Recent Decisions

CIVIL PROCEDURE

REASONABLE INQUIRY UNDER RULE 11: HOW MUCH IS ENOUGH?

In *Boone v. Superior Court,*[1] the Arizona Supreme Court decided an issue of first impression in Arizona: the amount of prefiling inquiry necessary to satisfy an attorney's responsibility of reasonable inquiry under Rule 11 of Arizona's Rules of Civil Procedure.[2] The court determined that filing a claim or defense violates Rule 11 if counsel should have known it was unjustified after reasonable investigation of both fact and law.[3] The court interpreted Rule 11 as requiring a reasonable investigation, but not as requiring preparation of a prima facie case before filing the complaint or answer.[4]

Overview Of The Boone *Decision*

Boone involved a medical malpractice claim against an anesthesiologist.[5] The plaintiff first sought legal consultation approximately four weeks

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1. 145 Ariz. 235, 700 P.2d 1335 (1985).

2. *Id.* at 238, 700 P.2d at 1338. ARIZ. R. CIV. P. 11 is identical to FED. R. CIV. P. 11. Therefore, federal cases interpreting FED. R. CIV. P. 11 are relevant in understanding ARIZ. R. CIV. P. 11. *See infra* note 18.

To correspond to a change in the FED. R. CIV. P. 11, Arizona amended ARIZ. R. CIV. P. 11 on Aug. 7, 1984 (effective Nov. 1, 1984) (amended Rule 11). Amended Rule 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . The signature of an attorney . . . constitutes a certificate . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

ARIZ. R. CIV. P. 11. The former version of ARIZ. R. CIV. P. 11 (old Rule 11) read in pertinent part:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney . . . . The signature of an attorney constitutes a certificate . . . that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay.

ARIZ. R. CIV. P. 11 (1939) (amended 1984).

The Arizona Supreme Court decided *Boone* under both versions of the rule. *See infra* note 14 and accompanying text. As used in this Casenote, the term Rule 11 refers to the amended version, unless otherwise specifically stated.

3. *Boone,* 145 Ariz. at 241, 700 P.2d at 1341. The filing of a pleading to harass, coerce, extort, or delay is similarly a Rule 11 violation. *See* McLaughlin v. Western Casualty and Sur. Co., 105 F.R.D. 624 (S.D. Ala. 1985) (removal petition judged not only untimely, but filed purely for the improper purpose of delaying trial); United States ex rel. U.S.-Namibia v. Africa Fund, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984) ("[P]laintiff's repeated initiation of obviously groundless actions, coupled with the specifics of this action established sufficiently an inference of improper purposes for these suits in violation of Rule 11."); Miller v. Affiliated Fin. Corp., 600 F. Supp. 987 (N.D. Ill. 1984) (imposition of sanctions possible where attorney unable to show absence of an improper purpose).

4. *Boone,* 145 Ariz. at 241, 700 P.2d at 1341.

5. The facts of *Boone* are set forth in 145 Ariz. at 237-38, 700 P.2d at 1337-38.

before the expiration of the statute of limitations.[6] Because there was not enough time to investigate fully before the statute of limitations expired, the complaint filed named the defendant anesthesiologist as "John Doe, M.D." The complaint was later amended to insert the anesthesiologist's true name, and he was subsequently served.[7]

The trial court granted the defendant's motion to dismiss because at the time plaintiff's counsel filed the complaint he lacked specific evidence that the defendant anesthesiologist's care fell below the applicable standard.[8] In the trial court's assessment, the plaintiff's attorney attempted to avoid the bar of the statute of limitations by "filing prematurely and waiting to serve."[9]

On special action, the Arizona Supreme Court vacated the trial court's order of dismissal.[10] The supreme court decided that plaintiff's counsel proceeded appropriately under Rule 11.[11] The court stated that "counsel is required only to make an investigation which is reasonable under the circumstances that exist at the time of filing the pleading."[12] The characterization of efforts as reasonable depends upon various factors: the existing situation, the facts known, the amount of available time, the need for reliance upon the client or other counsel for information or facts for the plead-

6. *Id.* at 237, 700 P.2d at 1337. On July 23, 1980, following minor surgery for an infertility problem, a healthy Mrs. Boone had a respiratory arrest and died. Her husband the plaintiff, first consulted an attorney in June, 1983. Mr. Boone stated his delay in seeking legal consultation was due to the "adverse effect [of] the tragedy of his wife's death on him personally." *Id.* at 237, 700 P.2d at 1337. Mr. Boone's attorney began investigation, obtained medical records, and attempted to learn the identities of the potential defendants prior to the expiration of the statute of limitations on July 23, 1983. The attorney filed a complaint on plaintiff's behalf, based on a good-faith belief that one or more of the physicians and health care providers were negligent. *Id.* at 237, 700 P.2d at 1337.

7. After the complaint was amended, a potential conflict of interest forced the original attorney to withdraw. The plaintiff served the hospital and surgeons with the complaint soon after a second attorney replaced the first. The anesthesiologist was aware he was named in the complaint; however, the plaintiff did not serve the defendant anesthesiologist until almost a year later when consultation with medical experts revealed defendant's treatment fell below the proper standard of care. *Id.* at 237-38, 700 P.2d at 1337-38.

8. *Boone,* 145 Ariz. at 238, 700 P.2d at 1338. The trial court granted the motion for several reasons: when he filed the complaint, counsel lacked specific knowledge that the defendant committed malpractice; counsel sued all doctors in attendance to beat the statute of limitations; and although counsel waited to serve the defendant until after he obtained specific evidence of malpractice, when he filed the complaint, he placed the defendant's name "on public record as having been sued for malpractice" when counsel "had *nothing* to back up [the] claim." *Id.* at 238, 700 P.2d at 1338 (quoting trial judge's minute entry order of August 9, 1984) (emphasis in original).

Almost a year after filing, counsel hired experts who reviewed the case against the defendants. In June, 1984 a consulting physician concluded the anesthesiologist's care fell below the applicable standard. A second anesthesiologist confirmed the consulting physician's opinion, stating that the decedent received an overdose of medication that was not properly reversed. *Id.* at 238, 700 P.2d at 1338. During surgery, Mrs. Boone received curare, a paralysis-causing drug routinely using during anesthesia. Curare use requires mechanical respiration and proper reversal. With improper curare administration, respiratory efforts will cease and death will result. S. FELDMAN, MUSCLE RELAXANTS 120-23, 192 (1979).

9. *Boone,* 145 Ariz. at 238, 700 P.2d at 1338 (quoting trial judge's minute entry order of August 9, 1984).

10. *Id.* at 242, 700 P.2d at 1342.

11. *Id.* at 240, 700 P.2d at 1340.

12. *Id.* at 241, 700 P.2d at 1341. The Arizona Supreme Court noted that each of Mr. Boone's attorneys, based on his respective knowledge and experience as an attorney and on his review of the facts and available medical records, formed a good-faith belief that one or more of the defendants acted negligently. The court did not require the development of a prima facie case before filing an answer or complaint. *Id.*

ing, and the plausibility of the claim.[13]

The supreme court examined the facts of *Boone* under both Old Rule 11 and New Rule 11 and concluded that plaintiff's counsel violated neither the Old Rule's subjective good faith or reasonable belief standard nor the New Rule's more stringent standard of a good faith belief, based on a reasonable investigation, that a claim is colorable.[14] The attorneys' actions in *Boone* were reasonable under the New Rule's more stringent standards because, under the circumstances, they conducted as much investigation as possible in the available time.[15]

Under *Boone,* it is improper to dismiss a case or to strike a meritorious claim or defense simply because the attorney had insufficient evidence, when he filed a pleading, to establish a prima facie case or defense.[16] Amended Rule 11 requires only that the attorney sign the pleading, certifying that he conducted a "reasonable inquiry," and that it is his belief that the pleading is well-grounded in fact and warranted by law.[17] What constitutes a "reasonable inquiry," however, is necessarily determined on a case-by-case basis. This Casenote clarifies the parameters of the "reasonable inquiry" requirement by tracing the development of New Rule 11, evaluating the requirement of factual inquiry, and examining the requirement that a pleading be warranted at law.[18]

Development of Rule 11

The former version of Rule 11 provided that counsel's signing of pleadings certified that counsel had read the pleadings and believed "good ground" existed to support the pleadings.[19] The old rule imposed a subjec-

13. *Id. See also Advisory Committee Note of 1983 to Amended Rule 11,* 97 F.R.D. 165, 199 (1983) (*Boone* and the Advisory Committee Note contained the same description of reasonable efforts).

14. *Boone,* 145 Ariz. at 241, 700 P.2d at 1341. Old Rule 11 was still in effect when counsel filed the complaint. The more stringent requirements of the amended rule were adopted on August 7, 1984, just prior to the trial court's dismissal. Amended Rule 11 became effective on November 1, 1984, during the pendency of the special action before the supreme court. Because the supreme court specifically found counsels' actions violated neither version of the rule, the court did not address whether amended Rule 11 applied retroactively.

15. *Id.* at 241, 700 P.2d at 1341.

16. *Id.* at 242, 700 P.2d at 1342.

17. ARIZ. R. CIV. P. 11.

18. Arizona is the only state that adopted FED. R. CIV. P. 11 without alteration. Thirty-eight states have rules with "some similarity" to the Arizona and the federal rule: rules with "some similarity" are those providing for sanctions when a pleading is not signed or is signed with intent to defeat the purpose of the rule and those providing for sanctions when a pleading contains scandalous or indecent material. Eight states have rules requiring signature, subscription or verification. Two states have "comparable" rules, and an additional state has a code section dealing with comparable subject matter. *See* FEDERAL PROCEDURE, STATUTES AND RULES, COMPARATOR; FEDERAL RULES OF CIVIL PROCEDURE AND STATE CIVIL PROCEDURAL STATUTES AND RULES (L. Ed. 1984). Because *Boone* is Arizona's first Rule 11 case, most of the cases cited in this Casenote are necessarily from the federal courts. Although the federal decisions are not binding on Arizona courts, they are relevant because Arizona intentionally copied the federal rule.

19. Prior to the 1983 amendment, FED. R. CIV. P. 11 provided in pertinent part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

FED. R. CIV. P. 11 (1937) (amended 1983). In 1984, Arizona amended its old Rule 11, which was

tive standard[20] and required that the court inquire as to the attorney's state of mind, motive or intention.[21] The rule focused on the good or bad faith of the attorney[22] and called for the striking of a pleading filed in bad faith.[23] The old rule did not deter abuse of the judicial system[24] because courts were reluctant to impose the rule's sanctions.[25] New Rule 11, amended in 1983, was an attempt to deal with abuse of the judicial system.[26]

The new rule imposes an affirmative duty upon the attorney to conduct some prefiling inquiry into both the facts and the law underlying a pleading.[27] In evaluating possible Rule 11 violations, courts should consider the case in light of the knowledge and facts available to the attorney at the time of filing.[28]

The amended rule provides sanctions for Rule 11 violations to deter improperly filed pleadings.[29] Sanctions include an order to pay the reasonable expenses, including reasonable attorney's fees, incurred by the opposing party in responding to the pleading. Courts may impose sanctions on the attorney, the client, or both.[30]

Rule 11 Factual Investigation Requirement

Rule 11 requires that a pleading or motion be well-grounded in fact.[31]

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identical to the pre-amendment federal rule, to correspond to the amended federal rule. *See* 2a J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.01[3] (2d ed. 1985) for comparison of the original and revised language.

20. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11,* 61 MINN. L. REV. 1, 59-60 (1976-1977).

21. Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 260 (E.D. Mich. 1985) ("Such a standard is by its very nature highly subjective, prompting an inquiry into the motives and intentions of the attorney or client who have been accused of improper use of legal process.") *See also* Woodfork ex rel. Houston v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985).

22. *Boone,* 145 Ariz. at 240, 700 P.2d at 1340.

23. ARIZ. R. CIV. P. 11 (1939) (amended 1984).

24. *Advisory Committee Note, supra* note 13, at 198. This Note indicates confusion existed regarding the application of the rule, the appropriate standards for attorneys, and the availability and applicability of sanctions.

25. Risinger, *supra* note 20, at 35. In Risinger's review of the use of the old version of Rule 11, he found relatively few cases: under the original rule promulgated in 1938, he discovered only nineteen cases with genuine Rule 11 motions. In these nineteen, courts found Rule 11 violations in only nine. Courts *sua sponte* noted Rule 11 violations in two additional cases. Sanctions, however, were imposed in only three of the eleven violations. *Id.* The *Advisory Committee Note, supra* note 13, at 198, cited the combination of the subjective bad-faith standard and the difficulty in defining the concept of "good ground to support" as reasons for courts' reluctance to impose sanctions.

26. *Advisory Committee Note, supra* note 13, at 198. "Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."

27. *Id.* "The standard is one of reasonableness under the circumstances. [citation omitted] This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." *Id.* at 198-99.

28. *Id.* at 199.

29. *Advisory Committee Note, supra* note 13, at 199-200. One court stated that "Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions." Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2nd Cir. 1985).

30. *Advisory Committee Note, supra* note 13, at 200. ("Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

31. Rule 11 states that "the signature of an attorney . . . constitutes a certificate by him that he

Violations of this requirement fall into three groups: claims or defenses filed with no factual basis at all;[32] claims or defenses filed with misrepresented or fictionalized accounts;[33] or claims or defenses filed without inquiry or investigation.[34]

Courts have found that no factual basis exists for a claim when the facts alleged do not support the claims asserted[35] or when there is a total absence of a factual predicate.[36] In such cases, courts have imposed sanctions. For example, in a case involving a dispute with protesting workers, the employer brought suit seeking injunctive relief from mass picketing and alleging Hobbs Act, RICO, and civil rights violations. The court concluded mass picketing, harsh words, and minor mischief merely interfered with ingress and egress to some extent but that these actions did not constitute the alleged federal crimes. Thus, the attorney failed to provide the necessary factual basis. Rule 11 warranted sanctions.[37]

Courts impose Rule 11 sanctions for misrepresentations made directly to the judge. Such misrepresentations include making assertions contrary to the evidence,[38] and contriving a claim and misrepresenting the true situation.[39]

Courts also impose sanctions where the attorney either conducted no investigation[40] or conducted an investigation insufficient to confirm the va-

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has read the pleading . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact. . . ." ARIZ. R. CIV. P. 11.

32. *See, e.g., In re* Liberty Music and Video, Inc., 50 B.R. 379 (S.D.N.Y. 1985); City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524 (S.D.N.Y. 1985); Barrios v. Pelham Marine, Inc., 106 F.R.D. 512 (E.D. La. 1985); WSB Elec. v. Rank & File Comm. To Stop 2-Gate Sys., 103 F.R.D. 417 (N.D. Cal. 1984).

33. *See, e.g.*, Armada Supply, Inc. v. S/T Agios Nikolas, 613 F. Supp. 1459 (S.D.N.Y. 1985); Filippini v. Austin, 106 F.R.D. 425 (C.D. Cal. 1985).

34. *See, e.g.*, Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985); Chemical Eng'g Corp. v. Marlo, Inc., 754 F.2d 331 (Fed. Cir. 1984); Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985); *Woodfork*, 105 F.R.D. 100; *Mohammed*, 606 F. Supp. 252; Fleming Sales Co. v. Bailey, 611 F. Supp. 507 (N.D. Ill. 1985); Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656 (D.N.C. 1985); In re Ronco, Inc., 105 F.R.D. 493 (N.D. Ill. 1985); Wrenn v. New York City Health and Hosps., 104 F.R.D. 553 (S.D.N.Y. 1985); Berkel v. Fox Farm and Road Mach., 581 F. Supp. 1248 (D. Minn. 1984); Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984); Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983); Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619 (E.D.N.Y. 1983).

35. *See, e.g., WSB Elec.*, 103 F.R.D. at 419-20 (mass picketing, harsh words, and minor mischief did not support claims of Hobbs Act or RICO violations nor claims of conspiracy); *Barrios*, 106 F.R.D. at 513 (in negligence suit against vessel owner for slip and fall, there was no basis for third party complaint against supplier of grease used during construction for failure to warn vessel owner that grease is slippery).

36. In re *Liberty Music and Video, Inc.*, 50 B.R. at 383-84 (assignee's argument that bankruptcy court lacked jurisdiction completely without merit where assignee, acquiring debtor's lease over objections of landlord, specifically requested that bankruptcy court retain jurisdiction over enforcement of the court's order and invoked that jurisdiction on prior occasions); *Yonkers*, 106 F.R.D. at 525 (claim for fraud lacked any good-faith basis in fact).

37. *WSB Elec.*, 103 F.R.D. at 420.

38. *Armada Supply*, 613 F. Supp. at 1466 (attorney made statements of fact that were sheer fabrications).

39. *Filippini*, 106 F.R.D. at 432 (attorney filed a federal claim on behalf of individual union members under 29 U.S.C. § 501(b), a section permitting individual members to sue only when a union is unwilling, misrepresenting that the union was unwilling to sue when in fact the union had already filed a state suit).

40. *Viola Sportswear*, 574 F. Supp. at 620.

lidity of a claim.[41] In one case, for example, the plaintiff based a charge of nationwide trademark conspiracy upon one pair of jeans worth ten dollars; the attorney conducted no prefiling inquiry to validate the claim.[42] The court imposed sanctions because the attorney filed the trademark conspiracy claim without proper prefiling inquiry.

Additional examples of insufficient investigation under Rule 11 are when an attorney acts upon mere assumptions[43] or accepts his client's[44] or another attorney's[45] view of the facts, unsubstantiated by further inquiry. An attorney's belief in the statements of another is not sufficient investigation. Rule 11 requires that the attorney himself conduct a reasonable inquiry to determine the factual basis of his client's claim or defense.[46]

In determining the reasonableness of an attorney's factual investigation under Rule 11, courts focus on observable and verifiable events.[47] Courts judging an attorney's factual investigation as reasonable cite specific activities or events to support their findings. Actions demonstrative of reasonable investigation under Rule 11 include discussions with plaintiff's officials and a review of the original complaint by a third-party plaintiff, rather than reliance upon the information in the original complaint;[48] obtaining prior recorded statements and affidavits of witnesses to support a client's claim;[49] and conducting extensive discovery, requesting production of medical records, and obtaining medical consultation.[50]

In determining the reasonableness of the factual investigation in *Boone,* the court focused on the attorney's interview of the plaintiff and his review of the medical records. Under the circumstances of the *Boone* case, these actions fulfilled the requirements of reasonable factual investigation.[51]

Rule 11 Legal Investigation Requirement

In addition to the requirement of reasonable factual investigation, Rule 11 also requires sufficient inquiry into the law underlying the pleading. Rule 11 provides that the attorney's signature certifies that the pleading is, "after reasonable inquiry . . . warranted by existing law or a good faith argument

41. *Wold,* 575 F. Supp. at 167 (attorney conducted no personal interviews, and only limited telephone inquiries that did not meaningfully address the relevant facts).

42. *Viola Sportswear,* 574 F. Supp. at 620. The court noted: "No effort was made by the plaintiff to make any investigation of the facts prior to the filing the complaint. . . . By the time the expedited discovery was completed . . . it was clear beyond cavil, if it had not been before, that the plaintiff's claim was without any basis in fact." *Id.*

43. *Mohammed,* 606 F. Supp. at 261.

44. *Marlo,* 754 F.2d at 334; *Kendrick,* 609 F. Supp. at 1172; *Fleming Sales,* 611 F. Supp. at 518-19; *Cilco,* 610 F. Supp. at 659; *Van Berkel,* 581 F. Supp. at 1250.

45. *Maier,* 758 F.2d at 1583-84; *Fla. Monument,* 605 F. Supp. at 1326-27.

46. *Cilco,* 610 F. Supp. at 659, "If all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation." *Id.*

47. *See Woodfork,* 105 F.R.D. at 104-05.

48. General Accident Ins. Co. v. Fidelity & Deposit Co., 598 F. Supp. 1223, 1230 (E.D. Pa. 1984).

49. Rauenhorst v. United States, 104 F.R.D. 588, 605 (D. Minn. 1985).

50. Friedgood v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984).

51. *Boone,* 145 Ariz. at 240, 700 P.2d at 1340.

for the extension, modification, or reversal of existing law."[52] Courts impose sanctions when attorneys bring cases not warranted by law, specifically, where attorneys base claims upon erroneous legal propositions[53] or upon legally insufficient positions.[54]

Erroneous legal propositions include: misconceptions or errors about the law by the attorney;[55] direct misrepresentations of law by the attorney to the court;[56] and insufficient inquiry into the existing law by the attorney.[57] The common theme uniting these Rule 11 violations is that in each instance the attorney was wrong about legal propositions used to support his case and would have discovered the error if he had conducted the reasonable investigation required by Rule 11.

Similarly, Rule 11 is violated where a party's position is legally insufficient,[58] meaning the legal argument is technically correct but is incorrectly applied to this case. In the usual case, the court simply dismisses the claim or denies the motion. Where, however, reasonable investigation by the attorney would have revealed the erroneous application of the law to his case, courts impose sanctions.[59]

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52. ARIZ. R. CIV. P. 11; FED. R. CIV. P. 11. *See supra* note 2.

53. *See supra* notes 38-41 and *infra* notes 55-57 and accompanying text.

54. *See infra* notes 58-59 and accompanying text.

55. Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205 (7th Cir. 1985) (Rule 11 sanctions against attorney who asserted authority as controlling despite clear authority to the contrary); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985) (award of costs to subpoenaed witness for defending a contempt proceeding after he refused to consent to unauthorized deposition videotaping); National Survival Game v. Skirmish, U.S.A., Inc., 603 F. Supp. 339, 341-42 (S.D.N.Y. 1985) (sanctions imposed when attorney contended in supporting memorandum, without citation to a single case or authority, that defendants were insulated from personal liability because the allegedly illegal conduct was performed in an official corporate capacity and not in an individual capacity). *See also* Zaldivar v. City of Los Angeles, 590 F. Supp. 852 (C.D. Cal. 1984); Fisher v. CPC International, Inc., 591 F. Supp. 228 (W.D. Mo. 1984).

56. *Filippini,* 106 F.R.D. at 427 (counsel directly misrepresented facts of case and knowingly used opinion that had been withdrawn without notifying court or offering republished opinion that reversed the earlier opinion); Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124, 126-27 (N.D. Cal. 1984) (attorney presented argument purporting to reflect existing law when argument actually predicated upon, and not merely arguing for, an extension of existing law); Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 101 (S.D. Cal. 1984) (unrepentant attorney based argument on case with no precedential value and ignored relevant law).

57. Steele v. Morris, 608 F. Supp. 274, 277 (S.D. W. Va. 1985) (court concluded that if attorney had made reasonable inquiry he would have been quickly dissuaded from filing motion).

58. *Eastway,* 762 F.2d at 254 (a claim of antitrust violation without any allegation of an antitrust injury was destined to fail); Weir v. Lehman Newspapers, Inc., 105 F.R.D. 574, 576 (D. Colo. 1985) (no plausible basis for attempt to invoke federal court jurisdiction that duplicated state court action); Ring v. R.J. Reynolds Indus. Inc., 597 F. Supp. 1277, 1281 (N.D. Ill. 1984) ("[T]he allegations of plaintiff's complaint completely fail, under well established law, to state a claim on which relief can be granted.").

59. *Wrenn,* 104 F.R.D. at 557-58 (not only did counsel exhibit a cavalier, bordering on contemptuous, disregard for the federal rules, but also state law barred the pendent state claims and the complaint failed to state a cause of action); Bookkeepers Tax Serv., Inc. v. National Cash Register Co., 598 F. Supp. 336, 339-40 (E.D. Tex. 1984) (the assertion of *res judicata* was based on two elements: the parties and the cause of action in both suits were the same. "[I]t is obvious that the substance of the claims in both suits are the same, and it is substance, not technicalities, that govern the application of *res judicata.*"). *See also* Charlton v. Estate of Charlton, 48 B.R. 1012, 1014-15 (Ariz. 1985); Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010, 1017 (N.D. Ill. 1985). In close cases, courts still appear reluctant to impose sanctions, contrary to requirements of the objective standard. *See* Fernandez v. Southside Hosp., 593 F. Supp. 840, 845 (E.D.N.Y. 1984) (although "the complaint was poorly drafted and failed to allege much," the court did not impose sanctions because the attorney "could have reasonably believed" that he would have been able to establish his claim);

In determining the reasonableness of the attorney's investigation of the law, courts look at the degree of complexity of the particular case and the clarity of the law involved. For example, courts have noted the lack of clarity of certain statutes and the resulting interpretative difficulty as factors in not imposing Rule 11 sanctions.[60] Also, courts do not impose sanctions for the creation of novel causes of action if reasonable arguments for modifying or extending current law exist.[61]

Impact of Boone

In *Boone v. Superior Court,* the Arizona Supreme Court discussed the factual and legal investigation requirements of the newly amended version of Rule 11. The court determined that the rule is violated when counsel either 1) fails to make a reasonable investigation or 2) files a claim or defense that he knew, or should have known, after reasonable inquiry of fact and law, was unjustified, insubstantial, groundless, or frivolous.[62] Under *Boone,* courts will not dismiss a case or strike a meritorious claim or defense on Rule 11 grounds solely because the pleading was filed at a time when available evidence did not establish a prima facie case or defense.[63] So long as the attorney conducts a reasonable investigation of fact and law prior to filing the pleading, and based on that investigation forms a good-faith belief that a colorable claim exists, Rule 11 is not violated. If, however, the attorney does not conduct an investigation "reasonable under the circumstances," then Rule 11 sanctions are appropriate.[64]

Ilardi v. Bechtel Power Corp., 106 F.R.D. 567, 571 (E.D.N.Y. 1985) (although the court denied the plaintiff's motion to set aside a directed verdict and grant a new trial, the court did not consider the motion so devoid of substance as to merit Rule 11 sanctions).

60. *See* Pudlo v. I.R.S., 587 F. Supp. 1010, 1011-1012 (N.D. Ill. 1984) (taxpayers' counsel's failure to know the proper standard for computing time within which to make a motion to quash was not unreasonable given that cases demonstrating the proper interpretation of the statute were few and that the time period itself was stringent, imposing an additional difficulty on reviewing controlling precedent); *Fernandez,* 593 F. Supp. at 845 (the applicable statute of limitations for civil rights claims and its commencement were not so clear that the attorney's investigation was unreasonable).

61. Skepton v. County of Bucks, Pa., 613 F. Supp. 1013, 1022 (E.D. Pa. 1985). One court has stated that:

> In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital change have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under existing precedents, and where no reasonable arguments can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves to punish only those who would manipulate the federal court system for ends inimicable to those for which it was created.

Eastway, 762 F.2d at 254.

Another court noted: "[T]he Court should not penalize an attorney for ingenuity or for trodding an uncertain and little used path." *McLaughlin,* 105 F.R.D. at 625.

62. *Boone,* 145 Ariz. at 241, 700 P.2d at 1341.

63. *Id.* at 242, 700 P.2d at 1342.

64. In addition to the factors discussed in this Casenote, courts consider various other circumstances when imposing sanctions. For example, when a party is presented with the opportunity to dismiss an unwarranted claim and unjustly refuses to do so, it is more likely courts will impose sanctions. *See Yonkers,* 106 F.R.D. at 525 (not only was there no factual basis for any claim but the plaintiff also unjustifiably refused to dismiss the claim even though presented with the opportunity to

Boone is significant because it affirms the Rule 11 requirement of reasonable investigation into both the facts and the law underlying a pleading. Although Rule 11 by necessity requires a case-by-case determination of compliance with its requirements, federal cases applying the amended rule illustrate when and under what circumstances an attorney can anticipate the imposition of Rule 11 sanctions.

Conclusion

In *Boone v. Superior Court,* the Arizona Supreme Court interpreted newly amended Rule 11 as requiring attorneys to make a reasonable investigation of fact and law before filing a claim. Although the old rule was ineffective in deterring misuse and abuse of the judicial system, amended Rule 11, with its objective standard of reasonable investigation, has greater potential to achieve this purpose. To realize this potential, however, attorneys must request application of Rule 11 and courts must utilize Rule 11.

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do so early in the litigation). Courts also consider the refusal to voluntarily dismiss a claim not warranted by law or well grounded in fact when evaluating possible Rule 11 violations. *See Barrios,* 106 F.R.D. at 514. These situations occur when the opposing party brings to the attention of the other attorney new facts or new law or controlling authority and the attorney refuses to withdraw or dismiss in spite of this new knowledge.

Courts no longer consider the absence of improper purposes, such as causing an unnecessary delay or needless expense, as providing insulation of an attorney from Rule 11 sanctions. *See Ronco,* 105 F.R.D. at 498. Neither will inadvertent error provide an excuse. *See Zaldivar,* 590 F. Supp. at 856. *But see* Baransky v. Serhant, 106 F.R.D. 247, 250 (N.D. Ill. 1985) (objective assessment of the severity of the mistake and the attorney's conduct following the discovery of the mistake). Furthermore, no longer will an attorney's good faith pursuit of an action provide a shield against Rule 11 sanctions. *See Fisher,* 591 F. Supp. at 233. The *Fisher* court, noting the attorney's affirmation of his good faith pursuit of the action, quoted from the plaintiff's brief:

> We live in America, not the Soviet Union, and Plaintiff believes there is still room in this country for good faith argument, without the threat of attorney's fees. This writer does not believe the Courts of the United States wish to penalize those who would mold our laws. Hence, Plaintiff moves this Court to deny Defendant's Request for attorney's fees.

Id. The court continued: "Plaintiff's view of this case and the legal system in general might charitably be described as quixotic. Obviously, defendants take a less charitable view and seek compensation for their involuntary service as windmills." *Id.*

CRIMINAL LAW

ARREST AS THE PREREQUISITE TO ESCAPE: AN ANALYSIS OF *STATE V. SANCHEZ*

In *State v. Sanchez*[1] the Arizona Supreme Court concluded that, under Arizona's statutory scheme, a suspect who flees from police prior to an arrest is not guilty of escape.[2] To reach this result, the *Sanchez* court addressed the escape statute's custody requirement, and the statutory phrase "constructive restraint." The holding ultimately reflected the court's desire not to expand the escape statutes to include flight from attempted arrest and included an invitation to the Arizona Legislature to consider enacting a fleeing statute.

On June 3, 1983, a Casa Grande police officer approached defendant Roy Sanchez after recognizing him and discovering that a misdemeanor warrant had been issued for his arrest.[3] The officer walked towards Sanchez and said "Roy, come here. I need to talk to you." The two circled a few times around a car in a parking lot, until the officer said, "This is it, Roy; you're under arrest." Hearing this, Sanchez, who was then ten to fifteen feet away from the officer, "took off running."[4] The trial court convicted Sanchez of escape in the third degree.

The Arizona Court of Appeals reversed the lower court's conviction.[5] The court determined that Sanchez was not under constructive restraint when he fled because the officer did not have the power to physically control him. With both actual and constructive restraint lacking, Sanchez was not in custody; therefore, his flight did not constitute escape in the third degree.

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1. 145 Ariz. 313, 701 P.2d 571 (1985).

2. At the time of Sanchez's arrest the statute provided: "A person commits escape in the third degree if, having been arrested for, charged with or found guilty of a misdemeanor or petty offense, such person knowingly escapes from custody." ARIZ. REV. STAT. ANN. § 13-2502(A) (1978). This provision has subsequently been amended. The amended statute incorporates the old provision and adds "or attempts to escape from custody" after "knowingly escapes." ARIZ. REV. STAT. ANN. § 13-2502(A) (1985). This change in the statute broadened its scope to include attempted escapes, but does not affect the issues raised in the case. The term "custody," which was the court's major concern, still appears in the statutes.

Under ARIZ. REV. STAT. ANN. § 13-2503 (1985), escape in the second degree includes escape or attempted escape from a correctional facility or from custody imposed because of an arrest, charge or conviction for a felony.

Escape in the first degree, as defined in ARIZ. REV. STAT. ANN. § 13-2504 (1985), includes escape or attempted escape from a correctional facility or custody by threatening to use, or by using, physical force, a dangerous weapon, or an instrument, against another person.

Escape has been defined as the voluntary departure of a person (without force) from the lawful custody of an officer or from a place where he is lawfully confined. State v. Jones, 266 Minn. 526, 529, 124 N.W.2d 729, 731 (1963). Absent a statutory provision to the contrary, the escapee is not required to use force for the event to qualify as an escape. *See, e.g.*, Perry v. State, 80 Okla. Crim. 58, 157 P.2d 217 (1945).

3. *Sanchez*, 145 Ariz. at 314, 701 P.2d at 572.

4. *Id.*

5. State v. Sanchez, 145 Ariz. 339, 701 P.2d 597 (Ct. App. 1985).

The Arizona Supreme Court affirmed the lower court's judgment of acquittal but disagreed with the court of appeals as to whether there could be custody through constructive restraint absent an arrest. The Arizona Supreme Court addressed, as an issue of first impression, whether a suspect commits escape in the third degree when fleeing from police prior to an arrest.[6]

Defining "Constructive Restraint Pursuant to an On-Site Arrest"

Sanchez was charged with escape in the third degree under Arizona Revised Statutes section 13-2502(A).[7] Escape in the third degree occurs when a suspect 1) has been arrested, charged with, or found guilty of a misdemeanor or petty offense; 2) is in custody; and 3) knowingly escapes.[8] The *Sanchez* court focused primarily on the "custody" requirement.[9] The *Sanchez* court expressly held that an individual must be under arrest before he or she can be in custody and, therefore, commit escape.[10]

In Arizona, custody is statutorily defined as "the imposition of actual or constructive restraint pursuant to an on site arrest or court order. . . ."[11] Since Sanchez was clearly not subject to "actual restraint," the court addressed the narrow issue of what constitutes "constructive restraint pursuant to an on-site arrest."[12]

What constitutes "constructive restraint" was an issue of first impression in Arizona.[13] The court explained that in the Arizona statutes, the term "constructive restraint" refers to situations where "the arrest has already occurred, the process of taking the arrestee to police station or judge has commenced. . . ."[14]

Under Arizona Revised Statutes section 13-3881(A), arrest occurs only by "an actual restraint . . . or . . . submission to the custody of the person making the arrest."[15] Absent submission, an actual restraint is required to

6. The state petitioned the Arizona Supreme Court for review. *Sanchez*, 145 Ariz. at 314, 701 P.2d at 572. The supreme court had jurisdiction pursuant to ARIZ. CONST. art. VI, § 5(3), ARIZ. REV. STAT. ANN. § 13-4032 (1985) and 17 ARIZ. REV. STAT. ANN. Rules of Crim. Proc., Rule 31.19.

7. In the context of an arrest, it is possible to confuse the crime of escape with the crime of resisting arrest. A suspect resists arrest when he or she attempts to prevent an arrest by 1) using or threatening to use physical force against the officer or another or 2) using any other means to create a substantial risk of injuring the officer or another. ARIZ. REV. STAT. ANN. § 13-2508 (1985); MODEL PENAL CODE AND COMMENTARIES 242.2. In contrast, escape involves nonviolent flight. ARIZ. REV. STAT. ANN. § 13-2502-2504 (1985). Sanchez's flight did not involve physical force or create a risk of physical injury to the police; therefore, the resisting arrest statute did not apply.

8. The statutes now include attempts to escape as well as actual escapes. *See supra* note 2.

9. The court did not consider the other two elements, evidently because the state chose only to raise the issue of arrest on appeal to the supreme court.

10. *Sanchez*, 145 Ariz. at 316, 701 P.2d at 574.

11. ARIZ. REV. STAT. ANN. § 13-2501(3) (1985).

12. Sanchez was 10 to 15 feet away from the officer at the time of flight; thus, actual physical restraint had not occurred. *Sanchez*, 145 Ariz. at 314, 701 P.2d at 572.

13. *Id.*. The court chose to focus on the phrase "constructive restraint" and not "pursuant to," which has not been defined within the statute nor discussed in any cases. While the statutory phrase "pursuant to arrest" can be interpreted as requiring arrest prior to custody, the statutory history and subsequent case law is silent on the issue.

14. *Id.* at 316, 701 P.2d at 574.

15. ARIZ. REV. STAT. ANN. § 13-3881(A) (1978).

demonstrate an arrest.[16] This analysis finds a constructive restraint situation only where there was an actual restraint. The practical effect of this analysis is that a purely constructive restraint situation cannot occur. Thus, the *Sanchez* decision makes the term "constructive restraint" redundant, as it is used in the definition of custody.

The court justified its construction of the statute on two principal grounds. First, the history of the escape statutes suggests that the state legislature did not intend to criminalize flight prior to arrest.[17] The legislature adopted escape statutes which were quite similar to those proposed by the Arizona Criminal Code Commission.[18] The commentary to the Commission's proposal expressly stated that "neither [nonviolent] nonsubmission nor flight are covered by these sections."[19] In addition, the Mode' Penal Code and Commentaries, which served as the basis of the Arizona Commission's proposal,[20] specifically chose not to criminalize nonviolent flight from arrest.[21]

Second, the court was concerned with a potentially uneven application of the escape statutes. If arrest was not required for escape, then the law could treat individuals committing identical acts differently.[22] Escape in the third degree, for example, requires that the escapee have previously been "arrested for, charged with or found guilty of a misdemeanor or petty offense."[23] Thus a person, such as Sanchez, could be convicted of escape for running from an attempted arrest that is unrelated to a prior misdemeanor charge.[24] In contrast, a person who, prior to flight, did not have an outstanding misdemeanor charge or conviction could not be guilty of escape in the third degree. Thus an identical act, fleeing, is considered criminal for one individual and not the other.

Ramifications of the Sanchez *Decision*

The *Sanchez* court focused on escape in the third degree. The court's holding will apply to all of the escape statutes, however, because escape in the first and second degrees occurs with an escape either from custody or a

16. *Id.*

17. *Sanchez*, 145 Ariz. at 315, 701 P.2d at 573.

18. *See* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE §§ 2501, 2502, 2503 & 2508 at 233-38 (1975). The Arizona statutes delete the Commission's "intentional escape" requirement, and simply require a person to "knowingly" escape or attempt to escape. *Cf.* ARIZ. REV. STAT. ANN. §§ 13-2502-2504 (1985). Unlike the escape statutes, the Commission's proposed statutes do not cover attempted escape.

19. ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE at 238 (1975). The Commission noted that in such a situation it is proper to pursue or use reasonable force to overcome the suspect. *Id.* at 238. Oregon has similar escape and resisting statutes and a similar commentary to the Code. Like the Arizona court in *Sanchez*, Oregon courts have held that nonviolent flight from attempted arrest is not covered by the escape statutes. *See, e.g.*, State v. Swanson, 34 Or. App. 58, 62, 578 P.2d 411, 413 (1978).

20. Unlike the Arizona statutes, the Model Code provides that belief in unlawfulness of arrest is a defense to a charge of resisting arrest. MODEL PENAL CODE AND COMMENTARIES § 242.2 Comment 8 (1980).

21. *Id.* at § 214. *See Sanchez*, 145 Ariz. at 315, 701 P.2d at 573.

22. *Sanchez*, 145 Ariz. at 315, 701 P.2d at 573.

23. ARIZ. REV. STAT. ANN. § 13-2502(A) (1985).

24. Sanchez had an outstanding misdemeanor warrant for running a red light and failing to appear for jail time. *Sanchez*, 145 Ariz. at 316, 701 P.2d at 574.

correctional facility.[25]

After *Sanchez*, the custody requirement of Arizona's escape statutes is satisfied upon an arrest of the suspect. Arizona has distinguished a "technical arrest" from a "full custody arrest."[26] The *Sanchez* opinion indicates that a "technical arrest" prior to the escape is sufficient to meet the custody requirement.[27]

Arizona case law indicates that the statutory requirement for arrest is satisfied by restriction of the suspect's movement.[28] Actual physical police contact is not necessary. In a Nebraska case discussed by the Arizona Court of Appeals in *Sanchez*, the officer stood directly in front of the suspect, announced the arrest, yet exerted no physical control over the suspect.[29] The court found that the suspect was under constructive seizure, and was therefore arrested.[30] The Arizona Supreme Court, however, believed the Nebraska definition of "constructive seizure" was inapplicable to Arizona's requirements for arrest.[31] Nonetheless, Arizona's past distinction between technical and full custody arrest coupled with this court's requirement for a technical arrest suggests something short of full custody may suffice. Thus, courts may still find the Nebraska standard instructive. The Nebraska standard finds that an individual is technically arrested if the officer 1) has apparent power to exert physical control over the suspect, 2) has an intention to effect an arrest, 3) has communicated that intention to the arrestee, and if 4) the arrestee understands the officer's intention.[32]

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25. *See supra* note 2.

26. The *Sanchez* court cites State v. Susko, 114 Ariz. 547, 562 P.2d 720 (1977). In that case the court distinguished between a "technical arrest" and a "full custody arrest" by stating that "the restraint of movement is, at least as a minimum, a technical arrest, although in a larger sense it may not be considered a full custody arrest. . . ." *Id.* at 549, 562 P.2d at 722.

27. *Sanchez*, 145 Ariz. at 315, 701 P.2d at 573. In *Sanchez*, the court first noted the distinction between "full custody arrest" and "technical arrest," then held that the phrase "constructive restraint" required a technical arrest. *Id.* at 315, 701 P.2d at 573. The absence of an explicit requirement for full custody arrest in the court's holding suggests that custody is accomplished with either type of arrest. *Id.* at 316, 701 P.2d at 574.

28. *See, e.g.*, State v. Green, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975) (whether the defendant has been arrested is to be tested by the evidence and not by the subjective beliefs of the parties); State v. Stauffer, 112 Ariz. 26, 28, 536 P.2d 1044, 1046 (1975) (arrest occurs when freedom of movement is restricted); State v. Edwards, 111 Ariz. 537, 539, 529 P.2d 1174, 1176 (1974) (arrest is completed when the suspect's liberty of movement is interrupted and restricted by the officer); State v. Durham, 108 Ariz. 233, 235, 495 P.2d 463, 465 (1972) (arrest occurs when the officer subdues the fleeing suspect); State v. Sanders, 118 Ariz. 192, 195, 575 P.2d 822, 825 (Ct. App. 1978) (arrest is completed when the individual's liberty of movement is interrupted).

29. State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981). The officer was standing directly in front of the defendant when he announced that the defendant was under arrest. Due to the officer's proximity to the defendant, he could have exerted physical control had he chosen to. The Nebraska court held that constructive restraint had occurred because: (1) the officer had the intention to effect an arrest, (2) that intention was communicated to the arrestee, (3) the arrestee understood he was under legal restraint, and (4) the officer had the apparent present power to control the person. *Id.* at 224, 306 N.W.2d at 911.

30. *Id.* at 225, 306 N.W.2d at 911.

31. The court found the Nebraska definition inappropriate because, while it was defining constructive restraint for the purpose of custody, the Nebraska court was construing "constructive seizure or detention" for the purposes of arrest. This distinction, however, does not hold up. The terms constructive restraint and constructive seizure describe the same concept. In addition, the Arizona court's distinction between custody and arrest becomes so blurred that the two courts, in fact, seem to be discussing the same issue. *See supra* notes 15-18 and accompanying text.

32. *White*, 209 Neb. at 224, 306 N.W.2d at 911. The court supplied these criteria when defining constructive seizure. A reading of *White* in combination with State v. Susko, 114 Ariz. 547, 562

The court's construction of the escape requirements, using the Nebraska standard, places courts in the difficult position of examining the physical position of the police officer and the suspect to determine whether an arrest has occurred and the process of taking the suspect to the station or judge has commenced.[33] While such an assessment is arguably difficult, the issue of when an arrest occurs has been dealt with successfully in other contexts, such as fourth amendment inquiries. This indicates courts should be equipped to handle such decisions in the escape context.

The Legislative Invitation

The *Sanchez* court's reading of legislative history and concern with uneven statute application made them unwilling to criminalize fleeing from attempted arrest. The court believed that they should not "judicially legislate" such a result.[34] Instead the court invited the Arizona Legislature to consider whether fleeing from attempted arrest should be criminalized. If the Arizona Legislature responds to the court's invitation, it might be guided by an already-existing fleeing statute, passed by the Arkansas Legislature.[35] In addition, there are a number of factors to be considered before criminalizing flight from attempted arrest.

There are four possible arguments against adopting a fleeing statute. First, it may be contrary to concepts of fairness to punish a person for spontaneous flight during an attempted arrest where the action does not risk a breach of the peace and the individual is innocent of the crime justifying the attempted arrest.[36] Avoiding arrest may be the most natural reaction of an innocent person frightened by unfamiliar circumstances.[37] And yet, even if the individual is found innocent of the underlying crime, the fleeing statute would impose criminal sanctions.

On the other hand, application of the escape statutes, as currently interpreted, may also be unfair. A suspect whose physical proximity to the officer

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P.2d 720 (1977), which distinguished full custody from technical arrest, suggests these criteria may be used to define the term "technical arrest."

33. *See White*, 209 Neb. 218, 306 N.W.2d 906.

34. *Sanchez*, 145 Ariz. at 316, 701 P.2d at 574.

35. Under the fleeing statute enacted in Arkansas, it is a misdemeanor to knowingly flee from an officer if the officer is trying to detain or arrest the individual.

ARK. STAT. ANN. § 41-2822 (1977) states:

> Fleeing.—If a person knows that his immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of such person to refrain from fleeing, either on foot, or by means of any vehicle or conveyance.
>
> Fleeing is a separate offense, and shall not be considered a lesser included offense or component offense with relation to other offenses which may occur simultaneously with the fleeing.

ARK. STAT. ANN. § 41-2823 (1977) provides the penalties for fleeing. Fleeing is generally considered a Class C misdemeanor; however, the statutes indicate that certain cases are characterized as more severe crimes (e.g., where there is property damage, injury to a person, or a recent conviction for fleeing).

36. *See* MODEL PENAL CODE AND COMMENTARIES § 242.2 at 214, Comment 2 (noting that if the defendant is innocent of a crime it is thought unfair to punish him/her for spontaneous flight or other reflexive act of resistance). If there is any physical resistance to the arrest, the arrestee could be charged with resisting arrest rather than fleeing or escape.

37. *Id.*

satisfies the technical arrest requirements[38] can be convicted of escape. A person who stands far enough away from the officer will not come within the escape statutes because that person is not within the potential physical control of the officer. Thus, for the same act of fleeing an attempted arrest, courts would reach different results depending on the fortuitous positioning of the parties.

Second, criminal sanctions for fleeing arrest may invite grave abuse.[39] The ambiguous nature of minor acts of evasion and resistance may encourage false allegations and result in discriminatory enforcement.[40] Conversely, the state's interest in encouraging persons to submit to police authority and the understanding that all statutes are susceptible to discriminatory enforcement[41] outweigh the possible abusive application of the statute.

Third, a fleeing statute is arguably unnecessary because, after *Sanchez*, only a narrow range of behavior is not covered by the escape and resistance statutes. While the court's use of technical arrest to satisfy the escape statutes' custody requirement allows the most liberal interpretation of arrest possible, Arizona statutes exclude only non-violent, pre-arrest flight from coverage. While non-violent flight may be a relatively rare occurance, the frequency of its occurance should not prevent criminalization if the act is considered undesirable.

Finally, existing police authority to pursue the fleeing person and to use the force necessary[42] to subject the suspect to custody may be preferable to a fleeing statute. Pursuit is, however, costly in terms of time and potential risks to officers. Also, the United States Supreme Court has limited the amount of force permitted when pursuing a suspect.[43] Deadly force is appropriate only if it is necessary to prevent a suspect's escape and the officer

38. For the requirements of an arrest, *see supra* notes 26-28 and accompanying text.

39. MODEL PENAL CODE AND COMMENTARIES § 242.2 at 214, Comment 2.

40. *Id.* Minor acts of evasion may be sufficiently ambiguous to allow an officer who has a negative attitude toward a particular group of people to see minor acts committed by members of that group as criminal while not seeing the same act by a nonmember as criminal. Further, a police officer may be tempted to harass a suspect with threats of prosecution for fleeing when the officer is unable to gather enough evidence to sustain a charge and conviction of a more serious crime.

41. Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35, 41 (1982).

42. Arizona limits the amount of force permitted in making an arrest; the limits themselves suggest force is permissible during an arrest. ARIZ. REV. STAT. ANN. § 13-3881(B) (1978) states: "No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention." This statute reflects Arizona case law, which holds that an officer must not intentionally inflict unnecessary bodily harm or death on a fleeing misdemeanant. Havier v. Partin, 16 Ariz. App. 265, 267, 492 P.2d 761, 763 (1972).

43. Tennessee v. Garner, 105 S. Ct. 1694 (1985). In the *Garner* case the suspect was trying to climb a fence to escape an attempted arrest. There was no sign the defendant had a weapon, but he did not comply with the police command to stop. The officer fatally shot the suspect in the head. The constitutionality of the Tennessee statute permitting such police response was challenged. The statute stated: "If, after notice of the intention to arrest the defendant . . . either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-7-108 (1982). The Court held that, while not unconstitutional on its face, the statute's application in this case was unconstitutional insofar as it allowed the use of deadly force against an apparently unarmed and nondangerous fleeing suspect. The use of deadly force is subject to the reasonableness requirement of the 4th Amendment. 105 S. Ct. at 1701.

has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[44] This limitation reduces the effectiveness of the threat of the use of deadly force as a deterrent to flight. Consequently, there is an increase in the importance of threat of punishment for flight.[45] Punishment for flight would promote social order, conserve police resources, and reduce the risks to officers.[46]

Adoption of a fleeing statute violates no major public policies. While there are valid arguments concerning potential unfairness, abuse, and discriminatory enforcement, the counter arguments described above are more compelling. Thus, the legislature should consider adopting a fleeing statute.[47] Doing so would convey the clear message that fleeing from attempted arrest is unacceptable, provide police officers with an alternative way to handle a fleeing suspect, and serve as a deterrent to fleeing.

Conclusion

In *State v. Sanchez*, the Arizona Supreme Court interpreted the term "constructive restraint" in such a way as to require arrest as a prerequisite to escape. In so doing, the court refused to allow a conviction for fleeing from an attempted arrest. The court made it clear that the Arizona Legislature is the appropriate body to criminalize fleeing from attempted arrest and expressly invited the legislature to consider doing so. Until such time as that body chooses to accept the invitation, Arizona will charge and convict suspects under the escape statutes only if a completed arrest occurs prior to the suspect's flight.

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44. *Garner*, 105 S. Ct. at 1697. As suspects become aware that the use of force is restricted, they may be more inclined to flee attempted arrests. Criminalization, therefore, may be important as a clear message that such fleeing will not be tolerated, thereby preventing an increase. It has been noted that most utilitarians view deterrence as the aim of punishment. Haas, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 708 (1981).

45. *Garner*, 105 S. Ct. at 1701 n.9. Since the Tennessee statute was held constitutional on its face, the police remained authorized to ". . . use all the necessary means to effect an arrest." TENN. CODE ANN. § 40-7-108. Tennessee has since amended the statute to limit the use of deadly force by police officers. *See* TENN. CODE ANN. § 40-7-108 (1985).

46. If the officer pursues, there is always the risk of injury to both parties.

47. *See supra* note 35.

B. FELONY-MURDER DEATH SENTENCE: THE TISON BROTHERS' INTENT TO KILL

"Pulling the trigger is only one factor, albeit a significant one, in determining intent."[1] The Arizona Supreme Court's second review[2] of the Tison brothers' murder convictions addressed the question of whether the death sentences imposed on the brothers are constitutional under the United States Supreme Court's decision in *Enmund v. Florida*.[3] *Enmund* held that a defendant may not be sentenced to death absent a showing that he killed, attempted to kill, or intended to kill. In a three to two decision,[4] the Arizona Supreme Court affirmed the death sentences.[5] In making this determination, the Arizona court became the first to decide that the dictates of *Enmund* are satisfied based solely on the reviewing court's finding that the defendants reasonably contemplated or anticipated lethal force would be used and lives would be taken.[6] The court held that imposing the death penalty on the Tisons did not violate the eighth amendment prohibition of cruel and unusual punishment because the defendants intended, within the meaning of *Enmund*, that the victims die.[7]

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1. Enmund v. Florida, 458 U.S. 782, 810 n.20 (1982) (O'Connor, J., dissenting).

2. State v. Ricky Tison, 142 Ariz. 446, 690 P.2d 747 (1984), *cert. granted sub nom.* Tison v. Arizona, — U.S. —, 54 U.S.L.W. 3561 (Feb. 25, 1986); State v. Raymond Tison, 142 Ariz. 454, 690 P.2d 755 (1984), *cert. granted sub nom.* Tison v. Arizona, — U.S. —, 54 U.S.L.W. 3561 (Feb. 25, 1986) [hereinafter referred to collectively as *Tison II*].

"*Tison I*" as used in this Casenote refers to the Tisons' appeal of their convictions and sentences to the Arizona Supreme Court, State v. Ricky Tison, 129 Ariz. 526, 633 P.2d 335 (1981), *cert. denied*, 459 U.S. 882, *reh'g denied*, 459 U.S. 1024 (1982); State v. Raymond Tison, 129 Ariz. 546, 633 P.2d 355 (1981), *cert. denied*, 459 U.S. 882, *reh'g denied*, 459 U.S. 1024 (1982).

3. 458 U.S. 782 (1982). Prior to *Enmund*, a felony murder defendant could be sentenced to death based on the degree of his participation in the underlying felony regardless of his individual *mens rea* with respect to the killing. *Tison II*, 142 Ariz. at 451, 690 P.2d at 752; *Tison I*, 129 Ariz. at 545, 633 P.2d at 354. Evidence of lack of intent could be used to show mitigating factors to support not imposing the death penalty pursuant to ARIZ. REV. STAT. ANN. § 13-703 (1978) (formerly § 13-454). *See* Richmond v. Cardwell, 450 F. Supp. 519 (D. Ariz. 1978).

Arizona's felony murder doctrine after *Enmund* does not require specific intent to kill in order to support a first degree murder conviction, but does require proof of the mental state for committing the underlying felony. State v. McLoughlin, 139 Ariz. 481, 485, 679 P.2d 504, 508 (1984). The Arizona Supreme Court directed trial courts to make findings in accordance with *Enmund* prior to sentencing. State v. McDaniel, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). *See infra* note 20.

4. Justice Feldman and Justice Gordon dissented in *Tison II*, arguing that the Arizona Supreme Court "flirts with the question of foreseeability" in its analysis of this case. 142 Ariz. at 453, 690 P.2d at 754. The dissent further contended that the holding does not follow the court's rules and authority and that the majority usurped the function of the trial court. The dissent maintained the court must remand to the trial court to receive evidence and make findings, 142 Ariz. at 450, 454, 690 P.2d at 751, 755, even though Tisons' counsel neither sought remand nor argued that additional evidence would be presented at an evidentiary hearing on intent. Appellant's Supplemental Brief at 10-11, *Tison II*, 142 Ariz. 454, 690 P.2d 755 (1984).

The United States Supreme Court recently resolved the issue of a reviewing court's authority under *Enmund* in Cabana v. Bullock, No. 84-1236, Jan. 26, 1986, slip op. at 14, 46 S. Ct. Bull. P. B717 (CCH) (1986). The *Cabana* Court held that findings of intent under *Enmund* need not be made by the trier of fact, as long as a state reviewing court makes a finding as to defendant's culpability pursuant to the *Enmund* criteria. *See infra* note 35.

5. *Tison II*, 142 Ariz. at 450, 690 P.2d at 751. After the *Enmund* decision in 1982, the Tisons petitioned for a hearing on the issue of intent. *Tison II* resulted from defendants' request for supreme court review of the trial court's summary denial of defendants' petitions.

6. *Tison II*, 142 Ariz. at 447, 690 P.2d at 748.

7. The term "*Enmund* intent" as used in this Casenote refers to the mental state of a defend-

This finding of intent initially seems contradictory to *Tison I*, where the Arizona Supreme Court noted, "[t]hat the defendants did not specifically intend that the [victims] die . . . is of little significance."[8] Under the guidelines of *Enmund*, however, the finding of intent in *Tison II* does not contradict the Arizona court's 1981 opinion.

This Casenote addresses the following issues: 1) whether sentencing the Tisons to death is constitutional under *Enmund*, and 2) whether the *Tison II* decision is consistent with other cases interpreting *Enmund*.

Factual Background

In 1978, Ricky and Raymond Tison, and a third brother Donny, helped their father, Gary Tison, and Randy Greenawalt, both convicted murderers, escape from prison.[9] The brothers held weapons on the guards, supplied a getaway car and joined the convicts in fleeing from capture.

Two days after the breakout, the Tisons' car broke down on a deserted road. The five men agreed to stop the next car that came along. Raymond Tison waved down the Lyons family's car, while Ricky and the others hid in ambush. The defendants forced the four members of the family into the desert at gunpoint. The family, including a baby in his mother's arms, was killed by repeated shotgun blasts. The bodies of the victims were found in and around the Tisons' disabled car.[10] After the murders, the gang continued their escape in the Lyons' car.[11]

Ricky and Raymond Tison defended against the murder charges by claiming that their father and Greenawalt fired the shots that killed the Lyons family. Defendants' counsel argued that the brothers neither knew

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ant who contemplated or anticipated that lethal force would or might be used in accomplishing a felony, as discussed in *Tison II*, and as the terms "anticipation," "contemplated," and "expectations," are used in *Enmund*. *See also infra* notes 27 and 31 and accompanying text.

8. *Tison I*, 129 Ariz. at 545, 633 P.2d at 354. In pointing out the apparent contradiction, the dissent noted that because there has been no evidentiary hearing on intent, the record before the court in *Tison II* is exactly the same as it was in *Tison I*. *Tison II*, 142 Ariz. at 450, 459, 690 P.2d at 751, 760. The dissent does not take into account, however, that the meaning of "intent" expanded with *Enmund*. *See supra* notes 6 and 7, and *infra* notes 19-20 and accompanying text. "Intent," as used by the court in 1981, comported with ARIZ. REV. STAT. ANN. § 13-105(5)(a) (1978) where "intentionally" or "with the intent to" is defined as, "with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct." *See infra* note 61 and accompanying text.

9. The facts are set forth at 142 Ariz. at 447-48, 451-52, 454, 456-57, 461, 690 P.2d at 748-49, 752-53, 755, 757-58, 762; *Tison I*, 129 Ariz. at 530-31, 542-46, 548-49, 553-55, 633 P.2d at 339-40, 351-54, 357-58, 364-66.

For a narrative description of the defendants' version of events, see the chapter entitled "Capital Punishment for Sins of Their Father," in A. DERSHOWITZ, THE BEST DEFENSE 289 (1981). Professor Dershowitz argued against the Tisons' death sentences in amici curiae for the American Civil Liberties Union before the Arizona Supreme Court in *Tison I*. Dershowitz also represents the defendants in their pending arguments before the United States Supreme Court.

10. The Lyons' teenage niece survived the initial shooting; her body was found some distance away, where she had managed to walk before bleeding to death. *Tison I*, 129 Ariz. at 530, 633 P.2d at 339. *See also* A. DERSHOWITZ, *supra* note 9, at 298.

11. Ten days later, the gang crashed another stolen vehicle after going through a police roadblock in an exchange of gunfire. Donny Tison was killed and the two defendants were captured. Their father, Gary Tison, fled into the desert and was found dead of exposure a few days later. *Tison I*, 129 Ariz. at 549, 633 P.2d at 340. Greenawalt was also captured at the roadblock, convicted in a separate trial and sentenced to death. State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828, *cert. denied sub nom.* Tison v. Arizona, 454 U.S. 848 (1981).

nor intended that the family would be killed.[12] The trial court convicted Raymond and Ricky of first degree murder in 1979 and they were sentenced to death.[13]

In statements made pursuant to a plea bargain agreement prior to Greenawalt's trial,[14] the brothers admitted they took the victims at gunpoint to the murder site. Ricky stated he heard Mr. Lyons say something to the effect, "Don't kill us," and Gary Tison responded that he was thinking about what to do.[15] Ricky stated that he and Raymond walked away from the group to bring water; he and Raymond then returned, and gave John Lyons a drink before Gary Tison and Randy Greenawalt opened fire.[16] The reviewing court referred to Ricky's narration that even in the dark he and

12. *Tison II*, 142 Ariz. at 454, 690 P.2d at 755. At the sentencing hearing, Raymond stated that the brothers had an agreement with their father that nobody would get hurt and that Raymond was not expecting the killing of the Lyons family. *Id.* Raymond made a contradictory statement, however, during a psychological evaluation provided to the trial court with the Presentence Report, which was cited by the reviewing court in *Tison I*:

> Raymond . . . felt almost certainly that if they became involved with legal authorities or were near capture that a shooting incident would occur. He stated that in terms of innocent civilians being injured that it was most unfortunate but that his father was in charge. His father was running it like "a military operation and there were *no survivors*—you know, that sort of thing—*no witnesses*." *Tison I*, 129 Ariz. at 555, 633 P.2d 364 (emphasis added).

A similar psychological report on Ricky Tison was cited by the State in Appellee's Answering Brief at 63, *Tison I*, 129 Ariz. 526, 633 P.2d 335.

13. *Tison I*, 129 Ariz. at 530, 548, 633 P.2d at 339, 357. Raymond was nineteen and Ricky was twenty at the time of the crime. Special Verdict at 5, State v. Tison, No. 9969 (Super. Ct. 1979). The sentencing judge considered the youth of the defendants in weighing mitigating circumstances, in addition to defendants' minimal prior criminal activity, and that their convictions were based on felony murder instructions. 129 Ariz. at 544, 555, 633 P.2d at 353, 364. In State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), the Arizona Supreme Court interpreted the state's death penalty statute as allowing consideration of all mitigating circumstances at sentencing and thus, the sentencing statute does not violate the eighth and fourteenth amendments. The Tisons' sentencing court found aggravating circumstances in the heinous, cruel and depraved manner of the offenses and because the victims were killed to facilitate stealing their car. *Tison I*, 129 Ariz. at 542, 633 P.2d at 351. For a discussion of the factors involved in the sentencing process in Arizona, see Note, *Aggravating Circumstances of Arizona's Death Penalty Statute: A Review*, 26 ARIZ. L. REV. 661 (1984).

14. Both defendants gave recorded statements on January 26, 1979 and February 1, 1979. After the brothers answered extensive questioning about the murders, the prosecution wanted the brothers to identify those people who assisted the gang's escape. When the defendants realized that they were expected to testify about events in addition to the murders, they refused to comply with the plea agreement. The trial court allowed the defendants to withdraw their guilty pleas and go to trial, but declined to order specific performance of the plea agreement against the State, which would have limited the State to seeking only life sentences for the defendants. *Tison I*, 129 Ariz. at 531-32, 549, 633 P.2d at 340-41, 358. The defendants did not testify at their own trials. The transcribed statements were neither admitted at the defendants' trials nor considered at the sentencing hearings; however, they were part of the record on appeal before the Arizona Supreme Court.

15. Statement of Ricky Tison, February 1, 1979, at 35, State v. Ricky and Raymond Tison, Super. Ct. Yuma Co., No. 9299.

16. *Id.* at 36-41. This factual point appears to have been misunderstood by the dissent because they state, "[the defendants] were some distance away from the actual place at which the killings occurred." *Tison II*, 142 Ariz. at 452, 690 P.2d at 753. The dissent correctly cites page 35 of Ricky Tison's February 1, 1979 statement, which indicates that Ricky and Raymond left the victims before the murders to get water. On the next page of that statement, however, Ricky places both defendants back at the murder site before the victims were shot: "But then when me and Ray went back, *we got the water, and me and Ray came back with it* and we were going to go over to the Lincoln and give it to them. This is when dad said, 'let him get a drink of water.' " Statement of Ricky Tison, *supra* note 15, at 35-36 (emphasis added). Soon after John Lyons took a drink, by Ricky's account, the family was killed in the presence of the defendants. *Id.* at 38-41. The court in *Tison I* unanimously found, "The record establishes that both defendants were present when the homicide took place." 129 Ariz. at 545, 633 P.2d at 354. The presence of the defendants during the murders is a

Raymond were close enough to see his father standing on one side of the car and Greenawalt on the other when the family was shot.[17] The court noted that even though Ricky and Raymond were armed, they watched and did nothing to stop the killing.[18] These facts became significant in light of the decision by the United States Supreme Court in *Enmund v. Florida.*

Enmund v. Florida

Enmund v. Florida[19] is a landmark holding in death penalty cases. The Supreme Court stated that before imposing the death penalty, the eighth amendment requires a showing that a defendant killed, attempted to kill, intended to kill, or contemplated or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony.[20]

In *Enmund*, the Supreme Court considered the proportionality of the death penalty for an accomplice convicted of felony-murder. Enmund only drove the getaway car for his co-defendants who killed two victims in the course of a robbery.[21] Although Enmund was not present at the murder site and was not the triggerman, he was sentenced to death along with the killers. The United States Supreme Court reversed and remanded, ruling that imposition of the death penalty under such circumstances violated the eighth amendment's prohibition against cruel and unusual punishment.[22]

The Court's rationale for this new rule was that retribution as a justification for capital punishment depends on the degree of the defendant's culpability in the sense of what his intentions, expectations, and actions were during the crime.[23] Whether the defendant was sufficiently culpable to justify imposing the death penalty depends on "whether [the defendant] intended that the [victims] be killed or *anticipated* that lethal force would or might be used if necessary to effectuate the robbery or a safe escape,"[24] "or *contemplate[d] that lethal force will be employed by others,*"[25] and "whether [defendant] intended or *contemplated* that life would be taken. . . ."[26]

As construed by the Arizona Supreme Court, under *Enmund*, courts are permitted to find intent based on evidence that the defendants antici-

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significant element in determining whether defendants anticipated and contemplated lives would be taken.

17. *Tison II*, 142 Ariz. at 448, 690 P.2d at 749.

18. *Id.* at 448, 456, 690 P.2d at 749, 757-58.

19. 458 U.S. 782 (1982).

20. *Enmund*, 458 U.S. at 788, 801. After *Enmund* was decided, the Arizona Supreme Court ruled that in future cases where a guilty verdict for first degree murder may have been based on a felony-murder theory, the trial judge must determine prior to imposing the death penalty whether the *Enmund* test was satisfied. State v. McDaniel, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). *See supra* note 3.

21. Enmund was waiting in a car some distance from a farmhouse where his accomplices went to rob an elderly man. When the man's wife came to his assistance with a gun, Enmund's accomplices shot and killed the elderly couple. *Enmund*, 458 U.S. at 784.

22. *Id.* at 788.

23. *Id.* at 800.

24. *Id.* at 788.

25. *Id.* at 799.

26. *Id.* at 801 (emphasis added).

pated or contemplated that life may be taken.[27] This is evidently what the *Tison II* majority means when it states that the record compels a finding that the Tison brothers "intended" to kill.[28] Because the Arizona Supreme Court previously found that the defendants did not specifically intend the death of the victims,[29] the *Tison II* decision can only satisfy *Enmund* by finding that the Tisons anticipated or contemplated that lethal force would or might be used, and lives taken.[30]

After *Tison I* and before *Tison II*, the Arizona Supreme Court defined the scope of *Enmund* in dicta: "We wish to make clear that 'intended to kill' encompasses the situation where a defendant contemplated, anticipated, or intended that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."[31] *Tison II* marked the first time the court applied that standard alone to affirm a death sentence.

THE FACTS OF *TISON II* MEET THE REQUIREMENTS OF *ENMUND*

Tison II is significant because the facts satisfy the *Enmund* principle based solely on the elements of anticipation and contemplation,[32] rather than intent in the sense of purposefully causing a result.[33] *Tison II* appears to be the first case in any jurisdiction where a reviewing court affirmed a death sentence on a finding that the defendant had *Enmund* intent[34] without additional supporting grounds.[35]

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27. *See supra* note 7 and accompanying text.

28. *Tison II*, 142 Ariz. at 447, 456, 690 P.2d at 749, 757. Upon Supreme Court review, the appellate court's findings of whether a defendant possessed the degree of culpability discussed in *Enmund* are presumptively correct under 28 U.S.C. § 2254(d) (Habeas corpus remedies). Cabana v. Bullock, No. 84-1236, Jan. 26, 1986, slip op. at 11, 46 S. Ct. Bull. P. B718 (CCH) (1986).

29. *See supra* note 8 and accompanying text.

30. *See supra* text accompanying notes 24-26.

31. State v. Emery, 141 Ariz. 549, 554, 688 P.2d 175, 180 (1984). This interpretation of *Enmund* may be the central question the Supreme Court will address in deciding Tison v. Arizona. The issue before the Court is whether *Tison II* is in "clear conflict" with *Enmund*. 54 U.S.L.W. 3591 (March 4, 1986).

32. *Tison II*, 142 Ariz. at 448, 456, 690 P.2d at 749, 757. The State pointed out the significance of *Tison II* when it argued, "this case presents this Court with its first opportunity to apply *all* of the circumstances that *Enmund* indicates may justify imposition of the death penalty upon such a person." Appellee's Supplemental Answering Brief at 13, *Tison II*, 142 Ariz. 454, 690 P.2d 755 (1984) (emphasis added).

The Tisons are not the first defendants in Arizona to seek resentencing based on *Enmund*. *See, e.g.*, State v. Emery, 141 Ariz. 549, 688 P.2d 175 (1984); State v. Vickers, 138 Ariz. 450, 675 P.2d 710 (1984); State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983), *cert. denied*, 465 U.S. 1074 (1984); State v. Jordan, 137 Ariz. 504, 672 P.2d 169 (1983); State v. Richmond, 136 Ariz. 312, 666 P.2d 57, *cert. denied sub nom.* Richmond v. Arizona, 464 U.S. 986 (1983); State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983); State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983), *cert. denied*, — U.S. —, 105 S. Ct. 1775 (1985).

33. *See supra* note 8.

34. *See supra* note 7.

35. *See supra* text accompanying notes 24-26. The Eleventh Circuit decided Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) using language consistent with "*Enmund* intent" as defined *supra* at note 7. The *Ross* court stated that "the record depicts an individual who undoubtedly contemplated that lethal force would be used either by himself or others as they held a family hostage, and who actively participated in the activities that culminated in [a policeman's death]." 756 F.2d at 1489. The Eleventh Circuit determined that Ross' death penalty was not disproportionate under *Enmund*. The *Ross* court cited *Tison II* with other supporting authority for the proposition that a reviewing court may determine from the record whether a defendant's culpability satisfies *Enmund*. *Id.* at 1487. In Cabana v. Bullock, the United States Supreme Court cited the *Ross* court's interpretation of

The *Tison II* majority distinguished the facts of *Tison II* from *Enmund* and concluded that imposition of the death sentence on the Tison brothers does not violate the *Enmund* rule.[36] The critical elements that distinguished *Tison II* are: 1) the defendants provided weapons to convicted murderers they broke out of prison;[37] 2) the defendants knew that their father had killed a guard in an earlier escape attempt;[38] 3) the defendants actively participated in the abduction of the Lyons family and in the events surrounding the murders;[39] and 4) the defendants were present during the murders.[40] The *Tison II* majority determined that the facts of this case supply culpatory elements missing from *Enmund* sufficient to justify imposition of the death penalty.[41]

TISON II IS CONSISTENT WITH OTHER CASES APPLYING *ENMUND*

In *Tison II*, the Arizona Supreme Court relied on *State v. Gillies*,[42] in which the facts were sufficiently distinguishable from *Enmund* that imposition of the death penalty did not violate the eighth amendment.[43] Gillies and an accomplice both participated in bludgeoning their victim. It was unknown whether Gillies or his accomplice dealt the final death blow.[44] The factual elements in *Gillies* that satisfied *Enmund* were Gillies' presence, substantial participation, and actions evidencing an intent to kill. In *Gillies*, as in *Tison II*, the Arizona Supreme Court imposed the death penalty based on its own determination from the record that *Enmund* was satisfied.[45] The *Tison II* majority justified imposing the death penalty because it found the

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Enmund in correcting an erroneous Fifth Circuit interpretation. Cabana v. Bullock, No. 84-1236, Jan. 26, 1986, slip op. at 5, 46 S. Ct. Bull. P. B 717 (CCH). *See supra* note 4.

36. *Tison II*, 142 Ariz. at 448, 457, 690 P.2d at 749, 758.

37. *Tison II*, 142 Ariz. at 447, 690 P.2d at 748. The evidence showed that the Tison brothers sawed off shotguns and acquired a virtual arsenal of weapons in preparation for the breakout. This evidence supports a finding that defendants anticipated use of lethal force in the escape.

38. *Tison II*, 142 Ariz. at 447-48, 456, 690 P.2d at 748-49, 757. Based on this knowledge, the *Tison II* majority found that the defendants would anticipate the use of lethal force during their flight. *Id.*

39. *Id.* The court found that the defendants' participation was substantially the same as their father's and Greenawalt's up to the moment of murder; for example, the defendants planned and agreed with the others to forcibly take the next car on the road. 142 Ariz. at 448, 456, 690 P.2d at 749, 757. In contrast, the record as construed in *Enmund* only supported the inference that Enmund waited by the road to aid the robbers' escape. 458 U.S. at 788.

40. *Tison II*, 142 Ariz. at 448, 456, 690 P.2d at 749, 757. *See supra* note 16.

41. *Tison II*, 142 Ariz. at 448, 457, 690 P.2d at 749, 758.

42. 135 Ariz. 500, 662 P.2d 1007 (1983).

43. *Id.* at 516, 662 P.2d at 1023.

44. *Id.* at 513, 662 P.2d at 1020. The young woman was kidnapped, beaten, raped, thrown off a cliff and then battered to death with rocks.

45. *Id.* at 515, 662 P.2d at 1022. The *Tison II* dissent contended that, "we [the Arizona Supreme Court] did not indicate that where the trial judge failed to [make *Enmund* findings], we could cure the defect by a de novo review of the record." 142 Ariz. at 453, 690 P.2d at 754. It appears, however, that the court unanimously proposed to do just that when the record supports such findings. Prior to *Tison II*, the Arizona Supreme Court stated, "[W]e will not remand a case for resentencing when the record compels an affirmative finding that the defendant killed, attempted to kill, or intended to kill as it did in *Gillies*, [135 Ariz. 500, 662 P.2d 1007], and *McDaniel*, [136 Ariz. 188, 663 P.2d 70] or when the record makes clear that the trial court could not have made such a finding." State v. Emery, 141 Ariz. 549, 553, 688 P.2d 175, 179 (1984). While the dissenters in *Tison II* can and do disagree about what the record supports, after *Emery* it is not clear how they can contend that the court has no authority to make such findings from the record. *See supra* note 4.

Tison II facts more similar to the *Gillies* facts than to those in *Enmund*.[46]

Similarly, in *State v. Richmond*,[47] the Arizona Supreme Court affirmed a death sentence after reviewing the record. The evidence showed that Richmond was present and actively participated in a leadership role in the events surrounding the murder. There was conflicting testimony about whether Richmond or an accomplice drove the car over the unconscious victim, killing him.[48] The court decided that Richmond was not the type of defendant that the *Enmund* court sought to protect from capital punishment.[49]

The majority in *Tison II* cited a Florida case, *Hall v. State*,[50] as factually similar to *Tison II*.[51] The court convicted Hall of first degree murder even though he contended he did not fire the murder weapon. Like the Tisons, Hall provided the weapon, but claimed his accomplice did the actual killing.[52] The court in *Hall v. State* found:

> Hall provided the weapon used to kill Mrs. Hurst and was present at her death. Additionally, Enmund was an aider and abettor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony. There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death.[53]

Based on intent, the facts in *Hall* satisfied the *Enmund* requirement. Thus, Hall's death sentence did not violate the eighth amendment.

The facts of *Tison II* are analogous to those in *Hall*. Like Hall, the Tison brothers provided the weapons used to kill the family and were present when they were killed.[54] By participating in the abduction of the Lyons family, forcing them at gunpoint to the murder site, the brothers did not merely aid, but were active principals in the underlying felonies of kidnapping and robbery.[55] They were also assisting in the detention of the victims when the family was murdered.[56] The factual similarity between *Tison II* and *Hall* supports the conclusion that the Tisons, like Hall, are morally culpable and, therefore, the death penalty is permitted.

In *Johnson v. Zant*,[57] the Georgia Supreme Court distinguished *Enmund* and affirmed the death penalty. The court held: "[W]e do not read

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46. *Tison II*, 142 Ariz. at 448, 457, 690 P.2d at 749, 758. The dissent, however, believes the *Tison II* facts are more like *Enmund* because the dissent maintains the brothers were not present during the murders. *Tison II*, 142 Ariz. at 451-52, 690 P.2d at 752-53. *See supra* note 16.

47. 136 Ariz. 312, 666 P.2d 57 (1983).

48. Richmond claimed one of his accomplices repeatedly drove a car over the victim they had robbed; the accomplices contended Richmond beat the victim unconscious and drove over him, crushing his skull. 136 Ariz. at 315, 666 P.2d at 63.

49. *Richmond*, 136 Ariz. at 318, 666 P.2d at 63.

50. 420 So. 2d 872 (Fla. 1982), *cert. denied sub nom.* Wainwright v. Hall, — U.S. —, 105 S. Ct. 2344 (1985).

51. *Tison II*, 142 Ariz. at 448, 690 P.2d at 749.

52. *Hall*, 420 So. 2d at 873-74. Hall abducted a pregnant housewife outside a store so he could steal her car for use in a robbery. He admitted driving the woman to a wooded area but claimed his co-defendant beat and sexually assaulted her and then shot her with a gun that Hall provided. Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1980).

53. 420 So. 2d at 874.

54. *See supra* notes 10, 17, and 39 and accompanying text.

55. *Tison I*, 129 Ariz. at 538, 553-54, 633 P.2d at 347, 362-63.

56. *Id.* at 556, 633 P.2d at 365.

57. 249 Ga. 812, 295 S.E.2d 63 (1982), *cert. denied*, 459 U.S. 1228 (1983).

Enmund so narrowly as to exclude imposition of the death penalty for all but those who fatally wield the murder weapon. * * * Johnson was not only present but active and participating throughout commission of the crimes of which he is convicted, including murder."[58] As in *Tison II*,[59] the evidence in *Johnson* did not reveal whether the defendant or his accomplice shot the victims. One of Johnson's victims survived and testified that because it was dark she could not see which assailant held the gun.[60] *Tison II* is consistent with *Johnson* and also has an additional element to satisfy *Enmund*—defendants' knowledge that their father had killed before in an escape attempt.

A pattern appears to emerge from cases interpreting *Enmund*. Supplying the murder weapon is not sufficient by itself to justify imposing capital punishment. The felony murder defendant's presence at the killing appears to be a significant element. When the evidence also shows defendant's active participation in the underlying felony or knowledge that a killing is probable, *Enmund* is considered satisfied and the death sentence justified. The pattern of proceeding from evidence of a defendant's presence, active participation, and knowledge, to an inference of *Enmund* intent is applicable to the facts of *Tison II*.

SIGNIFICANCE OF *TISON II*

In *Enmund*, the United States Supreme Court did not explain what it meant by anticipation, contemplation, or expectations of felony-murder defendants.[61] The dissent in *Enmund* pointed out that the plurality's decision requires the Court to develop "an Eighth Amendment meaning of intent."[62] The *Enmund* dissent was not satisfied with the plurality's intent-to-kill formulation because a determination of the defendant's degree of blameworthiness did not consider the defendant's knowledge of his accomplice's intent or knowledge of whether his accomplice was armed; the defendant's contribution to the planning and success of the crime; and the defendant's actual participation during the commission of the crime.[63] *Tison v. Arizona* presents an opportunity for the Supreme Court to clarify "contemplation," "anticipation" and "intent" as used in *Enmund*.

Tison II demonstrates a set of circumstances and elements, the totality

58. *Johnson*, 249 Ga. at 816-17, 295 S.E.2d at 68. An excellent, but pessimistic, analysis of *Enmund* is found in Note, Enmund v. Florida: *The Supreme Court's Subjective Policy of Death Penalty Limitation*, 3 DET. C.L. REV. 944 (1983), which viewed the decision as intruding upon the state's perogative to define subjective components of criminality. The author predicted that courts would interpret *Enmund* as permitting the death penalty only for deliberate murderers, excluding non-triggermen accomplices. *See also* Note, *The Felony Murder Rule and the Death Penalty*: Enmund v. Florida—*Overreaching by the Supreme Court?* 19 NEW ENG. L. REV. 255 (1984).

59. *See supra* note 12 and accompanying text.

60. *Johnson*, 249 Ga. at 817, 295 S.E.2d at 68.

61. *Tison II*, 142 Ariz. at 453, 690 P.2d at 762-63.

"Contemplate" and "contemplation" have been defined as "to expect or intend," and "the consideration of an event or state of facts with the expectation that it will transpire." BLACK'S LAW DICTIONARY 167 (5th ed. 1983); WEBSTER'S NEW WORLD DICTIONARY 136 (2d col. ed. 1983). For Arizona's statutory definitions, *see supra* note 8.

62. 458 U.S. at 824.

63. *Id.* at 825.

of which justified the conclusion that the defendants anticipated or contemplated lives would be taken as a result of their actions.[64] This case is significant because, if affirmed, it extends *Enmund* to permit capital punishment when the only grounds for the death penalty are that defendants contemplated or anticipated that lethal force would or might be used in committing a felony.[65] The record in *Tison II*, as reviewed by the Arizona Supreme Court, permits the inference that the defendants contemplated the family's elimination as witnesses. Defendants' conduct may not constitute intent for premeditated murder under Arizona's criminal statute,[66] but with *Tison II* such conduct is understood to be within the culpability required by *Enmund* to justify execution.

CONCLUSION

Enmund prohibits the death penalty unless there is a showing that the defendant killed, attempted to kill, or intended to kill. While intent to kill can be proved by a showing that the defendant purposefully caused the result, the Arizona Supreme Court maintains that *Enmund* intent is not limited to this narrow interpretation. *Tison II* interprets *Enmund* to permit execution of felony-murder defendants when the record only supports the conclusion that the defendants anticipated or contemplated the use of lethal force in accomplishing the crime. While the Arizona Supreme Court is the first jurisdiction to interpret *Enmund* this broadly, *Tison II* is consistent with other cases applying *Enmund*. The Arizona court's decision is in agreement with the Supreme Court's principle that a defendant's "punishment must be tailored to his personal responsibility and moral guilt."[67]

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64. *See supra* notes 23 and 37-40 and accompanying text.

65. After *Enmund*, some commentators predicted that only triggermen could be executed. *See, e.g.*, Note, *The Death Penalty and the Felony Murder Rule*, 29 N.Y.L. SCH. L. REV. 179 (1984); Note, *Felony Murder: Driving Away From the Death Penalty*, 12 STETSON L. REV. 479 (1983); Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357 (1984); *but see* Note, *The Eighth Amendment Prohibits the Penalty of Death for One Who Neither Took Life, Attempted or Intended to Take Life, Nor Contemplated That Life Would Be Taken*, 28 VILL. L. REV. 173 (1982). *See supra* note 58.

Most commentators analyzed the language of *Enmund* only as far as "intended to kill." Courts did not apply anticipation and contemplation as independent bases for satisfying *Enmund* until *Tison II*. *See supra* text accompanying note 19.

66. ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (1978).

67. *Enmund*, 458 U.S. at 801.

CRIMINAL PROCEDURE

A. THE AUTOMOBILE EXCEPTION AND MOTOR HOMES

In *California v. Carney*,[1] a case of first impression, the United States Supreme Court addressed the fourth amendment's[2] application to motor homes. The Court analyzed whether the vehicle exception[3] to the fourth amendment's warrant requirement applies to motor homes.[4] In *Carney*, the Court announced that the vehicle exception applies to motor homes unless enumerated factors indicate that the motor home is being used as a home.[5] In such a case, a warrant must be obtained before the motor home may be searched.[6] The Court justified warrantless searches of motor homes by stating: 1) the mobility of motor homes creates exigent circumstances;[7] and 2) the pervasive regulation of motor homes and the public nature of travel creates a diminished expectation of privacy in motor homes.

I. FACTS AND PROCEDURAL HISTORY OF *CALIFORNIA V. CARNEY*

In *Carney*, a Drug Enforcement Administration (DEA) agent had received an uncorroborated tip alleging that the defendant exchanged marijuana for sex with youths.[8] DEA agents observed the defendant talking with a young boy.[9] The defendant returned to a motor home parked in a public parking lot in downtown San Diego, California.[10] He entered the motor

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1. — U.S. —, 105 S. Ct. 2066 (1985).

2. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. *See infra* text accompanying notes 24-26.

4. The United States Bureau of the Census includes in the category of "recreational vehicles," motorized homes, travel trailers, folding camping trailers, and truck campers. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985 (105th ed., Washington D.C. 1984). One magazine article estimates that eight million people own recreational vehicles [RV's]. Opsata, *The Big Rollout*, 50 PLUS at 65 (Nov. 1984). The article cites a prediction by a University of Michigan professor that "by 1987, two households out of every five will either rent or own an RV." *Id.* at 67. The executive director of the Recreational Dealer's Association, responding to the estimate, states "[e]ven if [the professor is] off by 50 percent, we're still talking about 25 million RV's on the road within three years." *Id.* at 67.

5. California v. Carney, — U.S. —, —, 105 S. Ct. 2066, 2070-71 (1985). *See infra* text accompanying notes 75-76.

6. — U.S. at —, 105 S. Ct. at 2070.

7. *See infra* notes 27-33 and accompanying text.

8. People v. Carney, 34 Cal. 3d 597, 603, 668 P.2d 807, 809, 194 Cal. Rptr. 500, 502 (1983), *rev'd*, — U.S. —, 105 S. Ct. 2066 (1985).

9. For a full discussion of the facts, see People v. Carney, 117 Cal. App. 3d 36 (*opinion omitted*), 172 Cal. Rptr. 430 (1981), *rev'd*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), and People v. Carney, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), *rev'd*, — U.S. —, 105 S. Ct. 2066 (1985).

10. Justice Stevens, in his dissent, noted that the public parking lot was located near a courthouse. As he stated, "[T]he motor home was parked in an off-the-street lot only a few blocks from

home with the youth and closed the curtains.

The defendant and the youth remained inside the motor home for one and a quarter hours. After the youth left the vehicle, the agents approached the youth who corroborated the tip. They asked the youth to return to the motor home with them, knock on the door, and ask the defendant to come out. The youth did as they requested; when the defendant stepped out, the agents identified themselves as DEA agents. As one agent entered the motor home, he noticed marijuana and drug paraphernalia on the table. At that point, the agents arrested the defendant. A warrantless search of the motor home at an office of the Narcotics Task Force revealed more contraband.[11]

On appeal, the California Supreme Court determined that motor homes may be searched only pursuant to a search warrant. The court stated that the diminished expectation of privacy one has in a vehicle justifies warrantless searches of automobiles. However, the court reasoned that since a motor home has features characteristic of a home, the occupant's expectation of privacy in the motor home is not diminished.[12]

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the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application." Justice Stevens argued that, in evaluating whether or not an exigency existed, the accessability of a search warrant should be considered in conjunction with the fact that there was no showing that the motor home could imminently depart. Therefore, he argued, as in Coolidge v. New Hampshire, 403 U.S. 443 (1971), a warrant was necessary before a search could be conducted. California v. Carney, — U.S. at —, 105 S. Ct. at 2076 (Stevens, J., dissenting).

11. People v. Carney, 34 Cal. 3d at 603, 668 P.2d at 809, 194 Cal. Rptr. at 502.

12. At a preliminary hearing, defendant moved to suppress the evidence obtained from both searches. The magistrate denied defendant's motion, holding that the first search was justified under the "protective sweep" doctrine. Under that doctrine, a warrantless cursory search of the premises may be conducted when "officers reasonably perceive an immediate danger to their safety." United States v. Owens, 782 F.2d 146 (10th Cir. 1986). *See also* United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982); United States v. Baker, 577 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978); United States v. Spanier, 597 F.2d 139 (9th Cir. 1977).

In *Carney*, when the agents interviewed the youth, he stated that the 'older man' had given him marijuana in exchange for sex. The California Court of Appeals determined that this ambiguous comment allowed the agents to "reasonably infer there was more than one man inside the motor home." The agent stated that he stepped into the motor home for "safety reasons." As he stepped into the motor home, he saw marijuana paraphernalia on the table. People v. Carney, 117 Cal. App. 3d 36, (*opinion omitted*), 172 Cal. Rptr. 430, 434 (1981), *rev'd*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

The magistrate determined that the second warrantless search was permissible as an inventory search. Having entered the motor home to conduct a "protective sweep" and having seen the marijuana in "plain view," the agents arrested Carney and drove the motor home to the Narcotics Task Force office. There, agents searched the motor home and discovered additional contraband. The court stated that because the agents had seen contraband in plain view, it was reasonable for them to infer that there was more contraband inside the motor home. Since there was probable cause to conduct the later search (*see* Wimberly v. Superior Court, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976)), and there were exigent circumstances at the time of the seizure, the later search was reasonable. People v. Carney, 117 Cal. App. 3d 36, (*opinion omitted*), 172 Cal. Rptr. 430, 436 (1981), *rev'd*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

The Superior Court affirmed the magistrate's findings, and held that the searches of the motor home were justified under the vehicle exception to the warrant requirement. People v. Carney, 34 Cal. 3d 597, 604, 668 P.2d 807, 809, 194 Cal. Rptr. 500, 502 (1983), *rev'd*, — U.S. —, 105 S. Ct. 2066 (1985). The defendant pleaded *nolo contendere* to the charges and was placed on probation for three years. 34 Cal. 3d at 602, 668 P.2d at 808, 194 Cal. Rptr. at 501.

The California Court of Appeals affirmed the Superior Court's decision. The court held the initial warrantless entry into the motor home, leading to the seizure of the contraband in plain view, was justified by both the mobility of the motor home and the protective sweep doctrine. The later search was justified under the inventory rationale. The court further stated that the fact that the vehicle involved was a motor home did not change the result. The court stated,

Nor does the word 'mobile home' make unoperative those profound considerations which

The United States Supreme Court reversed the California Supreme Court decision.[13] The Court determined that, with certain limited qualifications, the vehicle exception to the warrant requirement is applicable to motor homes. The Court's decision focused on the mobility of motor homes and the exigency created by that mobility.[14] The Court further justified its holding by stating that a motor home, like an automobile, is pervasively regulated.[15] Therefore, the Court concluded that unless an "objective observer" would believe that the motor home is used as a home, an individual has a diminished expectation of privacy in a motor home. The opinion stated that the vehicle exception to the warrant requirement is applicable to motor homes if the motor home is in transit or "readily capable of [transit]" and is in a place not characteristic of residential uses.[16] The Court held that, on the facts of the case, the motor home was readily mobile[17] and the defendant used it as a vehicle rather than as a residence. Therefore the search was justified under the vehicle exception to the warrant requirement.[18]

II. ORIGIN OF AND TRADITIONAL JUSTIFICATIONS FOR THE VEHICLE EXCEPTION

The fourth amendment requires police to obtain a warrant before searching "houses, papers, and effects."[19] A warrant may not issue unless a neutral magistrate determines that probable cause exists.[20] Traditionally,

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led to the more flexible meaning to be given the term "reasonable" when applied to "automobile" searches. The fact that the mobile vehicle is also a motor home is but an additional factor possibly indicating a greater expectation of privacy, requiring additional facts beyond those authorizing search of a passenger vehicle under the "automobile exception" if the Fourth Amendment test of reasonableness is to be met.

People v. Carney, 117 Cal. App. 3d 36 (*opinion omitted*), 172 Cal. Rptr. 430, 435 (1981), *rev'd*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

The court distinguished between the motor home in the instant case and a "double-wide" mobile home in a mobile home park "attached to water and sewer service." The court noted that the latter vehicle "bears no resemblance to a motor home on a public street or in a public parking lot."

13. — U.S. —, 105 S. Ct. 2066 (1985). The United States Supreme Court reversed and remanded the case. On remand, the defendant likely will urge the California Supreme Court to decide, as it did before, on independent state grounds. However, a recent amendment to the California Constitution somewhat complicates the defendant's probable argument. On June 8, 1982, California voters approved Proposition 8, better known as the "Victims' Bill of Rights." CAL. CONST. art. 1, § 28. Although the independent state ground doctrine is not mentioned within the text of the constitutional amendment, the California Supreme Court, in a 4-3 opinion, determined that Proposition 8 eliminated this doctrine in criminal proceedings in California. *In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). Proposition 8 requires the admission of all relevant evidence in criminal proceedings. According to the court, this allows California to exclude only evidence mandated by federal law. However, because the *Carney* case arose before the effective date of Proposition 8, the case may be unaffected by the constitutional amendment. *See* People v. Smith, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983) (holding that Proposition 8 applies only to prosecutions for crimes committed after June 9, 1982, the effective date of Proposition 8). For a discussion of the issues raised by Proposition 8, see Blum and Lobaco, *The Prop. 8 Puzzle*, 5 CAL. LAW 28, NO. 2 (1985).

14. California v. Carney, — U.S. at —, 105 S. Ct. at 2070.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at —, 105 S. Ct. at 2071.

19. *See supra* note 2.

20. *See* Johnson v. United States, 333 U.S. 10 (1948).

the warrant requirement is most strictly applied to an individual's home.[21] Absent consent or exigent circumstances,[22] police may not search a home without a warrant.

Justice Stewart stated in *Mincey v. Arizona*[23] that " 'searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' "[24] The vehicle exception is one recognized exception to the warrant requirement. Under the vehicle exception, police may search a vehicle without first obtaining a warrant. The vehicle exception rests on dual justifications. First, a vehicle presents an exigency since it is readily mobile and thus able to leave the jurisdiction quickly.[25] Second, the owner may have a lessened expectation of privacy in the vehicle due to the pervasive regulation of vehicles and due to the public nature of travel.[26] These two factors justify an immediate warrantless search.

A. *The Mobility Rationale*

In 1925, the Supreme Court established the vehicle exception to the warrant requirement in *Carroll v. United States*.[27] Under the traditional formulation of the *Carroll* rule, two conditions must exist before a warrantless search of a vehicle may be conducted. First, the police must have probable cause to believe that the vehicle contains something which is lawfully subject to seizure.[28] Second, the vehicle must be capable of movement.[29]

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21. *See, e.g.*, Amos v. United States, 255 U.S. 313 (1921); Weeks v. United States, 232 U.S. 383 (1914).

22. *See* Payton v. New York, 445 U.S. 573 (1980).

23. 437 U.S. 385 (1978).

24. *Id.* at 390.

25. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

26. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974).

27. 267 U.S. 132 (1925). In *Carroll*, prohibition agents stopped an automobile they believed contained illicit alcohol. *Id.* at 160. The agents asked the driver and passenger to exit the automobile. The agents then searched the vehicle and found alcohol. In upholding the search, the Court determined that it was impractical to require police to procure a warrant before conducting a search because of the risk that the vehicle would leave the jurisdiction. The Court distinguished searches of vehicles and homes on the ground that the latter could not be moved. The Court stated,

> [There is] a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction . . . .

Id. at 153.

28. Carroll v. United States, 267 U.S. 132, 156 (1925).

29. *Id.* at 153. Chambers v. Maroney, 399 U.S. 42 (1970), applied the *Carroll* mobility rationale. In *Chambers*, the police, having probable cause to believe that the occupants of the automobile had committed an armed robbery, stopped the automobile on the highway. The police arrested the occupants and seized the automobile. Arguably, once the occupants were arrested and the automobile was placed in police custody, the car was no longer mobile and no exigency existed. Therefore, under traditional doctrine, the police should have been required to obtain a warrant before searching the automobile. *Id.* at 62-64 (Harlan, J., concurring in part and dissenting in part).

In *Chambers*, the Supreme Court held that a vehicle search conducted at the police station, following the arrest of all of the vehicle's occupants, was justified under the *Carroll* rationale. The Court stated that because the automobile had been stopped on the open highway and confederates

The *Carroll* decision left unresolved whether the inherent mobility of an automobile created an exigency or whether an exigency created by a moving, or imminently moving, vehicle was necessary before the vehicle exception applied.[30]

In 1971, the Supreme Court clarified the mobility requirement, in *Coolidge v. New Hampshire*,[31] and determined that an exigency justifying a warrantless search is created only by the imminent mobility, not the inherent mobility of an automobile. The *Coolidge* Court held that the warrantless search of a parked car could not be justified under the vehicle exception since no possibility existed that the automobile would move before a search warrant was obtained.[32] The *Carroll* situation was distinguishable, since in *Carroll* the automobile was stopped while in transit and could easily have left the jurisdiction.[33] *Coolidge*, although a plurality opinion, indicates that

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might have moved the vehicle, the automobile was imminently mobile at the time of the seizure. The *Chambers* Court held that the mobility of the vehicle at the time of the seizure, not at the time of the search, was relevant. *Id.* at 51. The Court reasoned that since the police could have searched the automobile on the highway, it was constitutionally permissible for them to search it later at the station house.

30. Federal courts of appeal generally require imminent mobility before allowing warrantless searches of vehicles. *See* United States v. Sigal, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974); United States v. Bradshaw, 490 F.2d 1097 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974). *Contra* United States v. Combs, 672 F.2d 574 (6th Cir.), *cert. denied*, 458 U.S. 1111 (1982); United States v. Rodgers, 442 F.2d 902 (5th Cir. 1971).

In *Bradshaw*, the court held that the applicability of the vehicle exception depends on whether there exists a risk that the evidence will be lost. In that case, the court invalidated the search of a pick-up truck, with an attached camper top, parked on the defendant's property. The agents argued that the defendant knew of their presence since he had seen them hiding on his property. The court concluded that the threat of the automobile moving could have been dissipated by posting a guard while waiting for a warrant. The court thus required the imminent mobility of the vehicle before the vehicle exception applied. 490 F.2d at 1103-04.

Similarly, in *Sigal* the court held that a warrantless search of an airplane was justified under the vehicle exception because probable cause and an exigency existed. The court focused on the imminent mobility of the plane. In *Sigal*, the agents had been tracking the movements of the defendant's airplane. When the airplane landed and the owner left the plane, the agents inspected the airplane and found marijuana. The defendant argued that even though the agents had probable cause, there was no exigency, and the agents should have obtained a warrant. 500 F.2d at 1122.

The *Sigal* court reiterated the factors necessary for the vehicle exception to apply: probable cause and an exigency. First, the court stated that airplanes are mobile. Second, the court stated that the agents did not know when the defendant would return to the plane and depart. Finally, the court reasoned that the defendant could have had confederates who might move the plane and/or destroy the evidence. Therefore the court determined that an exigency existed that required immediate action. *Id.*

See also United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1976) (exigent circumstances existed when the defendant had "completed loading the truck, disposed of his other vehicle, and assumed the driver's seat, ignition key in hand"); United States v. Maspero, 496 F.2d 1354, 1356 (5th Cir. 1974) (exigent circumstances existed where the police had information about the possible imminent mobility of a tractor-trailer rig and "the truck was in a semi-public place and had easy and immediate access to the road"); United States v. Miller, 460 F.2d 582, 586 (10th Cir. 1972) (under the "totality of the facts and circumstances," exigent circumstances existed that justified the warrantless search of a motor home).

31. 403 U.S. 443, 460-62 (1971). In *Coolidge*, police seized the defendant's automobile pursuant to an invalid search warrant. Evidence obtained in the search was used to convict the defendant. The search and seizure of the car followed the defendant's arrest and police admonitions to the defendant's wife not to move the car. The state attempted to justify the search of the automobile under the vehicle exception.

32. *Coolidge*, 403 U.S. at 460.

33. *Id.* at 462; *see supra* notes 27-29 and accompanying text.

in those instances where a vehicle cannot be moved, *Carroll* does not authorize a warrantless search.

United States v. Ross[34] addressed the extent of the search allowable once the vehicle exception applied. The Court held that if the vehicle exception applies, the police may search any part of the vehicle in which the contraband might be found.[35] The Court stated that if probable cause exists to search the vehicle, an individual's expectation of privacy may not survive.

B. *The Reduced Expectation of Privacy in Vehicles*[36]

If probable cause exists, the imminent mobility of a vehicle justifies a warrantless search. In *Cardwell v. Lewis*,[37] the Supreme Court set forth a separate justification for the vehicle exception—the reduced expectation of privacy in automobiles. A plurality of the Court held that the warrantless search of the exterior of an immobile automobile was reasonable under the fourth amendment, reasoning that the search did not invade a constitutionally-protected expectation of privacy.[38] The *Cardwell* Court explained that the expectation of privacy in a vehicle is affected by the public nature of automobile travel.[39] The *Cardwell* reasoning is related to the "plain view" doctrine.[40] According to this doctrine, a person has no reasonable expectation of privacy in items which are in the plain view of others. Therefore, a warrant is not required to seize such items.[41] Thus, even if a vehicle is not

34. 456 U.S. 798 (1982).

35. *Id.* at 823.

36. Katz v. United States, 389 U.S. 347 (1967), introduced the expectation of privacy analysis into search and seizure questions. In *Katz*, the Court held that the fourth amendment protected a conversation which took place in a public phone booth. *Id.* at 359. Justice Harlan, concurring in the result, set forth the accepted statement of the rule: 1) the individual must exhibit an actual subjective expectation of privacy; and 2) society must be prepared to accept that expectation as reasonable. *Id.* at 361 (Harlan, J., concurring).

37. 417 U.S. 583 (1974). In *Cardwell*, Lewis, a suspected murderer, was asked to come to the police station to answer a few questions. He parked his car in a public parking lot and went into the police station where he was arrested. Following Lewis' arrest, the police towed his car from the parking lot to the police impoundment lot. In order to obtain evidence that would establish the defendant's presence at the murder scene, the technician, without first obtaining a search warrant, examined the right rear tire treads and paint on the fender. *Id.* at 588.

38. *Id.* at 590-92.

39. *Id.* at 590-91. In *Cardwell*, the Court stated: "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 590. The tire treads and fender paint examined by the police technician were in plain view. Therefore, the defendant did not have a reasonable expectation of privacy in these items. The Court also noted that a vehicle "seldom serves as one's residence or as the repository of personal effects." *Id.*

40. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983).

41. Thus, although conversations in a closed automobile would be deemed private, one would not have a similar "reasonable" expectation that items left in an automobile in plain view would be private. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968).

In *Brown*, 460 U.S. 730 (1983), the Supreme Court delineated the requirements for applying the plain view exception. In *Brown*, a police officer who lawfully stopped the defendant at a roadblock noticed green balloons in the defendant's car. He believed the balloons contained contraband. The Supreme Court upheld the seizure of the balloons because the officer's search met the necessary prerequisites for a valid plain-view search: 1) the officer must be lawfully in a position that allows him to see the item; and 2) the officer must have probable cause to believe the item is unlawful. The Court's opinion specifically addressed the latter factor. The Texas court had held that it must be immediately apparent that the item is incriminating. 460 U.S. at 736. The Supreme Court held that

imminently mobile, a warrantless search may still be conducted if no expectation of privacy is infringed.

The *Cardwell* Court, however, did not hold that the expectation of privacy in a vehicle is diminished per se. Rather, the Court determined that an individual's expectation of privacy in a vehicle is dependent on the particular facts of the case.[42]

In *South Dakota v. Opperman*,[43] the Court set forth a second justification for the reduced expectation of privacy in vehicles. The Court held that the pervasive governmental regulation of automobiles reduces an individual's expectation of privacy in an automobile.[44] The Court also reiterated the reason for the reduced expectation of privacy set forth in *Cardwell*: the expectation of privacy in vehicles is diminished due to the public nature of travel.

In *United States v. Chadwick*,[45] the Court elaborated on the *Cardwell* and *Opperman* rationales. In *Chadwick*, the Court refused to justify the warrantless search of a footlocker under the vehicle exception rationale,[46] reasoning that the factors which diminish an individual's expectation of privacy in an automobile do not apply to a footlocker.[47] The Court stated that luggage contents, unlike parts of an automobile, are not open to public scrutiny.[48] Therefore, since no exigency existed, a warrant was required before a search could be conducted.

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this interpretation of Coolidge v. New Hampshire was mistaken and that the true requisite was the existence of probable cause to believe that the item is incriminating. 460 U.S. at 741-42.

42. The Court stated:

> That is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry. . . .
>
> With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle . . . we fail to comprehend what expectation of privacy was infringed.

Cardwell, 417 U.S. at 591 (footnote omitted).

43. 428 U.S. 364 (1976). In *Opperman*, the Court approved a warrantless inventory search of an impounded vehicle even though there was no exigency at the time of the search.

44. In summarizing the justifications underlying the vehicle exception, the *Opperman* Court stated:

> The reason for this well-settled distinction is two-fold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. . . . Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. . . . Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls. . . . As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

428 U.S. 364, 367-68 (1976).

45. 433 U.S. 1 (1977).

46. 433 U.S. at 11-13.

47. 433 U.S. at 13.

48. *Id.*

III. THE MOTOR HOME AS A HYBRID: HOME OR VEHICLE?

In *Payton v. New York*,[49] the Supreme Court said that absent consent or exigency, a home cannot be searched without a warrant. The *Carroll* decision allowed warrantless searches of potentially mobile automobiles.[50] Because a motor home is a hybrid having characteristics of both a home and a vehicle, it is difficult to determine which feature of a motor home should take precedence when deciding whether a warrant is necessary.[51] While many individuals use motor homes for transportation, others use them as residences.[52]

Several courts faced the problem of warrantless searches of motor homes before the *Carney* decision.[53] The Ninth Circuit, in *United States v. Williams*,[54] recognized that individuals have an increased expectation of privacy in motor homes. The court distinguished automobiles from motor

49. 445 U.S. 573 (1980).

50. *See supra* notes 27-29 and accompanying text.

51. Prior to the *Carney* decision, courts consistently applied the automobile exception to vehicles other than automobiles. *See, e.g.*, United States v. Rollins, 699 F.2d 530 (11th Cir.), *cert. denied*, 464 U.S. 933 (1983) (warrantless search of an airplane upheld under the vehicle exception); United States v. Cadena, 588 F.2d 100, 101 (5th Cir. 1979) (vehicle exception extended to ships although stringent proof of the exigency would be required since "[t]he ship is the sailor's home."); United States v. Sigal, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974) (application of the vehicle exception to an airplane); State v. Mower, 407 A.2d 729 (Me. 1979) (warrantless search of a converted school bus/camper upheld under the vehicle exception although the defendant used the school bus as his home).

52. A motor home may simultaneously have characteristics of both a vehicle and a home. A *Time Magazine* article states, "For many Americans, a home is not a house. It is a vehicle." Demerest, *In South Dakota: The Motor Homes Gather*, TIME, Aug. 7, 1978, at 8. An article in 50 PLUS states, "several thousand retired couples love the RV lifestyle so much that they have no permanent address." Opsata, *The Big Rollout*, 50 PLUS, Nov. 1984, at 68.

53. The Arizona Supreme Court applied the vehicle exception to motor homes in State v. Sardo, 112 Ariz. 509, 543 P.2d 1138 (1975) and State v. Million, 120 Ariz. 10, 583 P.2d 897 (1978). In *Sardo*, the defendant's motor home was parked in a hotel parking lot and the defendant was inside. The court stated that the apparent mobility of a vehicle presents an exigency which allows immediate police action. The court found that the motor home was imminently mobile. *Sardo*, 112 Ariz. at 513-14, 543 P.2d at 1142-43.

In *Million*, the defendants drove the motor home to a restaurant and parked. The defendants then drove an automobile to a residence. An hour later, the defendants returned to the motor home. The defendants then drove the motor home north where agents stopped it. The defendants argued that the police had ample time to obtain a warrant while the motor home remained in the parking lot. The court replied that "failure to obtain a warrant at the earliest possible moment does not necessarily make a subsequent warrantless search unreasonable. . . ." *Million*, 120 Ariz. at 15-16, 583 P.2d at 902-03. The *Million* court applied the traditional vehicle exception analysis to motor homes.

In State v. Francoeur, 387 So. 2d 1063 (Fla. Dist. Ct. App. 1980), the Florida District Court of Appeals upheld the warrantless search of a motor home during which contraband was uncovered. The court, in dictum, expressed the view that the vehicle exception would apply even if evidence indicated the motor home was used as a home. Emphasizing that the particular configuration of the motor home is not material, the court stated: "While there is no testimony that the defendants were using the vehicle as a living accommodation, it is our view that this factor would not alter the results." *Id.* at 1065.

See also, United States v. Kelly, 683 F.2d 871 (5th Cir.), *cert. denied sub nom.*, Kanelopoulos v. United States, 459 U.S. 972 (1982) (warrantless search of motor home stopped in transit upheld under *Ross*); United States v. Miller, 460 F.2d 582 (10th Cir. 1972) (exigent circumstances justified the warrantless search of a motor home under the vehicle exception); State v. Lepley, 343 N.W.2d 41 (Minn. 1984) (warrantless search of a motor home stopped in transit upheld, reasoning that the vehicle exception applies to motor homes).

54. 630 F.2d 1322 (9th Cir.), *cert. denied sub nom.*, Murchison v. United States, 449 U.S. 865 (1980).

homes on the ground that people actually live in motor homes. The court determined that certain common features of motor homes indicate that they more closely resemble homes than vehicles.[55] The court concluded that privacy expectations in motor homes are "significantly greater" than those in automobiles. In its discussion of the motor home search, the court relied primarily on an individual's increased expectation of privacy in a motor home. However, the court also stated that, on the facts of the case, no possibility existed that the motor home would move.[56]

A later Ninth Circuit opinion, *United States v. Wiga*,[57] interpreted the *Williams* case as holding that the vehicle exception was inapplicable to motor homes.[58] In interpreting *Williams* this way, the *Wiga* court relied solely on the language in *Williams* that explained the heightened expectation of privacy in motor homes and ignored the language in *Williams* discussing the immobility of the motor home.[59]

The Eleventh Circuit, in *United States v. Holland*,[60] determined that applicability of the vehicle exception to motor homes could not be decided on a categorical basis. The court held that where a motor home is used only for transportation the vehicle exception applies.[61] The court stated, "The use of a vehicle, not its shape, should control the standard that applies."[62]

IV. THE *CARNEY* RATIONALE

A. *Bases of the Court's Decision*

In *California v. Carney*, the United States Supreme Court discussed two bases for its decision. First, the Court noted that motor homes, like automobiles, are inherently mobile.[63] In the instant case, an exigency existed because the motor home was readily mobile.[64] Second, the Court stated that motor homes, like automobiles, are subject to pervasive regulation.[65] Hence, individuals who own motor homes, like individuals who own automobiles, enjoy diminished expectations of privacy in their motor home.

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55. The court noted that motor homes often have tinted glass and/or curtains to stop people from peering inside; in addition, ordinary motor homes have a bathroom and bed. The court determined that these features indicated that a motor home more closely resembled a home than an automobile. 630 F.2d at 1326.

56. *Id.* Under the traditional vehicle exception analysis, therefore, a warrantless search would not be justified. *See supra* notes 27-33 and accompanying text. However, the fact that the motor home contained potentially explosive chemicals justified the warrantless search of the motor home.

57. 662 F.2d 1325 (9th Cir.), *cert. denied*, 456 U.S. 918 (1981).

58. *Id.* at 1329. People v. Carney, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), *rev'd*, — U.S. —, 105 S. Ct. 2066 (1985), interpreted *Williams* in a manner consistent with the *Wiga* court. 34 Cal. 3d at 608, 668 P.2d at 813, 194 Cal. Rptr. at 506 (1983).

59. *Wiga*, 662 F.2d at 1329.

60. 740 F.2d 878 (11th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 2654 (1985). In *Holland*, the agents stopped the motor home on the highway. The court found the motor home inherently, imminently, and presently mobile. Additionally, when the defendants stopped for the night, they did not sleep in the motor home; instead, they rented motel rooms. The court determined that since the motor home was used solely for transportation, the vehicle exception was applicable. 740 F.2d at 880.

61. *Id.*

62. *Id.*

63. — U.S. at —, 105 S. Ct. at 2070.

64. *Id.*

65. *Id.*

1. *Mobility*

California v. Carney restates the traditional rule that exigent circumstances justify application of the vehicle exception. A search warrant may be required to search a vehicle only when the vehicle is immovable.[66] If the vehicle is immobile, however, a warrantless search may still be allowed if no reasonable expectation of privacy is infringed.[67] The motor home in *Carney* was mobile, thus justifying the application of the vehicle exception to the defendant's motor home.

2. *Reduced Expectation of Privacy*

The *Carney* opinion discussed the expectation of privacy analysis in vehicle exception cases. The Court earlier had set forth two justifications underlying the reduced expectation of privacy enjoyed by individuals in automobiles: 1) the public nature of travel (the individual and the vehicle are in "plain view"); and 2) the pervasive state regulation of vehicles.[68]

First, the *Carney* Court addressed the "public nature of travel." The *Cardwell* case had applied this analysis to find a reduced expectation of privacy only as to the exterior of an immobile vehicle.[69] The *Carney* Court noted that searches pursuant to the vehicle exception are not limited to items in plain view.[70] Rather, cases prior to *Carney* extended warrantless searches to parts of a vehicle not visible to the public.[71] Therefore, the Court reasoned, the pervasive regulation of vehicles, not the public nature of travel

66. At least one court, however, reads the *Carney* decision differently. In light of the *Carney* decision, the Ninth Circuit, in United States v. Bagley, 772 F.2d 482 (9th Cir. 1985), re-evaluated an earlier decision, United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983), which set forth the criteria used to evaluate the applicability of the vehicle exception. Under *Spetz*, the vehicle exception applied when probable cause existed *and* the vehicle either was stopped in transit or presented specific exigent circumstances justifying the seizure. *Spetz*, 721 F.2d at 1471.

In light of the *Carney* decision, the Ninth Circuit abandoned *Spetz*. The court interpreted *Carney* as holding that probable cause alone justified the warrantless search of a vehicle. Therefore, the court concluded that in order for the vehicle exception to apply, no showing of an exigency was necessary if probable cause existed. *Bagley*, 772 F.2d at 491.

If, as the Ninth Circuit states, probable cause alone is sufficient to justify a search under the vehicle exception, then the police may even search an immovable vehicle. However, the *Carney* court specifically noted that the police, unless they immediately searched the motor home, risked losing the evidence. As the Court stated, "[a]bsent the prompt search and seizure, it could readily have been moved beyond the reach of the police." — U.S. —, —, 105 S. Ct. 2066, 2070 (1985). Additionally, the facts of *Bagley* fall squarely within the traditional requirements of the vehicle exception since, as the Ninth Circuit stated, "Even if we apply the rule set forth in [*Spetz*], . . . we are convinced that, along with probable cause, exigencies also existed . . ." *Bagley*, 772 F.2d at 491. It remains unclear whether under *Bagley* the Ninth Circuit will justify a warrantless search of an *immovable* vehicle under their new interpretation of the vehicle exception.

67. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583 (1974).

68. South Dakota v. Opperman, 428 U.S. 364 (1976); *see supra* notes 43-44 and accompanying text.

69. *See supra* notes 37-41 and accompanying text.

70. — U.S. at —, 105 S. Ct. at 2069.

71. *Id.* For example, in Cady v. Dombrowski, 413 U.S. 433 (1973), the United States Supreme Court held that the warrantless search of a locked car trunk was reasonable. Also, the Court, in United States v. Ross, 456 U.S. 798 (1982), held that the warrantless examination of a sealed package in a car trunk was reasonable. The *Carney* Court noted that in the *Carroll* case, agents tore open the car upholstery in order to find the alcohol hidden behind the seats. Yet, the *Carney* Court noted, even in *Carroll* the extent of the search was not questioned. — U.S. at —, 105 S. Ct. at 2069. In contrast to *Cardwell*, the vehicles searched, with the exception of *Cady*, were either stopped in transit or imminently mobile.

and its plain view underpinnings, is the primary rationale underlying the reduced expectation of privacy in vehicles.[72]

In discussing the pervasive regulation of vehicles, the Court stated that motor homes, like automobiles, are regulated; therefore, individuals have a reduced expectation of privacy in motor homes.[73] The Court refused to distinguish motor homes from other vehicles for purposes of the vehicle exception even though motor homes can be used as homes.[74] The Court stated that to do so "would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments."[75]

B. *Is it Movable?: The Objective Test*

In *California v. Carney*, the Supreme Court addressed the dilemma presented by the hybrid characteristics of motor homes. The Court had to answer the difficult question whether the "home-like" characteristics of motor homes allows application of the vehicle exception. Traditionally, the first rationale justifying a warrantless search is the vehicle's ready mobility. If the vehicle is immobile, then the reduced expectation of privacy, due to both the public nature of travel and the pervasive governmental regulation, may justify the warrantless search. The *Carney* Court adopted this general formulation and determined that, in the instant case, the ready mobility of the motor home justified the warrantless search.

The Court refused, however, to apply a categorical rule and instead adopted an objective test: If it appears to the objective viewer that a motor home is in use as a home, then a warrant is required before a search may be conducted.[76] The Court enumerated several factors that would indicate use as a home: "[I]ts location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is connected to utilities, and whether it has convenient access to a public road."[77]

Several of the Court's enumerated objective factors not only show use as a home, but also indicate that the vehicle is not mobile. While the Court's objective test addresses the issue of whether the vehicle is being used as a home, it also requires that the objective observer evaluate the imminent mobility of the motor home. For example, if a motor home is elevated on blocks, it is not readily movable. Also, if a motor home does not have "convenient access to a public road," it is not readily movable. In fact, the District Court of New Hampshire in *United States v. Levesque*,[78] in applying the

72. *Carney*, — U.S. at —, 105 S. Ct. at 2069.

73. — U.S. at —, 105 S. Ct. at 2070.

74. *Id.* Additionally, the Court commented that motor homes are easily used as instrumentalities of crime. However, under the traditional vehicle exception analysis, both probable cause and an exigency are necessary before police may conduct a warrantless search of a vehicle. *See supra* notes 27-36 and accompanying text. The main justification underlying the vehicle exception is the imminent mobility of vehicles. The exception does not rest on a determination that vehicles are likely instrumentalities of crime. *Id.* at —, 105 S. Ct. at 2070.

75. *Id.*

76. *Id.*

77. — U.S. at —, 105 S. Ct. at 2071 n.3.

78. In a recent opinion, United States v. Levesque, 625 F. Supp. 428 (D.N.H. 1985), the court, in dictum, applied the *Carney* objective test to a trailer. Although the search was conducted pursu-

Carney "objective test," actually analyzed the ready mobility of the vehicle rather than whether the factors indicated use as a home.

California v. Carney involved application of the vehicle exception to an occupied motor home parked in a public parking lot. In *Carney*, because of the location of the vehicle and the fact that the defendant was inside the motor home, the Court deemed the motor home movable. The Court reasoned that with a mere turn of the key, the motor home could be mobile.[79] The Court would not recognize, as Carney urged, that an individual has a per se greater expectation of privacy in a motor home because it is "capable of functioning as a home."[80] Rather, the Court granted the protection a warrant affords only to those motor homes objectively determined to be residences and hence, immobile.[81]

V. ANALYSIS OF THE *CARNEY* OPINION

Prior to *Carney*, the *Cardwell* plurality held that whether an individual had a diminished expectation of privacy in a vehicle depended on the facts of the particular case. In *Cardwell*, the Court determined that no privacy expectation was infringed by the search of the vehicle's exterior. The Court stated, "[t]his is not to say that no part of the interior of the automobile has fourth amendment protection. . . ."[82] Yet the *Carney* Court justified the search of the enclosed interior of a motor home under the vehicle exception.

The reason underlying this seeming disparity is that the independent evaluation of an individual's expectation of privacy as required by *Cardwell* is necessary only when the vehicle is immobile. If the vehicle is imminently mobile, then the mobility outweighs any expectation that the vehicle's contents will remain private. *Carney* reaffirms the *Ross* holding that "[a]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband."[83]

In reading the *Carney* decision, however, it is important to remember that some individuals have no permanent address and actually live in their

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ant to a valid search warrant, the court nevertheless stated that on the facts of the case, a search warrant would be required under *Carney*. The court characterized the trailer:

> [T]he trailer on Lot 77 was approximately thirty feet in length and ten feet in width. It was a 'fifth wheel' trailer subject to movement only when attached to a pickup truck, which in this case was parked several feet from the trailer. The trailer was jacked up at one end by several cement blocks and a piece of lumber. The trailer served as the primary residence of Jane Connor and her common-law husband . . . . The trailer was attached to water, sewage, and electricity . . . provided by the Mile-Away [trailer park]. In order to prepare the trailer for travel, it would be necessary to disconnect the utility hookups, remove the stabilizing cement blocks, jack up the front end of the trailer, move the truck underneath the trailer, and attach the trailer to the truck. . . . [T]his preparation would take approximately three-quarters of an hour.

Id. at 442.

In deciding whether a warrant was required, the court placed greater emphasis on the lack of mobility of the trailer. The court determined that a warrant would be necessary to search the trailer.

79. — U.S. at —, 105 S. Ct. at 2070.

80. *Id.*

81. *Id.*

82. 417 U.S. at 591.

83. — U.S. at —, 105 S. Ct. at 2070, *citing* United States v. Ross, 456 U.S. 798, 823 (1982).

motor homes.[84] Even while traveling on the road, these people use their motor homes as residences. Yet, while in transit and even possibly while parked, an individual has no "reasonable" expectation of privacy in his motor home. While a motor home, like any other vehicle, is subject to state regulation, an individual may not have a diminished expectation of privacy in a motor home. Many people eat and sleep in motor homes, often drawing curtains to shield themselves from outside view. Like the luggage in *Chadwick*, it is difficult to justify warrantless searches of motor homes based on the argument that an individual has a reduced expectation of privacy due to the "public nature of travel." A motor home, like luggage, may be a "repository of personal effects."

While courts recognize that movable vehicles require immediate police action if police have probable cause,[85] the fourth amendment requires a warrant before an individual's home may be searched.[86] A vehicle's mobility, whatever its shape, makes effective law enforcement difficult. Similarly, a motor home's mobility presents difficult law enforcement problems. Perhaps, however, a different balance could have been struck. The Court could have recognized the heightened expectation of privacy in a motor home and required that it be seized until a neutral magistrate evaluates whether or not probable cause exists. Justice Harlan, in *Chambers v. Maroney*, suggested such an approach when he wrote:

> [P]ersons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. . . . [A] person always remains free to consent to an immediate search . . . . Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure.[87]

VI. *CALIFORNIA V. CARNEY*'S IMPACT ON ARIZONA LAW

The Arizona Supreme Court twice extended the vehicle exception to motor homes.[88] In those cases, the court applied the traditional formulation of the vehicle exception to motor homes: If probable cause exists and the vehicle is movable, then the motor home may be searched without a warrant.[89] While the *Carney* Court applied the traditional formulation of the vehicle exception to motor homes, the decision added an "objective test." *Carney* alters Arizona law to reflect that if an objective observer believes the vehicle is in use as a home, a warrant is required.

However, if a motor home is being used as a "home" under *Carney*, it

84. *See supra* note 52.
85. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).
86. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971).
87. 399 U.S. 42, 64 (Harlan, J., concurring and dissenting).
88. *See supra* note 53.
89. *Million*, 120 Ariz. 10, 15, 583 P.2d 897, 902 (1978); *Sardo*, 112 Ariz. 509, 513-14, 543 P.2d 1138, 1142-43 (1975).

probably is immobile. If the motor home is immobile, the vehicle exception is inapplicable in Arizona. Therefore, while *Carney*'s "objective test" modifies Arizona law in theory, the effect in fact is likely to be minimal; it merely reinforces the pre-existing law.

VII. CONCLUSION

California v. Carney applied the vehicle exception to vehicles "capable of functioning as homes." When a motor home is on the highway or in a place not normally used for residential purposes, the traditional justifications underlying the vehicle exception apply, thus allowing a warrantless search of the motor home. Only if the individual's home is immobile is he entitled to fourth amendment protection. Hence, while an individual enjoys the advantages of a mobile lifestyle, the individual is not entitled to have a neutral magistrate evaluate the existence of probable cause unless an objective observer believes the motor home is being used as a home. In balancing the competing interests, the Supreme Court valued practicality and determined that society's interest in effective law enforcement outweighs an individual's expectation of privacy in a motor home.

Janel A. Hill

B. *OREGON V. ELSTAD*: THE SUPREME COURT GOES BACK TO THE FUTURE WITH A NEW VOLUNTARINESS TEST FOR UNWARNED CONFESSIONS

In *Oregon v. Elstad*,[1] the United States Supreme Court limited the effect of *Miranda v. Arizona*[2] by holding that a defendant's unwarned voluntary admission in response to custodial questioning does not taint a later confession preceded by *Miranda* warnings.[3] Under *Elstad*, the later confession is admissible if the defendant made a knowing and voluntary waiver of his *Miranda* rights before confessing.[4]

At the time of his arrest, police officers briefly questioned Elstad about his involvement in a burglary.[5] They did not read him the *Miranda* warnings prior to this interrogation and Elstad admitted that he was present when the burglary took place. The officers took him to police headquarters, where they read him his *Miranda* rights. Elstad then made a full, written confession.

At his trial for first-degree burglary, Elstad's initial unwarned admission was excluded but the judge refused to exclude the later confession. Although the officers did not compel him to confess, Elstad argued that his initial unwarned statement constituted an admission of guilt psychologically compelling him to make further admissions. The coercive impact of his belief that his initial statement "let the cat out of the bag,"[6] tainted his later confession and made it impossible for him to make a truly voluntary waiver of his *Miranda* rights. The trial judge rejected these arguments and admitted the confession, finding that Elstad knowingly and voluntarily waived his *Miranda* rights.[7] The court convicted Elstad of first-degree burglary.

On appeal, the Oregon Court of Appeals reversed the trial court's decision to admit Elstad's confession.[8] This court accepted Elstad's contention that the coercive impact of his belief that his initial admission "let the cat out of the bag" tainted his confession.[9] The court found that the taint had

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1. 105 S. Ct. 1285 (1985).

2. 384 U.S. 436 (1966). In *Miranda*, the Supreme Court created a rule requiring that a brief reading of the suspect's fifth and sixth amendment rights precede all custodial interrogations of criminal suspects. The warnings set forth in *Miranda* are: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

3. *Elstad*, 105 S. Ct. at 1298.

4. *Id.* at 1293-94.

5. The facts of Oregon v. Elstad are set forth in 105 S. Ct. at 1289-90.

6. *See* United States v. Bayer, 331 U.S. 532 (1947). The *Bayer* Court stated:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id. at 540.

7. *Elstad*, 105 S. Ct. at 1290. Elstad conceded that the officers made no threats or promises at any point while he was in their custody. *Id.* at 1289.

8. State v. Elstad, 61 Or. App. 673, 658 P.2d 552 (1983), *review denied*, 295 Or. 617, 670 P.2d 1033 (1983), *rev'd* 105 S. Ct. 1285 (1985).

9. *Id.* at 677, 658 P.2d at 554.

not dissipated, because only a brief period of time separated the confession from the initial admission.[10]

The United States Supreme Court granted certiorari, reversed and remanded.[11] In the Supreme Court, Elstad contended that his confession was the tainted "fruit" of his initial illegally-obtained statement, and therefore, was inadmissible under the "fruit of the poisonous tree" doctrine, set forth in *Wong Sun v. United States*.[12] The Court rejected Elstad's argument, stating that the doctrine did not apply because the police officer's failure to read the *Miranda* warnings did not violate Elstad's constitutional rights.[13]

The Court also rejected Elstad's argument that the coercive impact created by his initial admission psychologically compelled him to confess. The Court held that the prosecution could not use Elstad's initial unwarned admission against him in its case-in-chief. The prosecution could, however, use Elstad's later warned confession because it followed his knowing and voluntary waiver of his *Miranda* rights.[14]

This Casenote will examine the rationale for the Court's decision, and consider the effect of the *Elstad* decision upon the future application of the *Miranda* exclusionary rule.

ANALYSIS OF *ELSTAD*

Unwarned Confessions do not Taint Subsequent Warned Confessions

The *Elstad* Court refused to apply the "fruit of the poisonous tree" doctrine to suppress Elstad's confession.[15] The "fruits" doctrine, set forth first in *Wong Sun*,[16] holds that where the state obtains evidence in violation of a defendant's fourth amendment rights, any additional evidence attributable to the illegally-obtained evidence is "tainted."[17] This derivative evidence is inadmissible unless the state can demonstrate a break in the causal connection between the derivative evidence and the illegally-obtained evidence.[18]

A Miranda *Violation is not a Constitutional Violation*

The Court rejected Elstad's argument that his confession was the excludable "fruit" of an admission obtained in violation of *Miranda*. In so doing, the Court distinguished *Miranda* rights from the constitutional rights that the fourth and fifth amendments protect.[19]

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10. *Id.* at 677-78, 658 P.2d at 554-55.

11. Oregon appealed the case to the United States Supreme Court after the Oregon Supreme Court denied certiorari.

12. 371 U.S. 471 (1963). *See infra* notes 16-18 and accompanying text.

13. *Elstad*, 105 S. Ct. at 1293. *See infra* notes 23-25 and accompanying text.

14. The Court stated that the later confession was knowing and voluntary because it was preceded by *Miranda* warnings. 105 S. Ct. at 1296.

15. *Id.* at 1290-91.

16. 371 U.S. 471 (1963).

17. *Id.* at 488.

18. The "fruit of the poisonous tree" doctrine requires that all evidence stemming from unlawfully obtained evidence be excluded unless the resulting evidence is obtained through means "sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

19. *Elstad*, 105 S. Ct. at 1292.

The fifth amendment, the Court stated, protects against coerced self-incrimination.[20] Prior to *Miranda*, courts utilized a "voluntariness" test, established by the Supreme Court under the fifth amendment's due process clause, to determine whether coercion existed.[21] *Miranda* created the presumption that coercion existed whenever police officers failed to precede a custodial interrogation with a reading of the suspect's fifth and sixth amendment rights.[22]

The *Elstad* Court acknowledged that one purpose of the *Miranda* warnings is to prevent violations of a suspect's fifth amendment right against self-incrimination.[23] The Court stated, however, that the fifth amendment itself does not require the reading of such warnings.[24] Consequently, failure to read the warnings does not, in and of itself, constitute a violation of the defendant's constitutional rights. The Court concluded that a *Miranda* violation is a procedural violation.[25] As such, a *Miranda* violation does not warrant the broad application of the exclusionary rule that the "fruits" doctrine traditionally requires for violations of fourth amendment constitutional rights.[26]

The Exclusionary Rule Serves Different Purposes under the Fourth and Fifth Amendments

The *Elstad* Court also refused to apply the "fruits" doctrine to *Miranda* violations because the exclusionary rule serves different purposes under the fourth and fifth amendments. Under the fourth amendment, the rule's purpose is to deter unreasonable searches and seizures.[27] The "fruits" doctrine furthers this purpose by requiring the exclusion of any evidence derived from illegally-obtained evidence.[28]

Under the fifth amendment, the exclusionary rule ensures that the defendant's statements are trustworthy by precluding the use of coerced statements.[29] Under *Miranda*, the court presumes that unwarned custodial statements are coerced.[30] The prosecution cannot use such statements in its case-in-chief, even where the defendant makes them voluntarily. Where actual coercion does not occur, the trustworthiness of the statements is not in

20. *Id.*

21. Under the voluntariness test, "the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." Wilson v. United States, 162 U.S. 613, 623 (1896). Whether the confession was voluntary or not depends on an examination of all the attendant circumstances. *See* Haynes v. Washington, 373 U.S. 503, 513 (1963).

22. *See Miranda*, 384 U.S. at 458.

23. *Elstad*, 105 S. Ct. at 1292.

24. *Id.* at 1291. The Court stated: "The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *Id.*, (quoting New York v. Quarles, 104 S. Ct. 2626, 2631 (1984)).

25. *Elstad*, 105 S. Ct. at 1293.

26. *Id.* The Court applied the reasoning contained in Michigan v. Tucker, 417 U.S. 433 (1974), which noted: "Since there was not actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." *Elstad*, 105 S. Ct. at 1293.

27. *Id.* at 1292. *See also* Dunaway v. New York, 442 U.S. 200 (1979).

28. *See supra* notes 16-18 and accompanying text.

29. *Elstad*, 105 S. Ct. at 1292-93.

30. *See Miranda*, 384 U.S. at 468.

question. As a result, the prosecution can use statements obtained in violation of *Miranda* in contexts other than in its case-in-chief, provided the statements satisfy the due-process voluntariness test.[31]

In *Michigan v. Tucker*, the Supreme Court refused to extend the "fruits" doctrine to exclude the testimony of a witness identified through the defendant's statement obtained in violation of *Miranda*.[32] The *Tucker* Court reasoned that because the officers did not coerce the defendant into making the statement, they did not violate his constitutional rights.[33] As a result, the Court refused to apply the "fruits" doctrine because the witness was not the "fruit" of a constitutional violation.[34]

The *Elstad* Court stated that the same reasoning applies where the alleged "fruit" of the unwarned statement is the defendant's subsequent confession.[35] Where the initial unwarned statement is not coerced, the "fruits" doctrine is inapplicable. Consequently, the Court determined that, in order to admit the confession, it was unnecessary to establish a break between the unwarned statement and the subsequent confession.[36] The confession is admissible in the prosecution's case-in-chief if the defendant made it voluntarily.[37] The Court found that Elstad's confession was voluntary because he gave it after a reading of the *Miranda* warnings.[38]

The Psychological Impact of "Letting the Cat Out of the Bag" does not Warrant the Exclusion of the Second, Warned Confession

Where officers obtain an initial confession in violation of a defendant's fifth amendment rights, a later confession is inadmissible unless the state can demonstrate that the coercive circumstances dissipated before the defendant made the later confession.[39] The Oregon Court of Appeals found that Elstad's belief that his initial unwarned statement "let the cat out of the bag" psychologically compelled him to make further admissions.[40] The court determined that the coercive impact of Elstad's belief that he had already admitted his guilt had not yet dissipated when he made his subsequent full confession.[41] Consequently, the court concluded that he was unable to make a valid waiver of his fifth amendment rights before he confessed.[42]

In reversing the holding of the Oregon Court of Appeals, the Supreme Court distinguished situations where the prior statement actually is coerced from situations where the prior statement is voluntary, though not preceded

31. *See* Michigan v. Tucker, 417 U.S. 433, 451 (1974); Harris v. New York, 401 U.S. 222, 225 (1971).
32. *Tucker*, 417 U.S. at 450-51.
33. *Id.* at 444-45.
34. *Id.* at 446.
35. *Elstad*, 105 S. Ct. at 1293.
36. *Id.*
37. *Id.* at 1298. In evaluating the voluntariness of the statements, the finder of fact must examine the surrounding circumstances and the entire course of police conduct. *Id.*
38. *Id.* at 1296.
39. *Id.* at 1294. *See also infra* note 44 and accompanying text.
40. *See* State v. Elstad, 61 Or. App. at 677, 658 P.2d at 555.
41. *Id.* at 677, 658 P.2d at 554.
42. *Id.* at 677-78, 658 P.2d at 554-55.

by *Miranda* warnings.[43] Where the prior statement actually is coerced, the Court enumerated several factors that are relevant in determining whether the coercion carries over to the second confession. The coercion may dissipate if the identity of the interrogators or the location of the interrogation changes, or if a substantial amount of time separates the two confessions.[44] Where the prior statement is voluntary, however, such considerations are unnecessary since giving the *Miranda* warnings prior to the second confession ensures the second confession's voluntariness.[45]

The Court refused to attribute constitutional significance to Elstad's belief that remaining silent was pointless because his unwarned admission had established his guilt.[46] Such a result, the Court believed, would equate the psychological impact of a voluntary, unwarned admission with that of an involuntary admission obtained by official coercion. Where no official coercion has occurred, the Court concluded that the *Miranda* warnings are sufficient to cure the deficiency that made the first confession inadmissible.[47]

The Court also determined that the defendant's initial, unwarned admission should not immunize him from the consequences of freely choosing to make a second confession following *Miranda* warnings. In the absence of a constitutional violation, the Court found that the fifth amendment does not require such immunity.[48] Furthermore, the Court believed that basing immunity upon an initial, unwarned admission would inflict a high cost upon law-enforcement activity by depriving the trier of fact of trustworthy evidence. In the absence of a constitutional violation, the exclusion of a second, warned confession provides the defendant little additional protection against compelled testimony.[49]

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43. *Elstad*, 105 S. Ct. at 1295.

44. *Id.* at 1294. The factors enumerated by the Court were first set out in Westover v. United States, 384 U.S. 494, 496 (1966). *Westover* was one of three companion cases to *Miranda*.

45. *Elstad*, 105 S. Ct. at 1296. The *Elstad* Court stated: "The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.' " *Id.* at 1294.

46. *Id.* at 1295.

47. *Id.* at 1295-96.

48. *Id.*

49. *Id.* at 1295. With respect to the second confession, Elstad's final argument was that he could not effectively waive his fifth amendment rights unless the officers informed him that any statement he made prior to the warnings could not be used against him at trial. The Court rejected this argument. According to the Court, requiring this extra warning would impose a duty upon the officers conducting the interrogation to determine whether *Miranda* requirements had been breached. The Court believed that police officers are "ill equipped" to make such determinations; the issue of when custody begins is a "murky" one; and a *Miranda* violation often is not identified until long after the interrogation has ended. *Id.* at 1297.

Justice Brennan, dissenting in *Elstad*, expressed serious concern over the implications of the Court's decision. He suggested the courts should presume that an admission or a confession obtained in violation of *Miranda* taints a subsequent confession unless the prosecution can show the taint is so attenuated as to justify admission of the subsequent confession. Contrary to the majority, Justice Brennan would apply the "fruit of the poisonous tree" doctrine to determine whether the subsequent confession resulted from an exploitation of the illegality or from means sufficiently distinguishable from the illegality to purge the primary taint. He suggested that the courts consider several factors: 1) advice to the defendant that the earlier confession may be inadmissible; 2) proximity in time and place of the interrogations; 3) intervening factors such as consultation with a lawyer or family members; and 4) purpose and flagrancy of the illegality. *Id.* at 1309-10 (Brennan, J., dissenting).

JUST A SMOKESCREEN

The *Elstad* Court primarily based its holding upon the distinction between *Miranda* violations and constitutional violations.[50] While the Court's analysis seems logical, its major premise is open to question.

The decision rests upon the majority's conclusion that the officers did not coerce Elstad into making an initial admission prior to reading him his *Miranda* rights.[51] If the officers had coerced Elstad, they would have violated both his constitutional rights and his *Miranda* rights. Thus, the distinction between the two kinds of violations would not have supported the majority's decision.

Elstad was eighteen years old. The officers confronted him in his bedroom, stood over him while he got out of bed and dressed, separated him from his mother, and questioned him directly about his involvement in the burglary.[52] The Court's conclusion that this situation involved no coercion is contrary to human experience.[53] As Justice Brennan's dissent points out, it is also contrary to the realities of custodial interrogation and to the Court's previous decisions.[54]

Furthermore, the Court based its holding that Elstad's initial, unwarned admission did not taint his later confession upon its finding that Elstad made the initial admission voluntarily.[55] In this context, the distinction between voluntary and involuntary initial admissions obscures the true issue. The true issue is whether or not the defendant felt psychologically compelled to make further admissions.

While the Court stated that there is no reason to believe that an initial admission psychologically compels a suspect to confess again, the realities of police interrogation procedures demonstrate otherwise. Interrogation manuals describe initial admissions as the keys to obtaining full confessions.[56] The manuals state that once the interrogators establish a crack in the suspect's absolute denials, further admissions are certain to follow.[57] The voluntariness of the initial admission does not lessen the suspect's compulsion to make these additional admissions. The *Elstad* Court, by focusing on the voluntariness of the initial admission, creates a smokescreen to cam-

50. *See supra* notes 19-26 and accompanying text.

51. The Court based this conclusion on Elstad's concession that the police officers made no threats or promises at any point while he was in their custody. 105 S. Ct. at 1289.

52. *Id.*

53. Justice Stevens, dissenting in *Elstad*, viewed the Court's conclusion as an "untenable premise" upon which to base its decision. *Id.* at 1323 (Stevens, J., dissenting).

54. *Id.* at 1301 (Brennan, J., dissenting). Justice Brennan stated: "The Court's marble-palace psychoanalysis is tidy, but it flies in the face of our own precedents, demonstrates a startling unawareness of the realities of police interrogation, and is completely out of tune with the experience of state and federal courts over the last 20 years." *Id.*

55. *See supra* notes 43-49 and accompanying text.

56. *See, e.g.*, A. AUBRY & R. CAPUTO, CRIMINAL INTERROGATION 290 (3d ed. 1980) ("The securing of the first admission is the biggest stumbling block. . . ."); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 82 (2d ed. 1967) (once first admission obtained, interrogators have enormous tactical advantages); R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE 143 (1976) (first admission is the breakthrough).

57. *See* A. AUBRY & R. CAPUTO, *supra* note 56, at 290 ("[T]here is every reason to expect that the first admission will lead to others, and eventually to the full confession.").

ouflage the coercive effect that even a voluntary initial admission has upon defendants.[58]

ELSTAD'S EFFECT ON THE FUTURE OF *MIRANDA*

The Practical Effect of Elstad

Although the *Elstad* Court refrained from overruling *Miranda*,[59] the decision greatly weakens the effect of the *Miranda* exclusionary rule and leaves the door open for police abuse. The decision encourages police officers to violate *Miranda* by asking unwarned questions.[60] After *Elstad*, such questions no longer carry the risk of causing the suppression of later confessions. The danger of such abuse is genuine as some officers, even before *Elstad*, utilized the technique of asking unwarned questions.[61] It is foreseeable that more will adopt this practice to obtain vital, initial admissions.[62]

Most subsequent confessions will be valid under *Elstad* so long as they are preceded by a "careful reading" of the *Miranda* warnings.[63] Where the court finds, however, that the initial unwarned admission resulted from coercion, the second, warned confession will be inadmissible unless the taint of that coercion has dissipated.[64] Even in this situation, however, the defendant's warned statements will be admissible to impeach him if he later testifies at trial.[65] *Elstad* has removed the biggest risk of unwarned questioning: full confessions being deemed inadmissible as direct evidence of guilt. Consequently, police officers now have little incentive to read the *Miranda* warnings prior to initial interrogations as they would have to forego the potential benefits of unwarned questioning.

The Future of Miranda

Since deciding *Miranda*, the Supreme Court has continuously modified the decision.[66] It sometimes appears that the Court has trouble determining

58. Justice Stevens termed the opinion "somewhat opaque and internally inconsistent." *Elstad*, 105 S. Ct. at 1323 (Stevens, J., dissenting).

59. *Id.* at 1298 ("The Court today in no way retreats from the bright line rule of *Miranda*.").

60. *See infra* note 62.

61. *See, e.g.*, United States v. Lee, 699 F.2d 466 (9th Cir. 1982) (without reading the *Miranda* warnings, FBI agents interrogated a murder suspect for over an hour in a closed car while confronting him with evidence of his guilt); United States v. Nash, 563 F.2d 1166 (5th Cir. 1977) (without reading the *Miranda* warnings, and without identifying himself as a law enforcement officer, an FBI agent conducted a 45-minute interrogation in a closed room); United States v. Pierce, 397 F.2d 128 (4th Cir. 1968) (when he was neither arrested nor read the *Miranda* warnings, a suspect confessed in response to questioning after being held at police station for several hours).

62. 105 S. Ct. at 1319 (Brennan, J., dissenting). Justice Brennan inquires: "How can the Court possibly expect the authorities to obey *Miranda* when they have every incentive now to interrogate suspects without warnings or an effective waiver . . . ?" *Id.*

63. *Id.* at 1294.

64. *Id.*

65. *See* Harris v. New York, 401 U.S. 222, 225 (1971).

66. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) ("public safety" exception to *Miranda*); United States v. Mandujano, 452 U.S. 564 (1976) (*Miranda* warnings need not be read to grand jury witnesses); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (witness whose identity is obtained via a *Miranda* violation can testify against the defendant at trial); Harris v. New York, 401 U.S. at 225 (*Miranda*-violative statements can be used at trial to impeach defendants who take the

exactly what *Miranda* meant in the first place, and what it means now, after nearly two decades of tinkering.[67]

Prior to *Miranda*, a confession's admissibility turned on whether or not it met the voluntariness test.[68] This test required a finding that the defendant confessed "freely, voluntarily, and without compulsion or inducement."[69] The conflicting language in the *Elstad* opinion suggests that the Court may be returning to a pre-*Miranda* voluntariness analysis with regard to confessions. At one point in the opinion, the Court correctly stated the *Miranda* rule: "Failure to administer *Miranda* warnings creates a presumption of compulsion."[70] Later in the opinion, however, the Court stated that "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary."[71]

The *Elstad* Court held that the admissibility of the defendant's subsequent warned confession turned on the voluntariness of both the initial unwarned statement and the later warned confession.[72] It is difficult to reconcile this holding with *Miranda*, given that under *Miranda*, unwarned statements are presumed to be involuntary.[73]

The *Miranda* Court stated that the warnings were a constitutionally-mandated prerequisite to an effect waiver of fifth amendment rights.[74] The *Elstad* Court, on the other hand, viewed the *Miranda* warnings as judicially-created procedural measures that were not constitutionally required.[75]

Although the *Elstad* Court stressed that unwarned statements remain inadmissible in the prosecution's case-in-chief, the Court's failure to view the warnings as a constitutional requirement and its decision to focus upon the voluntariness of the initial unwarned admissions indicate that, in the area of confessions, the Court may eventually return to a pre-*Miranda* voluntariness

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stand); Orozco v. Texas, 394 U.S. 324, 327 (1969) (custodial interrogation requiring *Miranda* warnings not limited to station-house questioning but includes any situation where the police question someone who is not free to leave).

67. In adopting the warnings requirement, the *Miranda* Court intended to protect both the rights of individuals and the integrity of the adversarial system. *See Miranda*, 384 U.S. at 475-77. The Court has since changed its focus and views the deterrence of unlawful police conduct as the primary purpose of the *Miranda* exclusionary rule. *See* Michigan v. Tucker, 417 U.S. at 446-48 (exclusionary rule in self-incrimination cases is based upon deterrence of police misconduct); Harris v. New York, 401 U.S. at 225 (excluding statements from use during cross-examination would not carry out deterrent purpose of *Miranda*); Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429, 455 (1984) (Court relied heavily on deterrent theory to define the scope of *Miranda*).

68. *See supra* note 21 and accompanying text.

69. Wilson v. United States, 162 U.S. 613, 623 (1896).

70. *Elstad*, 105 S. Ct. at 1292.

71. *Id.* at 1298.

72. *Id.*

73. *Miranda* created a presumption of compulsion in custodial surroundings. *See Miranda*, 384 U.S. at 468.

74. *Id.* at 476 ("The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.").

75. The *Elstad* Court stated: "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." 105 S. Ct. at 1292. *See also supra* notes 24-25 and accompanying text. The *Miranda* warnings as mere "prophylactic standards," are discussed in Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 57 (1978).

test.[76] Under such a test, the presence or absence of *Miranda* warnings might be just one of several factors for the courts to consider in determining whether a confession was truly voluntary.[77]

Such a move, although abhorred by *Miranda* supporters, would finally resolve the controversy surrounding *Miranda*[78] and would eliminate the Court's need to use the type of "smokescreen" analysis found in *Elstad*[79] in reaching decisions inconsistent with *Miranda* without actually overruling it. Studies have shown that the *Miranda* decision itself has had little impact upon the total number of confessions.[80] Consequently, a new voluntariness test using *Miranda* warnings as one of several factors may be the most effective and efficient way of ensuring that police officers respect all of an arrestee's fifth amendment rights.

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76. Even before *Elstad*, commentators suggested such a move by the Court. *See* Gardner, *supra* note 67, at 475 (adopting good faith exception to *Miranda* would signal a return to a case-by-case analysis of subjective factors); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 418-19 (1977) (The Burger Court demonstrated in *Harris* and *Tucker* its rejection of the inherent coercion notion and its willingness to return to a case-by-case determination of the presence of coercion in a process similar to pre-*Miranda* voluntariness cases).

77. *See* Ritchie, *supra* note 76, at 419.

78. *See, e.g.*, Sunderland, *Self-Incrimination and Constitutional Principle*: Miranda v. Arizona *and Beyond*, 15 WAKE FOREST L. REV. 171, 204-06 (1979) (criticizing the *Miranda* decision as not well reasoned nor well supported: Supreme Court merely exercising "raw judicial power"); Gardner, *supra* note 76 (if the Supreme Court's real purpose in subsequent *Miranda* cases is to gut the decision, it should do so directly and with cogent reasoning).

79. *See supra* note 58 and accompanying text.

80. *See generally* O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 204 (1973) (even after the *Miranda* warnings only a small fraction of suspects refuse to sign waiver forms or request the presence of counsel during questioning).

JUVENILE COURTS

GAMMONS V. BERLAT: THE JUVENILE INCAPACITY PROVISION

In *Gammons v. Berlat*,[1] the Arizona Supreme Court held section 13-501 of the Arizona Revised Statutes,[2] Arizona's juvenile incapacity statute, inapplicable to juvenile court proceedings. The statute provided that holding a minor under the age of fourteen criminally responsible for his conduct required clear proof that he understood the wrongfulness of his conduct at the time of the act. The effect of *Gammons* is that the juvenile incapacity statute does not apply to any child under the age of fourteen remaining in the juvenile court system. Under *Gammons*, the juvenile incapacity statute only protects juveniles under the age of fourteen transferred to adult criminal proceedings.[3]

Presumably because the case involved a juvenile, the reported facts in *Gammons* are very general.[4] Gammons, who was thirteen years old at the time of his arrest, was charged with sexual abuse and sexual conduct with a minor. Through counsel, Gammons requested a hearing to determine his legal capacity to understand the wrongfulness of his behavior. The trial court refused the requested hearing. The Arizona Supreme Court accepted jurisdiction as a special action to determine the applicability of section 13-501 to juvenile court proceedings.

Gammons reduces the scope of the juvenile incapacity presumption in Arizona by limiting application of the presumption to adult criminal proceedings. This Casenote briefly reviews the history of the juvenile incapacity presumption,[5] and then examines the *Gammons* decision[6] and its effect on the application of the juvenile incapacity presumption in Arizona.[7]

HISTORY OF THE JUVENILE INCAPACITY PRESUMPTION

The common law irrebuttably presumed a youth under the age of seven incapable of forming the intent necessary for a criminal conviction.[8] From

1. 144 Ariz. 148, 696 P.2d 700 (1985).

2. ARIZ. REV. STAT. ANN. § 13-501 (1978) provides: "A person less than fourteen years old at the time of the conduct charged is not criminally responsible in the absence of clear proof that at the time of committing the conduct charged the person knew it was wrong."

3. Juveniles may be transferred to adult criminal proceedings. ARIZ. REV. STAT. ANN. § 17(A), JUV. CT. R. P. 12-14. Although rare, such transfers are more likely if the juvenile is close to majority or he committed a serious crime. The judge may order a transfer if the juvenile is not amenable to treatment or rehabilitation through available juvenile facilities. *Id.* Rule 14(b)(1). Transfer to adult court is a matter of judicial discretion. *See In re* Appeal in Maricopa County, Juvenile Action No. J-94518, 138 Ariz. 287, 674 P.2d 841 (1983) (juvenile transferred from juvenile court to superior court for prosecution as an adult).

4. The facts of *Gammons* are set forth in 144 Ariz. at 148, 696 P.2d at 700.

5. *See infra* notes 8-25 and accompanying text.

6. *See infra* notes 27-47 and accompanying text.

7. *See infra* notes 48-58 and accompanying text.

8. S. DAVIS, RIGHTS OF JUVENILES 2-4 (2d ed. 1985).

age seven to fourteen, this presumption was rebuttable by evidence that the child understood the wrongfulness of the act he committed.[9] Once a child reached fourteen, however, the presumption no longer applied.[10]

The common law incapacity presumption initially developed when one court tried all individuals, regardless of their age.[11] With the advent of the juvenile justice system,[12] courts no longer tried juveniles along with adults. Courts classified juvenile proceedings as civil rather than criminal,[13] because the juvenile courts served a rehabilitative and protective purpose, rather than the punitive function served by the adult criminal system.[14]

States have split on the applicability of the incapacity presumption to juvenile proceedings. While several states have allowed juveniles to raise the incapacity defense,[15] others have not.[16]

In allowing the incapacity presumption in juvenile adjudications, in *In re Gladys R.*, the California Supreme Court reasoned that if the legislature wanted to repeal the incapacity statute it would have expressly done so.[17] Similarly, Pennsylvania found neither evidence of an implied repeal of the incapacity presumption, nor any legislative intent to replace the juvenile incapacity defense with the juvenile act.[18] The Washington Supreme Court

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9. Casenote, *Common Law Presumption of Criminal Incapacity of Minors Under Age Fourteen Inapplicable to Juvenile Delinquency Proceedings—In re* Davis, 34 MD. L. REV. 178, 180 (1974).

10. *Id.*

11. *See* S. DAVIS, *supra* note 8, at 1-1 to 1-6.

12. Illinois established the first juvenile court in the United States in 1899. Reformers considered the juvenile court highly innovative because of its separate treatment of juveniles from adults. Modest early reforms equally applied the same penal sanctions to minor and adult offenders. The courts eventually characterized juvenile proceedings as civil rather than criminal, leading to their status today. *Id.*

13. *Id.* at 1-3; *see* ARIZONA STATE JUSTICE PLANNING AGENCY, JUVENILE CRIME AND JUSTICE IN ARIZONA 4 (1978).

14. *See* S. DAVIS, *supra* note 8, at 1-3. The first juvenile courts developed from the old English concept of *parens patriae*. The *parens patriae* doctrine led to the development of a separate, nonpunitive system to rehabilitate wayward youth. Under this doctrine, if the child's parents did not maintain his welfare, the court could exercise its paternal prerogative and declare a child a ward of the Crown.

15. *See, e.g., In re* Gladys R., 1 Cal. 3d 855, 872, 464 P.2d 127, 138, 83 Cal. Rptr. 671, 684 (1970) (age of accountability is relevant in both juvenile and criminal proceedings); Commonwealth v. Durham, 255 Pa. Super. 539, 542, 389 A.2d 108, 110 (Pa. Super. Ct. 1978) (no evidence legislature intended to displace common law incapacity defense by enactment of juvenile act); State v. Q.D., 102 Wash. 2d 19, 30, 685 P.2d 557, 563 (1984) (incapacity statute applied to eleven-year old in juvenile proceeding).

16. *See, e.g., In re* Davis, 17 Md. App. 98, 104, 299 A.2d 856, 860 (1973) (criminal incapacity statute inapplicable in juvenile proceeding). *See also* United States v. Borders, 154 F. Supp. 214 (1957) (common law incapacity defense inapplicable in juvenile court).

17. *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970). In *Gladys R.*, the California Supreme Court found the juvenile court obligated under section 26 of the California Penal Code to conduct a capacity hearing. The court stated that section 26 applied to juvenile proceedings because applying a rebuttable presumption against criminal capacity to children between the ages of seven and fourteen accords with the historical treatment of juveniles. The court refused to presume repeal of the juvenile incapacity statute and stated that if the legislature intended to repeal or sever the juvenile incapacity statute, it would have done so expressly. *Id.* at 863, 464 P.2d at 133, 83 Cal. Rptr. at 677. California takes the position that the age of accountability is relevant in both juvenile and criminal proceedings.

18. Commonwealth v. Durham, 255 Pa. Super. 539, 389 A.2d 108 (Pa. Super. Ct. 1978). In *Durham*, the court found that the common law presumption of incapacity for children between the ages of seven and fourteen was "still very much alive in Pennsylvania." *Id.* at 542, 389 A.2d at 110. Because nothing in the juvenile act indicated a contrary legislative intent, the court upheld the common law incapacity presumption.

also upheld the presumption,[19] reasoning that the evolution of the juvenile justice system from a *parens patriae* scheme[20] to "one more akin to adult criminal proceedings,"[21] compelled the court to apply the incapacity statute in juvenile proceedings.

On the other hand, Maryland found the incapacity presumption inapplicable in juvenile court proceedings, relying on the rehabilitative, noncriminal philosophy associated with the juvenile court.[22] The Maryland court suggested a legislatively implied repeal,[23] based on the premise that the incapacity defense is repugnant to the rehabilitative principles and purposes of the juvenile statute.[24] Florida also found the juvenile incapacity defense implicitly repealed by the legislature, as evidenced by the treatment of juvenile violators as "delinquent" rather than "criminal."[25]

In *Gammons*, the Arizona Supreme Court had its first opportunity to address the scope of the juvenile incapacity presumption. With *Gammons*, Arizona joined those jurisdictions disallowing the incapacity presumption in juvenile proceedings.[26]

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19. State v. Q.D., 102 Wash. 2d 19, 685 P.2d 557 (1984) (The applicable statute in *Q.D.* is WASH. REV. CODE ANN. § 9A.04.050 (1977 and Supp. 1986)). In *Q.D.*, the court stated that a determination of the juvenile having understood the act he committed and its wrongfulness was a necessary element in a juvenile conviction. The court based its reasoning on the perception that the juvenile justice system evolved from a *parens patriae* ideology to one more akin to adult criminal proceedings. "This court has acknowledged Washington's departure from a strictly *parens patriae* scheme to a more criminal one, involving both rehabilitation and punishment." *Id.* at 23, 685 P.2d at 560. The court ruled that a contrary finding would render the incapacity statute "meaningless or superfluous, contrary to rules of construction." *Id.* The court indicated that it found no implied statutory repeal of the incapacity statute. *Id.* at 24, 685 P.2d at 560.

20. *See supra* note 14.

21. *Q.D.*, 102 Wash. 2d at 23, 685 P.2d at 560.

22. *In re* Davis, 17 Md. App. 98, 299 A.2d 856 (Md. Ct. Spec. App. 1973). The *Davis* court decided that because a child in the juvenile court is not punished, but is instead "afforded supervision and treatment to be made aware of what is right and what is wrong so as to be amenable to the criminal laws," the incapacity presumption is inapplicable in juvenile courts. *Id.* at 104, 299 A.2d at 860. The court expressed this sentiment:

> It being clear that the finding in a juvenile proceeding that a child is delinquent is not the equivalent of a determination arrived at in a criminal proceeding that he has committed a crime, it follows that it is not a prerequisite to a finding that a person is a delinquent child that the State show under the common law rule that the child had such maturity in fact as to have a guilty knowledge that he was doing wrong, that is the capacity to commit crime.

Id. at 103, 299 A.2d at 860. Alternatively, the *Davis* court suggested that the legislature amend the statute to reflect the court's decision not to apply the incapacity presumption in juvenile proceedings. *Id.* at 102, 299 A.2d at 859.

23. *Id.* at 102, 299 A.2d at 859.

24. Casenote, *supra* note 9, at 183. "[W]hen the purpose of treatment of immature offenders is solely rehabilitation, it is unnecessary to set limits of absolute irresponsibility. . . . Age lines and rebuttable presumptions of incapacity become superfluous in the light of this treatment purpose." Ludwig, *Responsibility for Young Offenders*, 29 NEB. L. REV. 521, 534 (1950).

25. State v. D.H., 340 So. 2d 1163 (Fla. 1976). In *D.H.*, the Florida Supreme Court found the common-law incapacity presumption inapplicable in a juvenile proceeding because of its inconsistency with Florida's Juvenile Act. The court stated that "the survival of the incapacity defense could act to defeat the juvenile statute's effectiveness by preventing the reformation of children who successfully argue the defense." *Id.* The court found that today's juvenile court functioned as a protective agency, eliminating the need to shield children from the severity of the criminal system. *Id.* Thus, the incapacity defense was no longer necessary in the juvenile courts. *Id.* at 1164. The Florida Constitution distinguishes between criminal and delinquent violations of law. FLA. CONST. art. I, § 15(b).

26. *Gammons*, 144 Ariz. at 152, 696 P.2d at 704.

THE *GAMMONS* DECISION

In determining that section 13-501 does not apply in juvenile court proceedings, the *Gammons* court focused on the juvenile court's purpose and on the legislature's intent in creating the incapacity statute. Legislative intent particularly influenced the court's ultimate decision.

Purpose of the Juvenile Court

In *Gammons*, the state argued that because juvenile proceedings do not hold a minor "criminally responsible,"[27] a statute such as section 13-501, which is part of the criminal code, does not apply in juvenile court proceedings.[28] The state maintained that juvenile courts were separate from criminal prosecutions, and were not guided by the same statutes.[29] Ostensibly, the juvenile court system, primarily seeking to rehabilitate rather than to punish, replaced the common law safeguards for children facing criminal punishment.[30] Gammons contended that the common law incapacity defense, and similarly, section 13-501, applied to all children under the age of fourteen, regardless of whether adjudicated in juvenile or criminal court.[31] Gammons argued that viewing the juvenile system as purely rehabilitative is outdated. It is not rehabilitative to try, convict, and punish a minor for an act he may have committed. Absent proof that he knew or understood the wrongfulness of his conduct such a proceeding may violate due process.[32]

The *Gammons* court found that the primary purpose of the juvenile system was rehabilitative, rather than punitive.[33] The court determined that

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27. As used in this Casenote, "criminally responsible" means that the offender is adjudicated and given sanctions under the criminal rather than the juvenile justice system.

28. State's Brief, Response to Petition for Special Action at 7, *Gammons*. The state further maintained that when the legislature adopted ARIZ. REV. STAT. ANN. § 13-501 in 1978, it intentionally changed the statutory language to embody criminal responsibility. Before 1978, Arizona's juvenile incapacity statute merely dealt with children "accused of crime." ARIZ. REV. STAT. ANN. § 13-135 (repealed by Laws 1977, Ch. 142, 2, effective October 1, 1978), predecessor to ARIZ. REV. STAT. ANN. § 13-501 (1978). The 1978 amendment changed the focus to children "criminally responsible." ARIZ. REV. STAT. ANN. § 13-501 (1978).

Arizona Revised Statute § 13-135 reads as follows: "All persons are capable of committing crimes except: 1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them they knew of its wrongfulness. 2. Idiots, lunatics and insane persons."

29. *Gammons*, 144 Ariz. at 149, 696 P.2d at 701.

30. State's Brief, at 7. The State argued that the terminology used in the juvenile court, such as *referred* rather than *arrested*, and *adjudication* rather than *conviction*, exemplified the dichotomy between the juvenile and criminal systems.

31. Defendant's Brief, Petition for Writ of Special Action at 10, 13, *Gammons*.

32. *Id.* at 13. *See In re* Gault, 387 U.S. 1 (1967). *Gault* gave rise to a new perception of the juvenile process and juvenile court. This landmark case decided that the essentials of due process and fair treatment must apply to juvenile court adjudications. *Gault* did not interfere with the rehabilitative philosophy of the juvenile courts but instead applied due process to juvenile proceedings. "However, while *Gault* required procedural safeguards to be applied to juvenile proceedings, it did not attempt to define the jurisdiction of state juvenile courts, or to define the offenses which would bring juveniles under that jurisdiction. That remains the prerogative of state legislatures." Jennings v. State, 384 So. 2d 104, 106 (Ala. 1980).

33. *Gammons*, 144 Ariz. at 151, 696 P.2d at 703. *See also* Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931). The *Burrows* court stated:

> [T]he purpose of the Arizona juvenile law is not to attempt to establish an arbitrary age below which the child is presumed to be ignorant of the consequences of his acts, but rather to provide a special method of treatment for minors under the age of eighteen who have

the incapacity presumption is a necessary safeguard only for juveniles tried in adult criminal court, and not for juveniles tried in juvenile court.[34] *Gammons* concluded that because the juvenile courts do not prosecute minors as criminal offenders,[35] the incapacity defense is unnecessary in juvenile proceedings and has no effect under the juvenile code.[36]

Legislative Intent

In *Gammons*, the state argued that if the legislature had intended section 13-501 to apply to juvenile delinquency cases, it would have either made that intent clear in the 1978 revision of the statute or made the statute part of the juvenile code. The state argued that because the legislature did neither, it intended that the incapacity statute apply to criminal proceedings as it did at common law, and not to juvenile proceedings.[37]

Gammons, however, argued that because the Arizona statute was "nearly identical"[38] to the California statute that served as its model,[39] the Arizona court should follow California's interpretation that the incapacity defense applied in juvenile proceedings.[40]

The *Gammons* court determined that the Arizona legislature had not intended section 13-501 to apply to juvenile proceedings.[41] The court reasoned that the legislature's provision of specific, independent procedures for the disposition of juvenile offenders supplanted the use of section 13-501 in juvenile proceedings.[42]

The court noted that the juvenile code's own incapacity provision[43] pro-

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violated the criminal law, and, even with such children, leaving the application of the juvenile or criminal code to the discretion of the trial court.

Id. at 111, 297 P. at 1034.

34. *Gammons*, 144 Ariz. at 149, 696 P.2d at 701. The court's reasoning is consistent with Professor Walkover's analysis: "Reliance on the rehabilitative ideal as the justifying spirit of a separate juvenile court threads its way through the reported cases denying use of the infancy defense." Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 549 (1984).

35. The premise of the concept that juvenile proceedings do not prosecute minors as criminals is that the purpose of the juvenile delinquency proceeding is rehabilitation, instead of the punishment purpose found in criminal proceedings. *See supra* notes 13-14 and accompanying text.

36. *Gammons*, 144 Ariz. at 151, 696 P.2d 703. For example, *In re* Michael, 423 A.2d 1180, 1183 (R.I. 1981), decided that because a determination of delinquency or waywardness is not the equivalent of a finding that a juvenile committed a crime, there is no reason to find that he had the maturity to understand the wrongfulness of his acts. The Rhode Island court regarded the common law presumption of infant incapacity as playing a minor role in a juvenile proceeding.

37. State's Brief, at 7.

38. Defendant's Brief, at 11.

39. *Id.* Arizona's legislature modeled ARIZ. REV. STAT. ANN. § 13-501 after the California Code, which provides in part: "All persons are capable of committing crimes except those belonging to the following classes: One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." CAL. PENAL CODE § 26 (West Supp. 1985). In its brief, the state distinguished the Arizona and California statutes in that the California statute speaks of being "capable of committing crime," while the Arizona statute deals with being "criminally responsible." In a juvenile delinquency proceeding the juvenile is not held "criminally responsible." The state interpreted this to mean that § 13-501 is inapplicable in juvenile proceedings. State's Brief, at 7.

40. Defendant's Brief, at 11. *See In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970).

41. *Gammons*, 144 Ariz. 148, 696 P.2d 700.

42. *Id.* at 151, 696 P.2d at 703.

43. *Id.* ARIZ. REV. STAT. ANN. § 8-201(11)(c) (Supp. 1985).

vides a separate scheme for dealing with children under the age of eight who commit crimes. Arizona law treats such children as "dependent" rather than "delinquent."[44] The independent provision for juveniles in the code illustrates the legislature's intent to apply a different standard in juvenile cases.

The *Gammons* court also observed that the predecessor to section 13-501 predated Arizona's first juvenile act by twenty-five years.[45] The court inferred that the legislature intentionally made the juvenile code separate from the criminal code.[46] From that, the court concluded that the legislature intended that the incapacity statute not apply to juvenile proceedings. Consequently, it appears that 13-501 will now apply only to juveniles transferred to adult criminal proceedings.[47]

JUVENILE JUSTICE AFTER *GAMMONS*

After *Gammons*, the juvenile incapacity statute[48] only applies to minors under the age of fourteen transferred to adult criminal court.[49] Because such transfers are rare,[50] section 13-501 now has little, if any, effect.

It makes little sense to insulate children from the juvenile system's services when the legislature intended that system to help those very individuals.[51] The *Gammons* decision is consistent with this argument. This would be the result if the court allowed the intended beneficiaries to use the incapacity defense as a shield from the system. Exposing youthful offenders to the treatment of juvenile court programs best utilizes the court's resources.

At the same time, the *Gammons* decision disallows the incapacity defense for those youths who might not benefit from juvenile rehabilitation programs and could legitimately assert the defense. This imposes an additional burden on defense attorneys who now cannot rely on the incapacity defense to exculpate certain youthful offenders. The court has a clearer role as a result of the *Gammons* decision. It now has a distinct rule for applying the juvenile incapacity presumption.

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44. ARIZ. REV. STAT. ANN. § 8-201 (11)(c) (Supp. 1985) provides that a "dependent" child is a child "[u]nder the age of eight years who is found to have committed an act that would result in adjudication as a delinquent or incorrigible child if committed by an older child."

45. *Gammons*, 144 Ariz. at 151, 696 P.2d at 703. *See* Penal Code, Part I, Title I, § 30, ARIZ. REV. STAT. (1887) (predecessor to ARIZ. REV. STAT. ANN. § 13-501) and Arizona Juvenile Act, ch. 63, Ariz. Spec. Sess. (1912). The Juvenile Code, enacted in 1912, was codified as part of the 1913 Civil Code. *See* Civil Code, pt. XIV, title XXVII, §§ 3562-78, ARIZ. REV. STAT. (1913).

46. *Gammons*, 144 Ariz. at 152, 696 P.2d 704.

47. *Id.*

48. ARIZ. REV. STAT. ANN. § 13-501 (1978).

49. *Gammons*, 144 Ariz. 148, 696 P.2d 700.

50. For example, in 1978 no transfers to adult court of minors under the age of sixteen occurred in Apache, Maricopa or Pima counties. U.S. DEPARTMENT OF JUSTICE, MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS AZ-7 (1982).

51. This argument was similarly voiced in the dissent of *In re* Gladys R.. Justice Burke expressed his concern that those minors excluded from the care and guidance of the juvenile court are likely in greater need of such care than those "more sophisticated who plainly knew that their acts were wrongful." *In re* Gladys R., 1 Cal. 3d at 870, 464 P.2d at 139, 83 Cal. Rptr. at 683 (Burke, J., dissenting). *See also* Walkover, *supra* note 34, at 548; Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 671 (1970).

There are those who doubt the rehabilitative nature of the juvenile court system. Justice Feldman dissented in *Gammons*,[52] asserting that juvenile delinquency sanctions are in reality criminal in nature, contrary to the rehabilitative theory espoused by the *Gammons* majority.[53] According to the dissent, once a child is awarded to the Department of Corrections, he is effectively confined in the criminal sense.[54] For example, a child placed in an "industrial school" or a "juvenile institution" is as confined as an incarcerated adult criminal.

The dissent argued that a juvenile facing confinement deserves all the procedural safeguards that an adult criminal defendant receives, plus the protection of section 13-501.[55] Without these protections, the juvenile is tried as a criminal under the auspices of the juvenile system, without due process of law.[56] The dissent reasoned that the *Gammons* majority allowed the state to evade the burden of proving a juvenile's capacity in the juvenile system, proof that section 13-501 required if the juvenile were tried in adult court.[57]

The common concern of both the *Gammons* majority and dissent is the effectiveness of the juvenile court system. Regardless of whether the juvenile courts apply section 13-501, the juvenile system itself demands further attention.[58] If the ultimate goal of the juvenile court is to counsel and rehabilitate youthful offenders, then a truly rehabilitative juvenile court system must be developed.

CONCLUSION

In *Gammons v. Berlat*, the Arizona Supreme Court determined that juvenile proceedings do not require a capacity screening. After *Gammons*, Arizona's juvenile incapacity statute applies only to those minors under the age of fourteen transferred to adult criminal proceedings. Courts transfer few minors to adult proceedings, so the incapacity statute will rarely apply.

The *Gammons* court based its decision on the premise that juvenile courts rehabilitate rather than punish. The court's goal was to keep juveniles in the juvenile system, where they receive counseling and rehabilitative help. The *Gammons* dissent however, points out that the juvenile system is not truly rehabilitative. A better juvenile justice system—one that

52. *Gammons*, 144 Ariz. at 152, 696 P.2d at 704.

53. *Id.* at 148, 696 P.2d at 700.

54. *Id.* at 152, 696 P.2d at 704.

55. *Id. See In re* Gault, 387 U.S. 1 (1967).

56. *Gammons*, 144 Ariz. at 152, 696 P.2d at 704.

57. *Id.*

58. Authorities agree that the juvenile system has problems; there is no agreement as to a solution. *See generally* S. DAVIS, *supra* note 8, at 1-3 to 1-4; Kaufman, *The Child in Trouble; The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System*, 60 WASH. U.L.Q. 743, 772-77 (1982). Justice Kaufman proposes the use of coordinators to develop inter-connections and to eliminate gaps within the juvenile system. He also suggests family contracts between the coordinators and families of juvenile offenders, in order to convince the children and their families that they play a part in their own rehabilitation.

truly rehabilitates—is necessary for the court's decisional premise to ring true.

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