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THE CONCURRENT SENTENCE DOCTRINE DIES A QUIET DEATH—OR ARE THE REPORTS GREATLY EXAGGERATED?

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The concurrent sentence doctrine is a judicially-created rule of criminal procedure. In this article, Professor Emanuel traces the history of the doctrine from its roots in eighteenth-century England to its current status in state and federal courts. Recently, the United States Supreme Court effectively forestalled the use of the doctrine in any federal felony conviction; however, Professor Emanuel argues that the doctrine remains viable in collateral actions for postconviction relief from federal convictions and in state courts.

The concurrent sentence doctrine provides that once a reviewing court has affirmed a conviction and sentence in an appeal brought by a defendant in a criminal case, the court need not consider the defendant's challenge to any convictions on additional counts which bear concurrent sentences of the same or a lesser term. The doctrine, a judicially created rule of federal criminal procedure, arose when the United States Supreme Court made a curious leap of logic from a questionable, if well-established rule, to a tenuously

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1. The limited use of the doctrine by state courts is discussed infra text accompanying notes 219-43.

2. See Claassen v. United States, 142 U.S. 140 (1891). Claassen stands for two rulings: first, that a conviction based on a verdict of guilty on each count of a multiple-count indictment is valid as long as the verdict on any single count is sufficient; and second, that even if the conviction on one or more of the counts cannot stand, the defendant has no right to resentencing. See infra text accompanying notes 25-35. Logic impels the first ruling; in theory, each verdict is separate and severable. Quaere, however, whether the sheer volume of counts might not be prejudicial. See United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985) (referring to the holistic nature of a sentencing decision), cert. denied, 474 U.S. 1061 (1986); McGee v. United States, 462 F.2d 243 (2d Cir. 1972) (remanding for a determination of whether the conviction on a subsequently vacated count had influenced the trial court's sentence on the remaining three counts). Logic does not support the second ruling. The sentence is based on the entire verdict; if part of the verdict is flawed, then whenever the sentence exceeds the minimum that can be imposed, the possibility arises that the sentence was based in part on a verdict which cannot stand. There is, of course, a "catch-22." To insure that the sentence was not affected by an invalid verdict, the verdict on each count would have to be examined. Thus the first ruling in Claassen would have no practical effect.
related doctrine founded on a troublesome assumption. Numerous challenges to the doctrine have arisen, including the arguments that the use of the doctrine abrogates a federal defendant’s right to appeal; that it infringes upon a defendant’s right to substantive due process; that when courts choose to vacate instead of affirming the unreviewed conviction they offend the doctrine of separation of powers; and that the doctrine’s raison d’etre, judicial economy, is not well served by its exercise. The Supreme Court, however, has not reconsidered the validity of the concurrent sentence doctrine since it delineated its scope in *Benton v. Maryland* in 1969.

When the Court granted a petition for writ of certiorari in November of 1986 in order to consider the role of the concurrent sentence doctrine in the federal courts, it appeared that at least some of the substantive questions surrounding the doctrine would be answered. Instead, in a two-paragraph opinion, the Court in *Ray v. United States* vacated the sentences and remanded, ruling that because the defendant’s convictions each carried a $50 assessment, the sentences were not concurrent and the doctrine could not be applied. Since the assessments were levied pursuant to a federal statute which imposes a minimal monetary assessment on all federal convictions, the interaction of the statute and the ruling in *Ray* forecloses the application of the concurrent sentence doctrine on direct review in the federal courts. Notwithstanding the opinion in *Ray*, the doctrine remains viable in collateral federal postconviction proceedings and in the state courts. Thus, challenges to its validity deserve attention.

I. THE HISTORY OF THE CONCURRENT SENTENCE DOCTRINE

A brief account of the history of the concurrent sentence doctrine is a valuable aid to a clear understanding of its intricacies. The ori-

3. See *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Pierce v. United States*, 252 U.S. 239 (1920). In *Claassen*, the Court was confronted with a single conviction based on a verdict of guilty on each of several counts of an indictment. The Court determined that at least one of the counts supported the conviction and refused to consider a challenge. *Hirabayashi* transmuted that ruling into a refusal to consider the validity of separate convictions where they carried concurrent sentences of an equal or lesser term to a conviction which was affirmed. *Hirabayashi* assumes that additional convictions (as opposed to the sentences they carry) have no effect on a defendant. As a general proposition this is questionable, although it may have been true of Hirabayashi himself in view of the fact that he deliberately violated certain military orders to challenge their constitutionality.


7. *Id.*

The origins of the doctrine can be traced to eighteenth-century England. In a line of cases beginning in the early nineteenth-century, American courts expanded upon these English roots and formulated the modern version of the doctrine.

A. English Historical Antecedents

The United States Supreme Court attributed the origin of the concurrent sentence doctrine to four eighteenth-century English cases. In the earliest of the four, Regina v. Ingram, a jury convicted a husband and wife of the crimes of assault and battery. The indictment charged: "vi et armis insultum fecit verberaverunt, vulneraverunt, etc." On appeal the couple contended that because "insultum fecit" ("he made an attack") was singular, it did not charge both of them with an assault and it was uncertain whom it did charge. The court upheld the verdict because if the challenged words had been omitted the indictment would have charged both with a battery which necessarily includes assault. In Rex v. Benfield, two defendants who were convicted of a libel for "singing in the street songs reflecting on [the] prosecutor's children," moved for arrest of judgment. They complained that the jury had found them guilty on a general verdict on a count of the information that enumerated as libelous several songs, and that one of the songs set-forth was not libelous. The court found that the song at issue was libelous, but went on to say, in dicta, 'that if this part of the charge had not been

9. In Claassen v. United States, 142 U.S. 140, 146 (1891), the Court stated, "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' Peake v. Oldham, Cowper, 275, 276; Rex v. Benfield, 2 Bur. 980, 985. See also Grant v. Astle, 2 Doug. 722, 730." Grant v. Astle, 99 Eng. Rep. 459 (K.B. 1781), states the same rule, citing Regina v. Ingram, 91 Eng. Rep. 335 (Q.B. 1712). See also Note, The Concurrent Sentence Doctrine: Sound Judicial Procedure or Illegitimate Shortcut?, 1981 U. ILL. L. REV. 723, 724 nn.6-7 [hereinafter Note, Judicial Procedure]; Comment, The Collateral Consequences Exception to the Concurrent Sentence Doctrine, 44 TEMPLE L.Q. 385, 387 n.13 (1971); Note, The Federal Concurrent Sentence Doctrine, 70 COLUM. L. REV. 1099, 1100 nn.5-6 (1970) [hereinafter Note, Federal Doctrine].


11. Id. The charge translates as follows: "with forces and arms he made an attack, they lashed [or whipped], they wounded [or injured], etc." The author is indebted to Associate Justice Charles L. Weltner of the Supreme Court of Georgia for the translation.

12. Id. The court recognized that in civil cases, where the jury finds general damages on a multicount pleading and one or more counts fail, the judgment must be set aside because the court cannot apportion the damages. In this case, however, the court would assess the fine, and, in the words of Chief Justice Parker, "[T]hey will set it only according to those facts which are well laid. If an offence sufficient to maintain the indictment be well laid, it is enough." Id.

so, it would, in an information or indictment, only go towards less-
ening the punishment; but would not be a sufficient reason for ar-
resting the judgment.\textsuperscript{14} Benfield does not cite Ingram, and stands 
for a different proposition. In Benfield, the defendants were charged 
with a crime for singing several separate songs, all of which were set 
out in the same count; the court seems to assume that the jury found 
all of the songs libelous. The rule announced in Benfield logically 
also would obtain if each song were the subject of a separate count, 
and a general verdict of guilty were returned. Indeed, in two civil 
cases, Grant v. Astle\textsuperscript{15} and Peake v. Oldham,\textsuperscript{16} Lord Mansfield 
mentioned that the rule did apply to multicount indictments.

Astle involved an action in assumpsit to recover fines from the 
holder of a number of customary tenements. The first and second 
counts sought the same damages, and the jury returned a verdict for 
that amount. On appeal, the court found Astle's attack on the sec-
ond count meritorious. Lord Mansfield agreed that the verdict must 
be set aside, but remarked:

\begin{quote}
I have exceedingly lamented, that ever so inconvenient and ill-
-founded a rule should have been established, as that, where there 
are several counts, entire damages, and one count is bad, and the 
others not, this shall be fatal . . . . And what makes this rule 
appear more absurd, is, that it does not hold in the case of criminal 
prosecutions; for, when there is a general verdict of guilty, on an 
indictment consisting of several counts, if any one of them is good, 
that is held to be sufficient.\textsuperscript{17}
\end{quote}

Earlier, in Oldham, an action for slander, Lord Mansfield had re-
marked:

\begin{quote}
However in civil cases the rule most certainly is settled, that where 
a verdict is taken generally and any one count is bad, it vitiates the 
whole. It has always struck me that the rule would have been much 
more proper to have said, if there is any one count to support the 
verdict, it shall stand good, notwithstanding all the rest are bad. In 
criminal cases the rule is so . . . .\textsuperscript{18}
\end{quote}

Interestingly, in Oldham, Lord Mansfield offered no citation for 
the rule he stated. When he reiterated the rule six years later in Astle,

\textsuperscript{14} Id. at 667.
\textsuperscript{16} 98 Eng. Rep. 1083 (K.B. 1775).
\textsuperscript{17} Astle, 99 Eng. Rep. at 466.
\textsuperscript{18} Oldham, 98 Eng. Rep. at 1084.
he attributed it to Ingram; however, Ingram does not support such a broad rule. Instead he could have cited Benfield.\textsuperscript{19}

B. American Historical Antecedents

In America, the concurrent sentence doctrine can be traced to Locke v. United States\textsuperscript{20} and Claassen v. United States.\textsuperscript{21} Locke appealed a judgment for the government on an eleven-count libel conviction.\textsuperscript{22} Citing no authority, the Court ruled: "The information consists of several counts, to all of which exceptions are taken. The Court, however, is of opinion, that the 4th count is good, and this renders it unnecessary to decide on the others."\textsuperscript{23} Since each count carried the same penalty, forfeiture of the cargo, no concurrent sentences were at issue. Additionally, the libel in Locke was not a criminal prosecution, although the Supreme Court later referred to a similar proceeding as quasi-criminal.\textsuperscript{24} Claassen, however, involved the criminal prosecution of the president of a national banking association.\textsuperscript{25} Claassen was tried on eleven counts; the jury acquitted him of six and found him guilty of the offenses charged in the remaining five. The statute provided as the sentence for any single offense not less than five nor more than ten years imprisonment; Claassen was sentenced to six years in the penitentiary. On appeal, the Court reviewed his conviction on the first count and found it valid. The Court then ruled that because the verdict of guilty on the first count was "sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered."\textsuperscript{26} The

\textsuperscript{19}. In Benfield, the court indicated that the failure of some of the allegations in a count of an information to state a crime would not affect the judgment of guilty, but would affect sentencing. 97 Eng. Rep. 664, 667 (K.B. 1760). This is ironic given the case's role as an historical antecedent of the concurrent sentence doctrine.

\textsuperscript{20}. 11 U.S. (7 Cranch) 339 (1813).

\textsuperscript{21}. 142 U.S. 140 (1891).

\textsuperscript{22}. Count One, which charged a violation of the embargo law, was abandoned by the government. Counts Two through Six charged violations of the general collection laws. Counts Seven through Eleven charged violations of the non-importation acts.

\textsuperscript{23}. Locke, 11 U.S. (7 Cranch) at 344.

\textsuperscript{24}. See Clifton v. United States, 45 U.S. (4 How.) 242, 250 (1846). The Court stated, citing Locke: "[I]t was held, at an early day, in this court, that one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad, the information being regarded in the nature of a criminal proceeding." Id. See also Taylor v. United States, 44 U.S. (3 How.) 197, 210 (1845) ("In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial.").


\textsuperscript{26}. Id. at 146.
Court cited both English and American case law, notably, Locke. The Claassen Court noted that "the jury did not return a general verdict against the defendant on all the counts, but found him guilty of the offences charged in each of the five counts now in question."27 Claassen's treatment of the conviction's validity is perfectly sound even today;28 however, its alleged antecedents are questionable. The English cases stated the rule in dicta; in fact, this rule of criminal procedure is quoted from a civil case.29 Likewise, of the four American cases cited, two involve a general verdict,30 and a third, Locke, appears to do the same, although the opinion is not clear on that point. The fourth is a civil action sounding in assumpsit and controlled by an Illinois statute.31

Claassen affirms not only the conviction but also the sentence.32 Claassen was in fact sentenced to a term of six years.33 Arguably, reason enough exists to require resentencing; a sentence might well be influenced by the multiplicity of convictions and the sentence imposed was not the minimum provided for by law.34 Nonetheless, the

27. Id. at 147 (emphasis added).

The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient.

See also Leary v. United States, 395 U.S. 6 (1969); Stromberg v. California, 283 U.S. 359 (1931). In Leary the Court, citing Stromberg, noted: "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." 395 U.S. at 31-32.

29. Claassen quotes Peake v. Oldham, 98 Eng. Rep. 1083 (K.B. 1775), an action for slander. See supra text accompanying note 18. The Claassen court also cites Grant v. Astle, 99 Eng. Rep. 459 (K.B. 1781), a case involving an action for assumpsit, in which Lord Mansfield reiterates the rule in dicta. This time, however, Lord Mansfield provides a citation to Regina v. Ingram, 91 Eng. Rep. 335 (K.B. 1712), a criminal case, which, unfortunately, does not stand for the proposition for which it is cited. See supra text accompanying notes 10-12 & 19. Finally, the court in Claassen cites Rex v. Benfield, 97 Eng. Rep. 664 (K.B. 1760), a criminal case which does stand for a very similar proposition. See supra text accompanying notes 13-14 & 19. Benfield is, however, far broader than Claassen. It does not seem to require more than a general verdict; that is, it does not require a finding that a defendant is guilty on a particular count, or even of an act in a count, on the basis of which conviction can be sustained.

32. Claassen, 142 U.S. at 147.
33. Id. at 143.
34. See supra note 2; see also Recent Cases, 107 U. Pa. L. Rev. 726, 727 (1959):

Concurrent sentences are awarded with an awareness of the multi-count conviction and are imposed with this in mind. Thus, concurrent sentences imposed for a conviction of eleven offenses may not be identical in terms of length with the sentence which would be imposed if only one of the eleven offenses were properly sustainable.
Claassen rule is still viable, although its impact on the sentence as opposed to the conviction has rarely been addressed by the United States Supreme Court.\(^{35}\)

**C. The Inception of the Modern Doctrine**

*Claassen*, of course, is not a concurrent sentence doctrine case for the simple reason that no concurrent sentence was involved; Claassen received only one six-year term. The *Claassen* rule, however, was soon applied in a case involving concurrent sentences—*Pierce v. United States*.\(^{36}\)

Pierce was convicted on four counts of an indictment.\(^{37}\) He was separately sentenced on each count, with the sentences to run concurrently. On appeal, the United States abandoned one of the counts on which Pierce had been convicted. Nonetheless, the Court expressly declined to set aside the sentence on that count, stating:

> The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce . . . did not exceed that which lawfully might have been imposed under the second, third or sixth counts, so that the concurrent sentence under the first count adds nothing to [his] punishment.\(^{38}\)

*Pierce* led, inexorably, to *Hirabayashi v. United States*,\(^{39}\) which states the concurrent sentence doctrine in its most common and most pure form. Hirabayashi was charged in a two-count indictment with violating a statute which made it a misdemeanor "knowingly to disregard restrictions made applicable by a military commander to persons in a military area."\(^{40}\) The regulations applied only to people of Japanese ancestry. Count One charged a failure to report to a Civil

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35. See, e.g., *Turner v. United States*, 396 U.S. 398, 420 & n.42 (1970). General sentences are, however, disfavored. "It has been correctly said of the general sentence that there is 'universal recognition that the practice, while permissible, is unsatisfactory.'" 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 527, at 113 (1982) (quoting *Benson v. United States*, 332 F.2d 288, 290 (5th Cir. 1964)).

36. 252 U.S. 239 (1920). In *United States v. Hines*, 256 F.2d 561 (2d Cir. 1958), the Second Circuit stated that applying *Claassen* to *Pierce* "appears to be error." *Id.* at 563.

37. The original indictment contained six counts, but two were struck by agreement at the trial. Three of the defendants, including Pierce, were convicted on all four remaining counts; the fourth defendant was convicted on only one of the counts. *Pierce*, 252 U.S. at 240, 242.

38. *Id.* at 252-53. None of the reported opinions in this case indicates the length of the sentences. *Id.*; *United States v. Pierce*, 245 F. 878 (N.D.N.Y. 1917) (on demurrer); *Pierce v. United States*, 245 F. 888 (N.D.N.Y. 1917) (on motion for bill of particulars).


40. *Id.* at 83.
Control Station to register for evacuation; Count Two charged violation of a curfew. Hirabayashi was convicted and sentenced to three months imprisonment on each count, the sentences to run concurrently. On appeal he contended, *inter alia*, that the orders were unconstitutional because they discriminated against people of Japanese ancestry. The Ninth Circuit Court of Appeals certified the appeal to the United States Supreme Court.\(^1\) The Court upheld the curfew order and Hirabayashi’s conviction for violating it—declining to consider the conviction on the first count on the ground that it was unnecessary to do so since the convictions carried concurrent sentences.\(^2\) Thus the concurrent sentence doctrine enabled the court to avoid addressing the constitutionality of the military orders which resulted in relocation and internment of the Japanese during World War II.

**II. FROM HIRABAYASHI TO BENTON**

The concurrent sentence doctrine flourished in the twenty-five years following the *Hirabayashi* decision. During this period the circuit courts of appeal viewed the doctrine as a means of furthering judicial convenience. However, the Supreme Court’s decision in *Ben-

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\(^1\) The Ninth Circuit also certified the question of whether the restrictions were adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power. *Id.* at 84-85.

\(^2\) *Id.* at 105. More than forty years later, Hirabayashi filed a writ of *coram nobis* seeking to vacate the convictions. The district court vacated the conviction for failing to report, but found the conviction for violation of the curfew valid. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff’d in part*, 828 F.2d 591 (9th Cir. 1987). The district court opinion makes no mention of the concurrent sentence doctrine. One of the requisites for the writ, however, is that the defendant suffer present adverse consequences as a result of the conviction. The court found that Hirabayashi satisfied that condition because of the admittedly "highly unlikely" possibility that the conviction might be used to impeach him, and because of the fact that if he were to be convicted of another crime, the 1942 conviction could be a factor in sentencing; *Id.* at 1445.

Use of the concurrent sentence doctrine permitted the Supreme Court to avoid consideration of not only the reporting orders issued against Japanese Americans, but also of the concomitant relocation orders. See *Hirabayashi*, 320 U.S. at 105. The Court again declined to review the constitutionality of the relocation orders in *Korematsu* v. United States, 323 U.S. 214, 221-22 (1944). Claims by Japanese Americans for "damages and declaratory relief for the tangible and intangible injuries suffered" because of relocation again evaded review more than four decades later. United States v. Hohri, 107 S. Ct. 2246, 2247 (1987).

It appears that the constitutionality of the relocation orders may never be decided, considering that Congress recently passed the Civil Liberties Act of 1988, Pub. L. No. 100-383, § 102, 100 Stat. 903, 904-05 (1988) (to be codified at 50 U.S.C. § 1989) in which Congress, *inter alia*, apologized to those individuals of Japanese ancestry who were evacuated, relocated and interned, offering each eligible person $20,000 in settlement of all claims against the United States.
ton v. Maryland\(^43\) signaled an abrupt end to this period and the beginning of a new era for the doctrine.

\section{A. The Concurrent Sentence Doctrine in the Federal Courts}

The concurrent sentence doctrine serves but one master, the judiciary.\(^44\) In those cases where a defendant challenges all of his convictions, a prosecutor briefing the case on appeal cannot safely forego all other avenues of argument and rely on the doctrine because he cannot be certain which convictions will be affirmed. Should the defendant challenge only one of several convictions, the prosecutor cannot be confident that the concurrent sentence doctrine will apply since it is not a jurisdictional bar.\(^45\) The defendant, of course, has no need for it; he can simply decline to appeal any or all of his convictions. The reviewing court, however, enjoys a significant benefit. For example, on the appeal of convictions on five counts of an indictment, the court may have to only review the challenges to one of the convictions. Additionally, the quantitative reduction in work may be eclipsed by the qualitative reduction in that the most troublesome contentions may be easily avoided.\(^46\) Thus it is not surprising that the doctrine enjoyed widespread acceptance in the federal circuit courts of appeal once it had received the imprimatur of the Supreme Court in Hirabayashi.\(^47\)

Not all courts, however, were equally convinced of the validity of the doctrine. In 1958, a Second Circuit opinion, United States v. Hines, noted that the Supreme Court never had explained the basis on which it decided to apply the Claassen doctrine to concurrent sentences.\(^48\) Additionally, the Second Circuit criticized the apparent presumptions "that a district judge does and should give the same punishment on one-count convictions as he does on multicount convictions, and that a defendant's punishment is no greater so long as

\begin{itemize}
\item \footnote{395 U.S. 784 (1968).}
\item \footnote{Of course the concurrent sentence doctrine, like any rule of judicial economy, benefits litigants (and society) in general by reducing the congestion of clogged court dockets and speeding the resolution of issues in litigation. \textit{See id.} at 798-99 (White, J., concurring).}
\item \footnote{\textit{Id.} at 791. While \textit{Benton} clarified this aspect of the doctrine, even before \textit{Benton} it was not generally perceived as jurisdictional. \textit{See, e.g.}, United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958).}
\item \footnote{There can be no better example of this than Hirabayashi v. United States, 320 U.S. 81 (1943). \textit{See supra} note 42.}
\item \footnote{\textit{See, e.g.}, the cases collected in Note, \textit{Judicial Procedure}, \textit{supra} note 9, at 729 n.52; Note, \textit{The Concurrent Sentence Doctrine After Benton v. Maryland}, 7 UCLA-ALASKA L. REV. 282, 283 n.10 (1978) [hereinafter Note, Benton v. Maryland]; Note, \textit{Federal Doctrine}, \textit{supra} note 9, at 1101 n.16.}
\item \footnote{256 F.2d 561, 562-63 (2d Cir. 1958).}
\end{itemize}
he must stay in prison for the same period of time." Finally, the court noted that the doctrine took into account neither the stigma nor the effect on parole of multiple convictions. The court then announced that it would entertain an appeal from convictions carrying concurrent sentences "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." 

Hines did not stand alone in indicating that the doctrine could be applied only absent a showing of prejudice. On occasion a court would forego application of the doctrine because the issues raised deserved consideration. For the most part, however, for a quarter of a century after Hirabayashi, the doctrine was alive and well in the federal courts.

B. Benton v. Maryland—A Reprieve

Benton v. Maryland is best known for its holding that the double jeopardy clause of the fifth amendment "represents a fundamental ideal in our constitutional heritage" and applies to the states through the fourteenth amendment. To make that ruling, however, the Court first had to address the state's contention that the concurrent sentence doctrine deprived the Court of jurisdiction, since Benton's double jeopardy claim only affected a conviction for larceny carrying a five-year sentence which ran concurrently with a fifteen-year sentence for burglary. Recognizing that it had indicated at times that

49. Id. at 563.

50. Id. Hines had been convicted on three counts of a four-count indictment, and sentenced to three concurrent three-year terms. He challenged only the conviction on one of the counts. The court reversed because of error in the jury instruction, vacated the sentence on the remaining two counts and remanded for resentencing. See infra text accompanying notes 95-103.

Despite the clarity of the Hines opinion, it did not result in a consistent approach, even in the Second Circuit. See United States v. Vargas, 615 F.2d 952, 956-57 (2d Cir. 1980).

51. See Saville v. United States, 400 F.2d 397, 399 (1st Cir. 1968) (applying the doctrine where "there is nothing to suggest that defendant received a larger sentence than would have been imposed had there been only one count"), cert. denied, 395 U.S. 980 (1969); Chavez v. United States, 387 F.2d 937, 939 (9th Cir. 1967) (applying the doctrine where there is no suggestion of prejudice); Smith v. United States, 335 F.2d 270, 271-72 (D.C. Cir. 1964) (declining to apply the doctrine where the defendant alleged that his conviction on one count was based on evidence seized in violation of the fourth amendment and that evidence had prejudiced the jury's consideration of the other two counts).

52. See Aron v. United States, 382 F.2d 965, 972 n.2 (8th Cir. 1967) (discussing fourth amendment challenges because of their "sensitiveness" notwithstanding the concurrent sentence doctrine).

application of the doctrine was mandatory, the Court admitted nonetheless having applied the doctrine "somewhat haphazardly" and having never proffered a "satisfactory explanation" for the doctrine before holding that it does not state a jurisdictional rule. The fact that a challenged conviction carries a concurrent sentence of equal or lesser term than a valid conviction does not render the controversy moot. In reaching that conclusion, the Court relied in part on four recent cases which had "canvassed the possible adverse collateral effects of criminal convictions": Street v. New York; Sibron v. New York; Carafas v. LaVallee; and Ginsberg v. New York. The cited cases refer to possible adverse legal consequences such as civil disabilities, including an impact on one's right to vote or to hold certain licenses, as well as the possibility that an unrev-

54. One might anticipate that having made that comment the Court would go on to fashion a "satisfactory explanation"; instead, it dismissed the topic in the introductory clause to the next sentence: "But whatever the underlying justifications for the doctrine . . . ." Benton, 395 U.S. at 789-90.

55. See St. Pierre v. United States, 319 U.S. 41, 43 (1943), where the Court recognized that if a petitioner could show "that under either state or federal law further penalties or disabilities [could] be imposed on him," the case would not be moot. The St. Pierre Court, however, specifically disallowed the potential for impeachment and stigma as disabilities, ruling, "Petitioner also suggests that the judgment may impair his credibility as witness in any future legal proceeding. But the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." Id. at 43.

56. Benton, 395 U.S. at 790 n.5. The Benton court uses the phrases "adverse collateral legal consequences" and "possible adverse collateral effects" interchangeably. Arguably the former phrase is broader, and includes the stigma that inheres in any criminal conviction, even absent a discernible practical or legal effect. See United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958). None of the cases cited in this portion of the Benton opinion refers to this generalized stigma, although in combination they list an extensive range of possible adverse legal consequences.

57. 394 U.S. 576, 579-80 n.3 (1969). In Street, the Court noted that the appellant's conviction subjected him to an actual threat of temporary loss of employment—two months suspension without pay. In addition, he was subject to possible collateral penalties such as having his conviction used to rebut character evidence in any future criminal proceeding, the possibility of a heavier sentence for any future criminal conviction, and the possibility that a future felony conviction might result in his being sentenced as a habitual offender.

58. 392 U.S. 40, 54-55 (1968). In a canvass of cases where possible collateral consequences prevented the appeal from being moot, the Court was influenced by the following facts; an alien convicted of "moral turpitude" might be subject to deportation or have difficulty proving "good moral character" in seeking U.S. citizenship, Fiswick v. United States, 329 U.S. 211 (1946); the possibility of heavier penalties in subsequent convictions or having civil rights affected, United States v. Morgan, 346 U.S. 502 (1954); and the possibility of having a business license revoked, Ginsberg v. New York, 390 U.S. 629 (1968).

59. 391 U.S. 234, 237-38 (1968). The Court found the petitioner's conviction prohibited him from engaging in certain businesses, serving as a labor union official for a certain period, voting in state elections, or serving as a juror.

60. 390 U.S. 629, 633-34 n.2 (1968). Under state and local laws, the appellant could have the license necessary for operating his luncheon business revoked.
iewed conviction might be used in the future to enhance punishment or to impeach credibility.\footnote{61}

According to \textit{Benton}, then, the concurrent sentence doctrine is a rule of judicial convenience, not a jurisdictional rule. Thus a reviewing court faced with a challenge to a conviction bearing a concurrent sentence may exercise its discretion in deciding whether to consider the challenge. Discretion must be guided, and its exercise must be principled. What guidelines are to govern the court's decision making? Clearly the court must evaluate the potential for adverse collateral effects. \textit{Benton} indicates that such potential always exists: "In \textit{Sibron v. New York} . . . [w]e noted 'the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.'\footnote{62} This would seem to conclude the matter; if potential for adverse collateral legal consequences exists (and that potential always exists) the concurrent sentence doctrine should not be applied. The Court, however, went on to consider whether the potential adverse legal consequences might be so remote that they should be treated as a species of harmless error. And the lid of the casket into which the concurrent sentence doctrine had just been laid sprung open.

One of the more questionable aspects of the Court's treatment of the concurrent sentence doctrine in \textit{Benton} is the determination by the majority that it would be inappropriate to apply the concurrent sentence doctrine to Benton himself.\footnote{63} The Court does not turn to an analysis of the potential adverse legal consequences, perhaps because contending with the harmless error analogy is difficult. Most, if not all, civil disabilities will accrue pursuant to the burglary conviction, 

\footnote{61. Use of the conviction for impeachment may be considered a civil disability in cases where the defendant is simply a witness; impeachment might also occur, however, in a future criminal prosecution of the defendant. Benton v. Maryland, 395 U.S. 784, 790-91 (1969).}

\footnote{62. \textit{Id.} (citation omitted). The \textit{Benton} Court does not address the issue of who has the burden of proof as to the existence of potential adverse collateral consequences. That issue had, however, been addressed in a series of cases involving the issue of mootness rather than the concurrent sentence doctrine. In St. Pierre v. United States, 319 U.S. 41 (1943), the Court implied that the burden lay on the defendant. Sibron v. United States, 392 U.S. 40, 55 (1968), however, holds that a presumption exists that a conviction carries collateral legal consequences. Thus the burden would seem to be placed on the prosecution. The \textit{Benton} Court's reliance on \textit{Sibron} would seem to indicate that a like presumption exists in concurrent sentence doctrine cases, but the matter is by no means clear. \textit{Benton}, 395 U.S. at 790-91; see United States v. Warren, 612 F.2d 887, 896 (5th Cir. 1980) (Roney and Hill, J.J., dissenting in part) (arguing the court should decide which party has the burden of persuasional appeal).}

\footnote{63. According to one commentator, Benton's prior convictions spanned thirty years and included four felonies. Note, \textit{Federal Doctrine, supra} note 9, at 1107 n.56. Benton's attorney was quoted as saying that "it is difficult to imagine a case less likely to have possible adverse collateral consequences than Benton's." \textit{Id.} (quoting Cramer, \textit{Concurrent Sentence Doctrine Limited}, 36 D.C. BAR J. 46, 50 (1969)).}
rendering the impact of the larceny conviction nugatory. The possibility that Benton will be tried in the future in a jurisdiction which would use the larceny conviction to enhance his punishment is admittedly remote; and were an attempt to impeach him to be made, the trier of fact presumably would be capable of understanding that the two convictions arose from the same series of acts.

The majority offers two reasons for its decision not to apply the concurrent sentence doctrine: first, that the Maryland Court of Appeals chose to address the larceny conviction on its merits indicates that the state has some interest in preserving it; and second, that both the status of the burglary conviction and the length of that sentence are still in "some doubt." The first argument will be true of nearly every case from the state courts that reaches the federal system; either the state court will have affirmed the conviction or it will no longer be at issue. As for the second point, even were Benton to prevail on his challenge to the length of the sentence, the burglary conviction would still carry a ten-year sentence, twice as long as that imposed on the larceny conviction. The likelihood that the conviction itself would be set aside was remote.

Although the Benton Court gave lip service to the continuing vitality of the concurrent sentence doctrine, it refused to apply the doctrine even though Benton seemed a particularly suitable case. As a result, some commentators believed that Benton had "dealt a mortal blow to the concurrent sentence doctrine." That did not prove to be the case. Benton, however, did signal the beginning of an era in which the doctrine would be subjected to increased scrutiny, during which a number of troubling questions would be raised.

III. THE CONCURRENT SENTENCE DOCTRINE AFTER BENTON

The Supreme Court has applied the concurrent sentence doctrine only once since the Benton decision. An exhaustive survey of the rel-

64. Benton, 395 U.S. at 790-91.
65. Id. at 805-06 (Harlan, J., dissenting). But see id. at 791 (where the majority noted that "a jury might not be able to appreciate this subtlety").
66. Id. at 792-93.
67. The fact that state courts rarely employ the concurrent sentence doctrine is discussed infra text accompanying notes 219-22.
68. Benton, 395 U.S. at 804 n.6 (Harlan, J., dissenting).
69. Note, Benton v. Maryland, supra note 47, at 289 (citing Comment, supra note 9, at 385; Note, Federal Doctrine, supra note 9; Comment, Benton v. Maryland: A Further Extension of the Rights of the Individual in Criminal Proceedings, 18 KAN. L. REV. 309 (1970)).
70. "[T]here continues to be ferment about the use of the concurrent sentence doctrine."
3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 527, at 123 (1982).
evant cases in the circuit courts of appeals, on the other hand, indicates that the circuits have various views as to the applicability of the doctrine with the Fifth Circuit being its staunchest proponent.

A. In the Supreme Court

Those who read Benton as sounding a death knell for the concurrent sentence doctrine were silenced in 1973 when the Supreme Court applied the concurrent sentence doctrine in Barnes v. United States.71 Barnes had been convicted on two counts of possessing United States Treasury checks which were stolen from the mail; two counts of forging the checks; and two counts of uttering the checks, knowing the endorsements to be forged. After affirming the convictions on the possession counts, the Court applied the concurrent sentence doctrine and declined to review the other convictions.72 Barnes has proven to be the last application of the doctrine by the United States Supreme Court. In Andresen v. Maryland,73 decided in 1976, the Court referred to the ongoing validity of the concurrent sentence doctrine, but did not apply it.74 In Pinkus v. United States,75 the Court reversed a decision in which the Ninth Circuit had relied on the concurrent sentence doctrine, because the concurrent sentence included not only a term of years but also a $500 fine.76 Finally, in Mariscal v. United States,77 the Court questioned the continuing validity of Pierce v. United States.78 In Pierce, the defendants were convicted on four counts and sentenced to concurrent terms on each of the counts; the Court declined to reverse their convictions on the first count even though the government abandoned that count on appeal. In Mariscal, the Ninth Circuit affirmed the defendant's convictions on ten counts of interstate transportation of property obtained by fraud; it then applied the concurrent sentence doctrine to avoid addressing "'rather complex issues'"79 and affirmed his convictions on twelve counts of mail fraud. After Mariscal filed a petition for

72. Id. at 848 n.16. In Barnes' appeal, the Ninth Circuit also had applied the concurrent sentence doctrine. Id. at 841.
74. The doctrine may not have been applicable. Id. at 469 n.4.
76. Id. at 304-05. The Pinkus Court noted in a footnote, "'The validity of the concurrent sentence doctrine is not challenged here. See Benton v. Maryland, 395 U.S. 784, 791 (1969).'" Id. at 304 n.7.
78. 252 U.S. 239 (1920); see supra notes 36-38 and accompanying text.
79. This account is taken from the opinion of the Supreme Court. Mariscal, 449 U.S. at 405. The Ninth Circuit opinion was unpublished.
writ of certiorari, the Solicitor General "confessed error" and con-
ceded that the mail fraud convictions were invalid. In response, the
Court granted the writ, vacated the judgment affirming the mail
fraud convictions, and remanded the case to the Ninth Circuit for
"reconsideration of the applicability of the 'concurrent sentence
doctrine' to a conviction conceded by the United States to be errone-
ous." While the message seemed to be that the concurrent sentence
doctrine was not applicable, the Court stopped short of simply
making that determination.

B. In the United States Circuit Courts of Appeal

Since Benton, the Court of Appeals for the District of Columbia
Circuit has rarely proven to be a hospitable home for the concurrent
sentence doctrine. In United States v. Hooper, shortly after Benton
was decided, the court accomodated its concern that "[t]he possibili-
ties of adverse collateral consequences cannot fairly be gainsaid,"
without abandoning the benefits to the court of the concurrent sen-
tence doctrine. The court adopted the then novel approach of vacat-
ing a conviction carrying a concurrent sentence; this, the court
reasoned, both protected the defendant and served the need for judi-
cial economy. The next year, noting that while it had frequently
followed Hirabayashi in the past it had often exercised its discre-
tion in favor of review, the court again opted for review "because of
the possible harmful effect on appellant of the myriad collateral con-
sequences of an improper double felony conviction." The court did
not explain why it chose to review the concurrent convictions instead
of vacating them, but it may well have been the result of the govern-
ment's raising an objection to the sentences being vacated. Subse-
sequently the court has opted sometimes to afford the defendant full
review, and sometimes to vacate the unreviewed convictions.

80. Id. at 405-06.
81. 432 F.2d 604 (D.C. Cir. 1970).
82. Id. at 605-06.
83. See United States v. Spears, 449 F.2d 946, 948 (D.C. Cir. 1971) (citing Duckett v.
United States, 410 F.2d 1004 (D.C. Cir. 1969); Greene v. United States, 246 F.2d 677 (1957),
vacated on other grounds, 358 U.S. 326 (1959)).
84. Spears, 449 F.2d at 949.
85. In a case decided nearly simultaneously, United States v. Miller, 449 F.2d 974 (D.C.
Cir. 1970), the court did vacate the concurrent convictions, noting that "the government pro-
fesses no interest in upholding appellant's remaining convictions." Id. at 980.
86. See United States v. Alexander, 471 F.2d 923, 933 n.17 (D.C. Cir.) ("the vitality of
the concurrent sentences doctrine is rapidly waning"), cert. denied, 409 U.S. 1044 (1972).
Durant, 648 F.2d 747, 752 (D.C. Cir. 1981); United States v. Harris, 627 F.2d 474, 477 (D.C.
The First Circuit rarely has used the concurrent sentence doctrine since *Benton* focused attention on it. In 1972, the court in *O'Clair v. United States* canvassed the possible adverse collateral consequences of a conviction. The court noted that "even if no other disabilities were incurred, there is always the extra stigma imposed upon one's reputation," and declined to apply the concurrent sentence doctrine. The rationale of *O'Clair* has held sway.

Since *Benton*, the Second Circuit on occasion has used the concurrent sentence doctrine. More often, it has not. In 1978, the court

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88. *But see* United States v. Gordon, 634 F.2d 639, 643 (1st Cir. 1980).
90. *Id.* at 1203.
91. With rare exceptions, the First Circuit has declined to apply the concurrent sentence doctrine. E.g., United States v. Contenti, 735 F.2d 628, 632 n.3 (1st Cir. 1984); United States v. Tashjian, 660 F.2d 829 (1st Cir.) (declining to apply the concurrent sentence doctrine in part because the district court judge said that the total number of convictions was a factor in the sentence on each of the four convictions), *cert. denied*, 454 U.S. 1102 (1981); United States v. Hayes, 653 F.2d 8, 14 (1st Cir. 1981) (raising the concurrent sentence doctrine *sua sponte* and then declining to apply it in order to decide the legal issue); United States v. Moynagh, 566 F.2d 799 (1st Cir. 1977) (after satisfying itself that collateral consequences would inure to the defendant's future detriment, the court reached the merits, reversed on four counts, and remanded for resentencing on the remaining six), *cert. denied*, 435 U.S. 917 (1978). In United States v. Nightingale, 703 F.2d 17 (1st Cir. 1983), the court erroneously announced that it was applying the concurrent sentence doctrine. The court reviewed a conviction on two counts. After affirming on the first count, the court announced, "The concurrent sentence doctrine renders a discussion of the second count moot." But the judgment line then read, "Affirmed as to Count One." *Id.* at 14. Since the conviction on the second count was not affirmed, the concurrent sentence doctrine was not technically applied.

Finally, in one case the First Circuit applied the rule in principle. In Vanetzian v. Hall, 562 F.2d 88 (1st Cir. 1977), a prisoner whose petition for writ of habeas corpus had been denied by the district court petitioned the First Circuit for a certificate of probable cause. The court recognized that no challenge to the conviction was presented. Thus, setting aside the challenged sentence would have no effect on the length of time the petitioner would remain in prison because he was also serving longer concurrent sentences. The court denied relief on the basis of the concurrent sentence doctrine. *Id.* at 90-91. The court, however, recognized it was not declining to consider the validity of a conviction but only of a sentence.


announced that "utilization of the concurrent sentence doctrine is now the exception rather than the rule." Then in 1980, in *United States v. Vargas*, the court delivered an opinion exhaustively tracing the history of the doctrine in the Second Circuit. *Vargas* divided the opinions of the Second Circuit into a number of classes: those that apply the doctrine with no further comment where no claim of collateral consequences was made; those that apply it only after ascertaining that there had been no prejudicial spillover; those that decline to apply the doctrine, with or without a stated reason; those that fail even to mention the potential for application of the doctrine; and those that first review the challenged conviction and then invoke the doctrine, either as an alternative holding or in order to 

94. United States v. Ruffin, 575 F.2d 346, 361 (2d Cir. 1978). The court declined to apply the doctrine in *Ruffin* because the sentence included a fine which was attributable to all three counts on which the defendant was convicted. *Id.* at 361-62.

95. 615 F.2d 952 (2d Cir. 1980).

96. *Id.* at 956 (citing United States v. Vega, 589 F.2d 1147 (2d Cir. 1978); United States v. Mejias, 552 F.2d 435 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977)).

97. *Id.* (citing United States v. Vasquez, 468 F.2d 565 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); United States v. Gaines, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972)).

98. *Id.* at 956-57 (citing, *inter alia*, United States v. Febre, 425 F.2d 107 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); United States v. Delgado, 459 F.2d 471 (2d Cir. 1972)).

99. *Id.* at 957 (citing United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); McGee v. United States, 462 F.2d 243 (2d Cir. 1972)). In *McGee*, the defendant was convicted on four counts of violating the Selective Service Act of 1967 and sentenced to consecutive two-year terms on each count. In his first appeal, the court affirmed the convictions on the first three counts and applied the concurrent sentence doctrine to avoid considering the validity of the conviction on the fourth count. United States v. *McGee*, 426 F.2d 691, 700 (2d Cir. 1970), *aff'd*, 402 U.S. 479 (1971). Subsequently he successfully moved to vacate the conviction and sentence on Count I. He then moved to set aside the remaining convictions and sentences; or, in the alternative, for a new trial on those counts; or, in the alternative, to suspend or reduce the sentences. The trial court entered the following order denying relief:

The defendant's and/or petitioner's motions to set aside the judgment of conviction on Counts II, III and IV of the indictment and for an order pursuant to Fed.R.Crim.P. 33 for a new trial are denied; and the motion for an order pursuant to Fed.R.Crim.P. 35 reducing the sentence heretofore imposed [is] denied in the exercise of our discretion.

*McGee v. United States*, 462 F.2d 243, 245 n.1 (2d Cir. 1972). *McGee* appealed only the denial of the motion to reduce sentence. The Second Circuit, concerned about the impact the vacated conviction on the first count may have had on the sentences on the remaining three counts, remanded for consideration of that issue. *Id.* at 247. When the trial court again denied relief, the appellate court expressed disagreement with that action, but found it within the trial court's discretion and affirmed. *McGee v. United States*, 465 F.2d 357, 358 (2d Cir. 1972). Throughout these extended proceedings, the validity of the conviction on the fourth count was never considered on appeal.

100. *Vargas*, 615 F.2d at 957 (citing United States v. Herrera, 584 F.2d 1137 (2d Cir. 1978), *cert. denied*, 449 U.S. 843 (1980); United States v. Hanlon, 548 F.2d 1096 (2d Cir. 1977)).
affirm a conviction which cannot stand on the merits.\textsuperscript{101} Although this cataloguing of different approaches implies a certain degree of criticism, the court excused itself, noting that "none of this is really surprising, because . . . the Supreme Court itself has not exactly provided crystal-clear guidance on the subject."\textsuperscript{102}

The \textit{Vargas} court went on to identify five factors which a court must consider in order to determine whether to apply the doctrine: the effect on a possible parole; the potential for impact of recidivist statutes; the potential that the unreviewed conviction might be used to impeach the defendant or to show a prior similar act in a future prosecution; the effect on a possible pardon; and the potential for stigma. The court then held without elaboration or citation that "the Government should have the burden of persuading the appellate court that the risk of collateral consequence is too slight to justify review."\textsuperscript{103} Of course, the government did not carry the burden in \textit{Vargas} and the court reached the merits; \textit{quaere} how often the government could carry the burden as posited by the Second Circuit.

The Third Circuit has rarely used the concurrent sentence doctrine since \textit{Benton}, although in one case it did rule that the doctrine applied because "no appreciable risk of greater collateral consequences" existed.\textsuperscript{104} More often, the Third Circuit has found that an appreciable risk exists, or that application of the doctrine is not economical, or has simply declined to apply the doctrine without elaboration.\textsuperscript{105}

Like the Third Circuit, the Fourth Circuit has rarely used the doctrine, although on occasion it has found the doctrine appropriate.\textsuperscript{106}

\begin{footnotes}
\footnotetext{101}{Id. (citing United States v. DeNoia, 451 F.2d 979 (2d Cir. 1971)). This practice, approved in Pierce v. United States, 252 U.S. 239 (1920) (\textit{see supra} notes 36-38 and accompanying text), apparently was disapproved in Mariscal v. United States, 449 U.S. 405 (1981) (\textit{see supra} notes 77-80 and accompanying text).}
\footnotetext{102}{\textit{Vargas}, 615 F.2d at 957.}
\footnotetext{103}{Id. at 959-60.}
\footnotetext{104}{United States v. Lampley, 573 F.2d 783, 788 (3d Cir. 1978).}
\end{footnotes}
CONCURRENT SENTENCE DOCTRINE

either because of a substantial risk of adverse collateral consequences,107 or because judicial economy dictates review.108

The Fifth Circuit has applied the concurrent sentence doctrine more often than other circuits and is its most stalwart defender.109 In United States v. Rubin,110 the court recognized that it had "often applied the doctrine mechanically without really considering the adverse consequences."111 In Rubin, the defendant appealed convictions on 103 counts of embezzlement, racketeering, income tax evasion, and failure to keep labor union records. The Fifth Circuit reviewed and affirmed 101 of the convictions; it declined to review the remaining two counts, affirming them under the concurrent sentence doctrine.112 After Rubin's petition for certiorari was granted by the United States Supreme Court, the Solicitor General confessed error, agreeing with Rubin that the Fifth Circuit had erred in applying the concurrent sentence doctrine because of the substantial likelihood that the unreviewed convictions would adversely affect parole consideration. The Supreme Court vacated the judgment and re-

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109. See Note, Benton v. Maryland, supra note 47, at 293-94. The exceptional vitality of the concurrent sentence doctrine in the Fifth Circuit is disclosed by a LEXIS search tallying the number of times each of the circuits has used the term "concurrent sentence doctrine" or "concurrent sentence rule" since Benton was decided:

<table>
<thead>
<tr>
<th>COURT</th>
<th>TIMES USED</th>
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<tbody>
<tr>
<td>District of Columbia</td>
<td>3</td>
</tr>
<tr>
<td>First Circuit</td>
<td>8</td>
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<tr>
<td>Second Circuit</td>
<td>23</td>
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<tr>
<td>Third Circuit</td>
<td>12</td>
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<td>Fourth Circuit</td>
<td>8</td>
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<td>Fifth Circuit</td>
<td>147</td>
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<tr>
<td>Sixth Circuit</td>
<td>18</td>
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<tr>
<td>Seventh Circuit</td>
<td>11</td>
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<td>Eighth Circuit</td>
<td>49</td>
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<td>Ninth Circuit</td>
<td>91</td>
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<td>Tenth Circuit</td>
<td>13</td>
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<tr>
<td>Eleventh Circuit</td>
<td>8</td>
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</tbody>
</table>

These figures, of course, include cases in which the terms are merely mentioned and the doctrine is neither applied nor rejected. Likewise they exclude cases in which the doctrine is in fact applied or discussed but these precise terms are not used. Nonetheless, they give an idea of the relative popularity of the doctrine in the various circuits.
110. 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979) (on remand from 439 U.S. 810 (1978)).
111. Id. at 280.
manded the case to the Fifth Circuit. On remand, the Fifth Circuit looked closely at the impact of the United States Parole Commission guidelines. Of Rubin’s 101 convictions, eighty-four were for embezzling a total of approximately $55,000. The two unreviewed convictions were for embezzling a total of approximately $330,000. The court recognized that the severity rating for the offense of embezzlement was based on the amount of money embezzled. If the two unreviewed convictions were not considered, Rubin’s offense would carry a severity rating of “high”; when they were considered, the rating became “very high.” The fact that the unreviewed convictions would result in a higher severity rating did not mean that use of the concurrent sentence doctrine would necessarily harm the defendant, however, because the Parole Commission does not automatically drop reversed convictions from its consideration. Rather, it looks to the “actual offense behavior” which can be reliably established and will consider a reversed conviction whenever the reversal was on grounds not relating to guilt or innocence. The Fifth Circuit concluded that application of the concurrent sentence doctrine to a challenge related to guilt or innocence is inappropriate. On the other hand, the concurrent sentence doctrine may be applied where the defendant complains of error unrelated to guilt or innocence, such as denial of a motion to suppress.

Rubin’s command that a sufficiency of the evidence contention be reviewed on appeal was soon modified. In United States v. Cardona the court considered an appeal by three defendants from their convictions on one count of conspiracy to possess with intent to distribute heroin and on two counts of possession with intent to distribute heroin. The defendants complained that the evidence was insufficient as to each of the three counts. The court reviewed the evidence as to Counts 1 and 2 and recognized that the evidence on Count 3 was “less substantial.” However, rather than scrutinize

113. Rubin, 591 F.2d at 281.
114. Id. at 281-82; see United States v. Vasquez-Vasquez, 609 F.2d 234, 235 n.2 (5th Cir. 1980).
115. See United States v. Alfrey, 620 F.2d 551 (5th Cir.) (defendant argued document erroneously admitted because the government failed to comply with the notice requirement of FED. R. EVID. 803(24)), cert. denied, 449 U.S. 938 (1980); Vasquez-Vasquez, 609 F.2d at 235 (defendant claimed court erred in denying motion to suppress because statements were taken after an illegal stop; fourth amendment violation apparently had no effect on the reliability of the statements). In both these cases the Fifth Circuit concluded that the concurrent sentence doctrine applied because the Parole Commission would give the same weight to the conviction even if it were reversed.
116. 650 F.2d 54 (5th Cir. Unit A June 1981).
117. Cardona, 650 F.2d at 57.
the evidence for sufficiency, the court adopted the approach the District of Columbia had taken in *United States v. Hooper.* Thus, the court retained the rule to the extent that it would forbear reviewing the validity of the convictions; however, instead of affirming the unreviewed convictions it would vacate them. The Fifth Circuit further ruled, "If the government subsequently determines that the interests of justice require reimposition of the sentences, then it may interpose its objections and these vacated convictions would then be open to appellate review."

The Fifth Circuit has ruled that the concurrent sentence doctrine is not applicable where the defendant correctly complains that the convictions are multiplicitous. For the most part, however, the Fifth Circuit has continued to apply the concurrent sentence doctrine, either in its pure form, by affirming the conviction, or by vacating the conviction when the possibility of adverse collateral consequences cannot completely be gainsaid. Of course in some cases the court has declined to apply the concurrent sentence doctrine, most commonly because adverse consequences are apparent.

118. 432 F.2d 604 (D.C. Cir. 1970). See *supra* text accompanying notes 81-82.

119. *Cardona,* 650 F.2d at 58. In a later case, the Fifth Circuit explained that "the effect of this judicial action is to suspend imposition of the sentences." *United States v. Montemayor,* 703 F.2d 109, 116 (5th Cir.) (challenge to the sufficiency of the evidence in a drug case), *cert. denied,* 464 U.S. 822 (1983).

120. *United States v. Osunegbu,* 822 F.2d 472, 481 (5th Cir. 1987). The court stated that "[w]here separate sentences on two or more counts are impermissible, the error is not cured by the existence of concurrent sentences." *Id.* (quoting *United States v. Bradsby,* 628 F.2d 901, 905 (5th Cir. 1980)). *But see United States v. Harrelson,* 754 F.2d 1182 (5th Cir.) (applying the concurrent sentence doctrine and vacating a perjury conviction which the defendant contended was multiplicitous), *cert. denied,* 474 U.S. 908 (1985).


123. *See United States v. Heffington,* 682 F.2d 1075 (5th Cir. 1982), *cert. denied,* 459 U.S. 1108 (1983); *United States v. Khamis,* 674 F.2d 390, 394-95 n.7 (5th Cir. 1982) (declining to apply the concurrent sentence doctrine because the court perceives at least two adverse consequences: an effect on parole and an effect on the defendant's alien status); *United States v. Hernandez,* 662 F.2d 289, 291 (5th Cir. Oct. 1981) (declining to apply the concurrent sentence doctrine because "the invalidity of his convictions on counts 2 and 3 is readily apparent"); *United States v. Garcia,* 655 F.2d 59, 63 n.4 (5th Cir. Unit B Sept. 1981) (concurrent sentence doctrine not applicable because conviction carried a "special parole term"); *United States v. Salinas,* 654 F.2d 319, 322 n.6 (5th Cir. Unit A Aug. 1981) (concurrent sentence doctrine not
The Sixth Circuit has applied the doctrine on occasion, but more often does not. In at least one case, the Sixth Circuit applied the doctrine but instead of affirming the unreviewed conviction, the court vacated it.

The Seventh Circuit has declined to apply the doctrine on many occasions because of the possibility of undesirable collateral consequences. On the other hand, the court has applied the doctrine absent possible adverse consequences.

The Eighth Circuit applied the doctrine relatively freely in the years immediately after Benton was decided, but in the mid-
1970's, the court began to question usage of the doctrine. Nevertheless, the court continued to apply the doctrine in appropriate cases. In one of its most recent pronouncements on the subject, however, the Eighth Circuit declined to apply the concurrent sentence doctrine, noting that "[c]ourts have long expressed doubt of the propriety of applying the concurrent sentence doctrine in cases on direct appeal." The Ninth Circuit, like the Fifth, was long a "staunch supporter of the doctrine." In United States v. DeBright, however, the en banc court rejected the use of the concurrent sentence doctrine.

The panel opinion in DeBright provided an exhaustive history of the concurrent sentence doctrine in the Ninth Circuit. The court recognized that it had applied the doctrine freely for some forty years, presumably because of the circuit's large case load. The court also recognized that it had applied the doctrine for some twenty-five years, until 1971, without mentioning adverse collateral consequences. More to the point, the court recognized that even since 1971 it had on occasion applied the concurrent sentence doctrine.

130. See United States v. Holder, 560 F.2d 953 (8th Cir. 1977) (declining to apply the doctrine because of the possible effect on parole consideration); Sanders v. United States, 541 F.2d 190 (8th Cir. 1976) (suggesting that the rule should be limited to application in cases involving collateral attacks on convictions as opposed to direct appeals), cert. denied, 429 U.S. 1066 (1977); United States v. Belt, 516 F.2d 873 (8th Cir. 1975) (seriously questioning the doctrine's applicability where the crimes are different and are serious), cert. denied, 423 U.S. 1056 (1976).

131. See Lee v. Lockhart, 754 F.2d 277 (8th Cir. 1985); United States v. Kirk, 723 F.2d 1379 (8th Cir. 1983) (advised caution in applying doctrine, but held doctrine is applicable where there was no prejudicial spillover and defendant received a 40-year sentence not subject to parole and would be nearly 90 years of age in 40 years), cert. denied, 466 U.S. 930 (1984); United States v. Wilson, 671 F.2d 1138, 1139 n.2 (8th Cir.) (doctrine applicable where the impact on parole was doubtful and other collateral consequences were "highly speculative"), cert. denied, 456 U.S. 994 (1982); United States v. Rapp, 642 F.2d 1120 (8th Cir. 1981) (doctrine applicable where review is on collateral attack, defendant received probation on all counts, and there was no prejudicial spillover).


134. 730 F.2d 1255 (9th Cir. 1984) (en banc).

135. Id. at 1260.


137. Id. at 1406 (citing, inter alia, United States v. Barker, 675 F.2d 1055, 1059 (9th Cir. 1982); Maxfield v. United States, 152 F.2d 593, 595 (9th Cir. 1945), cert. denied, 327 U.S. 794 (1946)).

138. The first reported decision in which the Ninth Circuit mentions adverse collateral consequences is United States v. Moore, 452 F.2d 576, 577 (9th Cir. 1971) (per curiam).
without mentioning collateral consequences. The court described this practice of affirming without discussion of collateral consequences as "particularly disturbing." Yet, the court recognized, the alternative is to canvas all possible collateral consequences. Doing so, however, diminishes the utility of the concurrent sentence doctrine because the one rationale for its application, judicial economy, is all but eradicated. The DeBright panel relied on the Second Circuit opinion in United States v. Vargas to determine that consideration of collateral consequences destroys the utility of the concurrent sentence doctrine. The panel declined, however, to follow Vargas and reject the doctrine. Instead it revitalized one of its own 1971 opinions, United States v. Fishbein. Fishbein adopted the approach taken by the District of Columbia Circuit in United States v. Hooper. Inexplicably, however, Fishbein had never been followed in the Ninth Circuit; rather the court had continued to apply the doctrine and affirm rather than vacate the unreviewed convictions. The DeBright panel concluded its discussion of the concurrent sentence doctrine with the prophetic remark, "Finally we would add that if for any reason the Hooper-Fishbein approach proves unsatisfactory in the long run, we should abandon the concurrent sentence doctrine entirely rather than return to the practice of affirming convictions regardless of their underlying lawfulness.

In fact, the Hooper-Fishbein approach proved unsatisfactory in the short run. On motion for rehearing the government convinced the en banc court that vacating convictions without reviewing their merits "would impermissibly infringe on the prosecutorial function of the executive branch." Having held that vacating an unreviewed conviction was inappropriate, the Ninth Circuit made good the panel's promise and completely rejected further use of the concurrent sentence doctrine. The court cited two major reasons. First, it deter-

139. DeBright, 710 F.2d at 1406 (citing, e.g., United States v. Ponticelli, 622 F.2d 985, 992 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); United States v. Jabara, 618 F.2d 1319, 1329 (9th Cir.), cert. denied 446 U.S. 987 (1980)).
140. DeBright, 710 F.2d at 1406.
141. 615 F.2d 952 (2d Cir. 1980).
142. 446 F.2d 1201 (9th Cir. 1971), cert. denied, 404 U.S. 1019 (1972).
143. 432 F.2d 604 (D.C. Cir. 1970). See supra text accompanying note 82.
144. DeBright, 710 F.2d at 1407.
145. Id. at 1409.
146. United States v. De Bright, 730 F.2d 1255, 1257 (9th Cir. 1984) (en banc). The court was also influenced by the "substantial practical difficulties with the implementation of Hooper." Id. The court noted that were the government to seek reinstatement of a vacated conviction at some time in the future, the result would be a fragmented appeal. Furthermore, the work of the Parole Commission might be delayed while reinstatement was sought.
mined that since a fair review of adverse collateral consequences would "ordinarily be very time-consuming," judicial economy was not, in fact, well served by application of the doctrine. Furthermore, the court ruled that application of the concurrent sentence doctrine infringed upon the defendant’s statutory right to an appeal.

After the Benton decision, the Tenth Circuit continued to apply the concurrent sentence doctrine on occasion, but by no means uniformly. In a 1982 opinion, the court gave extended consideration to the doctrine. Recognizing that "[a] growing realization that adverse collateral consequences inexorably flow from most criminal convictions has prompted both courts and commentators to criticize frequent application of the doctrine," the court declined to apply it. The court also declined to vacate the convictions. Thus, the Tenth Circuit ordinarily affords a defendant full review.

Shortly after it was created, the United States Court of Appeals for the Eleventh Circuit adopted the approach of the old Fifth Circuit in United States v. Cardona and of the District of Columbia Court of Appeals in United States v. Hooper. The court applied the concurrent sentence doctrine and declined to review the convictions bearing concurrent sentences, but rather than affirming those convictions, it vacated them. The Eleventh Circuit, however, does not always take this approach. Sometimes it simply applies the con-

147. Id. at 1258.
148. Id. at 1259 (citing 28 U.S.C. § 1291 (1982)). Section 1291 grants federal criminal defendants the right to have a conviction reviewed by a court of appeals.
150. See, e.g., United States v. Stoker, 522 F.2d 576 (10th Cir. 1975); United States v. Masters, 484 F.2d 1251 (10th Cir. 1973).
151. See United States v. Montoya, 676 F.2d 428 (10th Cir.), cert. denied, 459 U.S. 856 (1982).
152. Id. at 432.
153. See Newman v. United States, 817 F.2d 635 (10th Cir. 1987); United States v. Varoz, 740 F.2d 772 (10th Cir. 1984); United States v. Valentine, 706 F.2d 282 (10th Cir. 1983); United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983).
154. The United States Court of Appeals for the Eleventh Circuit was established on November 1, 1981. In the first opinion handed down, the court ruled that cases decided prior to the close of business on September 30, 1981 by the "Old Fifth" or "Former Fifth" were binding precedent in the new Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).
155. 650 F.2d 54 (5th Cir. Unit A June 1981).
156. 432 F.2d 604 (D.C. Cir. 1970).
current sentence doctrine in its pure form and affirms the conviction rather than vacating it.\textsuperscript{158} Additionally, in some cases the court has simply declined to apply the concurrent sentence doctrine.\textsuperscript{159}

By 1986, while only the Ninth Circuit had rejected the doctrine outright,\textsuperscript{160} the First, Second, Eighth and Tenth had all but done so in opinions sharply circumscribing or criticizing it.\textsuperscript{161} The Third, Fourth, Sixth and Seventh Circuits had never relied on the doctrine to an appreciable extent and had no occasion to review their positions. While the newly-created Eleventh Circuit seemed relatively open to use of the doctrine,\textsuperscript{162} several of its judges had criticized the Fifth Circuit’s failure to reconsider it while they were still members of that court.\textsuperscript{163} Only the Fifth Circuit remained a proponent of the doctrine and continued to apply it regularly.

\section*{IV. The Validity of the Concurrent Sentence Doctrine—Unanswered Questions}

As the foregoing survey shows, in the eighteen years since \textit{Benton} was handed down, a number of questions relative to the vitality of the concurrent sentence doctrine have arisen. Some, such as the doctrine’s interaction with a defendant’s statutory right to appeal, implicate its validity. Others, such as its contribution to judicial efficiency, implicate only its utility. In light of \textit{Ray v. United States},\textsuperscript{164} it seems unlikely that these questions will be addressed by

\begin{itemize}
\item\textsuperscript{158} See United States v. Fuentes-Jimenez, 750 F.2d 1495, 1497 (11th Cir. 1985) (the court found “no basis for believing that the appellant will suffer adverse collateral consequences” and no effect on parole), \textit{cert. denied}, 476 U.S. 1160 (1986); United States v. Plotke, 725 F.2d 1303 (11th Cir.), \textit{cert. denied}, 469 U.S. 843 (1984); United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983).

\item\textsuperscript{159} See United States v. Brewer, 807 F.2d 895, 896 n.1 (11th Cir.) (declining to apply doctrine where the parties fail to discuss it, indicating that the parties should assist the court in determining the possibility of adverse collateral consequences), \textit{cert. denied}, 107 S. Ct. 1999 (1987); United States v. Rosen, 764 F.2d 763 (11th Cir. 1985), \textit{cert. denied}, 474 U.S. 1061 (1986); United States v. Davis, 730 F.2d 669, 671 n.2 (11th Cir. 1984) (declining to apply the doctrine where “the government has made no affirmative showing that the likelihood of harm to the defendant in the form of adverse collateral consequences is so remote as to be insignificant”).

\item\textsuperscript{160} United States v. De Bright, 730 F.2d 1255 (9th Cir. 1984) (en banc).


\item\textsuperscript{163} See United States v. Warren, 612 F.2d 887, 895 (5th Cir.) (en banc) (Roney, Hill, Clark, Fay and Vance, J.J., dissenting in part), \textit{cert. denied}, 446 U.S. 956 (1980).

\item\textsuperscript{164} 107 S. Ct. 2093 (1987). \textit{Ray} is discussed infra notes 203-211 and accompanying text.
the United States Supreme Court in the foreseeable future. Nonetheless, the questions that impact on the validity of the doctrine deserve attention.165

A. Does the Concurrent Sentence Doctrine Violate the Federal Right to Appeal from a Judgment of Conviction?

The United States Constitution does not provide a defendant with the right to appeal from a judgment of conviction.166 However:

Present federal law has made an appeal from a District Court’s judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court.167

165. If use of the doctrine is a valid exercise of judicial power, a decision as to whether to use it in the interests of judicial economy would seem to be peculiarly within the province of each court.


An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

McKane, 153 U.S. at 687.

167. Coppedge v. United States, 369 U.S. 438, 441-42 (1962) (citations omitted). Coppedge relies on 28 U.S.C. §§ 1291, 1294. These statutes, on their face, create jurisdiction in the court of appeals but do not create a right to an appeal in a litigant. Cf. 28 U.S.C. § 1252. Coppedge also cites Fed. R. CRIM. P. 37(a), which is now incorporated in the Federal Rules of Appellate Procedure. Fed. R. CRIM. P. 37 advisory committee's note. The Rules assume a right of appeal in a defendant. The Coppedge Court also refers to Carroll v. United States, 354 U.S. 394, (1957), where the Court, in giving a brief history of federal appellate jurisdiction, noted that “it was 100 years before the defendant in a criminal case, even a capital case, was afforded appellate review as of right.” Id. at 400-01 (footnote omitted) (emphasis in original). Similarly, in Abney v. United States, 431 U.S. 651, 656 n.3 (1977), the Court noted, “A general right of appeal in criminal cases was not created until 1911. Act of Mar. 3, 1911, 36 Stat. 1133.” The Act cited, like 28 U.S.C. § 1291, appears to create jurisdiction in the court as opposed to a right in the defendant. Finally, as the De Bright court noted, Federal Rule of Criminal Procedure 32(a)(2) directs a district court judge to inform a defendant of “his right to appeal.” United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc).

Apparently, the right of appeal is in the nature of an implied right of action allowed by 28 U.S.C. § 1291. For discussions of how the Court determines whether to imply a private right of action, see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374-82 (1982); Cort v. Ash, 422 U.S. 66, 78 (1975).

Although the extent to which a defendant has a right of appeal is unclear, an extended discussion of that issue is beyond the scope of this Article. For purposes of this Article, it is assumed that a defendant has a right to bring the entire case before the court of appeals.
The existence of a defendant’s right to have his conviction reviewed on appeal implicates the validity of the concurrent sentence doctrine. If a defendant has a right to appellate review, can the court, in the interest of judicial economy, deny him that right? According to the Ninth Circuit, it cannot. That court relied upon the argument that use of the concurrent sentence doctrine offends the right to appeal as support for its rejection of the doctrine, ruling that it “impinges upon the defendant’s statutory right.”168 This contention was also articulated by the dissenting judges in United States v. Warren,169 who argued:

Persons convicted of federal crimes are entitled to an appeal. That right is empty if no court decides the appeal. Under the concurrent sentence doctrine, which is founded solely on a concern for judicial economy, convictions resulting in concurrent sentences often go unreviewed, and yet affirmed, despite “the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.”170

One answer to this attack on the doctrine may be that the use of the doctrine is like a partial affirmance without opinion; since an entire case may be affirmed without opinion,171 it follows that part of a case may be as well. An affirmance pursuant to the concurrent sentence doctrine, however, is different from other affirmances in that when the court affirms under the doctrine, it is not expressing an opinion on the correctness of the judgment affirmed. It is, instead, expressly declining to consider the validity of the judgment, and affirming it nonetheless. An affirmance without opinion, on the other hand, indicates that the judgment is valid and an opinion would have no precedential value.172 The existence of a defendant’s right of appeal is better reconciled with the appellate court’s exercise

168. De Bright, 730 F.2d at 1259.
169. 612 F.2d 887 (5th Cir.) (Roney and Hill, JJ., dissenting in part), cert. denied, 446 U.S. 956 (1980).
170. Id. at 896 (quoting Sibron v. New York, 392 U.S. 40, 55 (1968)).
172. See, e.g., 5th Cir. R. 25:

When the court determines that any of the following circumstances exists: (a) judgment of the district court is based on findings of fact that are not clearly erroneous; (b) the evidence in support of a jury verdict is not insufficient; (c) the order of an administrative agency is supported by substantial evidence on the record as a whole; (d) summary judgment, directed verdict or judgment on the pleadings is supported by the record; and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
of discretion to simply decline to rule on the appeal by analogizing the court's action to a harmless error ruling. Harmless error is typically invoked with respect to particular aspects of a trial, not with respect to a verdict or judgment. For example, when a defendant argues to the appellate court that his conviction should be reversed because the trial court erred in admitting certain evidence, a court may, in an appropriate case, respond, "Yes, that was (or may have been) error. But the evidence is sufficient, absent the erroneously admitted evidence, and it was not so prejudicial as to require in fairness that you be retried." In other words, the error was harmless. In applying harmless error theory to justify the concurrent sentence doctrine, a court is going a step further and saying, "Yes, it may be that the particular conviction you complain of is invalid, but we need not decide whether or not that is the case because the conviction at issue works you no harm." The State of Maryland proffered this theory in *Benton.* The Solicitor General, on the other hand, suggested that the doctrine be treated "as a principle of judicial efficiency." The Supreme Court declined to apply the doctrine or to discuss the relative merits of these positions beyond noting that the doctrine might survive "as a rule of judicial convenience." When the Court subsequently applied the doctrine in *Barnes,* thereby making it perfectly clear that it had in fact survived, the Court simply stated, "[W]e decline as a discretionary matter to reach these issues." In fact, the arguments of the State of Maryland and of the Solicitor General are not competing but complementary. One expresses a rule, the other a rationale. Thus a conviction *may* be affirmed under the concurrent sentence doctrine because it is harmless and no viable right of the defendant is infringed; additionally, it *should* be so affirmed because to do so promotes judicial efficiency.

While treating the doctrine as an application of harmless error to justify its use, an alternative theory also suffices. The Supreme Court addressed the concurrent sentence doctrine in *Benton* in the context of an argument by the State of Maryland that the doctrine deprived the Court of jurisdiction by rendering the controversy moot. The Court disagreed, holding that "our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the ele-

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174. *Id.* at 791-92.
175. *Id.* at 792.
ments necessary to create a justiciable case or controversy.'”177 The Court then added:

It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide (as in Hirabayashi) that it is "unnecessary" to consider all the allegations made by a particular party. The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed.178

Benton responded to the contention that the doctrine deprived the court of jurisdiction. The argument is not that the court lacks jurisdiction to review the challenged conviction, but that the court lacks discretion not to review the challenged conviction. An appropriate response is to complete the analysis begun in Benton.

The Benton ruling that the concurrent sentence doctrine does not deprive the court of jurisdiction may be taken a short step further; a more complete statement is that the concurrent sentence doctrine does not deprive the court of jurisdiction as a matter of law. That is, the fact that the challenged conviction bears a sentence concurrent to a longer sentence does not conclusively establish that no case or controversy exists. This is not to say, however, that the appeal from the challenged conviction might not be moot as a matter of fact. Such an appeal will be moot as a matter of fact when no collateral consequences flow from the concurrent conviction. If this view is taken, the doctrine does not conflict but instead dovetails with the federal right of appeal. The doctrine applies where no collateral consequences exist, and the court will not and may not review the challenged conviction.179 On the other hand, where collateral consequences exist the court is confronted with a justiciable case or controversy which it will resolve.

178. Id. at 791 (footnote omitted).
179. Interestingly, Hirabayashi is a case in which there may well have been no collateral consequences, legal or otherwise. Because Hirabayashi deliberately challenged laws he believed unconstitutional, 320 U.S. 81, 84 (1943), stigma is not an issue. His act of civil disobedience may be seen as a badge of honor, not infamy. Because he received two concurrent sentences of only three months duration, it is unlikely that the second negatively impacted on his parole. Id. Finally, both because his "crimes" were acts of civil disobedience and because they were inextricably linked to each other, the potential for incremental harm as a result of the second conviction was minimal.
B. Does the Concurrent Sentence Doctrine Violate a Defendant's Right to Substantive Due Process?

One commentator has suggested that application of the concurrent sentence doctrine may run afoul of substantive due process guarantees. The argument is premised, however, on the assumption that a defendant in a federal criminal case has a fundamental right to appeal. The commentator recognizes that no fundamental right to appeal "per se" exists, but argues that "when such review is provided by statute, a fundamental right of access to the court arises." That begs the question, however, since a court's use of the concurrent sentence doctrine hardly denies access to the court; it cannot occur unless the right of access has been afforded the defendant and the case is before the court. The determinative fact remains that no fundamental right to appeal a federal criminal conviction exists.

Since the right to appeal is not fundamental, the concurrent sentence doctrine does not violate a defendant's substantive due process rights unless it lacks a rational basis. The expressed rationale of courts applying the doctrine, that it increases judicial efficiency, supplies the rational basis necessary to justify its use in the face of a challenge grounded in substantive due process. Of course, if the doctrine is treated as jurisdictional under the analysis set forth in the preceding section, no substantive due process issue can arise.

180. Note, Judicial Procedure, supra note 9, at 742.
181. Id. at 745.
182. Id.
185. The same author argues that use of the doctrine offends equal protection, relying in large part on Justice White's concurrence in Benton. Note, Judicial Procedure, supra note 9, at 749. While Justice White raised the specter of an equal protection violation, he also dismissed it:

The unreviewed count is often one which, but for the concurrent sentence rule, the prisoner would have a right to challenge, either directly or on collateral attack. Arguably, to deny him that right when another man, convicted after a separate trial on each count, or sentenced consecutively, could not be denied that right under the applicable state or federal law, raises an equal protection question. But clearly so long as the denied review is of no significance to the prisoner the denial of equal protection is not invidious but only theoretical. Benton, 395 U.S. at 799 (White, J., concurring).
186. The same is true, of course, of equal protection issues.
C. Is to Vacate to Err? Does the Concurrent Sentence Doctrine Violate the Separation of Powers Doctrine?

For the most part the executive branch of the government supports the use of the concurrent sentence doctrine; however, it takes issue with the practice of vacating rather than affirming an unreviewed conviction. The Solicitor General takes the position that "the practice of vacating unreviewed convictions offends important separation of powers principles, it devalues the role of juries and district courts, and it places the unreviewed conviction in a unique and extremely uncertain status." Of these contentions, only the first addresses the validity of the doctrine; the second and third raise policy considerations.

The Solicitor General's position is that the decision to prosecute rests with the executive, and the court cannot override that decision by vacating either a valid conviction or the sentence imposed pursuant to a valid conviction. The Solicitor General contends that to do so would override the prosecutorial function that is committed to the executive branch.

The Supreme Court consistently has "long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." The Court, however, also has ruled that "broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise," and has subjected this discretion to judicial review.

The argument that the doctrine of separation of powers forecloses the judiciary from vacating convictions under the concurrent sen-

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188. Id. Ray, as petitioner, also argued that application of the doctrine offends separation of powers. Brief for Petitioner Ray at 40-43, Ray v. United States, 107 S. Ct. 2093 (1987) (No. 86-281). Of course, Ray concludes that full review must be afforded while the Solicitor General argues that the conviction at issue should be affirmed pursuant to the concurrent sentence doctrine.
189. The Solicitor General cites the Constitution's direction that the President "take Care that the Laws be faithfully executed" as the source of prosecutorial power and discretion in the Executive Branch. Reply Memorandum for the United States at 20 (citing U.S. CONST. art. II, § 3).
190. Ball v. United States, 470 U.S. 856, 859 (1985); see Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868) (also recognizing the power of the district attorney to "enter a nolle prosequi at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress").
192. See Ball, 470 U.S. at 860 (reviewing the government's discretion to prosecute under two statutes).
Concurrent sentence doctrine supposes a rigid division of authority between the executive branch and the judiciary. In the context of a dispute between Congress and the Executive, the Supreme Court has decisively rejected that view of separation of powers. The question is not whether vacating presumptively valid convictions has any impact on the executive branch’s prosecutorial discretion, but rather to what extent “it prevents the Executive Branch from accomplishing its constitutionally assigned functions.” Even where “the potential for disruption” exists, it may be “justified by an overriding need to promote objectives within [the judiciary’s] constitutional authority.” Thus the fact that the executive branch has discretion as to the prosecutorial decision does not mean that the judiciary lacks discretion to vacate a presumptively valid conviction in the interests of judicial economy, at least absent a showing by the government that the conviction has significance.

D. Collateral Use of Unreviewed Convictions

In his concurring opinion in Benton, Justice White defended the concurrent sentence doctrine, but he expressed concern that an attempt to use an unreviewed conviction to a defendant’s detriment might offend constitutional guarantees. While the possibility of abuse is undeniable, no indication exists that it has ever occurred. The most cogent reason is that the government has no need to use the unreviewed conviction. Typically, the unreviewed conviction is tied to a lawful conviction—affirmed on its merits—which stems from the same criminal transaction. Moreover, if the court was

195. Id.
196. Both the Fifth Circuit and the District of Columbia Circuit Courts of Appeal give the government leave to interpose objections when the interests of justice so require. See United States v. Cardona, 650 F.2d 54, 58 (5th Cir. 1981); United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970).
197. 395 U.S. 784, 799-800.
198. Extensive research has uncovered no reported case which records a complaint that a conviction which had been affirmed under the concurrent sentence doctrine was used for impeachment, or to increase punishment for a subsequent crime, or otherwise to the detriment of the defendant.
199. See Benton, 395 U.S. at 805 (Harlan, J., dissenting). Assuming that the doctrine was properly applied in the first instance, use of the unreviewed conviction for impeachment should be harmless error. See supra text accompanying note 65. But see O’Clair v. United States, 470 F.2d 1199, 1203 (1st Cir. 1972) (“there is always the extra stigma imposed upon one’s reputation”).
correct in its application of the concurrent sentence doctrine in the first instance, then it should not cause adverse consequences on parole.\textsuperscript{200}

An affirmed but unreviewed conviction is likely to become important only if the underlying conviction is set aside. In that event, the reviewing court would have the record before it and could consider the previously unreviewed conviction on its merits.

While unlikely, the possibility exists that unanticipated collateral use of the unreviewed conviction may be made even though the underlying convictions remain intact. For example, laws affecting sentencing and parole can change and a conviction that does not seem to make a difference when it is affirmed may prove to be important at a later date. The problem, at that point, is how best to afford the defendant relief. The relief sought would be review of the conviction; the difficulty would be in providing access to a reviewing court. Those courts that vacate rather than affirm have provided a solution; they typically include in their order a proviso that if the interests of justice so require, the prosecutor may seek reinstatement of the conviction and sentence.\textsuperscript{201} The court should afford the same right to the defendant: the defendant should be given leave to reinstate the appeal if the interests of justice so require.\textsuperscript{202}

V. 18 U.S.C. § 3013 AND RAY V. UNITED STATES

In 1986 the Supreme Court effectively forestalled the use of the concurrent sentence doctrine in all federal felony convictions. By analogy, the same holds true for federal misdemeanor convictions.


\textsuperscript{202} Although the courts do not refer to the retention of jurisdiction in ruling that the prosecutor may move for reimposition of the conviction, that appears to be the applicable theory. The concept of inherent judicial power authorizes the retention of jurisdiction. See 1 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 0.60[6], at 633 (2d ed. 1986). Additionally, 28 U.S.C. § 2106 (1982) provides the basis for retention of jurisdiction:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances . . . .

\textit{Id.}
However, the doctrine remains viable in collateral actions for post-conviction relief from federal convictions and in the state courts.

A. The Bell Tolls, Faintly

Late in 1986, the United States Supreme Court granted a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the role of the concurrent sentence doctrine in the federal courts.203 The petitioner, John William Ray, had been convicted on one count of conspiracy to possess cocaine with intent to distribute, and two counts of possession of cocaine with intent to distribute. He was sentenced to concurrent seven-year prison terms on all three counts, as well as to concurrent special parole terms of five years on the two possession counts. The court of appeals affirmed his conspiracy conviction and one of the possession convictions on the merits; it then applied the concurrent sentence doctrine and declined to review the second possession conviction.204

After the writ of certiorari was granted, the Solicitor General realized, and pointed out to the Court, that pursuant to 18 U.S.C. § 3013(a)(2)(A),205 Ray also had been assessed $50 on each count, for a total of $150. The Court’s response to this information was to rule:

Since petitioner’s liability to pay this total depends on the validity of each of his three convictions, the sentences are not concurrent. The judgment of the Court of Appeals is therefore vacated, and the cause is remanded to [the Fifth Circuit Court of Appeals] so that it may consider petitioner’s challenge to his second possession conviction.206

The entire opinion comprises only two paragraphs; it is not, on its face, significant. Its significance arises from the fact that 18 U.S.C. § 3013(a)(2)(A) requires that an assessment of $50 be made “on any person convicted of [a felony] offense against the United States.” Furthermore, three circuit courts of appeal have had occasion to rule on the application of the statute to convictions on multicount indict-

ments and all have agreed that the statute directs an assessment on
each count of a conviction.207

For all its subtlety, the Ray opinion leaves no room for doubt as
to the application of the concurrent sentence doctrine to a conviction
carrying an assessment of at least $50. The Supreme Court did not
remand to the court of appeals for consideration of that question;
rather it ruled, "It now appears, however, that petitioner is not in
fact serving concurrent sentences."208 Since the statute commands
that each federal felony conviction carry an assessment of at least
$50, it also now appears that the concurrent sentence doctrine can no
longer be utilized with respect to federal felony convictions.209

B. Is There Life After Death? A Consideration of Federal
Misdemeanors, Collateral Proceedings, and State Offenses

1. Federal Misdemeanors

The remote possibility that the concurrent sentence doctrine con-
tinues to be applicable to federal misdemeanors is hardly worth con-
sidering. The statute that requires a $50 assessment for each felony
conviction also requires a $25 assessment for each misdemeanor con-
viction.210 In some instances, the strictures of judicial decisionmak-
ing require splitting hairs,211 but application of the concurrent
sentence doctrine to federal misdemeanors is not an issue likely to
provoke a $25 distinction.

207. See United States v. Dobbins, 807 F.2d 130, 131-32 (8th Cir. 1986); United States v.
Donaldson, 797 F.2d 125, 128 (3d Cir. 1986); United States v. Pagan, 785 F.2d 378, 381 (2d
Cir. 1986).
209. Should the statute be repealed, the doctrine might enjoy renewed vitality. Absent that
circumstance, it seems for the most part unavailable. But see United States v. Mayberry, 774
F.2d 1018 (10th Cir. 1985) (ruling that 18 U.S.C. § 3013 is not applicable to assimilative
crimes). In the odd case where a district court judge omits the assessment, it would seem that
a remand to correct the sentence would be more appropriate than seizing on the omission and
applying the doctrine. See United States v. Pagan, 785 F.2d 378, 380-81 (2nd Cir. 1986). But
see United States v. Stovall, 825 F.2d 817, 824 (5th Cir. 1987), where the court held that
absent an objection by the government, where the trial court failed to levy the assessments the
case would not be remanded, and in the absence of any assessments, the concurrent sentence
doctrine would be applied. That portion of the opinion was deleted by order after the govern-
ment pointed out that the offenses had preceded enactment of 18 U.S.C. § 3013. United States
v. Stovall, 833 F.2d 526 (5th Cir. 1987).
system in order to record their serial numbers was a search, but recording the numbers was
not a seizure).
2. Collateral Attacks on Federal Convictions

Because Ray was decided on petition for writ of certiorari following affirmance of Ray's conviction on direct appeal, it does not speak to the viability of the concurrent sentence doctrine in collateral attacks on federal convictions. By far the most common postconviction proceeding is an action pursuant to 28 U.S.C. § 2255. In fact, it has been said that "'[a] federal prisoner seeking relief from his federal sentence has Section 2255 as his exclusive remedy.'"212 As to federal prisoners in custody, section 2255 is coextensive with the writ of habeas corpus, which it supplants as a remedy.213 The question, then, is whether the concurrent sentence doctrine may still be used in actions filed under that section.

Section 2255 provides that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.214

Assuming that a petitioner can meet the "in custody" requirement of the statute,215 it would seem that if part of the sentence imposed was an assessment which had not yet been paid, Ray would apply and the concurrent sentence doctrine could not be used. If the assessment has been paid, the question would seem to be whether section

212. Baker v. Sheriff of Santa Fe County, 477 F.2d 118, 119 (10th Cir. 1973); see United States v. Addonizio, 442 U.S. 178, 185-86 (1979). The writ of coram nobis may be available, United States v. Morgan, 346 U.S. 502 (1954), but only where an action pursuant to section 2255 will not lie. Burns v. United States, 321 F.2d 893, 896 (8th Cir.), cert. denied, 375 U.S. 959 (1963). At any rate, consideration of coram nobis is unnecessary here, because one of the prerequisites to its availability is a showing that the petitioner presently suffers adverse consequences as a result of the conviction that is being attacked. Hirabayashi v. United States, 627 F. Supp. 1445, 1448 (W.D. Wash. 1986) (citing United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981)). Such a showing would preclude application of the concurrent sentence doctrine.


215. A prisoner in custody may challenge a concurrent sentence even though he will not be entitled to release if his challenge is successful. Grimes v. United States, 607 F.2d 6, 9 (2d Cir. 1979); see Close v. United States, 450 F.2d 152 (4th Cir. 1971), cert. denied, 405 U.S. 1068 (1972); Sciberras v. United States, 404 F.2d 247, 249 (10th Cir. 1968).
2255 allows a petitioner to recover an assessment. If it does, as in Ray, the sentences are not concurrent for purposes of section 2255. On the other hand, if section 2255 does not allow recovery of the assessment, for purposes of a section 2255 proceeding the sentences are concurrent and the doctrine can be applied.

While one may argue that the interests of justice require that a petitioner who succeeds in having a conviction vacated should be entitled to recover any assessment paid, both section 2255 and the constitutional writ of habeas corpus protect a liberty interest, not an economic one. Though an action to recover an assessment collected pursuant to an invalid conviction may lie, it will not lie under section 2255 or the writ of habeas corpus. Section 2255 and the writ of habeas corpus remedy illegal restraint; while an unpaid assessment may be considered an illegal restraint if liberty is conditioned on its being paid, an assessment that has already been paid is arguably no longer an illegal restraint on liberty. Thus the concurrent sentence doctrine may have continuing validity in collateral actions for postconviction relief from federal convictions, in that it may be applied where either no assessment was made, or where an assessment was made and has been paid.

3. The Concurrent Sentence Doctrine in the State Courts

The concurrent sentence doctrine has never enjoyed widespread popularity in the state courts. One reason advanced to account for the lack of state court use of the doctrine is that state law is far more likely to forbid multiple punishment for a single offense than is federal law. Another factor may be the prevalence of state recidivist statutes, but perhaps the most salient factor is the subliminal impact of the type of crime being considered.

217. It appears that a sentence of a fine alone does not give rise to "custody" within the meaning of the section. Id. § 43, nn.64-67 and accompanying text. Assuming that it does not, however, it is still possible that a petitioner who was in custody and had also paid a fine, and who could avail himself of section 2255, would automatically be entitled to recovery of the fine if he were successful in vacating the sentence. See Davis v. Muellar, 643 F.2d 521, 524 n.3 (8th Cir. 1981) (stating in dictum that "habeas corpus relief would include return of the posted bond").
218. This class includes assimilative crimes, United States v. Mayberry, 774 F.2d 1018, 1021 (10th Cir. 1985), and convictions obtained before 18 U.S.C. § 3013 was enacted in 1984.
220. Note, Judicial Procedure, supra note 9, at 733-34 n.85; Note, Benton v. Maryland, supra note 47, at 285.
221. Comment, supra note 9, at 390.
CONCURRENT SENTENCE DOCTRINE

Crimes against the person are peculiarly within the province of the states (with their police power) as opposed to the federal government. Thus state appellate courts regularly decide the appeals of defendants convicted of, *inter alia*, murder, assault, and rape. The federal courts have occasion to consider such crimes, but far less frequently. Consider the Supreme Court cases in which the doctrine has evolved and been applied: *Locke*, involving violation of embargo and importation laws; *Claassen*, involving violation of banking laws by embezzlement of funds; *Pierce*, involving violation of the espionage act by the circulation of pamphlets; *Hirabayashi*, involving the violation of military curfews and reporting orders; and *Barnes*, involving the possession, forgery and uttering of stolen treasury checks. Only *Benton* involved behavior that is criminal because of the threat it poses to personal security (burglary), and Benton was tried and convicted in the courts of the State of Maryland.

What these cases have in common is that the convictions carrying concurrent sentences do not also carry separate stigma. This is true even of *Benton*, where the crimes were burglary and larceny. In state criminal convictions, however, this is often not true. Murder carries a different stigma than assault; armed robbery carries a different stigma than embezzlement; and rape carries a different stigma than kidnapping. The list could go on, but the point is that because of the police power being lodged in the states, state criminal offenses are more likely to carry a separate, distinct, and significant stigma.

The infrequent use of the concurrent sentence doctrine by the state courts may reflect intuitive sensitivity to the heightened element of stigma.

This is not to say that state courts never apply the doctrine. It is alive and well, for example, in Maryland, Missouri, and Wash-

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222. Arguably some crimes are so horrible that independent convictions cannot possibly cast the defendant in a worse light. *See* State v. Bowman, 36 Wash. App. 798, 807-08, 678 P.2d 1273, 1279 (Ct. App. 1984) (court applied the doctrine after finding that stigma was not an issue and noting that: "[i]f the evidence of the prosecuting witnesses . . . is to be believed, to describe [the defendant] as a beast is to libel the entire animal kingdom") (quoting State v. Goebel, 36 Wash. 2d 367, 380, 218 P.2d 300, 307 (1950).

223. This Article does not purport to offer an exhaustive survey of state courts’ positions on the concurrent sentence doctrine; rather the Article discusses the approach of a representative group of states.


This state, while aware of the doctrine, appear never to have utilized it. While Rhode Island has consistently refused to apply the doctrine, it has not foreclosed that possibility. Pennsylvania and Wisconsin, on the other hand, have expressly declined to adopt the doctrine. And Georgia has rejected it, at least in appeals from denials of petitions for writ of habeas corpus. Florida first considered the concurrent sentence doctrine in the context of a petition for writ of habeas corpus. James Frizzell was serving two concurrent ten-year sentences, one imposed as a result of a conviction of robbery and the other imposed as a result of a conviction of uttering a forged instrument. Frizzell's motion to vacate the robbery conviction and sentence was denied. He then filed a petition for writ of habeas corpus in the Supreme Court of Florida. The state conceded the fact that Frizzell would not be entitled to release from confinement, even if he were successful in attacking the robbery conviction and sentence, no longer barred habeas relief. The state, however, contended that the court might still apply the concurrent sentence doctrine and decline to reach the merits.

Frizzell was not an appropriate case for application of the concurrent sentence doctrine. The conviction Frizzell wished to challenge is arguably the more serious of the two because it carries the greater stigma. As the Supreme Court of Florida noted, it might well have serious collateral consequences, such as a negative effect on Friz-
zell's opportunity for parole, or his ability to be chosen as a trusty.\textsuperscript{233} Unfortunately, the court did not follow that line of reasoning in declining to apply the doctrine. Rather, it mistakenly conceived of the doctrine as simply a different label for the prematurity rule, describing it as "an outgrowth of the historic requirement of the writ of habeas corpus that one seeking the writ must be entitled to immediate discharge from all custody if successful in his petition."\textsuperscript{234} The court then recited the rationale for dispensing with the prematurity rule in habeas litigation—that justice is not served by delay in considering a challenge to a conviction because evidence will be lost and witnesses will disappear—and leapt to the conclusion that the concurrent sentence doctrine, likewise, will never bar consideration of the merits of convictions challenged by petition for writ of habeas corpus.\textsuperscript{235}

The court's error lies in seeing the concurrent sentence doctrine as simply a variant of the prematurity rule. The prematurity rule was rejected because it simply delayed litigation of a claim that would, in all likelihood, become ripe.\textsuperscript{236} The concurrent sentence doctrine, on the other hand, is properly applied only when, in all likelihood, the interests of justice will never require consideration of the merits.\textsuperscript{237}

\begin{flushright} \textsuperscript{233} Frizzell, 238 So. 2d at 69. \\
\textsuperscript{234} Id. at 68. While some of the same policy considerations underlie the development of both rules, the concurrent sentence doctrine has a completely separate genesis. See supra text accompanying notes 9-42. \\
\textsuperscript{235} The court held: "From henceforth this Court will consider the merits of petitions for habeas corpus even though the petitioner is not entitled to be released if successful in his attack on a conviction, and regardless of whether the sentences are concurrent or consecutive." Id. at 69. \\
\textsuperscript{236} Peyton v. Rowe, 391 U.S. 54 (1968). A prisoner might die before his claim became ripe, or other circumstances (such as a pardon) might render it moot. Ordinarily the claim would not simply go away. Rather, it would reappear, and the passage of time would render determination of the merits all the more difficult. \\
\textsuperscript{237} The Supreme Court of Georgia cited Frizzell in Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975), in which it ruled that the judicial convenience served by application of the concurrent sentence doctrine in habeas litigation was outweighed by the interests of justice. In that determination the court relied on statistics supplied upon request by the Attorney General. The Attorney General had informed the court that only 25\% of all habeas petitions attack concurrent sentences, and in approximately 90\% of those petitions, the testimony and evidence relating to one conviction will also relate to the other. Presumably an even smaller percentage of petitions attack only a sentence which is concurrent to and lesser than another sentence. The Atkins opinion interweaves, somewhat confusingly, two separate strands of thought. On the one hand, it foreshadows the analysis of the Ninth Circuit in DeBright, see supra text accompanying notes 133-48; on the other hand, it embodies the confusion the Supreme Court of Florida, as expressed in Frizzell, over the nature of the concurrent sentence doctrine. \\
In Atkins, the petitioner, who was serving a life sentence for felony murder and a 10-year sentence for armed robbery, sought to attack both sentences. The court agreed with the petitioner that the armed robbery was a lesser included offense of the felony murder and the conviction was therefore void under Georgia law. \end{flushright}
Frizzell notwithstanding, in 1977 Florida’s Third District Court of Appeal applied the concurrent sentence doctrine in the context of a direct appeal.\textsuperscript{238} Subsequent opinions have confirmed that the concurrent sentence doctrine is viable on direct appeal in Florida.\textsuperscript{239} It will not, however, be applied where the defendant’s complaint is that the trial judge sentenced him without benefit of a sentencing guidelines scoresheet, which is required by the Florida Rules of Criminal Procedure.\textsuperscript{240} Frizzell has never been reconsidered, but it would seem that if the doctrine is applicable in direct appeals it would also be applicable in habeas litigation.

The question at hand is not whether states do use the concurrent sentence doctrine, but whether they may. The answer to that question appears to be yes. The mandatory assessment which was levied in \textit{Ray} applies only to federal convictions. It has long been recognized that where a fine is levied, the concurrent sentence doctrine does not apply.\textsuperscript{241} But most state convictions do not carry fines or assessments and, thus, they will be distinguishable from \textit{Ray} on their facts.

The United States Supreme Court has not held the doctrine unconstitutional. In fact, it has approved its use where appropriate.\textsuperscript{242} \textit{Ray} has limited applicability in the state courts. Thus the state courts are, for the most part, free to use the concurrent sentence doctrine.\textsuperscript{243}

VI. CONCLUSION

In \textit{Ray v. United States}, the Supreme Court seized on the fact that each federal felony conviction carried a $50 assessment, and used that fact to largely abrogate the concurrent sentence doctrine with-

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  \item \textsuperscript{238} Mathis v. State, 348 So. 2d 1221 (Fla. 3d DCA 1977), \textit{cert. denied}, 357 So. 2d 186 (Fla. 1978).
  \item \textsuperscript{239} See, e.g., Foxx v. State, 392 So. 2d 48 (Fla. 3d DCA 1981); Jacobs v. State, 389 So. 2d 1054 (Fla. 3d DCA 1980).
  \item \textsuperscript{240} Uptagrafft v. State, 499 So. 2d 33 (Fla. 1st DCA 1986).
  \item \textsuperscript{241} See Pinkus v. United States, 436 U.S. 293, 304-05 (1978) ($500 fine); United States v. Ruffin, 575 F. 2d 346, 361 (2d Cir. 1978) ($5000 fine). Until \textit{Ray}, it was not entirely clear that a fine of $50 would foreclose application of the doctrine.
  \item \textsuperscript{242} See Barnes v. United States, 412 U.S. 837, 841 (1973); Benton v. Maryland, 395 U.S. 784, 791 (1969). Even the circuit courts of appeal which have rejected the doctrine have done so as a matter of policy rather than as a matter of constitutional necessity. \textit{See supra} notes 81-163 and accompanying text.
  \item \textsuperscript{243} The state courts may use the doctrine on direct appeal or in collateral postconviction proceedings such as habeas corpus. Likewise, the federal courts may continue to use the doctrine in adjudicating postconviction challenges to appropriate state convictions since neither 18 U.S.C. § 3013 nor \textit{Ray} applies.
\end{itemize}
out evaluating it on the merits. Because *Ray* does not foreclose use of the doctrine in collateral federal proceedings or in state proceedings, the validity *vel non* of the doctrine deserves consideration nonetheless.

This Article has considered the arguments that the doctrine is invalid and found them wanting. The doctrine does not offend the separation of powers doctrine; it does not violate a defendant's federal right to appeal, or substantive due process or equal protection rights; and should the application of the doctrine prove to have been erroneous, other remedies are available to compensate. It may, however, as the Ninth Circuit contends, be more trouble than it is worth, but whether a court finds it useful is a matter appropriately left to each court.

Though the doctrine is analytically sound, it is nonetheless troubling. The concept that the federal courts of appeals, bulwarks of liberty, may decline even to review an allegedly invalid conviction unsettles many an observer. No doubt the troubling nature of the doctrine underlies the Supreme Court's jettisoning of it.

Ironically, the Court has managed to eliminate the doctrine, which is itself a mechanism for avoiding review of convictions on their merits, in an opinion which avoids consideration of the doctrine on its merits. Yet because of the doctrine's continued, albeit truncated vitality, the Court may yet have to resolve the many unanswered questions that surround the concurrent sentence doctrine.

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244. 107 S. Ct. 2093. The Court could have treated the assessment as so minimal as to be insignificant, as least as to a nonindigent defendant. *But see* United States v. Donaldson, 797 F.2d 125 (3d Cir. 1986). Congress referred to the assessments as "nominal." S. REP. No. 497, 98th Cong., 2d Sess. 13, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS, 3607, 3619. It should be noted that the purpose is to fund relief for victims, not to penalize the defendant. *Id.*; Donaldson, 797 F.2d at 127.

245. *See supra* text accompanying notes 212-43.

246. *See supra* text accompanying notes 187-96.

247. *See supra* text accompanying notes 166-79.

248. *See supra* note 180 and text accompanying notes 180-86.

249. *See supra* text accompanying notes 201-02.

250. *See* United States v. De Bright, 730 F.2d 1255 (9th Cir. 1984) (en banc).
