptr. at 729 n.6.

9. People v. Duncan, 53 Cal. 2d 803, 812, 351 P.2d 103, 108, 3 Cal. Rptr. 351, 356 (1960); People v. Hall, 220 Cal. 166, 170, 30 P.2d 23, 25 (1934). As recently as People v. Modesto, 66 Cal. 2d 695, 705 n.2, 427 P.2d 788, 795 n.2, 59 Cal. Rptr. 124, 131 n.2 (1967), the supreme court held that a trial court's denial of a motion for change of venue would be upheld absent a showing of specific prejudice among the jurors.

10. Mandamus had previously issued to protect other aspects of the defendant's fundamental right to fair trial. Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959) (mandate a proper procedure to require a trial court to give defendant, before trial, an opportunity to inspect and copy statements made by him to law enforcement officers); Funk v.

defense arsenal. If mandate fails or is not sought, the pre-*Maine* procedure remains: The defense may raise the motion for venue change at trial and seek review on direct appeal.[11] Thus, denial of a venue change motion can receive review twice.[12]

*Maine*'s most significant substantive change is its holding forbidding appellate courts merely to review the trial court's discretion, but compelling them to satisfy themselves independently that the standards for impartial jurors have been met.[13]

Minimum standards for juror impartiality are set by interpretation of the Constitution; the question is whether *Maine* goes beyond the federal minima. The constitutional minimum standards have never required *absolute* impartiality. To obtain a reversal, a defendant must show an actual opinion or deep impression in the juror's mind.[14] Even the showing of an opinionated juror is not sufficient, for the real test of a constitutionally unacceptable juror is his inability to set aside an opinion and judge the issues on the evidence alone.[15] *Sheppard v. Maxwell*,[16] the case which inspired *Maine*, signaled a trend[17] toward a standard more liberal than the

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Superior Court, 52 Cal. 2d 423, 340, P.2d 593 (1959) (mandate a proper procedure to have the benefit of discovery of other prosecution evidence); Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959) (mandate appropriate to compel a trial court to permit hypnotic examination of a defendant in order to prepare adequately for trial); Zamloch v. Municipal Court, 106 Cal. App. 2d 260, 235 P.2d 25 (1951) (mandate appropriate to compel dismissal where a defendant has been denied the constitutional right to a speedy trial). In civil cases since 1961 there has been legislative authorization for testing denial of a motion for venue change by application for mandamus. CAL. CIV. PRO. CODE § 400 (West Supp. 1967).

11. 68 A.C. at 392, 438 P.2d at 376, 66 Cal. Rptr. at 728.

12. In civil cases appellate review of a denial of a motion for venue change is available only by mandamus; appeal will not lie from an order denying the change. Hennigan v. Boren, 243 Cal. App. 2d 810, 52 Cal. Rptr. 748 (1966). *Maine* flatly allows double review with no reference to res judicata, apparently subordinating that issue to the imperative need for juror impartiality in criminal actions. See note 11 *supra*.

13. 68 A.C. at 393, 438 P.2d at 376, 66 Cal. Rptr. at 728. The supreme court now finds binding the "duty" imposed by Sheppard v. Maxwell, 384 U.S. 333 (1966), to conduct an "independent evaluation" of the motion for venue change, although in People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967), this "duty" imposed by *Sheppard* was not binding. Perhaps because the "duty" is not constitutionally compelled—although even a constitutionally compelled duty may be applied only prospectively—the court gave it only prospective application. 68 A.C. at 395 n.9, 438 P.2d at 378 n.9, 66 Cal. Rptr. at 730 n.9.

14. Irvin v. Dowd, 366 U.S. 717 (1961); Reynolds v. United States, 98 U.S. 145 (1878).

15. Spies v. Illinois, 123 U.S. 131 (1887). This test rests upon the two dubious assumptions: (1) That beliefs and the ability to set them aside operate at the conscious level; and (2) that the prospective juror willingly will disclose that his beliefs might affect his judgment. Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform*, 38 S. CAL. L. REV. 672, 675 (1965).

16. 384 U.S. 333 (1966).

17. *Sheppard* noted that it was advancing the trend of Estes v. Texas, 381 U.S. 532 (1965) and Rideau v. Louisiana, 373 U.S. 723 (1963). *See* REARDON REPORT, *supra* note 8, at 74.

"actual prejudice" or "inability to set aside" standard, by saying that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."[18] Nevertheless, *Sheppard* explicitly declined to rely on pretrial publicity alone, holding only that the "totality of the circumstances"—pretrial publicity plus the atmosphere at trial—infringed the defendant's right to due process.[19] Therefore, it is impossible to say whether or to what extent *Sheppard* advances beyond the "actual prejudice" standard.

Approving the *Reardon Report*,[20] and relying on pretrial publicity alone, *Maine* clearly rejected the "actual prejudice" test. The court held that a motion to change venue should be granted whenever the dissemination of "potentially prejudicial material" creates the "reasonable likelihood"[21] that a fair trial cannot take place in the jurisdiction. The court, however, adopted no rigid standards[22] as to what constitutes "potentially prejudicial material" or a "reasonable likelihood" that a fair trial is impossible. Since the pretrial publicity issue in *Sheppard* did not arise on a pretrial mandamus application, it is not possible accurately to compare the actual standards the two courts apply to venue change motions. It seems possible to read *Maine*'s standard so narrowly as to allow little more generosity in granting venue changes than under the previous standard, but the court's enthusiastic quotation of the *Reardon Report* suggests a more liberal attitude.

The court denied that *Maine* will hamper the administration of justice.[23] It argued that frivolous applications for mandamus may be summarily denied without much delay, and that any delay which does result will be compensated for by a reduction in the number of reversals on appeal. This argument is not valid if the venue change standards truly have been liberalized. If, for example, incriminating pretrial newspaper accounts are grounds for venue change, few motions are likely to be frivolous. Since California newspapers often publish sensational pretrial accounts of crimes,[24] the number of

18. 384 U.S. at 363.

19. *Id.* at 354.

20. REARDON REPORT, *supra* note 8, at 119 § 3.2(c).

21. The "reasonable likelihood" may be determined by testimony of individuals in the community, qualified public opinion surveys, or the court's own independent evaluation of the circumstances. 68 A.C. at 394, 438 P.2d at 377, 66 Cal. Rptr. at 729.

22. *Id.* at 399, 438 P.2d at 380, 66 Cal. Rptr. at 732.

23. *Id.* at 390, 438 P.2d at 375, 66 Cal. Rptr. at 727.

24. *See* D. GILMOR, FREE PRESS AND FAIR TRIAL 50-54, 60-61 (1966); REARDON REPORT, *supra* note 8, at 25-47.

meritorious applications may increase dramatically. On the other hand, the incidence of reversal for erroneous denial of venue change motions before *Maine* was already very low.[25] If the standards have been liberalized, however, both the risk of such reversals and the number of meritorious motions is increased; greater delay in the final resolution of cases seems inevitable.

Of perhaps more significance in evaluating the impact of *Maine* is the court's statement that the new standard should "minimize the number of cases coming before the appellate courts, in mandamus proceedings and on appeal, where a prominent contention is that a fair and impartial trial could not be had."[26] Thus, the court suggests that in view of the availability of mandamus, the independent evaluation of the appellate court, and the possibly liberalized standard for granting venue motions, trial judges will grant venue changes far more liberally than previously. Only if the supreme court applies a strict standard to venue change motions, rejecting them wholesale, or trial judges can be moved to grant venue change motions liberally, will the appellate machinery remain unclogged. Since *Maine* suggests a liberal, not strict, standard it encourages the latter alternative of increased liberality by trial judges in granting venue changes.

By refining one of the preventive techniques available to assure the defendant a fair trial, the supreme court has struck at a more difficult problem. An increase of venue changes based on charges of inflammatory and incriminating pretrial news media accounts will spotlight the need for reasonable legislative controls on press coverage of criminal trials. *Maine* well illustrates that measures limiting disclosure by local police are insufficient to deal with the problem.[27] At first, *Maine* appears to relieve the tension between free press and fair trial by removing the trial when the press has created prejudice. Yet, as a practical matter, if the administration of justice will be hampered by constant changes of venue, *Maine* may be read as an indirect suggestion that the first amendment give up some ground to insure fair trials in the original forum.

### *G. Insanity Hearing*

*People v. Laudermilk.*[1] The court affirmed a first degree murder

25. See note 8 *supra*.
26. 68 A.C. at 395, 438 P.2d at 378, 66 Cal. Rptr. at 730.
27. The local police did all that any fair trial statute could require of them in terms of withholding details of the crime, yet the local newspaper published incriminating material from an out-of-state source. Only measures going directly to the press could have met the problem.

1. 67 Cal. 2d 272, 431 P.2d 228, 61 Cal. Rptr. 644 (1967), *cert. denied*, 37 U.S.L.W. 3136 (U.S. Oct. 15, 1968).

conviction and held that the defendant's evidence of his incompetence to stand trial was not sufficient to compel the trial court to grant a hearing on this issue under Penal Code section 1368.[2]

The decision elaborates on the recently revised interpretation given section 1368 in *People v. Pennington*.[3] *Pennington* held that an accused must be granted a section 1368 hearing once there is "substantial evidence that he is incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense."[4] This holding followed closely on the heels of the United States Supreme Court's decision in *Pate v. Robinson*,[5] which found a denial of due process in a trial court's failure to order a similar hearing in Illinois after the defendant presented uncontradicted lay testimony depicting a history of irrational behavior.

The problem here is satisfying the requirement[6] that a defendant be both physically and mentally present at his trial while protecting against the risk that he might flout justice by feigning insanity.[7] The California statutory rule[8] that a defendant cannot be tried while he is insane has both common law[9] and constitutional[10] support. Prior to *Pennington*, trial judges were given broad discretion in deciding whether to order a section 1368 hearing.[11] *Pennington*'s "substantial evidence" test greatly limits this discretion, but that opinion is not

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2. "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity." CAL. PEN. CODE § 1368 (West 1956).

3. 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

4. *Id.* at 518, 426 P.2d at 949, 58 Cal. Rptr. at 381. The court also stated that when the trial court commits such an error a new trial must be granted rather than a retrospective determination of the defendant's sanity during his original trial. *Id.* at 521, 426 P.2d at 951, 58 Cal. Rptr. at 383. For a short commentary on *Pennington* see *The Supreme Court of California 1966-1967*, 55 CALIF. L. REV. 1059, 1132-35 (1967).

5. 383 U.S. 375 (1966).

6. People v. Berling, 115 Cal. App. 2d 255, 267-70, 251 P.2d 1017, 1023-25 (1953).

7. *Cf.* People v. Gilberg, 197 Cal. 306, 310, 240 P. 1000, 1002 (1925).

8. CAL. PEN. CODE § 1367 (West 1956) provides: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

9. 4 W. BLACKSTONE, COMMENTARIES 24-25, 395-96 (9th ed. 1783); 1 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (1736).

10. Pate v. Robinson, 383 U.S. 375, 378 (1966).

11. *See* People v. Lindley, 26 Cal. 2d 780, 789, 161 P.2d 227, 232 (1945); People v. Hettick, 126 Cal. 425, 427-28, 58 P. 918, 919 (1899). An excellent example of how unwilling appellate courts were to find an abuse of discretion in this area is People v. Darling, 107 Cal.

helpful in determining the minimum amount of evidence required, since the court found "beyond possibility of dispute that defendant presented substantial evidence of incompetence to stand trial."[12]

Before trial, Laudermilk moved to suspend his prosecution under section 1368. The court had earlier appointed two psychiatrists to examine the defendant. Both concluded that he was legally sane at the time of the commission of the act; one finding him sane at the time of examination, the other making no finding on this question.[13] The only support for the motion was the defense counsel's statement that Laudermilk was incapable of assisting in his own defense, citing his irrational conduct during the preceeding week and one-half. The court denied the motion but appointed a third psychiatrist, Dr. Hoffman, to examine the defendant.

After the prosecution's opening statement the defendant withdrew his not guilty and not guilty by reason of insanity pleas, and pleaded guilty. Prior to sentencing, Dr. Hoffman's report was filed, and while it stated that "the defendant is able to ascertain right from wrong, and would be able to assist in his defense,"[14] it also contained several indications to the contrary. Dr. Hoffman found Laudermilk to have a mental illness of long standing, and diagnosed him as a severe paranoid personality with a depressive reaction. He predicted that if the defendant were not properly restrained he would be a danger to others and would probably commit suicide.[15] Finding the report no obstacle, the judge sentenced Laudermilk to life imprisonment.

On appeal to the supreme court, he contended both that a section 1368 hearing should have been held, and that he did not have the capacity to understand the nature and consequences of his guilty plea. The court preliminarily noted that under these circumstances a defendant is not estopped from appealing his conviction after a guilty plea. It stated that the error alleged by Laudermilk was jurisdictional,

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App. 2d 635, 237 P.2d 691 (1951), where the court approved the trial court's failure to grant a section 1368 hearing although two psychiatrists submitted medical reports stating that the defendant was presently insane and the third stated he could be.

12. 66 Cal. 2d at 519, 426 P.2d at 949, 58 Cal. Rptr. at 381.

13. As the court noted in *Pennington*, the test of sanity under section 1368 is different than M'Naughton: " 'A defendant is sane within the meaning of section 1368 of the Penal Code, if he is able to understand the nature and purpose of the proceedings taken against him and to conduct his own defense in a rational manner.' (citations) This is obviously correct. M'Naughton insanity is immaterial. In the instant case the jury could properly have agreed, and did so, that defendant knew the difference between right and wrong and knew the nature of his acts when he killed his young victim." 66 Cal. 2d at 515-16, 426 P.2d at 947, 58 Cal. Rptr. at 379. Although Pennington was found to be sane at the time he committed the offense he still had a right to a section 1368 hearing.

14. 67 Cal. 2d at 279, 431 P.2d at 233, 61 Cal. Rptr. at 649.

15. 67 Cal. 2d at 278-79, 431 P.2d at 233, 61 Cal. Rptr. at 649.

and that if the trial court should have granted a hearing, it had no power to pronounce judgment.[16] The court then held that the accused had failed to present the substantial evidence required for a section 1368 hearing, either under *Pate* or *Pennington*. It also ruled that the record did not support his claim that he lacked the mental capacity to understand the nature and consequences of his plea.[17]

The court dismissed the defense counsel's statement regarding Laudermilk's inability to assist in his defense as "the lawyer's conclusion from an experience with an uncooperative client."[18] It held that such a statement by itself, although of some significance, was not substantial evidence necessitating a section 1368 hearing. It noted that under a contrary ruling defendants might be encouraged to feign an inability to cooperate with counsel in order to obtain a hearing.[19]

Since *Pennington* involved the unequivocal testimony of a psychologist as to the defendant's inability to assist in his defense,[20] it did not provide a usable guideline for determining whether Dr. Hoffman's contradictory report in *Laudermilk* was constitutionally sufficient to compel a section 1368 hearing. It is therefore necessary to contrast the instant case with *Pate*, where the United States Supreme Court found a hearing constitutionally compelled after four lay witnesses testified that they believed the defendant to be insane. It reached this conclusion notwithstanding the defendant's alert appearance at trial and a stipulation that a psychiatrist would testify that he was able to cooperate in his own defense.[21] It is arguable that notwithstanding their equivocal nature, Dr. Hoffman's observations of Laudermilk[22] constituted more substantial evidence than that which existed in *Pate*. However, the *Laudermilk* court saw the crux of the Hoffman report to be the statement that the defendant would be able to assist in his defense. Because of this conclusion the court would not consider whether the doctor's other significant observations of the defendant provided the substantial evidence requisite for a section

16. The court disapproved People v. Hunsaker, 218 Cal. App. 2d 475, 32 Cal. Rptr. 792 (1963), to the extent it was inconsistent with this conclusion. 67 Cal. 2d at 282, 431 P.2d at 235, 61 Cal. Rptr. at 651.

17. 67 Cal. 2d at 288, 431 P.2d at 239, 61 Cal. Rptr. at 655.

18. *Id.* at 287, 431 P.2d at 238, 61 Cal. Rptr. at 654.

19. *Id.*

20. There was other expert testimony in *Pennington* including four psychiatrists who testified that the defendant was presently sane. 66 Cal. 2d at 522, 426 P.2d at 951-52, 58 Cal. Rptr. at 383-84.

21. 383 U.S. at 383-86. Although Laudermilk vigorously contended in his petition for certiorari to the United States Supreme Court that *Pate* compelled reversal, the Court denied certiorari. Laudermilk v. California, 37 U.S.L.W. 3136 (U.S. Oct. 15, 1968).

22. See text accompanying note 15 *supra*.

1368 hearing. The court did not consider whether the trial court should have disregarded the expert's conclusion,[23] pursuant to the rule that a trier of fact may disbelieve part of the testimony of a witness which is tainted with contradictions.[24]

Justice Peters dissented, arguing that Laudermilk had clearly presented the uncontradicted history of irrational behavior which *Pate* deemed sufficient to require a hearing.[25] He concluded that notwithstanding the strong evidence of present sanity, Dr. Hoffman's report, the defense counsel's statement, and the defendant's own statements[26] revealed a history of pronounced irrational behavior.[27]

*Laudermilk* indicates that the court will give a strict interpretation to *Pennington*'s substantial evidence requirement. While a defense counsel's own observation of his client's inability to assist in his defense is of some probative value, it does not in itself constitute substantial evidence of insanity. Defense counsel must present unequivocal—and preferably expert—testimony concerning the defendant's incompetence in order to meet the substantial evidence requirement.

### *H. Rights of Minors*

*People v. Lara.*[1] The court held that a minor—even if mentally retarded and without the advice of a friendly adult—may be capable of an intelligent and understanding waiver of his constitutional rights and thus of providing an admissible confession to a capital offense.

Lara and Alvarez, aged 18 and 17 respectively, stole a car for use in a holdup, and kidnapped and killed the owner to avoid identification. The police arrested them separately and informed each of his constitutional rights to counsel and to remain silent.[2] Both stated that they understood the warnings, but within an hour Lara made a full confession. The police then granted Alvarez' request to confer with Lara. Lara told Alvarez that he had confessed and urged Alvarez to do likewise. Alvarez then made a full confession. The

23. *See* People v. Wolf, 61 Cal. 2d 795, 811-15, 394 P.2d 959, 969-71, 40 Cal. Rptr. 271, 281-83 (1964), where the court held that on the question of a defendant's sanity a jury can weigh expert opinions and agree or disagree with all or part of them as they believe appropriate.

24. *See* Berger v. Steiner, 72 Cal. App. 2d 208, 164 P.2d 559 (1945).

25. 67 Cal. 2d at 291, 431 P.2d at 241, 61 Cal. Rptr. at 657.

26. Justice Peters summarizes some of the defendant's more incoherent statements in his dissent. *Id.* at 292-93, 431 P.2d at 242, 61 Cal. Rptr. at 658.

27. *Id.* at 294, 431 P.2d at 243, 61 Cal. Rptr. at 659.

1. 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied*, 392 U.S. 945 (1968).

2. The warnings given were those required by People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). As the trial took place before the date of Miranda v. Arizona, 384 U.S. 436 (1966), the standards there required were not controlling.

defendants were jointly tried as adults and convicted of kidnapping and first degree murder. Lara received the death sentence, while Alvarez, too young to be executed under California law,[3] was sentenced to life imprisonment.

On appeal, each defendant claimed that his confession should have been excluded from evidence because, as a minor, he could not intelligently and understandingly waive his constitutional rights to counsel and to remain silent. Furthermore, Alvarez, who had an I.Q. of 65-71 and a mental age of approximately ten years, claimed that his mental subnormality made his waiver ineffective.

Rejecting these claims, the court, in an opinion by Justice Mosk, found both defendants to have validly waived their constitutional rights. It held that the admissibility of such confessions depends not on the defendant's age or mental subnormality alone, but on a combination of these factors with other circumstances such as his education, experience, and ability to comprehend the meaning and effect of his statement.

Applying this "totality of circumstances" test to the facts, the court found the trial court's determination of intelligent waiver adequately supported by the record. For several reasons, the court refused to regard Alvarez' low I.Q. and mental age as controlling on the issue of intelligent waiver: First, a prosecution expert testified that Alvarez was functioning with the accumulated life experience of a 17-year old despite the fact that his learning capacity was that of a 10-year old;[4] second, the same expert characterized as "innate shrewdness" Alvarez' request to talk with Lara before making a statement;[5] and third, the defense expert admitted that Alvarez understood the meaning of the words in the warning given him by the police at the time of his arrest.[6] The court also found each defendant's extensive prior experience[7] with the police and courts sufficient to overcome the normal timidity and ignorance of youth confronted with adult officialdom.

The court failed to consider the fact that previous experience with the police and juvenile courts does not necessarily equip a youth to

3. CAL. PEN. CODE § 190.1 (West Supp. 1967).

4. 67 Cal. 2d at 378, 432 P.2d at 211, 62 Cal. Rptr. at 595.

5. *Id.* Also, a deputy sheriff testified that he heard Alvarez tell Lara that he intended to "play the crazy part." *Id.* It is unclear whether the court viewed this as evidence that Alvarez had cheated on his psychological tests or as evidence that he was clever despite his low I.Q.

6. *Id.* at 377, 432 P.2d at 211, 62 Cal. Rptr. at 595.

7. Alvarez had had "more arrests and convictions than he could remember since the age of 11 or 12," and Lara had been arrested on a narcotics charge only four months before his arrest in the present case. *Id.*

operate intelligently in the adversary adult criminal process. Because the juvenile court system is based upon the rehabilitative ideal, and—as was even more the case in the pre-*Gault*[8] era in which this case arose—because its system of individualized justice vests broad discretionary powers in the court, there are great pressures on the child to appear cooperative and humble.[9] A confession of guilt is often regarded as the sine qua non of the juvenile court's reformative mission.[10] By the same token, the juvenile's assertion of rights is likely to be interpreted as resistance to treatment.[11] One California court has recognized this problem; it held that a boy who, like Alvarez, has been a juvenile delinquent was incapable of an intelligent waiver, because in his long experience he "had dealt with officers . . . under statutory proceedings designed to gain his confidence and to establish complete and friendly rapport."[12]

Even if one assumes that the minor's juvenile court experience does prepare him for the adversary process, the differences between adult and juvenile proceedings and treatment pose other serious problems for one such as Alvarez who is, in a real sense, caught between two systems. At the time of his waiver and confession Alvarez—because he was seventeen—was under the jurisdiction of the juvenile court; subsequently he was rejected by the juvenile court and certified to the superior court for prosecution as an adult. Alvarez may therefore have relied on his age and expected his confession to be used only in rehabilitative treatment under juvenile court auspices. Such possible unawareness of the consequences of a confession renders an intelligent waiver doubtful. Due process should, at a minimum, require that the minor be explicitly warned that he may be tried as an adult rather than as a juvenile.

Even if Alvarez had been given such a warning, it seems rather unrealistic to expect him to know whether he should act like an adult—asserting his rights and thereby appearing to the juvenile authorities to

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8. *In re* Gault, 387 U.S. 1 (1967).

9. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV.L. REV. 775, 803-04 (1966).

10. "To help the child change his attitude, a clean breast, a confession, is a primary prerequisite . . . . Otherwise the court would be aiding the child to build his future on a foundation of falsehood and deceit . . . ." Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1208-09 (1960).

11. "[A]nything that may tend to discourage a child from making a clean breast of it, that may tend to encourage him to try to escape the consequences of his actions by denial or otherwise, must retard and is likely to defeat the court's efforts to correct the child." *Id.* at 1209.

12. *In re* Medina, 255 A.C.A. 924, 933, 63 Cal. Rptr. 512, 517 (1967), *hearing granted*, 68 A.C. (minutes at 2, Dec. 29, 1967).

be recalcitrant and unrepentent—or like a juvenile, at the risk of having his admissions used against him in subsequent adult criminal proceedings. This "squeeze" on the minor is not only unfair, but also may prejudice the operation of the juvenile court system, which depends on trust and full disclosure between the authorities and the child. For these reasons a federal court held, in *Harling v. United States*,[13] that any confession obtained from the minor while he was under juvenile court jurisdiction is inadmissible in subsequent adult criminal proceedings. *Lara* rejected this view, relying on cases[14] which hold that the parens patriae relationship exists only between the court and the child—not between the police and the child—and that any admissions made by the child in police interrogations while under juvenile jurisdiction are admissible in a subsequent criminal prosecution. That the police are adversaries of the child and not an integral part of the parens patriae relationship is a highly questionable assumption.[15] Furthermore, the proposition that the child can be expected to recognize policemen as his adversaries while other juvenile authorities are purporting to be his friends is rather dubious.

As Justice Peters indicated in his scathing dissent to *Lara*, the cases which the majority cited to support its finding of a valid waiver are weak authority because they focused on the due process concept of coercion.[16] The coercion cases emphasized the conduct of the police.[17] However, with the application to the states of the privilege against self-incrimination[18] and the right to counsel,[19] confession cases began relying on those rights rather than the coercion concept. Thus, under *Miranda v. Arizona*[20] confessions which are not coerced are

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13. 295 F.2d 161 (D.C. Cir. 1961).

14. *E.g.*, State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966).

15. *See* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 776-87 (1966), offering extensive discussion and documentation of the police role in juvenile proceedings.

16. To support its "totality of circumstances" rule for minors the court relied principally on two cases: Haley v. Ohio, 332 U.S. 596 (1948), which is replete with vivid language describing the refusal of the police to let the defendant see his mother for several days, and Gallegos v. Colorado, 370 U.S. 49 (1962), which similarly emphasizes the "ominous cast" given the case by the defendant being "cut off" from adult advice for five days. *Id.* at 54. To support its rule for the mentally retarded the court relied on cases such as State v. Faught, 254 Iowa 1124, 1130, 120 N.W.2d 426, 429 (1963), which held that the confession in issue "was given voluntarily, without inducement, promise, threat or coercion," and Bean v. State, 234 Md. 432, 443, 199 A.2d 773, 778 (1964), which held that the confession in question was "not the product of force, either physical or psychological, or of threats, promises or inducements."

17. *See Developments in the Law, Confessions*, 79 HARV. L. REV. 938, 969-72 (1966).

18. Malloy v. Hogan, 378 U.S. 1 (1964).

19. Gideon v. Wainwright, 372 U.S. 335 (1963).

20. 384 U.S. 436 (1966).

nonetheless inadmissible if they are the product of the defendant's ignorance of his constitutional rights.

The *Miranda* warnings are satisfactory protections against ignorant waivers of rights only if the defendant is competent to understand them. Given *Miranda*'s emphasis on intelligent waiver,[21] the focus of analysis shifts from the capacity to resist coercion to the capacity to make an intelligent assessment of defense tactics. In this regard it is significant that the legislature has made a clear judgment regarding the competency of minors to handle their legal affairs intelligently. To protect minors from their immaturity and lack of judgment, the legislature has deemed them legally incompetent to make binding contracts,[22] to hold property,[23] or even to appear in civil court except through a guardian ad litem.[24] These disabilities, judged to be too important to be determined in each individual case based on the "totality of circumstances," protect the minor from monetary losses in his legal and business dealings with others. Yet *Lara* would permit an uncounseled minor to make a binding decision on the subject of legal tactics which may literally mean the difference between life and death.

The court attempted to dispel this incongruity by making a distinction between the civil protections granted all minors and the protections sought by the defendants in *Lara*. The court noted the high crime rate among youth and argued that when a minor commits such wrongs, "society's interest in self-preservation intervenes."[25] Therefore, "with respect to tortious or criminal acts of minors, the law extends no blanket presumption of incapacity."[26] The fault with this distinction is that the defendants in *Lara* were not arguing that they should be deemed legally incompetent to commit the crime.

The issue was whether a minor is competent to waive his constitutional rights. Society's legitimate interest in self-preservation is not enhanced by a minor's ignorant waiver. Recent decisions regarding the rights of the accused manifest a constitutional judgment that society's interest in law enforcement cannot justify infringement of certain rights.

Furthermore, even if the Constitution did permit the crime rate to be balanced against the rights of the accused, the court's decision in *Lara* would not be justified. It is one thing to deem a minor

21. *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 205 (1966).
22. CAL. CIV. CODE §§ 33, 34, 35, 1556, 3103 (West 1957).
23. CAL. CIV. CODE §§ 1154-64 (West 1957).
24. CAL. CIV. CODE § 42 (West 1957); CAL. CIV. PRO. CODE § 372 (West Supp. 1967).
25. 67 Cal. 2d at 379, 432 P.2d at 212, 62 Cal. Rptr. at 596.
26. *Id.* at 381, 432 P.2d at 213, 62 Cal. Rptr. at 597.

capable of committing a crime, because there is such a large overlap between the norms learned by almost all children and the criminal law. Thus society can reasonably expect that the typical minor knows what acts are right and what acts are wrong. It is quite another matter to expect that the typical minor is capable of distinguishing good from bad legal strategy. Such matters as the right to remain silent and the right to counsel are not among the basic cultural values of the typical minor.

The foregoing is not to assert that a blanket rule against waiver by minors is constitutionally required. The protections afforded to minors by the legislature in the civil area are merely analogies.[27] However, since the court is making a comparable judgment regarding the capacity of minors in an area where consitutional rights and extremely serious penal consequences are at stake, it should offer a better reason than the spectre of a juvenile crime wave for a rule which provides less protection for the minor in the criminal than in the civil process.

*People v. Lara* may also be wrong on constitutional grounds. *In re Gault*[28]—which the court distinguishes on narrow grounds in one footnote[29]—explicitly held that the minor's parent must be notified of the minor's right to counsel in formal proceedings to determine delinquency.[30] Since this requirement is apparently based on a judgment that a minor is incapable of understanding his right to counsel without the help of a friendly adult, the rule also is applicable to minors being tried as adults.

*Miranda* and *Escobedo v. Illinois*[31] held that the right to counsel extends to the interrogation phase of the criminal proceedings, because in cases involving confessions the trial is often no more than an appeal from the interrogation. Therefore, for whatever reasons the *Gault* Court felt that it was constitutionally required that parents be notified of the minor's right to counsel at the child's trial, the basic rationale of *Miranda* and *Escobedo* requires that the parent also be notified at the interrogatory state of the proceedings. Admittedly,

27. By the same token a legislative judgment favoring waiver of constitutional rights by minors is not binding on the court. *See* CAL. CIV. PRO. CODE § 372 (West Supp. 1967).

28. 387 U.S. 1 (1967).

29. 67 Cal. 2d at 391 n.21, 432 P.2d at 220 n.21, 62 Cal. Rptr. at 604 n.21.

30. 387 U.S. 1, 41 (1967): "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child *and his parents* must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child" (emphasis added).

31. 378 U.S. 478 (1964).

*Gault* contains language indicating that waiver by minors is in principle no different than waiver by adults.[32] However, the precise holding of *Gault* on the right to counsel, when coupled with the holdings of *Escobedo* and *Miranda*, compels the conclusion that a minor cannot waive his right to counsel at the interrogatory stage of the proceedings unless his parents have been notified of his rights.

### *I. Sentencing*

*In re Fluery.*[1] The court approved *In re Patton*[2] and approved and extended *Aguilera v. California Department of Corrections*,[3] two recent court of appeal decisions granting prison inmates credit on their prison terms for time spent in jail following termination of their paroles.

A prisoner lawfully on parole remains technically in custody,[4] and although not in prison, is deemed to be serving his sentence.[5] The Adult Authority may, for cause,[6] suspend or revoke his parole and order his return to prison.[7] After such suspension or revocation, section 3064 of the Penal Code provides that "until his return to custody he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be part of his term." In *Patton, Aguilera*, and *Fluery*, the courts were faced with the question of whether this statute prevented an individual whose parole had been suspended or revoked from receiving credit on his prison term for time spent in jail while serving a concurrent misdemeanor jail sentence or awaiting return to prison or reinstatement of his parole.

In *Patton* the petitioner was convicted of a misdemeanor and sentenced to jail. Since the court did not impose either consecutive or concurrent sentences, his jail term, by operation of Penal Code section 669, was deemed to run concurrently with his prison sentence. Five days before his misdemeanor arrest, the Adult Authority had suspended his parole and ordered his return to prison. However, it

32. *In re* Gault, 387 U.S. 1, 55 (1967); *see* Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HAST. L.J. 223, 227 (1967).

1. 67 Cal. 2d 600, 432 P.2d 986, 63 Cal. Rptr. 298 (1967).
2. 225 Cal. App. 2d 83, 36 Cal. Rptr. 864 (1964).
3. 247 Cal. App. 2d 150, 55 Cal. Rptr. 292 (1966).
4. CAL. PEN. CODE § 3056 (West Supp. 1967).
5. *E.g., Ex parte* Casey, 160 Cal. 357, 116 P. 1104 (1911).
6. CAL. PEN. CODE § 3063 (West 1956).
7. *Id.* § 3060.

failed to execute its order until after he had completed his misdemeanor sentence.

The Attorney General argued that while the petitioner was in jail he was an escapee and fugitive from justice within the meaning of section 3064, since he was absent from prison after his parole had been suspended. Rejecting this argument, the court held that while in jail the petitioner was in custody, and therefore entitled to credit on his prison sentence for the time spent in jail. A denial of credit, the court argued, would not only have required a tortured reading of section 3064, but would also have resulted in the imposition of consecutive sentences, contrary to section 669.

In *Aguilera* the petitioner was jailed under Adult Authority orders revoking his parole and ordering his return to prison. Although the Adult Authority could have directed his immediate return to prison, it failed to do so. The court held that inasmuch as he was jailed under Adult Authority orders, he was held in custody, and therefore was not a fugitive and escapee within the meaning of section 3064. The court accordingly granted his credit on his prison term for the time spent in jail, but expressly left open the question of whether credit should be granted when the Adult Authority does not unreasonably delay the parolee's return to prison.

The petitioner in *Fluery*, an inmate of San Quentin, applied for a writ of habeas corpus on the ground that the Adult Authority had improperly refused him credit on his prison term for time that he had spent in jail. In 1958 he had begun a maximum 15-year prison term. Between 1961 and 1966 he was paroled three times. During the periods he was out of prison, he was jailed several times as a result of both misdemeanor convictions and Adult Authority orders suspending or revoking his parole and ordering his return to prison. His petition revealed that his sentence had been computed contrary to both *Patton* and *Aguilera*, and presented the question expressly left undecided in *Aguilera*. The supreme court issued an order to show cause. The respondent warden filed his return indicating that he had credited the petitioner with the disputed periods of jail time, thus leaving the petitioner with nothing of which to complain. Nevertheless, the supreme court, on the ground that *Patton* and *Aguilera* were not being consistently followed and because the question left undecided by *Aguilera* was a recurring problem, decided the questions which the petitioner had presented.[8]

8. The court's decision, therefore, was an advisory opinion. There is no constitutional restraint against advisory opinions in California. In several cases they have been rendered where important questions of public interest were presented. *E.g.*, County of Madera v. Gendron, 59

The court approved both the reasoning and holdings of *Patton* and *Aguilera*.[9] Furthermore, the court extended *Aguilera* to those situations where the Adult Authority returns the parolee to prison without unreasonable delay. The court stated that where a parolee is jailed while the Adult Authority is determining whether to reinstate his parole or while it is arranging to transport him to prison after it has ordered his return, it cannot add to his sentence the time spent in jail on the ground that it acted without unreasonable delay.

In approving these decisions and in extending *Aguilera*, the court had only to give Penal Code section 3064 its clear and obvious construction. Any other result would entail the absurdity of treating a former parolee as an escapee and fugitive from the very body that is preventing his return to prison.

### *J. Retroactivity*

*People v. Doherty*,[1] *People v. Jackson*,[2] and *People v. Rivers*.[3] At common law, judicial decisions were always given retroactive effect.[4] It is now well established,[5] however, that a court may limit the applicability of an overruling decision by specifically holding that it will operate only prospectively—even to the extent of not applying to the overruling case.[6] In July 1967, the court delivered three important opinions concerning the especially troublesome question of the retroactive application of newly established principles of criminal law.

Cal. 2d 798, 382 P.2d 342, 31 Cal. Rptr. 302 (1963) (court determined whether district attorney may engage in private practice despite the fact the district attorney appellant had been defeated for reelection by the time the case reached the court.

9. In so doing the court expressly overruled *In re* Payton, 28 Cal. 2d 194, 169 P.2d 361 (1946), which denied credit to a parolee jailed for 35 days between suspension of his parole and return to jail. This case, however, was of doubtful authority by the time it reached the *Fluery* court. Both *Patton* and *Aguilera* distinguished it on rather dubious grounds. And a case decided subsequent to *Patton* and *Aguilera*, but prior to *Fluery*, failed to even cite it. *In re* Clark, 254 Cal. App. 2d 1, 61 Cal. Rptr. 902 (1967). The court also disapproved the implication of *In re* Hall, 63 Cal. 2d 115, 45 Cal. Rptr. 133, 403 P.2d 389 (1966), that parolees are never entitled to credit for time spent in jail.

1. 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967).
2. 67 Cal. 2d 96, 429 P.2d 600, 60 Cal. Rptr. 248 (1967).
3. 66 Cal. 2d 1000, 429 P.2d 171, 59 Cal. Rptr. 851 (1967).
4. *See* Linkletter v. Walker, 381 U.S. 618, 621 (1965). However, the problems of retroactively applying a new rule in criminal cases did not then exist since once a person was convicted of a crime he could not use the writ of habeas corpus unless he was incarcerated longer than the term of his sentence. 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND 52 (1642). This, of course, is not the law today. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).
5. *See. e.g.*, Linkletter v. Walker, 381 U.S. 618, 628 (1965).
6. *See*, State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), *cited in* Linkletter v. Walker, 381 U.S. 618, 627 (1965); *See* England v. Louisiana State Bd. of Med. Exam., 375 U.S. 411 (1964) (civil case).

Although the internal consistency of these decisions may be questionable, they represent the court's most recent attempt to reconcile the competing interests of those who have relied on the old law and those who claim that consistency dictates that the fairness of their trials be judged under the new law.[7]

In *People v. Doherty*[8] the court held that the principles announced in *Miranda v. Arizona*[9] would apply to the new trial it awarded Doherty on appeal.[10] It stated that these principles apply to any retrial occurring after the date of *Miranda*,[11] notwithstanding the fact that they were not the law at the time of the original trial.[12]

In *Doherty*, the court was required to interpret *Johnson v. New*

7. On this conflict, see the discussion of retroactivity in Linkletter v. Walker, 381 U.S. 618, 622-29, 637-40 (1965).

8. 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr 857 (1967).

9. 384 U.S. 436 (1966). *Miranda* held that in the absence of a knowing waiver, confessions and other admissions obtained during custodial police interrogation are inadmissible where the suspect was not informed of his right to counsel, his right to be silent, and the possible use of his statements against him in court.

10. Doherty's conviction was reversed because of the erroneous admission of an incriminating statement he had made. The court found this admission to be reversible error under Escobedo v. Illinois, 378 U.S. 478 (1964), and People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 361 (1965).

11. For the purposes of this discussion the following dates are important: *Escobedo* was decided on June 22, 1964; Doherty was arrested in August 1964 and tried in November of that year; *Dorado* was decided on January 29, 1965; and *Miranda* was announced on June 13, 1966.

12. The court also established a new rule concerning the waiver of *Escobedo* and *Dorado* objections by a defendant. The Attorney General contended that the defendant failed to object to the admission of his incriminating statement and thereby waived his right to raise such an objeetion on appeal since his trial occurred after Escobedo v. Illinois, 378 U.S. 478 (1964). *Escobedo* was decided on June 22, 1964, and the first *Dorado* decision came on August 31, 1964—394 P.2d 195, 41 Cal. Rptr. 264 (1964). However, the supreme court granted a rehearing, and the final *Dorado* decision was not announced until January 29, 1965. Doherty was tried in the period between *Escobedo* and the final *Dorado* decision. The court found, contrary to the Attorney General's assertion, that defense counsel did make a proper objection at trial. 67 Cal. 2d at 15, 429 P.2d at 161, 59 Cal. Rptr. at 861. In addition, it held that failing to object to the admission of illegally obtained statements at a trial held before January 29, 1965, the date of *Dorado*, does not operate as an automatic waiver of the defendant's *Escobedo* and *Dorado* rights. *Id.* at 14, 429 P.2d at 160, 59 Cal. Rptr. at 860.

The court's deeision on waiver overrules six decisions of the courts of appeal: People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966) (dictum), *writ dismissed as improvidently granted*, 392 U.S. 616 (1968); People v. Woods, 239 Cal. App. 2d 697, 49 Cal. Rptr. 266, *cert. denied*, 385 U.S. 950 (1966); People v. Valdez, 239 Cal. App. 2d 459, 48 Cal. Rptr. 840 (1966); People v. Almond, 239 Cal. App. 2d 46, 48 Cal. Rptr. 308 (1965); People v. Brown, 238 Cal. App. 2d 924, 48 Cal. Rptr. 204 (1965); People v. Palmer, 236 Cal. App. 2d 645, 46 Cal. Rptr. 449 (1965) (dictum). In *Miller* and *Woods*, the defendants' petitions for a hearing in the state supreme court were denied.

The court stated in *Doherty* that the implications of *Escobedo* were not fully understood until its final *Dorado* decision. *Compare* People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), *with* People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964). It noted: "Defendants can no more be charged with anticipating [those implications] than can the states."

*Jersey*[13]. In *Johnson*, the United States Supreme Court rejected the petitioner's attempt to have *Escobedo v. Illinois*[14] applied retroactively to reverse his felony-murder conviction, which had become final four years prior to the *Escobedo* decision. *Johnson* established the constitutional rules of retroactivity for *Miranda* and *Escobedo* by holding them applicable only to cases in which the trial began after those decisions were announced.[15] The California supreme court held that *Johnson* required the exclusion of Doherty's extrajudicial statements at his retrial if they failed to meet *Miranda* standards.[16] It noted that *Johnson* stated, without distinguishing between trials and retrials, that *Miranda* governs "cases in which the trial began after [June 13, 1966]."[17] The court emphasized the fact that Doherty had

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67 Cal. 2d at 14, 429 P.2d at 180, 59 Cal. Rptr. at 860, quoting from O'Connor v. Ohio, 385 U.S. 92 (1967). *Accord*, People v. Natividad, 240 Cal. App. 2d 244, 49 Cal. Rptr. 437 (1966).

The court made one exception to its ruling. If defense counsel, in a trial prior to January 29, 1965 developed facts on voir dire which support the exclusion of statements under *Escobedo* and *Dorado* but intentionally failed to object to their introduction for the purpose of later acquiring a reversal on appeal, then the right to a later objection was waived. 67 Cal. 2d at 14 n. 4, 429 P.2d at 180 n.4, 59 Cal. Rptr. at 860 n.4.

This exception to the court's waiver holding led Justice Friedman to deny a writ of habeas corpus in *In re* Woods, 256 A.C.A. 837, 64 Cal. Rptr. 382 (1967). He found that defense counsel had employed such a strategy in that case. *Id.* at 842, 64 Cal. Rptr. at 385. However, he footnoted his vexation with the supreme court's mandate when he stated: "There is irony in the notion that in cases tried before the second *Dorado* decision an ignorant attorney's negligent failure to object will permit appellate consideration of the *Escobedo-Dorado* claim, while a knowledgable attorney's deliberate silence will preclude it. The client secms to suffer more by having a knowledgable attorney than an ignorant one . . . ." *Id.* at 843 n.1, 64 Cal. Rptr. at 385 n.1.

13. 384 U.S. 719 (1966).

14. 378 U.S. 478 (1964).

15. 384 U.S. at 733. In People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967), the court followed *Johnson* in limiting the operation of *Miranda* to trials beginning after June 13, 1966. However, it decided to continue its former rule of retroactivity for *Escobedo* and *Dorado*—they apply to cases in which a final judgment had not been reached before June 22, 1964. See discussion of *Rollins* in *The Supreme Court of California 1966-1967*, 55 CALIF. L. REV. 1059, 1147-49 (1967).

16. 67 Cal. 2d at 17, 429 P.2d at 182, 59 Cal. Rptr. at 862. Justice Tobriner's majority opinion in *Doherty* that *Miranda* controls retrials of cases originally tried before June 13, 1966, was forseeable in view of his earlier opinions in People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967), and People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967).

In *Rollins* he noted the fact that it was unimportant that a suspect was arrested and interrogated before the *Miranda* cutoff date of June 13, 1966. He stated that, "Until the trial has begun, it is not unduly burdensome to require the prosecution to forego the use of evidence which fails to meet current constitutional standards." 65 Cal. 2d at 688 n.7, 423 P.2d at 226 n.7, 57 Cal. Rptr. at 298 n.7. In *Modesto* the court held that *Miranda* was not applicable to an appeal from a retrial since the retrial, and not the original trial, had taken place prior to June 13, 1966. 66 Cal. 2d at 706 n.4, 427 P.2d at 796 n.4, 59 Cal. Rptr. at 132 n.4. This signifies Justice Tobriner's belief that it is the retrial date that is applied in the retroactivity test.

17. 67 Cal. 2d at 17, 429 P.2d at 182-83, 59 Cal. Rptr. at 862-63, quoting 384 U.S. at 721 (1966).

been given a new trial for reasons independent of *Miranda*. It also stated that applying *Miranda* to retrials would not seriously disrupt the administration of the criminal law, as the Supreme Court feared[18] in *Johnson*.

Justice Mosk concurred in the court's decision to grant Doherty a new trial, but interpreted *Johnson* differently on the retroactivity issue. Citing statements in *Johnson* that, "*Escobedo* and *Miranda* should apply to *cases commenced* after those decisions were announced"[19] and that, "Future defendants will benefit fully from our new standards",[20] he concluded that on retrial the trial court should apply the evidentiary rules prevailing when the original proceedings commenced.[21] He noted that the majority's ruling might lead to arbitrary results.[22]

The majority emphasized that its decision would not require numerous retrials.[23] However, it failed to discuss whether its holding would require the release of numerous prisoners who could not be successfully convicted in a new trial.[24] This was a concern of the United States Supreme Court in *Johnson*.[25] Prosecutors who based their case on confessions which were admissible[26] under *Escobedo* and *People v. Dorado*[27] will now find them inadmissible upon retrial

18. "[R]etroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." 384 U.S. at 731.

Although he recognized that *Doherty* would create problems for prosecutors, Justice Tobriner argued that *Johnson* also placed a burden upon prosecutors by applying *Miranda* to interrogations taken before June 13, 1966, if the case came to trial after that date. 67 Cal. 2d at 19, 429 P.2d at 184, 59 Cal. Rptr. at 864. He stated that the burden imposed upon prosecutors in the instant case is no greater than that placed upon them by *Johnson*. *Id.* at 20, 429 P.2d at 184, 59 Cal. Rptr. at 864.

19. 384 U.S. at 733 (emphasis added by Mosk, J.).

20. *Id.* at 732.

21. 67 Cal. 2d at 23, 429 P.2d at 186, 59 Cal. Rptr. at 866.

22. *Id.* at 25, 429 P.2d at 187-88, 59 Cal. Rptr. at 867-68. Justice Mosk hypothesized a situation where two codefendants had made inculpatory statements in a trial occurring before *Miranda*. Both were convicted and appealed, but only one had his conviction reversed on wholly non-constitutional grounds. While one defendant is imprisoned because of his incriminatory statement, the other defendant is able to exclude such a statement in his retrial and thereby goes free.

23. *Id.* at 18, 429 P.2d at 183, 59 Cal. Rptr. at 863.

24. Justice Mosk, however, did show such concern in his concurring opinion. *Id.* at 24-25, 429 P.2d at 187, 59 Cal. Rptr. at 867.

25. 384 U.S. at 731.

26. The reversal in *Doherty*, of course, was based on statements that were inadmissible under *Escobedo* and *Dorado*. However, *Doherty* would apply equally to reversals caused by errors wholly unrelated to constitutional provisions.

27. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

because of the *Miranda* standards. Since these cases will be several years old,[28] it is inevitable that many will be dropped for failure to obtain enough admissible evidence to convict at the new trial. The *Johnson* holding imposes a similar burden[29] upon prosecutors. However, it is much easier to find new evidence, independent of the inadmissible confessions, in cases where the arrests were made a few months prior to the discovery of their inadmissibility than in cases that are several years old.[30]

*Doherty* is in accord with the majority of other jurisdictions' interpretations of *Johnson* on the retrial issue.[31] Even if the United States Supreme Court later decides that the *Miranda* standards are not constitutionally required on retrial, *Doherty* will not be overruled since states are always free to adopt stricter standards of retroactivity than those required by the Constitution.[32]

In *People v. Jackson*[33] the court made the logical extension of *Doherty* by holding that the rules of *Escobedo* and *Dorado* apply to any retrial occurring after the date of the *Escobedo* opinion—even though the original trial had occurred prior to the decision in that case and the conviction had become final. Jackson was convicted of first degree murder in 1962, and the conviction and judgment imposing the death penalty were affirmed by the supreme court in 1963.[34] Subsequently, because of errors in the jury instructions condemned in *People v. Morse*[35], the court issued a writ of habeas corpus and reversed the judgment as to the penalty only.[36] At his penalty retrial Jackson was again given the death penalty.

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28. The decision in *Doherty* was handed down two years and eleven months after Doherty's arrest.

29. See note 18 *supra*.

30. *See* United States v. LaVallee, 330 F.2d 303, 312-13 (2d Cir. 1964): "Indeed, those prisoners who have committed the more serious crimes and who are thus serving the longer sentences may be the primary beneficiaries of our ruling [giving retroactive effect to the decision in Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel at trial)]. Because they have been incarcerated for a longer period and in view of the fact that more time has thus elapsed since the commission of their crime, it will be the hardest to retry precisely those offenders who, in the interests of an ordered society, should least be permitted to remain at large."

31. *See, e.g.*, People v. Sayers, 28 App. Div. 2d 1132, 1133 n.*, 284 N.Y.S.2d 481, 482 n.* (1967). The leading contrary authority is People v. Worley, 37 Ill. 2d 439, 227 N.E.2d 746 (1967).

32. *See* Johnson v. New Jersey, 384 U.S. at 733.

33. 67 Cal. 2d 96, 429 P.2d 600, 60 Cal. Rptr. 248 (1967).

34. People v. Jackson, 59 Cal. 2d 375, 379 P.2d 937, 29 Cal. Rptr. 505 (1963).

35. 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964). *Morse* condemned, *inter alia*, jury instructions concerning the possibility of parole in the event a life sentence was imposed. Such an instruction was given in *Jaekson*.

36. *In re* Jackson, 61 Cal. 2d 500, 393 P.2d 420, 39 Cal. Rptr. 220 (1964).

Jackson contended on appeal that statements inadmissible under *Escobedo* and *Dorado* were used against him in his guilt trial, and that his conviction should therefore be reversed. Chief Justice Traynor, writing for the court, stated that *Escobedo* and *Dorado* were not applicable to the guilt trial since that judgment became final prior to the date of *Escobedo*.[37] However, the court held[38] that those cases did apply to the penalty retrial since it occurred after that date. The court again reversed the judgment imposing the death penalty because of *Escobedo* and *Dorado* violations in the penalty retrial.[39]

*People v. Rivers*[40] holds that the rules of *Escobedo* and *Dorado* do not control reinstated appeals in cases where the judgment became final[41] prior to June 22, 1964, the date of the *Escobedo* opinion. *Rivers* involved an appeal reinstated because of *Douglas v. California*,[42] which requires California to appoint counsel for indigents when their cases are appealed.[43] *Rivers* overruled four decisions[44] of the courts of appeal, in all of which the supreme court had denied hearings.

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37. 67 Cal. 2d at 98-99, 429 P.2d at 601-02, 60 Cal. Rptr. at 249-50.

38. Id. at 100, 429 P.2d at 603, 60 Cal. Rptr. at 251.

39. The court followed its recent decision in People v. Spencer, 66 Cal. 2d 158, 424 P.2d 715, 57 Cal. Rptr. 163 (1967). *Spencer* held that, "To overcome the likelihood that the erroneous introduction of defendant's extrajudicial confession impelled his testimonial one, the State bears the burden of showing that the causative link between the two confessions had been broken." *Id.* at 168, 424 P.2d at 722, 57 Cal. Rptr. at 170. In *Jackson* the court found the defendant's testimony at the original trial to be a product of his incriminating statements to the police. Because those statements were inadmissible at the penalty retrial under *Escobedo* and *Dorado* his other testimony at the original trial which related to those statements was also inadmissible at the penalty retrial.

Justice Peters concurred in the reversal of the judgment imposing the death penalty but disagreed with the court's refusal to overturn the finding of guilt. As he did in *Rivers*, he argued that the guilt judgment was no longer final and *Escobedo* and *Dorado* should apply to reverse that judgment. 67 Cal. 2d at 101-04, 429 P.2d at 603-06, 60 Cal. Rptr. at 251-54. He urged that by recalling the remittitur as to the penalty, "[T]he remittitur relating to the guilt trial was also necessarily recalled." *Id.* at 103, 429 P.2d at 605, 60 Cal. Rptr. at 253. Therefore *Escobedo* and *Dorado* should be retroactively applied to the case. *Id.* at 104, 429 P.2d at 606, 60 Cal. Rptr. at 254.

40. 66 Cal. 2d 1000, 429 P.2d 171, 59 Cal. Rptr. 851 (1967).

41. "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

42. 372 U.S. 353 (1963).

43. Rivers was convicted of first degree robbery in 1960. He appealed from the conviction, but his appeal was dismissed in 1961 after his request for the appointment of counsel was denied. 66 Cal. 2d at 1001, 429 P.2d at 172, 59 Cal. Rptr. at 852.

44. People v. Jaquish, 244 Cal. App. 2d 444, 53 Cal. Rptr. 123 (1966); People v. Boyden, 237 Cal. App. 2d 695, 47 Cal. Rptr. 136 (1965); People v. Garner, 234 Cal. App. 2d 212, 44 Cal. Rptr. 217 (1965); People v. Benavidez, 233 Cal. App. 2d 303, 43 Cal. Rptr. 577 (1965). In *Benavidez* the court of appeal applied *Escobedo* and *Dorado* to a reinstated appeal and reversed a murder conviction even though it found that, "The evidence read without the confession leads

Chief Justice Traynor, writing for the court in *Rivers*, considered factors that were ignored in *Doherty*. He discussed the significant number of cases in which appeals were reinstated under *Douglas*, and he was concerned that the indigent defendants receiving reinstated appeals would have a much better chance of success on appeal if *Escobedo* and *Dorado* applied to their cases. The Chief Justice argued that such an application would promote inequality between indigent defendants and other defendants who earlier had been able to afford counsel on appeal and who therefore had their cases ruled upon under pre-*Escobedo* rules.[45]

The court noted prophylactic purpose of *Escobedo* and *Dorado* with regard to future police conduct and pointed out that they were not intended to apply to conduct which was lawful when it occurred years before.[46] Finally, it expressed concern about these cases "offer[ing] the least likelihood of successful retrial."[47] Quoting from *In re Lopez* the court concluded:[48] "To require a general release of prisoners of undoubted guilt would be to cripple the orderly administration of the criminal laws."[49]

In contrast to *Rivers*, the *Doherty* opinion pays little attention to the effect of applying *Miranda* to retrials. The *Doherty* court discounted the reliance[50] police officers placed on prior decisions in

to the inescapable conclusion that Benavidez killed Johnson in cold blood . . . ." *Id.* at 305, 43 Cal. Rptr. at 578.

45. 66 Cal. 2d at 1004, 429 P.2d at 174, 59 Cal. Rptr. at 854.

46. *Id.*

47. *Id.* Note Justice Fourt's bitter dissent in People v. Benavidez, 233 Cal. App. 2d 303, 307, 43 Cal. Rptr. 577, 580 (1967), where the court reversed, on *Escobedo* and *Dorado* grounds, a 1959 murder conviction in an appeal reinstated by *Douglas*. He pointed out that the shotgun used in the killing and other prosecution exhibits had previously been destroyed by court order pursuant to law.

48. 66 Cal. 2d at 1004, 429 P.2d at 174, 59 Cal. Rptr. at 854.

49. *In re* Lopez, 62 Cal. 2d 368, 381, 398 P.2d 380, 390, 42 Cal. Rptr. 188, 198 (1965). Justice Peters dissented in *Rivers*. Besides restating his dislike for recent retroactivity decisions, he argued that *Escobedo* and *Dorado* should apply to this appeal because the instant case was not final before June 22, 1964, the cutoff date for *Escobedo* and *Dorado* established in *Rollins*. By recalling the remittitur he contended that: "The so-called 'final' judgment disappears from the case, and the appeal is in the same position as if no appeal had been deeided." 66 Cal. 2d at 1007, 429 P.2d at 176, 59 Cal. Rptr. at 856.

An additional argument posed by the dissent is that if Rivers had originally been provided counsel on appeal, he, rather than Danny Escobedo, might have been the person to precipitate the landmark decision on confessions. Because he was not so fortunate, he should not be deprived of the opportunity to use *Escobedo* and *Dorado* presently on appeal. It is ironic to note that if Rivers had somehow been able to get a new trial on non-constitutional grounds, he would under *Doherty* have been able to benefit from the even stricter rules of *Miranda* at his retrial.

50. Doherty was interrogated on August 24, 1964, after the *Escobedo* decision. The implications of that decision, however, were far from being clear at that time. See note 12 *supra* and accompanying text. One week later the first opinion in *Dorado* was handed down, but a rehearing was granted, and it was not until January 29, 1965, that *Dorado* set forth some clear standards for custodial interrogation.

planning admissible custodial interrogations, while in *Rivers* Chief Justice Traynor determined this to be a significant factor.[51] In *Doherty* the court passed over the difficulties that its holding posed for a successful retrial by utilizing an unconvincing[52] analogy to the burden imposed upon prosecutors by *Johnson*. Although Justice Mosk's concurring opinion discussed the inequities created by applying *Miranda* to retrials,[53] the majority did not consider this problem. Again this was a matter of import in *Rivers*.[54]

There is one important distinction between *Doherty* and *Rivers* which perhaps can explain the seemingly inconsistent analyses the court employed in these two cases. The impact of *Doherty* falls primarily on cases presently on appeal. Most of these cases will be less than three years old if a new trial is granted by an appellate court. *Rivers*, however, deals with appeals reinstated because of *Douglas v. California*.[55] It affects cases in which the judgments were final prior to March 18, 1963, the date of *Douglas*. If new trials were granted in this situation the cases now would be at least five years old. While the prospects for a successful retrial in the *Doherty*-type cases are somewhat dim, the situation is even worse in cases five or more years old such as *Rivers*,[56] where it is probable not only that important evidence is difficult to obtain but that it has been destroyed.[57]

In conclusion, these are the rules of retroactivity with which the California criminal bar must now deal: Certain constitutional rules of criminal procedure[58] are given full retroactive effect.[59] The rules of *Escobedo* and *Dorado* will apply in cases in which the judgment was not final before June 22, 1964.[60] Those rules also control a retrial granted on habeas corpus which occurred after that date even though the defendant's original conviction was final prior to June 22, 1964.[61] However, *Escobedo* and *Dorado* are not applicable to reinstated appeals in cases where the judgment became final prior to the date of

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51. *See* 66 Cal. 2d at 1004, 429 P.2d at 174, 59 Cal. Rptr. at 854.
52. See text accompanying note 30 *supra*.
53. See note 22 *supra*.
54. See text accompanying note 45 *supra*.
55. 372 U.S. 353 (1963).
56. Rivers' arrest and trial occurred in 1960.
57. See note 49 *supra*.
58. *See, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964) (exclusion of involuntary confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel at trial); Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript).
59. *See* Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1961).
60. People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967).
61. People v. Jackson, 67 Cal. 2d 96, 429 P.2d 600, 60 Cal. Rptr. 248 (1967).