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Criminal Procedure

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CRIMINAL PROCEDURE

INTRODUCTION

The subject of criminal procedure is as broad as it is significant. The United States Court of Appeals for the Tenth Circuit published over 150 decisions during this survey period[1] implicating concepts under the criminal procedure umbrella. This survey addresses decisions focusing on two of those concepts: procedural safeguards mandated by the United States Supreme Court in *Miranda v. Arizona*,[2] and the fundamental right to counsel accorded to defendant's through the Sixth Amendment.[3]

In *Miranda*, the Supreme Court laid out the important elements of what would later be called the *Miranda* warnings: the substance of those warnings, a temporal limitation defining when authorities must give the warnings,[4] and requirements for how police may obtain a waiver from the suspect.[5] Parts I and II of this survey focus on the timing and waiver aspects of *Miranda*—the more contentious issues raised by the decision and subsequent applications. Part I discusses the requirement that the *Miranda* warning precede custodial interrogation and reviews two Tenth Circuit cases examining at what point contact between the police and a suspect rises to this level.[6] Part II focuses on a suspect's waiver of his *Miranda* rights, analyzing two cases in which the defendant challenged the validity of the *Miranda* waiver.[7]

Part III begins with an examination of the Sixth Amendment right to counsel, including the distinction between that and the Fifth Amendment's right to counsel provision under *Miranda*. The survey then fo-

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1. This survey addresses cases decided by the United States Court of Appeals for the Tenth Circuit between September 1, 1997, and August 31, 1998.

2. Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Court held that under the Fifth Amendment, the prosecution could not use a defendant's confession or self-incriminating statement obtained during a custodial interrogation unless certain procedural safeguards were present. *See Miranda*, 384 U.S. at 444. Before questioning commenced, the person was to be warned of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.*

3. U.S. CONST. amend. IV. This survey will also highlight the distinction between the Sixth Amendment right to counsel—which is mandated by the Constitution—and the Fifth Amendment right to counsel as expanded by *Miranda*. *See* discussion *infra* Part III.

4. A *Miranda* warning is required prior to a custodial interrogation. *See Miranda*, 384 U.S. at 444.

5. A waiver must be made "voluntarily, knowingly and intelligently." *Id.*

6. *See* United States v. Torres-Guevara, 147 F.3d 1261, 1266 (10th Cir. 1998); United States v. Benally, 146 F.3d 1232, 1238–39 (10th Cir. 1998).

7. *See* United States v. Gell-Iren, 146 F.3d 827, 830 (10th Cir. 1998); United States v. Bautista, 145 F.3d 1140, 1146–50 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 255 (1998).

cuses on two Tenth Circuit decisions which address potential violations of the Sixth Amendment.[8]

I. CUSTODIAL INTERROGATION—THE TEMPORAL ASPECT OF *MIRANDA*

A. *Background*

The Supreme Court's decision in *Miranda* was an attempt to find balance between societal interest in prosecuting criminal activity and constitutional protections provided to the accused.[9] The Court reviewed police interrogation methods and found the methods were intended "to put the defendant in such an emotional state as to impair his capacity for rational judgment."[10] The Court stated that these procedures were used to "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights."[11] Although *Miranda* has since spawned over thirty years of debate,[12] the Court viewed its holding "not [as] an innovation in our ju-

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8. *See* Strachan v. Army Clemency & Parole Bd., 151 F.3d 1308, 1311 (10th Cir. 1998); United States v. Lin Lyn Trading Ltd., 149 F.3d 1112, 1117 (10th Cir. 1998).

9. *See Miranda*, 384 U.S. at 439; *see also* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 717, 725 (1994) (asserting that the Supreme Court intended that *Miranda* would redress the inherently coercive nature of interrogations, therefore creating an environment in which the suspect may invoke his constitutional rights.) A *Terry* stop, however, enables an officer to stop and frisk a suspect for weapons upon reasonable suspicion, rather than probable cause when the officer "has reason to believe that he is dealing with an armed and dangerous individual." Terry v. Ohio, 392 U.S. 1, 27 (1968).

10. *Miranda*, 384 U.S. at 465. Training methods stressed the use of psychological factors during interrogations. *See id.* at 448. For example, training advised that interrogations should take place in a setting unfamiliar to the suspect. *See id.* at 449–50. Questioners were to act confidently that the suspect committed the crime and direct comments as to why—and not whether—the suspect was involved. *See id.* at 450. The questioner was to blame the victim or society, and de-emphasize the "moral seriousness" of the crime. *Id.* If such "kindness and stratagems" did not work, the questioner was to rely on an "oppressive atmosphere of dogged persistence." *Id.* at 451. Training stressed that interrogation should be "steadily and without relent" for several hours. *Id.* In the most serious cases, interrogation was to last for days—with only the required breaks for food and sleep—while the police maintained an "atmosphere of domination." *Id.* Interrogators were trained that this final method may cause the suspect to talk, but that the questioner had not used duress or coercion. *See id.* Authorities should use this extended interrogation, however, only "when the guilt of the subject appear[ed] highly probable." *Id.* (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (6th ed. 1994)).

11. *Id.* at 455.

12. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV 1055, 1063, 1132 (1998) (asserting that the rate which police solve crimes, or "clearance rates," have declined because of *Miranda*, causing society to bear the costs of restricting the abilities of police to solve crimes); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 503, 562 (1998) (arguing that the effects of *Miranda* on conviction rates are negligible because *Miranda* "does not protect suspects from conviction but only from a particular method of conviction").

risprudence, but [as] an application of principles long recognized and applied in other settings."[13]

It is well settled that a suspect must receive *Miranda* warnings before custodial interrogation.[14] The Supreme Court, in *Miranda*, defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[15] Two issues are often raised in conjunction with claims of *Miranda* violations.[16] First, whether the suspect was in "custody," and second, whether the questioning rose to the level of an "interrogation."[17]

1. Custody

Custody determinations generally revolve around when—not how—authorities administered the *Miranda* warnings.[18] A police officer may stop someone based upon a "reasonable belief"[19] that a crime is being contemplated or committed; the investigation may then give the officer probable cause to make an "arrest."[20] This series of events produces difficulties in pinpointing when the contact became custodial and, therefore, when the *Miranda* warning is required.[21] In determining whether a person is in custody for the purposes of receiving *Miranda* warnings, courts look at the totality of the circumstances to determine "whether there is a 'for-

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13. *Miranda*, 384 U.S. at 442. For a comparison of pre- and post-*Miranda* confession cases, see Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996). Hancock asserts that due process focuses on excluding coerced confessions, while *Miranda* seeks to prevent them. *See id.* at 2201.

14. *See* Godsey, *supra* note 9, at 717 (stating that "*Miranda* warnings are not triggered until a police officer subjects a person to 'custodial interrogation'").

15. *Miranda*, 384 U.S. at 444.

16. *See* Godsey, *supra* note 9, at 717 (discussing the requirement that both "custody" and "interrogation" exist).

17. *See* Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 901 (1997) (stating that the right to remain silent and the right to counsel are triggered "by the simultaneous combination of custody and interrogation").

18. *See* United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981) ("There is generally no question as to the sufficiency of the [*Miranda*] warnings themselves. They are either given or they are not given.").

19. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that, upon observation of suspicious behavior, a police officer identifying herself as such, may make "reasonable inquiries." *Terry*, 392 U.S. at 30. If these inquiries do not dispel her suspicion of the danger to herself or the public, she may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons." *Id.*

20. Arrest is the curtailment of the suspect's "freedom of action." Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

21. *See, e.g.*, *Berkemer*, 468 U.S. at 440 (holding that the non-threatening nature of *Terry* stops precludes the need for *Miranda* warnings). *But see* United States v. Perdue, 8 F.3d 1455, 1466 (10th Cir. 1993) (finding that *Miranda* warnings were required in a *Terry* stop involving police questioning of an individual on an isolated road with police guns drawn); United States v. Smith, 3 F.3d 1088, 1098 (7th Cir. 1993) (finding that custody existed during a *Terry* stop, therefore triggering *Miranda*, when police removed the individual from an automobile, separated him from his companions, and placed him in handcuffs).

mal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[22]

2. Interrogation

With respect to interrogation, proscribed investigative techniques are not limited to direct questions.[23] For *Miranda* purposes, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[24]

B. *Tenth Circuit Cases*

1. *United States v. Torres-Guevara*[25]

a. *Facts*

Drug Enforcement Agency (DEA) Detective Michael Judd observed suspicious behavior by Torres-Guevara in an airport.[26] Judd followed Torres-Guevara outside the airport and saw her approached by Miguel Garcia, another passenger on the flight.[27] Judd approached the couple and, in English, identified himself as a police officer.[28] Judd then showed his DEA credentials, but neither person responded.[29] After ascertaining that they spoke and understood Spanish, Judd continued the conversation

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22. California v. Beheler, 463 U.S. 1121, 1125 (1983) (citation omitted); *see also Berkemer*, 468 U.S. at 442 (stating that in determining whether a suspect is in custody, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"); People v. Horn, 790 P.2d 816, 818 (Colo. 1990) (stating that "the test for determining whether a person is in custody is an objective one, which considers whether a reasonable person in the suspect's position would believe that he is deprived of his freedom of action in any significant way"); William F. Nagel, *The Differences Between the U.S. Supreme Court and the Colorado Supreme Court on the Test for the Determination of Custody for Purposes of* Miranda, 71 DENV. U. L. REV. 427, 427 (1994) (comparing Colorado's objective focus on feelings of freedom deprivation to the Supreme Court's focus on the atmosphere of the interrogation).

23. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnote omitted).

24. *Innis*, 446 U.S. at 301.

25. 147 F.3d 1261 (10th Cir. 1998).

26. *See Torres-Guevara*, 147 F.3d at 1262–63. The suspicious behavior involved the defendant's style of dress, body language, mannerisms, and place of departure. *See id.* at 1263. She wore a long, baggy sweatshirt over a T-shirt. *See id.* She held her hands over her stomach, "as if she was holding something in place." *Id.* She walked quickly through the airport, made no eye contact, and picked up no baggage. *See id.* Finally, she departed from Los Angeles, a "drug source" city. *Id.* at 1262; *cf.* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747, 753–54 (1997) (discussing the numerous and sometimes overlapping characteristics that are part of various "drug carrier" profiles and what profiles trigger arrest or detainment).

27. *See Torres-Guevara*, 147 F.3d at 1263.

28. *See id.*

29. *See id.*

in Spanish.[30] Without blocking their path, Judd advised them they were free to leave and then asked if he could speak to them for a minute.[31] Both consented, and "Detective Judd again asked whether they understood that they were not under arrest and that they were free to go."[32] Both indicated their understanding.[33]

Judd asked to see their identification and airline tickets.[34] Special Agent Michael Eddington joined Judd at this time.[35] Judd returned the tickets and asked if either of them were carrying drugs or large amounts of cash.[36] Garcia replied, "No."[37] Torres-Guevara did not respond.[38] Judd asked Torres-Guevara if she understood the question; again, she did not respond.[39] Judd asked for "permission to search their persons."[40] Garcia consented, and during the search Judd reiterated to Garcia that he was not under arrest.[41] Judd did not find anything on Garcia and waved him on.[42]

Judd again asked to search Torres-Guevara, but she did not respond.[43] When asked if she understood the question, again, she did not respond.[44] Judd told her that if she had drugs she should turn them over to him.[45] Sergeant Mark Whittaker joined the other two officers.[46] In Spanish, he said to Torres-Guevara, "You have drugs, don't you?"[47] She lowered her head and did not respond.[48] Whittaker asked, "Don't you?" and she replied, "Yes."[49]

Torres-Guevara indicated that the drugs were under her shirt.[50] Whittaker placed her under arrest, and they proceeded to an airport office so that a female officer could perform a search.[51] While walking to the office,

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30. *See id.*
31. *See id.*
32. *Id.*
33. *See id.*
34. *See id.*
35. *See id.* One of the elements the court considered in determining whether a consensual encounter escalated into a seizure was whether "more than one officer confronted the subject." *Id.* at 1264. Other factors included whether "the encounter occurred in a confined or nonpublic space; the officers confronting the subject were armed or uniformed; . . . the officers exhibited an intimidating or coercive demeanor; and the officers asked the subject potentially incriminating questions." *Id.*
36. *See id.*
37. *Id.*
38. *See id.*
39. *See id.*
40. *Id.*
41. *See id.*
42. *See id.* Torres-Guevara argued that because Garcia left only after being searched and after Judd "waved him on," she felt that she could not leave until she agreed to be searched. *Id.* at 1265.
43. *See id.* at 1263.
44. *See id.*
45. *See id.*
46. *See id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *See id.*
51. *See id.*

before being given a *Miranda* warning, Torres-Guevara started to cry and said, "This was my first time."[52] After they reached the office, and before a *Miranda* warning had been given, Whittaker asked if the drugs were in her stomach area.[53] She responded by removing two, kilogram-size packages of cocaine from under her shirt and placing them on the table.[54]

Torres-Guevara claimed that her admission to carrying drugs, and the statement that it was her "first time" carrying drugs, should not have been admitted at trial because officers failed to provide *Miranda* warnings before interrogating her.[55] The district court denied Torres-Guevara's motion to suppress.[56] The Tenth Circuit Court of Appeals affirmed, concluding that Torres-Guevara made the incriminating statements about carrying drugs while the encounter was still consensual and that she had volunteered, rather than responded to police interrogation, the statement that it was her "first time."[57]

b. *Decision*

At issue were the two separate statements made by Torres-Guevara, both of which came before she was given a *Miranda* warning.[58] The admissibility of these statements hinged on whether Torres-Guevara was in police custody at the time she made them.[59] The court looked at the "totality of the circumstances"[60] to determine whether Torres-Guevara was in custody[61] and reviewed *de novo* the district court's finding that she was not in custody.[62]

The Tenth Circuit concluded that the failure of the police to give the *Miranda* warnings prior to the communication of the incriminating statements was not a constitutional violation because the actions and behavior of the police did not rise to the level of custodial interrogation and, therefore, had not triggered Torres-Guevara's Fifth Amendment *Miranda* rights.[63] Because Torres-Guevara made the admission to carry-

52. *Id.*
53. *See id.*
54. *See id.* at 1263–64.
55. *See id.* at 1262.
56. *See id.*
57. *See id.* at 1266.
58. *See id.*
59. *See id.*
60. *Id.*
61. *See id.*
62. *See id.*
63. *Id.* The three types of encounters between an individual and the police identified by the Tenth Circuit are

> (1) consensual encounters which do not implicate the Fourth Amendment[;] (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity[;] and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

ing drugs during a consensual search,[64] as opposed to while in custody,[65] the *Miranda* warning was not required.[66] Additionally, the court found that Torres-Guevara's statement that it was her "first time" carrying drugs was admissible because she volunteered the statement, rather than giving it in response to police interrogation.[67]

2. *United States v. Benally*[68]

a. *Facts*

After finding a dead body near the house Benally lived in, police officers contacted Benally's mother.[69] The police asked her to come to the station and bring any members of the household present on the night the victim was killed, in the hope that someone in the household had seen or heard something helpful to the investigation.[70] The authorities interviewed Benally and his mother for twenty to thirty minutes, who then went home following the interview.[71] Later that day, the police asked

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Id. (quoting United States v. Shareef, 100 F.3d 1491, 1500 (10th Cir.1996)).

64. *See id.* at 1266. A consensual search is a search where the defendant is free to leave at any time. *See id.* An objective test of whether a reasonable person in the defendant's position would feel free to leave is applied. *See id.* at 1264 (citing United States v. Hernandez, 93 F.3d 1493, 1498 (10th Cir. 1996)).

65. *See id.* In reaching this conclusion, the court considered certain relevant factors in determining whether a search escalates into a seizure. *See id.* at 1264. These factors included: the type of setting where the encounter happened, whether the officers were armed or uniformed, whether coercive or intimidating tactics were employed, and whether potentially incriminating questions were asked. *See id.* at 1264–65; *cf.* United States v. Acklin, No. 97-6244, 1998 WL 110430 (10th Cir. Mar. 13, 1998). In *Acklin*, authorities arrested the defendant on drug charges after a consensual search outside an airport. *See Acklin*, 1998 WL 110430, at *2. Acklin argued that the encounter was custodial at the time the police approached her because the police had a "subjective but unexpressed belief they had sufficient probable cause to hold her based on the drug profile information." *Id.* She argued that because the encounter was custodial from the start, the police erred in not informing her of her *Miranda* rights when she was initially approached. *See id.* The court rejected her argument, stating: "The subjective intentions or state of mind of either the defendant or police [are] irrelevant . . . ." *Id.* at *3.

66. *See Torres-Guevara*, 147 F.3d at 1266. "*Miranda* warnings are required only when a suspect is in custody." *Id.* The court looked at the "totality of the circumstances" in finding that the defendant was not in custody. *Id.* Relevant factors included: the authorities approached the defendant in a public area, they did not prevent her from leaving, they did not produce weapons, they did not threaten the defendant, they promptly returned examined tickets and identification, and they clearly told the defendant that she was not under arrest and was free to leave. *See id.* at 1265.

67. *Id.* at 1266; *see also* United States v. Muniz, 1 F.3d 1018, 1022 (10th Cir. 1993) ("If a person voluntarily speaks without interrogation by an officer, the Fifth Amendment's protection is not at issue, and the statements are admissible.").

68. 146 F.3d 1232 (10th Cir. 1998).

69. *See Benally*, 146 F.3d at 1239.

70. *See id.*

71. *See id.* at 1239. In *California v. Beheler*, 463 U.S. 1121 (1983), the Supreme Court held that *Miranda* warnings were not required where the suspect was not placed under arrest, voluntarily came to the police station, and left without incident following a brief interview. *See Beheler*, 463 U.S. at 1121–22. In *Benally*, there was no arrest during the first meeting, the parties voluntarily came to the police station, and the interview lasted less than thirty minutes. *See Benally*, 146 F.3d at 1239.

Benally to return because his earlier statements did not make sense.[72] After being Mirandized and questioned for ninety minutes, Benally admitted to being present during the victim's murder.[73]

A jury convicted Benally of voluntary manslaughter.[74] On appeal, he claimed that the district court should have suppressed statements he made during both interviews, arguing that they were made during custodial interrogations, but before authorities informed him of his *Miranda* rights.[75]

b. *Decision*

The admissibility of the incriminating statements depended on whether Benally was in custody when he made those statements.[76] Benally argued that his initial interview was custodial.[77] Because the determination of custody is "fact intensive," the Tenth Circuit reviewed for "clear error" the district court's finding that Benally was not in custody.[78]

To determine whether Benally was in custody for *Miranda* purposes, the Tenth Circuit evaluated whether police formally arrested Benally or if the police restrained his freedom of movement to the point where it objectively appeared he was in custody.[79] The court emphasized that the presence of either of these conditions established the existence of custody for *Miranda* purposes.[80]

Benally pointed to his mother's testimony that she felt "compelled" to submit to an interview.[81] He argued that "demanding his mother's presence at the police station . . . curtailed his freedom of action as well."[82] The court, however, rejected Benally's claim because there was no testimony showing that Benally heard his mother express this sentiment at the time of her interview.[83] Benally also claimed that he was not Mirandized before the second interview.[84] After independently reviewing

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These factors led the Tenth Circuit to conclude that the defendant's *Miranda* rights were not triggered at this initial meeting. *See id.*

72. *See Benally*, 146 F.3d at 1239.
73. *See id.*
74. *See id.* at 1234.
75. *See id.* at 1238–39.
76. *See id.* at 1239.
77. *See id.* at 1238.
78. *Id.* at 1239.
79. *See id.*
80. *See id.*; *see also* California v. Beheler, 463 U.S. 1121, 1125 (1983) ("The ultimate inquiry [of whether a suspect is in custody] is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (citation omitted)).
81. *Benally*, 146 F.3d at 1239.
82. *Id.*
83. *See id.*
84. *See id.*

the record, the court rejected the argument, finding "adequate evidence to the contrary."[85]

C. *Other Circuits*

In *Torres-Guevara* and *Benally*, the Tenth Circuit rejected the defendants' claims that custodial interrogation preceded their *Miranda* warning. Other circuits also evidence a reluctance to find that custodial interrogation occurred prior to the administration of *Miranda* warnings.[86] The facts in *United States v. Yusuff*,[87] a Seventh Circuit case, are similar to those in *Torres-Guevara*.[88] In *Yusuff*, officers on drug interdiction operations approached Yusuff in an airport.[89] Yusuff answered questions and consented to a pat down search.[90] The agent felt a hard lump in her jacket pocket.[91] When asked, "What is that?" she replied, "Drugs."[92] When asked the quantity, she replied, "700 grams."[93] The authorities then took Yusuff to a less crowded area, where she opened her coat and removed a plastic bundle from underneath her clothes.[94] After opening the package, the agents arrested Yusuff and advised her of her *Miranda* rights.[95]

Yusuff sought to exclude her statement that the lump consisted of drugs, claiming that the agents were conducting a custodial interrogation and, therefore, they should have given the *Miranda* warning.[96] In rejecting this argument, the Seventh Circuit focused on the fact that the pat down was consensual and had occurred in a busy, public area.[97] Additionally, the court pointed out that "[m]oments before the pat down, the officers . . . told [the defendant] that she was not under arrest and was

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85. *Id.* The court also rejected the defendant's claim that his statements were involuntary. *See id.* The court reviewed the factors that pointed to a coerced confession, stating that a finding of coercion comes from the totality of the surrounding circumstances, with no single factor being determinative. *See id.* at 1240. The court evaluated the following factors in determining the defendant's statements at both interviews were voluntary: "(1) the age, intelligence, and education of the defendant; (2) the length of the detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of [his] constitutional rights; and (5) whether the defendant was subjected to physical punishment." *Id.* at 1239–40 (citation omitted). The court rejected the defendant's argument in part because of the non-coercive environment of the interviews and its finding that the defendant received a *Miranda* warning prior to the second interview. *See id.* at 1240.

86. *See, e.g.*, United States v. Shea, 150 F.3d 44 (1st Cir. 1998), *cert. denied*, 199 S. Ct. 568 (1998); United States v. Yusuff, 96 F.3d 982 (7th Cir. 1996).

87. *Yusuff*, 96 F.3d at 982.

88. *See* United States v. Torres-Guevara, 147 F.3d 1261, 1261–64 (10th Cir. 1998).

89. *See Yusuff*, 96 F.3d at 984.

90. *See id.*

91. *See id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *See id.* at 984–85.

96. *See id.* at 987.

97. *See id.* at 988.

free to leave."[98] The only reason Yusuff did not feel free to leave was because she knew the lump consisted of drugs and "that a reasonable person, after consenting to a brief pat down search in a busy airport, would not believe themselves in custody if an officer felt a lump (e.g., a back brace or purse) and asked what it was."[99] Therefore, the agent's "question of 'What's this?' did not turn the consensual encounter into custodial interrogation requiring the Miranda warnings."[100]

In *United States v. Shea*,[101] FBI agents arrested Shea for his part in an attempted bank robbery.[102] After his arrest, but before authorities advised him of his *Miranda* rights, Shea made several incriminating statements that prosecutors subsequently used against him at trial.[103] Shea argued that the district court should have suppressed these statements because he made them during a custodial interrogation, but before the agents advised him of his *Miranda* rights.[104] There was no dispute that Shea was in custody at the time he made the incriminating statements.[105] As for the existence of interrogation, Shea argued that the number of agents and degree of force used in his arrest was the equivalent of interrogation.[106] The court rejected this argument, however, finding that Shea's statements were "spontaneous utterances" and there was no evidence suggesting any agent tried to elicit or coerce incriminating statements from him.[107]

D. *Analysis*

The determination of whether a person is in custody, or is being interrogated, can be a "fine line."[108] The previous two cases demonstrate the Tenth Circuit's analysis in determining whether the police cross that line.[109] While these holdings do not represent new positions for the Tenth Circuit, they do represent the Tenth Circuit's continued course of nar-

98. *Id.*

99. *Id.*

100. *Id.*

101. United States v. Shea, 150 F.3d 44 (1st Cir. 1998), *cert. denied*, 199 S. Ct. 568 (1998).

102. *See Shea*, 150 F.3d at 47. Authorities charged the defendant with conspiracy to commit armed bank robbery, attempted bank robbery, use and carrying of firearms during and in relation to a crime of violence, and felon in possession of ammunition. *See id.*

103. *See id.* The following statements were made: "'How did you know I was here?'; 'Where did you come from?'; 'I should have gone home.'; 'What do you got me for, a stolen jeep?'; 'What am I going to get for bank robbery, forty years? I'll be out when I'm seventy.'" *Id.*

104. *See id.*

105. *See id.* at 48.

106. *See id.*

107. *Id.*

108. Moran v. Burbine, 475 U.S. 412, 426 (1986) ("[T]he interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." (quoting New York v. Quarles 467 U.S. 649, 656 (1984)).

109. *See* United States v. Torres-Guevara, 147 F.3d 1261, 1266 (10th Cir. 1998); United States v. Benally, 146 F.3d 1232, 1238–39 (10th Cir. 1998).

rowing the scope of *Miranda*.[110] For example, in *Torres-Guevara*, the court stated that "[a] limited number of routine questions . . . followed by a question about possession of contraband and a request to search, are not sufficient to render an otherwise consensual encounter coercive."[111] From the detainee's perspective, however, it is unlikely there is anything routine about being questioned by three plain-clothes officers outside an airport.

The Tenth Circuit has addressed the conflict surrounding *Miranda* in much the same way as courts across the country—courts continue to limit the applicability of the *Miranda* procedural protections.[112] These decisions are important because they reflect societal demands that courts be "tough on crime."[113] Because many perceive *Miranda* as impeding the ability of the police to obtain confessions, criticism of the decision has been fierce.[114] Additionally, the belief that *Miranda* was an unwarranted expansion of the Constitution,[115] has led critics to assail the decision on legal grounds.[116]

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110. *See* United States v. Leach, 749 F.2d 592, 598–99 (10th Cir. 1984) (affirming the trial court's finding that there was no custodial interrogation and, thus, no *Miranda* requirement, when the defendant chose the time and location to speak with Secret Service Agents concerning his alleged counterfeiting). *But see* United States v. Perdue, 8 F.3d 1455, 1466 (10th Cir. 1993) (stating that *Miranda* was required in a *Terry* stop in which the police questioned the individual on an isolated road with their guns drawn).

111. *Torres-Guevara*, 147 F.3d at 1265 (citation omitted).

112. A recent exception to this is *United States v. Dickerson*, No. 97-4750, 1999 WL 61200, at *1, *20–*21 (4th Cir. Feb. 8, 1999)). *See* discussion *infra* note 339.

113. Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1080 n.2 (1998); *see* Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISCIPLINARY L.J. 39, 39 (1998) (discussing how following public opinion lends legitimacy to the Court).

114. *See* Miranda v. Arizona, 384 U.S. 436, 538 (1966) (White, J., dissenting) (stating that confessions, "[p]articularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime . . . have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty"); Cassell & Fowles, *supra* note 12, at 1055 (claiming that the *Miranda* decision "handcuff[ed] the cops"); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1080–83 (1986) (criticizing *Miranda* because the Fifth Amendment only protects against self-incrimination in judicial proceedings, not during interrogation); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1978 SUP. CT. REV. 99, 106 (stating that *Miranda* was one of the Warren Court's most controversial criminal procedure decisions).

115. U.S. CONST. amend. V.

116. *See* Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 88 (1996) (stating that critics of *Miranda* consider it "judicial legislation," and that *Miranda* tactics are better suited "for a police manual than for a constitutional decision"); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 622 (1996) (stating that after *Miranda*, a movement arose to impeach Chief Justice Earl Warren and that "[t]he U.S. Department of Justice's Office of Legal Policy under the Reagan Administration characterized the decision as illegitimate in a 120 page report recommending that the Department of Justice urge the Supreme Court to overrule *Miranda* altogether").

There are two great forces working against the prospects of overruling *Miranda*. Adherence to precedence always constrains the Court, to some degree, in its subsequent decisions.[117] The second factor is far more difficult to quantify. For better or worse, *Miranda* is a part of the American culture.[118] While political, legal, and media organizations have attacked and ridiculed *Miranda*,[119] it is often the first thing an accused thinks of when dealing with the police.[120] Therefore, overruling *Miranda* could cause a popular "backlash" against police, bringing with it distrust and resentment towards law enforcement and the courts.[121]

II. WAIVER OF A DEFENDANT'S RIGHTS UNDER *MIRANDA*

A. *Background*

The Fifth Amendment protects individuals against self-incrimination in criminal matters.[122] *Miranda* emphasized the need to protect against self-incrimination during custodial interrogation, because "[a]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."[123]

Simply reciting the *Miranda* warning does not ensure the admissibility of subsequent statements by a suspect.[124] Prior to interrogation, the

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117. Although the Supreme Court has not overruled *Miranda*, the Court has extended the use of harmless error analysis to "dilute the practical effect of" *Miranda*. Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 157–58 (1991); *see also* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2036 (1996) (stating that "*stare decisis* remains far more than a mere echo in our legal culture. At the very least, it is a formidable obstacle to any court seeking to change its own law. And, of course, it still rigidly binds lower courts to much existing case law.").

118. *See* United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981) ("Most ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite [the *Miranda* warning] as well as any police officer").

119. *See* Leo, *supra* note 116, at 622 (discussing the reaction to *Miranda* by police, politicians, President Nixon, the Congress, newspaper editorials, and cartoonists).

120. *See generally* J.M. Balking, *What Is Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992). Balking discusses the status of *Miranda* in the culture and how the mass media influences public perception of legal rights. *See id.* at 1981. He reports that in Canada, Canadian motorists have demanded that they be read their *Miranda* rights. *See id.*

121. Leo, *supra* note 116, at 680.

122. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

123. Miranda v. Arizona, 384 U.S. 436, 461 (1966).

124. *See* Moran v. Burbine, 475 U.S. 412, 452–53 (1986) (Stevens. J., dissenting) (arguing that *Miranda* clearly condemns threats or trickery that cause a suspect to make an unwise waiver of his rights even though he fully understands those rights); *see also* Leo, *supra* note 116, at 621 (stating that "[a]bsent a voluntary, knowing, and intelligent waiver of the prophylactic *Miranda* warnings, any admission or confession will be excluded from evidence in subsequent trial proceedings").

police must obtain a waiver of the suspect's rights;[125] suspects must waive their rights "voluntarily, knowingly and intelligently."[126] If a waiver is absent or improper, courts will exclude subsequent evidence.[127]

A valid waiver must contain two components.[128] First, suspects must waive their rights without police coercion.[129] Additionally, a suspect must have an understanding of the "nature of the right being abandoned and the consequences of the decision to abandon it."[130] The *Miranda* court stated that the government bore the "heavy burden" of proving the validity of a waiver.[131]

A suspect's "mental illness" may affect his ability to make a valid *Miranda* waiver.[132] The mental condition of a suspect, however, does not control the "voluntariness" analysis.[133] Absent a finding of police coercion, courts will likely uphold the validity of a waiver by a mentally impaired suspect.[134]

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125. In *Miranda*, the Court carefully distinguished between statements voluntarily made to police and those brought about via interrogation:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478 (footnote omitted).

126. *Id.* at 444. In a subsequent case, the Court set out a two-tiered test for a valid waiver:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citation omitted).

127. *See Miranda*, 384 U.S. at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].") (footnote omitted); *cf.* Leo, *supra* note 116, at 621. *But see* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions and Compelled Testimony*, 93 MICH. L. REV. 929, 940 (1995) (commenting on an article which proposed that during a pretrial hearing, the government should be able to compel a suspect to give information to convict the suspect).

128. *See Moran*, 475 U.S. at 421.

129. *See id.*

130. *See id.*

131. *Miranda*, 384 U.S. at 475.

132. Colorado v. Connelly, 479 U.S. 157, 162 (1986).

133. *See Connelly*, 479 U.S. at 164.

134. *See id.* at 165. *But see* Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988) (stating that a *Miranda* waiver of a mentally ill person may be invalid if it is not made knowingly); Commonwealth v. Cephas, 522 A.2d 63, 64–65 (Pa. Super. Ct. 1987) (finding that a *Miranda* waiver was not made knowingly and was, therefore, invalid, when the defendant suffered from chronic undifferentiated schizophrenia, police knew the defendant suffered from mental illness, and the defendant "exhibited bizarre and psychotic behavior" in the detention room).

B. *Tenth Circuit Cases*

1. *United States v. Gell-Iren*[135]

a. *Facts*

FBI agents arrested Gell-Iren for possession and intent to distribute drugs.[136] According to law enforcement personnel testimony, after the arrest, an agent read Gell-Iren his *Miranda* rights in Gell-Iren's principal language, Spanish.[137] When the authorities asked Gell-Iren if he understood his rights, he replied, "Yes."[138] Gell-Iren, however, later "testified that he . . . told the agents he understood his rights 'a little bit' and that he . . . believed that his statements would not be used against him."[139]

After indicating that he understood his rights, Gell-Iren asked to speak with an agent.[140] Although Gell-Iren had not signed a waiver of rights form, he incriminated himself to the agent by stating that he had purchased the drugs, kept them in his van overnight, and delivered the drugs to his buyer.[141]

A district court jury convicted Gell-Iren of possession with intent to distribute heroin.[142] On appeal, he argued that the district court should not have admitted the post-arrest statements for two reasons.[143] First, he did not sign a form waiving his *Miranda* rights, and second, he made statements to an officer other than the one that Mirandized him.[144]

b. *Decision*

The Tenth Circuit began with Gell-Iren's claim that the trial court should have suppressed his statements because he did not sign a waiver of rights form.[145] By a preponderance of the evidence, the government had to prove that his choice to waive his rights was "free and deliberate,"

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135. 146 F.3d 827 (10th Cir. 1998).

136. *See Gell-Iren*, 146 F.3d at 829.

137. *See id. See generally* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 202–04 (1997) (reviewing approaches taken by different courts concerning language barriers when administering the *Miranda* warning).

138. *Gell-Iren*, 146 F.3d at 829.

139. *Id.* at 830. The court stated that the defendant's testimony was not credible, while the agent's testimony was credible. *Id. See generally* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 428–29 (1996) (discussing the occurrence and differentiation of lying told by police to suspects during interrogation).

140. *See Gell-Iren*, 146 F.3d at 829.

141. *See id.* at 830.

142. *See id.* at 829.

143. *See id.*

144. *See id.*

145. *See id.* at 830.

and not the product of "intimidation, coercion, or deception."[146] The court explained that a waiver is only required to be "clear," it need not be express.[147]

The court stated that "[w]here a defendant's actions clearly demonstrate that he . . . voluntarily waived his *Miranda* rights, his failure to sign a waiver of rights form does not render his waiver involuntary."[148] In this case, two actions by Gell-Iren were relevant to the court in determining that his waiver was voluntary.[149] First, he indicated that he understood his rights and the authorities informed him of them, and second, he gave information to the agents even though he knew he was not required to provide such information.[150]

Gell-Iren's also claimed that the district court should have suppressed his statements because the authorities did not re-*Mirandize* him after a new questioner substituted the original questioner—the one who provided the initial *Miranda* warning.[151] The court disagreed, stating that Gell-Iren "must have known that his rights had not materially changed" due to the existence of a new questioner[152] and that a "*Miranda* warning does not lose its efficacy if a defendant is warned by one officer and then interrogated by another."[153]

2. *United States v. Bautista*[154]

a. *Facts*

On April 5, 1996, FBI Special Agents Leggitt and Kohl interviewed Bautista in his home regarding the murder of Bautista's friend.[155] On June 26, 1996, Leggitt and FBI Special Agent Schum returned to Bautista's home and requested that he accompany them to the police department for further discussions.[156] FBI Special Agent Langenberg joined the questioning at the station.[157]

The agents told Bautista that they believed he knew more about the victim's death than he previously indicated, and that they wanted to find out "what really happened."[158] Bautista's story, however, remained consis-

146. *Id.* (quoting United States v. Johnson, 42 F.3d 1312, 1318 (10th Cir. 1994)).
147. *Id*; *see infra* note 248.
148. *Gell-Iren*, 146 F.3d at 830 (citing United States v. Austin, 933 F.2d 833, 835–36 (10th Cir. 1991)).
149. *See id.*
150. *See id.*
151. *See id.*
152. *Id.* at 830–31 (quoting United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995)).
153. *Id.* at 831 (quoting *Andaverde*, 64 F.3d at 1312).
154. 145 F.3d 1140 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 255 (1998).
155. *See Bautista*, 145 F.3d at 1143.
156. *See id.* at 1143–44.
157. *See id.* at 1144.
158. *Id.*

tent.[159] Leggitt then told Bautista, "This is really serious. We need the truth, and before we do that we need to advise you of your rights."[160] Leggitt read Bautista's *Miranda* rights.[161] Bautista "refused to sign the waiver of rights form and stated that he did not want to answer any more questions."[162] Bautista agreed to be fingerprinted and, after the other agents departed, Schum continued the questioning.[163]

Bautista admitted to being present when the victim died.[164] He then told Schum that he didn't want to say anything else until he had spoken with a lawyer.[165] The authorities fingerprinted Bautista and took him home.[166] On July 2, 1996, agents arrested Bautista and brought him in for more questioning.[167] Leggitt again read Bautista his *Miranda* rights.[168] Bautista waived his rights and agreed to answer questions.[169] Bautista confessed to stabbing the victim and signed a confession written out by Agent Leggitt.[170]

A jury convicted Bautista of second-degree murder.[171] On appeal, Bautista argued that the district court should have suppressed his June 26[172] and July 2 statements.[173] Bautista sought to have his July 2 confession suppressed because his *Miranda* waiver was involuntary.[174] He claimed that

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159. *See id.*
160. *Id.*
161. *See id.*
162. *Id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.* at 1144–45.
171. *See id.*
172. *See id.* Bautista argued that the trial court should have suppressed his June 26 statements because police officers violated his rights by continuing the interrogation after he expressly invoked his right to remain silent under *Miranda*. *See id.* Furthermore, he argued that once he invoked his right to counsel on June 26, under *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), police should have refrained from further interrogation until they supplied him counsel. *See Bautista*, 145 F.3d at 1145. *Edwards* held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. 484–85 (footnote omitted).

173. *See Bautista*, 145 F.3d at 1145.
174. *See id.* The defendant also asserted that the July 2 confession was inadmissible as "fruit of the poisonous tree." *Id.* For a discussion of this doctrine in relation to *Miranda*, see Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 302 (1996) (arguing that the doctrine applies only to constitutional violations, not *Miranda* violations).

his July 2 waiver was invalid because he had invoked his *Miranda* rights on June 26, but police continued the interrogation without providing counsel.[175] He argued that in the absence of the requested counsel he could not properly or voluntarily waive his rights on July 2 prior to his confession.[176]

b. *Decision*

The relevant issue before the court centered on the validity of Bautista's *Miranda* waiver on July 2.[177] Bautista argued that his July 2 waiver was involuntary and therefore invalid because the authorities denied him counsel after invoking his *Miranda* right to such counsel on June 26.[178] The court found that because Bautista was never in custody on June 26, his invocation of *Miranda* was ineffective.[179] Accordingly, the court only analyzed whether Bautista made the waiver voluntarily and knowingly.[180] The court stated that for a waiver to be voluntary, the totality of the circumstances must show that "(1) the waiver was a product of a free and deliberate choice rather than intimidation, coercion, or deception, and (2) the waiver was made in full awareness of the nature of the right being waived and the consequences of waiving."[181]

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175. *See Bautista*, 145 F.3d at 1145.

176. *See id.*

177. *See id.* at 1148. The Tenth Circuit also analyzed whether the trial court should have suppressed Bautista's July 26 statements. *See id.* at 1145. The appeals court stated that "[a]bsent either a custodial situation or official interrogation, *Miranda* and *Edwards* are not implicated," and that "any statement given in violation of the rules established in these cases cannot be introduced as evidence in the state's case-in-chief." *Id.* at 1147–48. Bautista argued that the interrogation became custodial when he was Mirandized on June 26. *See id* at 1147–48. Therefore, *Edwards* should have barred the July 2 interrogation. *See id.* at 1145. The government argued that because Bautista was not in custody on June 26, *Miranda* was not applicable, and that the agent's unnecessary advisement of *Miranda* had no bearing. *See id.* at 1145–46.

The Tenth Circuit stated that "although giving a *Miranda* warning does not, in and of itself, convert an otherwise non-custodial interrogation into a custodial interrogation, it is a factor to be considered by the court." *Id.* at 1148 (citing United States v. Lewis, 556 F.2d 446, 449 (6th Cir. 1977)). In *Lewis*, the Sixth Circuit held that the giving of *Miranda* rights does not produce a custodial interrogation. *See Lewis*, 556 F.2d at 449 ("The precaution of giving *Miranda* rights in what is thought could be a non-custodial interview should not be deterred by interpreting the giving of such rights as a restraint on the suspect, converting a non-custodial interview into a custodial interrogation for *Miranda* purposes."). The Tenth Circuit expressed concern that the interrogation may have become custodial, but stated "we decline to discuss this issue further since our result would be the same under either conclusion." *Bautista*, 145 F.3d at 1149.

The Tenth Circuit found that Bautista's interrogation on July 2 did not violate *Edwards*. *See id.* at 1150. Custodial interrogations are by nature coercive, and *Edwards* was intended to prevent police from continually harassing and questioning a suspect in custody who has invoked his right to have an attorney present. *See id.* Because Bautista was released for a significant amount of time between interrogations, however, the coercive atmosphere dissipated, and *Edwards* was not violated. *See id.*

178. *See Bautista*, 145 F.3d at 1145.

179. *See id.* at 1150; *see also* discussion *supra* note 177.

180. *See Bautista*, 145 F.3d at 1150.

181. *Id.* at 1149.

The court noted that according to the record, only twenty minutes passed between the time agents arrested Bautista and when they administered the *Miranda* warning,[182] and that it was only another eighty minutes until the authorities finished taking his confession.[183] The court stated that there was no indication of intimidation, coercion, or deception on the part of the authorities and, therefore, held that Bautista waived his rights "voluntarily and knowingly."[184]

C. *Other Circuits*

In *United States v. Salameh*,[185] FBI agents arrested appellant Abouhalima for his role in the bombing of the World Trade Center Complex in New York City.[186] Subsequent to his arrest and after agents advised him of his rights,[187] Abouhalima agreed to answer the agents' questions.[188] During the interrogation he made incriminating statements linking him to the bombing.[189] Abouhalima was convicted in district court and, on appeal, argued that his waiver was invalid because it came after he had endured ten days of torture in Egypt.[190] The Second Circuit rejected this argument, stating that Abouhalima was not entitled to a suppression hearing because there was no evidence that agents of the United States engaged in coercive tactics.[191] Although it was possible that actions taken by Egyptian police weakened Abouhalima's mental state, courts are not required to look at a defendant's motivation for speaking when the actions of U.S. officials are not at issue.[192] Because Abouhalima did not allege physical or mental coercion by U.S. agents during the interview when he made the incriminating statements, the court found no constitutional violation.[193]

In *United States v. Schwensow*,[194] Schwensow argued against the validity of his *Miranda* waiver because the effects of alcohol withdrawal and anti-anxiety medication prevented the waiver from being knowing and voluntary.[195] After a five-week drinking binge, Schwensow sought

182. *See id.*

183. *See id.* The court's reasoning seemed to suggest that police did not have time to coerce or force a confession from the defendant.

184. *Id.*

185. 152 F.3d 88 (2nd Cir. 1998), *cert. denied sub nom.*, Abouhalima v. United States, 119 S. Ct. 885 (1999).

186. *See Salameh*, 152 F.3d at 105.

187. *See id.*

188. *See id.* at 117.

189. *See id.*

190. *See id.* The defendant argued that the district court's failure to hold a suppression hearing violated his Fifth and Sixth Amendment rights. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. 151 F.3d 650 (7th Cir. 1998).

195. *See Schwensow*, 151 F.3d at 660.

out a detoxification center.[196] Unable to remember the name or address of a previously recommended center, he visited a nearby Alcoholic Anonymous office.[197] Volunteers staffed the office, which served only as a telephone hotline.[198] A volunteer helped Schwensow locate a detoxification center and agreed to drive Schwensow to the center.[199] Schwensow asked if they could stop at a friend's house on the way in order to drop off a duffel bag he was carrying.[200] To prevent Schwensow from getting sidetracked, the volunteer offered to store the bag at the office until Schwensow completed his detoxification.[201] After taking him to the center, the volunteers opened the duffel bag, fearing it contained contraband.[202] They found a semi-automatic pistol, sawed-off shotgun, and various burglary paraphernalia.[203] The staff notified the authorities, who arrested Schwensow at the detoxification center on an outstanding warrant.[204] Schwensow waived his *Miranda* rights after receiving them from the police, and denied ownership of the weapons found in the bag.[205] After spending the next day in the hospital Schwensow was again questioned.[206] He received and waived his *Miranda* rights again, and told the detective that "the items in the bag were his and that he had intended to sell them."[207] Upon review of the record, the court found that Schwensow's argument that "delirium tremens, blackouts, and hallucinations" rendered his waiver invalid was not supported by fact.[208] The court concluded that Schwensow was not impaired and that his waiver was therefore valid.[209]

In *United States v. Peck*,[210] law enforcement officers arrested appellant Peck for possession with intent to distribute drugs.[211] After the

196. *See id.* at 652.
197. *See id.*
198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.* at 653.
203. *See id.*
204. *See id.*
205. *See id.* Schwensow then denied a request to search his apartment and stated that he was "dying of a progressive liver disease." *Id.* Although he never expressly invoked his right to silence, the police officer took the combination of responses to mean that Schwensow did not want to talk about the case. *See id.* at 658 n.5. The district court concluded that Schwensow invoked his right to silence, and the circuit court followed the district court's finding. *See id.*
206. *See id.* at 653.
207. *Id.*
208. *Id.* at 660.
209. *See id.* The court also held that questioning Schwensow on December 1, thirty-six hours after he invoked his *Miranda* rights, was not a violation because police waited a significant amount of time between interrogations and provided a fresh set of *Miranda* warning before the second interrogation. *See id.* at 658; *cf.* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that police may recommence interrogation if the defendant's original request to cease questioning was "scrupulously honored").
210. United States v. Peck, 161 F.3d 1171 (8th Cir. 1998).
211. *See Peck*, 161 F.3d at 1172–73.

authorities Mirandized and took Peck into custody, he signed a "'statement of cooperation' which stated that he was aware of his right to speak with an attorney and that he could stop cooperating at any time."[212] Peck incriminated himself,[213] and the district court utilized these statements were to categorize him as a "career offender."[214] Peck claimed that because he did not know the possible "adverse impact his statements could have on sentencing,"[215] his waiver was not "intelligent and knowledgeable," and was therefore invalid.[216] The Eight Circuit rejected Peck's claims, stating that "[l]ack of awareness of the potential adverse impact of statements is not sufficient in itself to invalidate a waiver of the right to counsel."[217]

In general, circuit court's were more likely to find a waiver invalid in cases where the defendant's mental capabilities were at issue or where a defendant's right to remain silent was not "scrupulously honored."[218] In *United States v. Garibay*,[219] the Ninth Circuit reversed and remanded Garibay's drug conviction because the prosecution did not show that Garibay knowingly and voluntarily waived his *Miranda* rights.[220] Customs agents arrested Garibay at the U.S.-Mexico border after finding approximately 135 pounds of marijuana in a hidden compartment in his car.[221] Two agents questioned the defendant after he waited in a holding cell for approximately one hour.[222] They asked Garibay if he understood English.[223] He replied, "Yes," and an agent read Garibay his *Miranda*

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212. *Id.* at 1173.

213. Peck incriminated himself by discussing his involvement with drug sales prior to his arrest. *See id.* This included receiving several shipments of methamphetamine, each weighing over eight ounces, and receiving one thousand pounds of marijuana. *See id.*

214. *Id.* To meet the requirements for a career offender, a defendant must have at least two prior felonies involving violence or controlled substances within the last ten years. *See id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.2, 4B1.1 (1997). He was sentenced for two other drug convictions, in September 1986 and July 1995. *See Peck*, 161 F.3d at 1173. Based on his incriminating statements, the district court concluded that his conduct in relation to the instant offense had begun in early 1996, thereby qualifying him as a career offender. *See id.*

215. *Peck*, 161 F.3d at 1173–74.

216. *Id.* at 1173. Peck also argued that his statements should have been suppressed because he was tired after a long bus ride before he met the police and that officers suggested he would receive leniency if he cooperated. *See id.*

217. *Id.* The court also rejected Peck's argument that his statements were involuntary, because he did not show that his will was "overborne." *Id.* at 1174 (citing United States v. Meirovitz, 918 F.2d 1376, 1379 (8th Cir. 1990) ("The appropriate test for determining the voluntariness of a confession is whether, in light of the totality of the circumstances, pressures exerted upon the suspect have overborne his will." (internal quotation marks omitted))).

218. Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that police may recommence interrogation if the defendant's original request to cease questioning was "scrupulously honored").

219. 143 F.3d 534 (9th Cir. 1998).

220. *See Garibay*, 143 F.3d at 537.

221. *See id.* at 536.

222. *See id.*

223. *See id.*

rights in English.[224] After orally waiving his rights,[225] Garibay made incriminating statements.[226] On appeal, Garibay successfully argued that his waiver was invalid because of his "limited-English skills and low mental capacity."[227] The court stated that the prosecution bears the burden of proving that Garibay waived his *Miranda* rights knowingly and intelligently.[228] In finding that the prosecution failed to meet its burden, the court pointed to Garibay's "English-language difficulties, borderline retarded IQ, and poor verbal comprehension skills."[229]

In *United States v. Tyler*,[230] the authorities arrested Tyler for murdering a government informant the day before she was supposed to testify against his brother.[231] Police read Tyler his *Miranda* warning, and Tyler said that he did not wish to make a statement.[232] Police ceased interrogation, transferred him from the station to the barracks, and placed him in a small room at approximately 10:00 P.M.[233] On the walls was a "timeline of the murder investigation and crime scene photographs, including two photographs of the body of [the victim] (one of which was in color)."[234] Police spoke with Tyler about his education, his mother's health, hunting, and other subjects until approximately 10:55 P.M.[235] At that time Tyler began to cry, and an officer in the room told him to "tell the truth."[236] After an officer re-Mirandized Tyler, he gave incriminating statements.[237] The police obtained another incriminating statement from Tyler on July 20,[238] after what the government claimed were repeated *Miranda* warnings and Tyler's oral waiver of his rights.[239] Tyler argued that the trial court should have suppressed his 10:55 P.M. statement on July 9 and his July 20 statement because they came after he invoked his right to remain silent.[240] The Third Circuit stated: "The appropriate inquiry under *Miranda* and its progeny, however, is not simply whether Tyler knowingly waived his rights after receiving appropriate warnings.

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224. *See id.*

225. *See id.* The court chastised the government's policy against using written waivers in either English or Spanish at the border. *See id.* at 540.

226. *See id.* at 536. The defendant's incriminating statements included that he was paid one-hundred dollars to drive the car across the boarder and leave it at an arranged drop off location. *See id.* at 536 n.2.

227. *Id.* at 536.

228. *See id.* The burden must be proven by a preponderance of the evidence. *See id.*

229. *Id.* at 538.

230. 164 F.3d 150 (3rd Cir. 1998).

231. *See Tyler*, 164 F.3d at 151–52.

232. *See id.* at 152.

233. *See id.*

234. *Id.* at 153.

235. *See id.* at 152.

236. *Id.* at 155.

237. *See id.* Tyler incriminated himself by saying that his brother wanted to kill the victim. *See id.*

238. *See id.*

239. *See id.* This time, Tyler stated that his brother only wanted to scare the victim. *See id.*

240. *See id.* at 152.

Rather, the inquiry is whether the police 'scrupulously honored' Tyler's assertion of his right to remain silent."[241] The court overruled the district court's admission of the July 9 statements because the "mantra-like recitation of *Miranda* warnings" and command to "tell the truth" were the "antithesis of scrupulously honoring Tyler's right to remain silent."[242] Additionally, the court stated that the record did not allow it to determine the validity of Tyler's alleged waiver on July 20.[243] The court took exception to the district court's statements that "there is nothing in the record to support an argument that Defendant's waiver was not knowingly made."[244] This suggested that the district court improperly reversed the burden to Tyler to show the invalidity of his *Miranda* waiver.[245]

D. *Analysis*

One cannot overstate the value of a confession for the prosecution.[246] Therefore, it is not surprising that *Miranda*'s requirement that police obtain a waiver before trying to illicit a confession has been assailed as interfering with the efforts of law enforcement.[247] Recent Supreme Court decisions have made it easier for police to obtain *Miranda* waivers.[248] As evidenced in the Tenth Circuit cases discussed in this section, if the record does not show coercion or manipulation, the likelihood of having a waiver overturned on review is slight.[249]

The previous cases demonstrate three significant aspects to the validity of a *Miranda* waiver. First, a waiver does not require a signed affirmation by the suspect.[250] Second, a suspect can neither invoke nor

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241. *Id.* at 154.

242. *Id.* at 155.

243. *See id.* at 152.

244. *Id.* at 156 (citation omitted).

245. *See id.*

246. *See* Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting) ("The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.").

247. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV 387, 389 (1996) (arguing that *Miranda* leads to fewer confessions and, therefore, harms the efforts of law enforcement).

248. *See* Davis v. United States, 512 U.S. 452, 454, 559 (1994) (holding that suspect's statement, "Maybe I should talk to a lawyer," did not trigger his *Miranda* right to counsel because any such invocation must be sufficiently clear "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney"); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that waiver was valid even though suspect refused to sign a waiver because "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated").

249. *See* United States v. Gell-Iren, 146 F.3d 827, 830 (10th Cir. 1998); United States v. Bautista, 145 F.3d 1140, 1146–50 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 225 (1998).

250. *See Gell-Iren*, 146 F.3d at 830; *see also* discussion *supra* note 148 and accompanying text.

waive his rights unless custodial interrogation exists.[251] Finally, for a waiver to be valid, the prosecution must show by a preponderance of the evidence that it was made voluntarily and knowingly.[252]

The Tenth Circuit's holdings in the previous cases are consistent with its previous decisions.[253] These decisions do not represent new law, but are examples of the court applying old law to new fact situations. The court is attuned to the uneasiness created when a defendant's confession or incriminating statement is not admitted due to a "technicality."[254] Given societal attitudes towards criminals, the court's unwillingness to exclude confessions or incriminating statements in these situations is not surprising.[255]

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. *Background*

The Sixth Amendment[256] has long been interpreted to provide counsel to defendants for criminal proceedings in the federal courts.[257] In *Gideon v. Wainright*,[258] the Supreme Court held that the right to counsel is fun-

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251. In other words, the suspect that confesses during a consensual meeting with police will not be successful in arguing that he never waived his rights. *See, e.g.*, *Bautista*, 145 F.3d at 1148–49; *see also* discussion *supra* note 177.

252. *See Gell-Iren*, 146 F.3d at 830. *But see* Leo, *supra* note 116, at 659–60 (stating that "the *Miranda* waiver is not always automatically obtained but often becomes an act of consent negotiated as police detectives employ subtle psychological strategies to predispose a suspect toward voluntarily waiving his or her *Miranda* warnings").

253. *See, e.g.*, United States v. Hernandez, 93 F.3d 1493, 1503 (1996) (holding that an interpreter's failure to translate "waive" did not invalidate the defendant's waiver); United States v. March, 999 F.2d 456, 460 (1993) (holding that waiver was valid where police read and explained the waiver form to an illiterate defendant); United States v. Hack, 782 F.2d 862, 866 (1986) (holding that waiver was valid when a mentally alert defendant had been given Novocain for pain caused by a gunshot wound to the mouth).

254. *See* Cassell & Fowles, *supra* note 12, at 1057–58 (citing a number of negative reactions to the Supreme Court's decision in *Miranda*); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1525 n.183 (1996) (discussing the extreme negative public reaction for letting "bad guys" escape punishment due to a "technicality").

255. *See* McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) ("Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." (internal quotation marks omitted)). *See generally* Norman J. Finkel, *Commonsense Justice, Psychology, and the Law: Prototypes That Are Common, Senseful, and Not*, 3 PSYCHOL. PUB. POL'Y & L. 461, 461–64 (1997) (supporting "commonsense justice" by disaggregating and examining prototypes held within different segments of society); Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?*, 47 AM. U. L. REV. 1221, 1228–37 (1998) (discussing the public and private costs of crime and how rising crime leads to vigilantism).

256. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. XI.

257. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)).

258. 372 U.S. 335 (1963).

damental, applying to the states through operation of the Due Process Clause of the Fourteenth Amendment.[259] Therefore, the government must provide counsel for indigent defendants in all felony prosecutions.[260] Additionally, absent waiver, an indigent defendant may only be sentenced to jail time in misdemeanor or petty offense cases if counsel represented him at trial.[261]

The Sixth Amendment right to counsel applies automatically once a person is indicted and requires the presence of counsel during any encounter where the government attempts to elicit information from the defendant.[262] There can be no deliberate attempt to gather incriminating information from a defendant without counsel unless the defendant waives the right.[263] In comparison, the right to counsel established in *Miranda* derives its authority from the Fifth Amendment.[264] However, the *Miranda* right is not a constitutional requirement, but rather a procedural safeguard designed to protect a suspect's rights.[265] Moreover, the suspect must invoke it.[266]

Courts analyze Sixth Amendment waivers under similar standards to those used to assess *Miranda* waivers.[267] An individual must waive her rights "voluntarily, knowingly, and intelligently."[268] Similar to the *Edwards* rule,[269] if police initiate interrogation after a defendant invokes his

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259. *See Gideon*, 372 U.S. at 342. Section One of the Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

260. *See Gideon*, 372 U.S. at 342.

261. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

262. *See* Massiah v. United States, 377 U.S. 201, 205–06 (1964).

263. *See Massiah*, 377 U.S. at 206.

264. *See* Miranda v. Arizona, 384 U.S. 436, 444, 469 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

265. *See id.* (stating that the warnings are "procedural safeguards" to be used "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *cf.* Daniel C. Nester, *Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning*, 16 S. ILL. U. L.J. 101, 103 (1991).

266. *See* Davis v. United States, 512 U.S. 452, 460 (1994) (holding that the right to counsel in not triggered until the suspect "unambiguously" invokes the right); Towne v. Dugger, 899 F.2d 1104, 1107 (11th Cir. 1990) ("The threshold inquiry with regard to the waiver of the right to counsel is whether the right to counsel was in fact invoked."); *cf.* Marcy Strauss, *Reinterrogation* 22 HASTINGS CONST. L.Q. 359, 365 (1995) (stating that "*Miranda* required that after a suspect invokes her rights, the questions must cease").

267. *Cf.* Patterson v. Illinois, 487 U.S. 285, 292–93 (1988) (holding that where a *Miranda* warning was sufficient to permit waiver of the Fifth Amendment right to counsel, it was also sufficient to permit waiver of the Sixth Amendment right to counsel at the same time).

268. Brewer v. Williams, 430 U.S. 387, 403 (1977).

269. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) ("[A]n accused . . ., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the

Sixth Amendment right to counsel, the waiver is invalid, and any incriminating statements obtained after a waiver are inadmissible.[270]

The Sixth Amendment right to counsel is both narrower and broader than the right to counsel under the Fifth Amendment.[271] The Sixth Amendment's coverage is broader because it applies to any "critical stage"[272] of the judicial process, rather than only to custodial interrogation.[273] However, it is narrower because the Fifth Amendment right to counsel applies to interrogation for any suspected crime, whether or not the adversarial relationship for that crime has been initiated.[274]

B. *Tenth Circuit Cases*

1. *Strachan v. Army Clemency & Parole Board*[275]

a. *Facts*

Appellant Strachan had served two years of a six-year sentence for attempted kidnapping when he was paroled in 1992.[276] Four years later he was convicted of assault, for which he served ninety days in the city jail.[277] Based on his assault conviction and other parole violations, the authorities revoked Strachan's parole, returned him to prison.[278] Additionally, the credit[279] Strachan received towards his six-year sentence was revoked.[280] Strachan argued that his assault conviction was void under the Sixth Amendment because he did not have counsel for his defense.[281]

b. *Decision*

The Tenth Circuit stated that Strachan had a right to counsel under *Gideon*[282] and that absent an indication of counsel or an effective waiver,

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authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."); *cf.* Solem v. Stumes, 465 U.S. 638, 641 (1984) (articulating the *Edwards* rule as "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him").

270. *See* Michigan v. Jackson, 475 U.S. 625, 628, 636 (1986).

271. *See* McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

272. Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (stating that the Sixth Amendment right to counsel can be triggered "by way of formal charge, preliminary hearing, indictment, information, or arraignment").

273. United States v. Wade, 388 U.S. 218, 220 (1967); *see also McNeil*, 501 U.S. at 178.

274. *See McNeil*, 501 U.S. at 178; discussion *infra* note 306 and accompanying text.

275. 151 F.3d 1308 (10th Cir. 1998).

276. *See Strachan*, 151 F.3d at 1310–11.

277. *See id.* at 1311.

278. *See id.*

279. The credit for parole is commonly known as "street time." *Id.* at 1310.

280. *See id.* at 1311.

281. *See id.* The defendant also claimed that the district court erred in allowing his unconstitutional conviction to be a basis for the revocation of his street time. *See id.*

282. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment applies to the states as well as the federal government).

there exists a presumption that the right to counsel was denied.[283] Where an entitled defendant is denied counsel, any conviction is presumptively void.[284]

The court indicated that the certified record of Strachan's conviction contained blanks where either defense counsel was supposed to sign or where the judge was supposed to indicate waiver of counsel.[285] The court stated that an inconclusive record is equivalent to a silent one and, therefore, found that Strachan was not represented by counsel.[286] The appellate court vacated the district court's decision and remanded the case for proceedings consistent with the appellate decision.[287]

2. *United States v. Lin Lyn Trading, Ltd.*[288]

a. *Facts*

Appellee Thomas and his wife owned co-appellee Lin Lyn Trading, an import company targeted by Customs agents.[289] As a result of an informant's tip, on February 22, 1991, agents searched Lin Lyn's offices and seized many documents.[290] Five weeks later, Customs inspectors at the Portland International Airport detained Thomas as he returned from a trip to Asia.[291] The inspectors conferred via telephone with Customs agents in the Portland office about the investigation and proceeded to inspect documents he was carrying.[292] Included in these documents was a yellow legal pad which Customs officials subsequently seized, despite Thomas's claim that the pad contained notes of his conversations with his attorney.[293]

The defendants requested the notepad's return, but an Assistant United States Attorney ordered the material sealed.[294] The investigation continued, and in 1993 appellees were notified that they could make a motion for return of the notepad pursuant to Federal Rule of Criminal Procedure 41(e).[295] On September 7, 1994, the district court granted the

283. *See Strachan*, 151 F.3d at 1311.
284. *See id.*
285. *See id.*
286. *See id.* (citing Oswald v. Crouse, 420 F.2d 373, 374 (10th Cir. 1969)).
287. *See id.* at 1310.
288. United States v. Lin Lyn Trading, Ltd., 149 F.3d 1112 (10th Cir. 1998).
289. *See Lin Lyn*, 149 F.3d at 1113.
290. *See id.*
291. *See id.*
292. *See id.*
293. *See id.*
294. *See id.*
295. *See id.* Federal Rule of Criminal Procedure 41(e) states:
Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of

motion finding that "its seizure was unlawful and the government's continued possession of privileged attorney-client communications would cause the defendants irreparable injury."[296]

The defendants were indicted for conspiracy to defraud the United States, smuggling goods, and unlawful entry of goods.[297] Less than one week after the indictment, the government returned the notepad.[298] The district court dismissed the indictment based, in part, on the magistrate's finding that the "government's deliberate intrusion into the attorney-client relationship" violated the defendants' Fifth and Sixth Amendment rights.[299]

b. *Decision*

The Tenth Circuit reviewed the decision to dismiss the indictment for "abuse of discretion."[300] The appellate court noted the lower court's determination that the notepad's seizure "violated the Fourth Amendment and that, because of the use of tainted evidence, the Sixth Amendment right to counsel was violated immediately upon return of the indictment."[301] However, the Tenth Circuit, citing *Maine v. Moulton*,[302] ruled that there was no Sixth Amendment violation and that the district court erred in dismissing the indictment.[303]

In reversing the dismissal of the indictment, the Tenth Circuit noted that the Customs officials seized the notepad in 1991, but the government did not issue an indictment until 1994.[304] Therefore, the defendant's right to counsel was not violated[305] because the right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings."[306]

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fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

FED. R. CRIM. P. 42(e).

296. *Lin Lyn*, 149 F.3d at 1114.

297. *See id.*

298. *See id.*

299. *Id.* at 1115. The district court held that the actions of the government agents violated the defendants' Fifth Amendment right to due process and a fair trial, and therefore, it dismissed the indictment. *See id.* at 1117–18. The Tenth Circuit reversed because "the district court's failure to consider alternative adequate remedies was an abuse of its discretion." *Id.* at 1118.

300. *Id.* at 1116.

301. *Id.* at 1117.

302. Maine v. Moulton, 474 U.S. 159, 180 & n.16 (1985) (stating that information obtained in violation of the Sixth Amendment was not admissible in a case where an indictment had not been handed down, but information was admissible if the Sixth Amendment right had not yet attached).

303. *See Lin Lyn*, 149 F.3d at 1117.

304. *See id.* at 1118.

305. *See id.* at 1117.

306. *Id.* The court cited *Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality opinion), for its dictum that

C. *Other Circuits*

In *United States v. McLaughlin*,[307] the defendant was on trial for his role in the shooting of a government informant.[308] After prosecutors cross-examined McLaughlin, the court took a fifteen-minute recess.[309] The court told the defense counsel that she could redirect after the recess and, at the prosecutor's request, ordered the attorney not to speak to McLaughlin during the break about anything he had said during that day's testimony.[310] After the recess, defense counsel stated that she had no redirect, adding:

> I did think to myself what other areas I might want to explore with [the defendant]. I have identified other areas, and I would be prepared to consult with him on that. But given the Court's ruling, I am not permitted to do that, so I have no further questions.[311]

McLaughlin was convicted on multiple counts and, on appeal, argued that his Sixth Amendment right to counsel was violated when the court ordered his attorney not to talk to him during the fifteen minute recess between his cross-examination and redirect.[312] The D.C. Circuit discussed similar cases involving recesses of varying lengths[313] and held that preventing McLaughlin from talking to his attorney during the brief recess was not a Sixth Amendment violation.[314] The court stated that the trial judge has the sole discretion to order a recess during the testimony

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> [t]he initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689–90. On the other hand, *Miranda v. Arizona*, 384 U.S. 436 (1966), stated:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries.

Id. at 477.

307. 164 F.3d 1 (D.C. Cir. 1998).

308. *See McLaughlin*, 164 F.3d at 3.

309. *See id.*

310. *See id.*

311. *Id.*

312. *See id.* at 1.

313. *Compare* Perry v. Leeke, 488 U.S. 272, 283–85 (1989) (holding no Sixth Amendment violation where discussion was barred during a fifteen minute recess between the defendant's direct and cross), *with* Geders v. United States, 425 U.S. 80, 91 (1976) (stating that preventing communication over a seventeen hour recess was a Sixth Amendment violation), *and* Mudd v. United States, 798 F.2d 1509, 1515 (D.C. Cir. 1986) (stating that preventing communication over the weekend was a Sixth Amendment violation).

314. *See McLaughlin*, 164 F.3d at 4–5.

of a witness.[315] Addressing McLaughlin's argument that the existence of the recess allowed him to consult with his attorney about his testimony, the court stated: "We cannot hold that Sixth Amendment rights turn on such happenstance. It cannot be the law that the right to counsel attaches on the fortuity of a recess before defendant's redirect when there is no right to such a recess."[316]

In *United States v. Walker*,[317] appellant Quinn was involved in a car chase with police.[318] After Quinn crashed his car and escaped on foot, the police impounded the car and found a loaded 9mm semiautomatic handgun.[319] An investigation led to Quinn's arrest for possession of a firearm by a convicted felon.[320] At trial, an acquaintance of Quinn's, Lamond Walker, testified that he, not Quinn, had been driving the car.[321] Police suspected that Quinn suborned perjury from Walker and enlisted Quinn's cellmate for assistance.[322] Quinn made incriminating statements to the cellmate, leading to an against Walker for perjury and against Quinn for subornation of perjury.[323] Quinn claimed these statements violated his Sixth Amendment right to counsel.[324] The court noted that Quinn was not indicted for subornation of perjury until nearly eight months after his statements to his cellmate.[325] Because the right to counsel does not attach until the initiation of an adversarial process, the court rejected Quinn's argument.[326]

In *Rogala v. District of Columbia*,[327] a police officer stopped an automobile operated by Rogala and conducted a field sobriety test.[328] During the administration of the test, the police officer prevented Rogala

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315. *See id.* at 5. The court noted that when a defendant acts as a witness the rules that apply to other witnesses generally apply to him as well. *See id.*

316. *Id.*

317. 148 F.3d 518 (5th Cir. 1998).

318. *See Walker*, 148 F.3d at 520.

319. *See id.*

320. *See id.*

321. *See id.* The jury deadlocked in the first trial. *See id.* On re-trial, Quinn was convicted, although Walker again testified that he had been driving the car during the chase. *See id.* at 520–21.

322. *See id.* at 521. The cellmate was asked to be "attuned" to anything Quinn might say about his trial, but "not to initiate any conversation" with him. *Id.*

323. *See id.* Quinn told his cellmate "he should not be in jail because his 'home boy' had 'stood up in court and took the rap for him being in the car.'" *Id.* The cellmate then asked Quinn if he was driving the car during the chase, to which Quinn replied that he was, but that "his 'home boy' had claimed to be the driver." *Id.*

324. *See id.* In *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that the defendant's Sixth Amendment right to counsel was violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah*, 377 U.S. at 206.

325. *See Walker*, 148 F.3d at 529.

326. *See id.* at 528–29 (citing Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (plurality opinion)); *see also* discussion *supra* note 306.

327. 161 F.3d 44 (D.C. Cir. 1998).

328. *See Rogala*, 161 F.3d at 45.

from interacting with his passenger, an attorney.[329] Rogala claimed the officer violated his Sixth Amendment right to counsel by preventing any consultation with the attorney.[330] The D.C. Circuit ruled against the defendant because the Sixth Amendment right to counsel does not begin until adversary judicial proceedings begin.[331]

D. *Analysis*

The cases decided by the Tenth Circuit during the survey period are consistent with prior holdings.[332] Issues involving the Sixth Amendment right to counsel are far removed from the controversy and debate surrounding *Miranda* because the Sixth Amendment is perceived as protecting liberty and fairness, while *Miranda* is perceived as impeding the police.[333] While there is some debate concerning whether the Supreme Court and other judicial bodies have remained true to the Framers' original intent for the Sixth Amendment,[334] there are no indications that the Court will apply a more narrow reading.[335]

A reoccurring issue within all of the circuits involves the triggering point for the Sixth Amendment right to counsel. As stated in *Kirby v. Illinois*,[336] an accused has a Sixth Amendment right to counsel at any "critical stage" of the prosecution.[337] Although the Supreme Court has indicated when the Sixth Amendment requires the appointment of counsel, the Court

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329. *See id.* at 48.

330. *See id.* at 55.

331. *See id.* The court pointed out that the defendant's "fortuity" to be stopped while riding with an attorney did not grant additional Sixth Amendment protection. *Id.*

332. *See, e.g.*, Lucero v. Gunter, 17 F.3d 1347, 1351 (10th Cir. 1994) ("The Sixth Amendment right to counsel does not attach until the initiation of formal adversary criminal proceedings 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (plurality opinion))); Oswald v. Crouse, 420 F.2d 373, 374 (10th Cir. 1969) (holding that the defendant was entitled to an evidentiary hearing to determine the validity of his conviction where the trial record was ambiguous as to whether he was represented by an attorney).

333. *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (stating that the Sixth Amendment is "deemed necessary to insure fundamental human rights of life and liberty"); Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense . . . ."); *see also supra* notes 12, 119–20 and accompanying text.

334. *See* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 43 (1991) (stating that the Sixth Amendment "contemplated the defendant's right to choose private counsel; it did not envision the provision of appointed counsel").

335. *But see* Ralph Ruebner, *Police Interrogation: The Privilege Against Self-Incrimination, the Right to Counsel, and the Incomplete Metamorphosis of Justice White*, 48 U. MIAMI L. REV 511, 539 (1994) (arguing that Justice White's decisions narrowed the Sixth Amendment right to counsel).

336. 406 U.S. 682, 690 (1972).

337. *Kirby*, 406 U.S. at 690; *accord* United States v. Gordon, 4 F.3d 1567, 1571 (10th Cir. 1993); United States v. Geittmann, 733 F.2d 1419, 1425 (10th Cir. 1984); Nees v. Bishop, 730 F.2d 606, 611 (10th Cir. 1984); *cf. supra* notes 272, 306.

has not set specific guidelines for performance, other than saying "that the right to counsel is the right to the effective assistance of counsel."[338]

CONCLUSION

During the survey period, the Tenth Circuit continued to narrowly apply the *Miranda* doctrine. The Supreme Court has also refused to expand *Miranda* and may take the opportunity to further limit it in the future.[339]

The cases heard by the Tenth Circuit focused on the existence of custodial interrogation and the validity of the *Miranda* waiver. In all cases, the court rejected the defendants' claims. This reflects the difficult burden for defendants in successfully winning *Miranda* issues before the court.

The Tenth Circuit also followed its own precedent in issues involving the Sixth Amendment right to counsel. Here, the court found violations of a defendant's rights when it was unclear whether the defendant had representation. The court also followed the Supreme Court in refusing to grant a Sixth Amendment right to counsel prior to the formal initiation of adversarial proceedings.

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338. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

339. *See, e.g.*, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *petition for cert. filed*, (U.S. Jul. 30, 1999) (No. 97-159-A). In *Dickerson*, the defendant argued that his voluntary confession should have been suppressed due to a technical violation of *Miranda*. *See Dickerson*, 166 F.3d at 671. The Fourth Circuit reversed because the lower court did not consider 18 U.S.C. § 3501 (1994). *See Dickerson*, 166 F.3d at 671. Section 3501, enacted two years after *Miranda*, states that a voluntary confession "shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." 18 U.S.C. § 3501(a). Although neither party addressed the statute, the Fourth Circuit held that "Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court." *Dickerson*, 166 F.3d at 671–72. *See generally* Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, Or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 479–81 (1998) (discussing the impact of 18 U.S.C. § 3501 on the *Miranda* decision).

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