Denver Law Review

Volume 71
Issue 4 *Tenth Circuit Surveys*

Article 12

January 1994

Criminal Procedure Survey: Search and Seizure

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CRIMINAL PROCEDURE SURVEY: SEARCH AND SEIZURE

INTRODUCTION

In criminal procedure jurisprudence during the 1993 term, the Tenth Circuit brought its search and seizure law in line with precedent from other circuits and went beyond its own precedent. In *United States v. Brown*[1] the court formally adopted the warrant severability doctrine. Under this doctrine, already the law in eight other circuits, reviewing courts can sever search warrants which have both constitutional and unconstitutional provisions. The Tenth Circuit, however, provided no apparent standards to govern lower courts' application of the doctrine. In *United States v. Butler*[2] the Tenth Circuit court substantially confused settled precedent and trivialized the exigent circumstances exception to the warrant requirement. In *Butler*, the court upheld a plain view seizure where the officer was not legally present under any prior theory. This broadening of arresting officers' ability to immediately enter the home, and presumably other areas, owned by an arrested individual cannot be squared with any existing law under the Fourth Amendment.

This Survey discusses the warrant severability doctrine and the Tenth Circuit's adoption of the doctrine in *United States v. Brown*, concluding that this case provides no meaningful direction to the trial courts in applying the doctrine. Part II analyzes *United States v. Butler* in the context of the exigent circumstances exception to the warrant requirement, finding that the case substantially broadens and trivializes the exception.

I. ADOPTION OF THE WARRANT SEVERABILITY DOCTRINE

A. *Background*

The Fourth Amendment requires that search warrants describe with particularity both the place to be searched and the items to be seized.[3] This requirement leaves little discretion in the hands of the officer executing the warrant.[4] The Tenth Circuit elaborated on this specificity requirement by stating that the search must be "confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause."[5] Prior to the adoption of the warrant severability doctrine, if any part of a warrant did not conform to the Fourth Amend-

1. 984 F.2d 1074 (10th Cir.), *cert. denied*, 114 S. Ct. 204 (1993).
2. 980 F.2d 619 (10th Cir. 1992).
3. The Fourth Amendment provides "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (particularity requirement prevents a "general, exploratory rummaging in a person's belongings").
4. *See* Marron v. United States, 275 U.S. 192, 196 (1927).
5. Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985).

ment mandate, the entire warrant was invalid. Any evidence seized under the warrant's authority was inadmissible at trial.[6]

The warrant severability doctrine avoids the exclusion of evidence obtained under a valid warrant provision. The doctrine allows the court to sever the unconstitutional portion of the warrant from the constitutional portion and suppress only that evidence which officers seize under the unconstitutional provisions.[7] The doctrine is consistent with the purpose of the exclusionary rule.[8] The rule deters officers from illegally obtaining evidence by excluding that evidence from trial, thereby ensuring that officers do not profit from constitutional violations.[9] The doctrine, however, still allows consideration of evidence which officers constitutionally obtain.[10]

When a court is considering severing a warrant, the foremost question is whether the court may sever the warrant at all. Because the Fourth Amendment prohibits general warrants, a court must decide either that it can sever the constitutional portions of the warrant or that the unconstitutional portions so dominate the warrant that the court must consider the warrant as general and therefore unseverable.[11] The Supreme Court addressed such a situation in *Lo-Ji Sales, Inc. v. New York*.[12] In *Lo-Ji Sales*, a warrant authorized the police to search an adult bookstore and to seize two adult films and " '[t]he following items that the Court independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law . . . .' "[13] There were no items listed. The Town Justice accompanied the police to the bookstore in order to determine which items violated the code. At the bookstore, an investigator wrote into

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6. Rosemarie A. Lynskey, Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with* United States v. Leon, 41 VAND. L. REV. 811, 813 (1988). Some commentators criticized the severity of invalidating the entire warrant for minor errors. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6(f), at 258 (2d ed. 1987).

7. Prior to the 1993 Tenth Circuit term, eight circuits had adopted some version of the severability doctrine. *See* United States v. George, 975 F.2d 72, 79 (2d Cir. 1992); United States v. Blakeney, 942 F.2d 1001, 1027 (6th Cir.), *cert. denied*, 112 S. Ct. 646 (1991), *and cert. denied*, 112 S. Ct. 881 (1992); United States v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); United States v. Fitzgerald, 724 F.2d 633, 636-37 (8th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 950 (1984); United States v. Riggs, 690 F.2d 298, 300 (1st Cir. 1982); United States v. Christine, 687 F.2d 749, 754 (3d Cir. 1982); In re Search Warrant Dated July 4, 1977, 667 F.2d 117, 130 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); United States v. Cook, 657 F.2d 730, 735 (5th Cir. 1981). The Seventh Circuit, while not specifically addressing the warrant severability issue, construes warrants more narrowly than the warrants' language requires in order to avoid finding the warrants overbroad. Donovan v. Fall River Foundry Co., 712 F.2d 1103, 1111 (7th Cir. 1983). The Fourth Circuit has not addressed the issue of warrant severability. For an example of the Tenth Circuit's approach to this problem prior to *Brown*, *see infra* notes 31-32 and accompanying text.

8. John W. Kastelic, Project, *The Exclusionary Rule, Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 385, 397 n.830 (1984).

9. *Id.*

10. *Id.*

11. Charles L. Cantrell, *Search Warrants: A View of the Process*, 14 OKLA. CITY. U. L. REV. 1, 67-68 (1989). *See also* Kastelic, *supra* note 8, at 397 n.832.

12. 442 U.S. 319 (1979).

13. *Id.* at 321-23.

the warrant the titles of the films, magazines and coin-operated film projectors which the Town Justice found obscene after viewing.[14]

The Court held that the warrant was similar to the general warrants the Fourth Amendment sought to prohibit.[15] Beyond the two films listed, the warrant allowed the officials conducting the search total discretionary power in determining what they should seize. Of key importance to the Court's invalidation of the entire warrant was the fact that "the search began and progressed pursuant to the sweeping open-ended authorization in the warrant."[16] The search was not initially limited to a search for the specific items listed; rather, the discovery of additional "illegal" items increased the scope of the search.[17]

In reaching its decision in *Brown*, the Tenth Circuit majority relied heavily on *United States v. George*[18] and *United States v. LeBron*.[19] In *George*, the Second Circuit held severance possible for a warrant which provided for the search and seizure of a number of specific items[20] and "any other evidence relating to the commission of a crime."[21] The officers seized, under the plain view doctrine,[22] a loaded firearm which the defendant, a convicted felon, could not legally possess.[23]

The court held that the warrant's "any other evidence" provision was overbroad.[24] On remand, the court directed the trial court to consider whether severance of the warrant was appropriate.[25] If severance was available, the evidence seized under the plain view doctrine was admissible.[26] The court cautioned, however, that the doctrine was inapplicable if (1) the warrant was devoid of sufficiently particular language; (2) the warrant was not meaningfully severable; or (3) the constitutional portions made up an "insignificant or tangential" portion of the warrant.[27]

In *United States v. LeBron*, the Eighth Circuit majority held severable a warrant which described three stolen items with particularity but in addition authorized the search and seizure of "any other property, description

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14. *Id.* at 323.
15. *Id.* at 325.
16. *Id.* at 326.
17. *Id.*
18. 975 F.2d 72 (2d Cir. 1992).
19. 729 F.2d 533 (8th Cir. 1984).
20. The list included "1 [b]urgundy purse, 1 burgundy shoulder bag, credit cards, personal papers, and ID of Dawn Wood. Misc. photos, keys to Honda motorcycle, dark attache case containing McDonalds management material, McDonalds uniform Handgun, workboot of similar design to plaster cast . . . ." *George*, 975 F.2d at 74.
21. *Id.*
22. In order for evidence to be admissible under the plain view doctrine, there are two requirements: first, that the officer was lawfully present when he observed the evidence; and second, that the officer immediately upon viewing the evidence had probable cause to believe that it was incriminating. For a more complete description of the plain view doctrine, see *infra* notes 90-93 and accompanying text.
23. *George*, 975 F.2d at 75.
24. *Id.*
25. *Id.* at 80.
26. *Id.* at 79.
27. *Id.* at 79-80.

unknown, for which there exists probable cause to believe it stolen."[28] The court found this clause unconstitutional.[29] The police seized all three items described in the valid portion of the warrant. Weapons the officials later seized were not admissible under the plain view doctrine because the officers were no longer legally present under the warrant.[30]

Prior to *Brown*, the Tenth Circuit indicated a general approval of the warrant severability doctrine, even though the court never explicitly adopted it. In *United States v. Leary*,[31] for example, the Tenth Circuit noted in dictum that the severability doctrine was a possible remedy to retain valid portions of a warrant.[32]

B. *Tenth Circuit Opinion:* United States v. Brown[33]

On January 29, 1991, a detective obtained a search warrant (Warrant I) based on his affidavit which stated two primary grounds for probable cause.[34] First, two people at the defendant's house had told an informant they stole and sold vehicles and they had offered to sell the informant other goods well below their fair value.[35] Second, the detective himself observed an individual at the defendant's house working on a dismantled truck with a cutting torch.[36] The detective also observed a second truck which the informant had stated was stolen.[37]

Warrant I, a state warrant, authorized a search for a large number of specific vehicle parts and other items,[38] but included a final sentence authorizing the seizure of "[a]ny other item which the Officers determine or have reasonable belief is stolen while executing this search warrant."[39] The warrant authorized a maximum time of sixteen hours but the search actually lasted fifty-one hours. On February 7, 1991, after the detective and other officers had executed Warrant I, the detective applied for a sec-

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28. 729 F.2d at 535-36.
29. *Id.* at 537.
30. *Id.* at 538-39.
31. 846 F.2d 592 (10th Cir. 1988).
32. *Id.* at 606, n.25.
33. 984 F.2d 1074 (10th Cir. 1993).
34. *Id.* at 1075.
35. *Id.* at 1075-76.
36. *Id.* at 1076.
37. *Id.*
38. The enumerated items included:
Vehicle parts to include the following, but not limited to: Bumpers, grills, fenders, hoods, cabs, dashes, truck beds, engines, transmissions, drive shafts, frames, rear ends, springs, steering parts, seats and other interior parts, VIN plates, titles, vehicle registrations, blank registration forms, bills of sale, blank titles, drive-out stickers, broadcast sheets, EPA stickers, windows, doors, tires, rims and truck bed toolboxes. Tools or toolboxes which are stolen or contain tools that can be used to disassemble or reassemble any vehicle, welders and cutting torches, air compressors, computers, computer components, photocopy machines, firearms, protective devices, carpeting which also may be stolen.
Id.
39. *Id.* For an explanation of why this language is not merely an authorization of plain view seizures, see *infra* note 57 and accompanying text. *See also Brown*, 984 F.2d at 1080 (Seth, J., dissenting).

ond state search warrant (Warrant II).[40] The detective listed items officers observed while executing Warrant I which were not specifically described in the warrant.[41] Warrant II authorized the seizure of specific property,[42] but also included a catch-all authorization to seize "any other item which the Officers have determined or have reason to believe is stolen, while executing this warrant."[43]

While executing Warrant II, the officers smelled methamphetamine in the house and, in fact, found a laboratory in the garage.[44] Based on that information, the officers obtained a federal search warrant (Warrant III) and executed it on the same day.[45] The evidence secured under Warrant III led to the defendant's conviction for conspiracy to manufacture methamphetamine.[46]

The defendant appealed, challenging the district court's denial of his motion to suppress all evidence the officers seized under the warrants.[47] The defendant claimed that Warrants I and II were overbroad. Since the officers' observations while executing Warrants I and II formed the sole probable cause basis for Warrant III, the evidence seized under Warrant III was also inadmissible as the "fruit" of the unconstitutionally broad first two warrants.[48] The Tenth Circuit affirmed the conviction, holding that the unconstitutionally broad final sentences of Warrants I and II were severable from the sufficiently particular list of items. Therefore, the evidence seized under Warrant III was not the fruit of illegal warrants.[49]

1. Majority Opinion

Judge Paul J. Kelly, writing for the majority, began by addressing whether the warrants in question were sufficiently particular to satisfy the Fourth Amendment. The majority noted that both Warrants I and II specifically described a number of objects to be seized,[50] but assumed *arguendo* that the final sentences under those warrants were not descriptive, did not adequately limit the officers' discretion, and were therefore unconstitutional.[51]

The majority held that the final sentences of Warrants I and II were severable from the constitutionally adequate portions of those warrants.[52]

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40. *Id.* at 1076.
41. *Id.*
42. Warrant II provided for the seizure of, "a Quasar Microwave . . . A brown Cedar chest that is faded on the top lid and has a tray on the inside, approximately 3' wide and 4' in length and approximately 2 1/2' to 3' in depth." *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court held that evidence obtained by exploitation of a constitutional violation was tainted "fruit of the poisonous tree" and was inadmissible. *Id.* at 488.
49. *Brown*, 984 F.2d at 1078.
50. *See supra* notes 38 and 42.
51. *Brown*, 984 F.2d at 1077 n.1.
52. *Id.* at 1078.

The majority further held that the severed warrants provided a lawful basis for the officers' presence in the defendant's home; therefore, the officers' observations while on the premises provided the probable cause for the additional warrants.[53] Under the severed Warrant I, the state officers were legally present in the defendant's home when they observed the stolen items described in Warrant II. Similarly, they were legally in the defendant's home under the severed Warrant II when they smelled the methamphetamine. Warrant III, which was based on the smell of methamphetamine, was therefore valid.[54]

2. Dissenting Opinion

Judge Seth's dissent acknowledged that warrant severance is a proper remedy, but argued that in this case the overbroad language "so tainted the entire warrant that severance is not justified."[55] Because Warrant I was "so tainted," the officers were not lawfully on the defendant's property while executing that warrant. Warrants II and III were therefore illegal as the fruit of the invalid Warrant I.[56]

Much of the dissent focused on the overbroad language of Warrant I. The dissent asserted that the court could not construe the overbroad language as authorizing plain view seizures,[57] nor could the court argue that the officers were lawfully on the premises under the "good faith" exception[58] in order to validate any of the warrants.[59] The dissent pointed out that while Warrant I authorized a search on January 29, 1991, between 6:00 a.m. and 10:00 p.m., the actual search lasted at least fifty-one hours and did not end until January 31, 1991.[60] In addition, officers invited many townspeople, whose property had been stolen, onto the defendant's property in order to identify and claim their property.[61]

As a result of the overbroad scope and extraordinary duration of the search, the dissent argued that Warrant I more closely resembled a general warrant than a warrant with both constitutional and overbroad por-

53. *Id.*
54. *Id.*
55. *Brown*, 984 F.2d at 1078 (Seth, J., dissenting).
56. *See id.*
57. *Id.* at 1079. The plain view doctrine requires that the officer have probable cause to believe the item is stolen in order to seize it, whereas the warrant authorized seizure where the officer had only a "reason to believe" the item was stolen. *Id. See also* Horton v. California, 496 U.S. 128 (1990) (discussing the requirements necessary to apply the plain view doctrine).
58. *See* United States v. Leon, 468 U.S. 897 (holding that, under the "good faith exception," evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found invalid is admissible).
59. *Brown*, 984 F.2d at 1080-81. The dissent noted that Warrant I was so "facially and grossly overbroad" that no officer could have understood it to give guidelines as to what that officer could seize. Since there could be no reasonable reliance on such a facially defective warrant, the good faith exception from *United States v. Leon* could not apply in this case. *Id.* at 1080.
60. *Id.* In addition to the large number of tools and auto parts seized, the officers also took a fishing reel, turquoise stones, Christmas wreaths, Christmas lights and a bug sprayer. *Id.*
61. *Id.* at 1079.

tions.[62] The dissent stated that Warrant I was indistinguishable from the general warrant in *Lo-Ji Sales*[63] which the Supreme Court held unconstitutional. Warrants II and III were therefore tainted[64] by the unconstitutionality of Warrant I, and were not valid under any other grounds.[65]

C. *Analysis*

The court's adoption of the warrant severability doctrine was a prudent decision which brought Tenth Circuit jurisprudence in line with all circuits that have specifically considered this point of law.[66] The doctrine is a useful tool which, when correctly applied, avoids suppression of legally-obtained evidence when the warrant is defective due to technical oversight or overbroad, unjustified authorizations to search. When considering whether a warrant should be severed, however, it is important to remember the Fourth Amendment's prohibition against general warrants. While the language of Warrant I in *Brown* resembled the language of warrants which other courts of appeals have severed and held valid,[67] the remarkable duration of the search in *Brown* makes it a troublesome case for the adoption of the severability doctrine. Trial courts will have little guidance in determining how excessive a search's duration must be before that execution renders a warrant unseverable.

As the majority correctly noted, the language of Warrant I was similar to many other warrants which courts have severed. In fact, the list of specific items in Warrant I was more extensive than the lists in many of the warrants which led to the adoption of the severability doctrine in other circuits.[68] While Warrant I certainly contained overbroad language, it was not so facially deficient as to appear general in nature when compared with other warrants which courts have held severable.

The execution of the warrant, however, makes its severance more problematic. As the dissent noted, the search under Warrant I was to last for no more than sixteen hours.[69] That figure represented the magistrate's determination of a reasonable time allotment to search not only for the enumerated items, but also for the additional "stolen" items the majority in *Brown* found the officers could not constitutionally seize.[70] Because the actual search lasted more than three times the stated time limit, the officers involved were operating largely under the authority of the overbroad portion of the warrant.

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62. *Id.* at 1082.

63. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

64. *Brown*, 984 F.2d at 1082. *See supra* note 48 and accompanying text for a discussion of the exclusion of tainted evidence.

65. *See id.* at 1081.

66. *See* cases cited *supra* note 7.

67. *See supra* text accompanying notes 18-27.

68. *See supra* notes 20 and 28 and accompanying text.

69. *Brown*, 984 F.2d at 1080.

70. *Id.*

The search in *Brown* somewhat parallels the search in *Lo-Ji Sales, Inc. v. New York*,[71] where the sufficiently particular portion of the warrant comprised a negligible portion of the scope of the total warrant.[72] That is, the sufficiently particular portion of Warrant I in *Brown* authorized a relatively small portion of the duration of the search.[73] The search in *Brown* differed from that of *Lo-Ji Sales* which was merely an effort directed at seizing whatever material the Town Justice deemed as violative of the penal code.[74] The *Lo-Ji* warrant, as the search demonstrated, never had any legitimate, particularized aspect.[75] Under Warrant I in *Brown*, however, the officers devoted substantial time to the discovery of the particular enumerated items. They did not search exclusively under the overbroad language.[76] Thus, at least a portion of Warrant I, both on its face and in its execution, fell within constitutional requirements, and *Lo-Ji Sales* is inapposite.

United States v. George[77] is more useful in this context. The warrant in *George* was more facially vague than the Warrant I in *Brown*. While the court in *George* did not decide whether to sever the warrant at issue, it noted that severance might not be appropriate in a case where the sufficiently particular portions of a warrant composed only an "insignificant or tangential" portion of the warrant.[78] Warrant I in *Brown* appears to be a warrant where, in light of the search's duration, the enumerated items bordered on being insignificant.

In addition, *United States v. LeBron*[79] specifically held that while searching under an overbroad portion of a severable warrant, the police are not legally present for the purpose of the plain view or other doctrines.[80] The correct question in evaluating *Brown* is, at what point did the officers complete the search for sufficiently particularized items under Warrant I? The majority did not ask that question, nor did it explain why the excessive duration of the search did not render the warrant unseverable.

The problem with the result in *Brown* is not that it adopted the warrant severability doctrine; the doctrine itself is useful when correctly applied. The main problem is that the *Brown* majority did not examine the execution of Warrant I. Rather, the majority based its holding purely on the language of the warrant.[81] The majority therefore did not address the proper limits of the warrant severability doctrine. As a result, trial courts will lack sufficient guidance in determining whether they may properly

71. 442 U.S. at 325.
72. *Id.*
73. *Brown*, 984 F.2d at 1082 (Seth, J., dissenting).
74. *See supra* text accompanying notes 12-17.
75. *Lo-Ji Sales*, 442 U.S. at 326 (the search began and progressed pursuant to the sweeping, open-ended authorization in the warrant).
76. *See Brown*, 984 F.2d at 1076.
77. 975 F.2d 72 (2d Cir. 1992).
78. *Id.* at 79-80.
79. 729 F.2d 533 (8th Cir. 1984).
80. *Id.* at 537-38. *See also infra* notes 90-93 and accompanying text.
81. *Brown*, 984 F.2d at 1077-78.

sever a warrant.[82] With *Brown* as a guide, trial courts will rarely look beyond the language of a warrant to determine whether the warrant was properly executed.

II. THE TRIVIALIZATION OF THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT

A. *Background*

Under the Fourth Amendment, warrantless searches and seizures inside a home are presumptively unreasonable.[83] Absent consent[84] or exigent circumstances, a state officer may not enter a person's house unless the officer possesses a warrant.[85] In the absence of a warrant or exigent circumstances, any evidence seized as a result of the illegal entry is inadmissible at trial.[86]

The Supreme Court has grouped exigent circumstances into several categories: officers responding to an emergency,[87] officers in hot pursuit of a fleeing felon,[88] or officers acting to prevent destruction or removal of evidence.[89] These exigent circumstances represent exceptions to the warrant requirement and should be as narrowly construed as possible.[90]

An officer who is in a person's home without a warrant, but whose presence is supported by an exception to the warrant requirement, for example, an exigent circumstance, may seize some evidence. Such evidence must be in plain view from the officer's lawful position and the officer must immediately have probable cause to believe the evidence is incriminating.[91] Thus, the officer must be lawfully present, by warrant or

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82. This lack of guidance for lower courts concerning which warrants are severable is a prevalent problem among jurisdictions which have adopted the severability doctrine. *See* Mark S. Halpern, Comment, *Redaction—the Alternative to the Total Suppression of Evidence Seized Pursuant to a Partially Invalid Search Warrant*, 57 TEMP. L.Q. 77, 79, 91-92 (1984).

83. Payton v. New York, 445 U.S. 573, 586 (1980). The Court further stated "[t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms . . . ." *Id.* at 589.

84. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Consent must be voluntary, but the consenting party does not have to know that he can refuse to consent. *Id.* at 248-49.

85. *Payton*, 445 U.S. at 590.

86. Weeks v. United States, 232 U.S. 383, 393, 398 (1914). The Supreme Court held that the exclusionary rule applies to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

87. *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987).

88. Warden v. Hayden, 387 U.S. 294, 298-299 (1967).

89. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

90. *See* Katz v. United States, 389 U.S. 347, 357 (1967). The burden of demonstrating that exigent circumstances exist is on the prosecution. Chimel v. California, 395 U.S. 752, 762 (1969); *see generally* Steven D. Allison, Project, *Exigent Circumstances, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 902-10 (1993) (discussing the limits of exigent circumstances).

91. Horton v. California, 496 U.S. 128, 136-37 (1990).

otherwise,[92] in order to invoke the plain view doctrine to legitimize a seizure.[93]

The Supreme Court ostensibly created a new exception to the warrant requirement in *Washington v. Chrisman*.[94] In *Chrisman* a campus police officer stopped the defendant's roommate and asked to see the roommate's identification.[95] The roommate was drinking and the officer suspected that he was underage. The roommate had no identification and asked that the officer allow him to return to his room to obtain it.[96] The officer accompanied the roommate to the room and, while waiting in the threshold of the room, observed marijuana seeds in the room.[97] He entered the room and seized the marijuana.[98]

The Court held that an officer has the right to monitor the movements of an arrested person in order "to ensure his *own* [the officer's] safety."[99] Under those circumstances, there was no requirement of exigent circumstances for the officer to enter the room without a warrant. Thus, the officer's presence in the room, and therefore the plain view seizure of the marijuana, were legal.[100]

Courts generally have interpreted *Chrisman* to stand for the proposition that after a lawful arrest, an arrestee who invites the arresting officer to accompany him to his home or requests to enter his home grants the officer a lawful presence in the home.[101] Without the arrestee's invitation or request that he be allowed to enter his home, the officer must demonstrate either exigent circumstances or a valid warrant in order to be lawfully in the home.[102]

Prior to *Chrisman*, the Tenth Circuit had addressed the limits of exigent circumstances in *United States v. Anthon*.[103] In *Anthon* the defendant was arrested outside his hotel room when he was wearing only swimming

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92. In Maryland v. Buie, 494 U.S. 325 (1990), the Court held that officers may conduct a protective sweep incident to an in-home arrest provided they have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337. The protective sweep is not a full search. *Id.* at 335.

93. *See* Steven G. Davison, *Warrantless Investigative Seizures of Real and Tangible Personal Property by Law Enforcement Officers*, 25 AM. CRIM. L. REV. 577, 604-605 (1988).

94. 455 U.S. 1 (1982).

95. *Id.* at 3.

96. *Id.*

97. *Id.* at 3-4.

98. *Id.* at 4.

99. *Id.* at 7 (emphasis added). The Court also noted that an officer may monitor the arrestee's movements in order to prevent the arrestee's escape. *Id.*

100. *Id.* at 8.

101. *See, e.g.*, United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984) (The two significant elements of the holding in *Chrisman* were that the arrestee requested to return to his room and that there was a lawful arrest prior to the officer entering the room.), *cert. denied*, 471 U.S. 1061 (1985).

102. *Chrisman* itself represented a departure from prior Supreme Court decisions in its apparent abandonment of the exigent circumstances requirement for warrantless entry. *See* Ira D. Wincott, Comment, *Constitutional Law—Fourth Amendment—Plain View Exception to the Warrant Requirement—Exigent Circumstances*—Washington V. Chrisman, 29 N.Y.L. SCH. L. REV. 125, 147-48 (1984).

103. 648 F.2d 669 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

trunks. The arresting officers returned the defendant to his room, without his consent or request, in order to procure clothing for him.[104] While the officers were in the defendant's hotel room, they discovered cocaine and marijuana. The court held that the defendant did not consent to the police presence, and that no exigent circumstances existed which could justify the officers' entry without a warrant.[105]

B. *Tenth Circuit Opinion:* United States v. Butler[106]

On April 30, 1991, two Deputy United States Marshals and two county sheriff's officers arrived at Butler's trailer in rural Oklahoma in order to serve Butler with an arrest warrant.[107] The ground surrounding the trailer was covered with broken glass, hundreds of beer cans, and parts from several dismantled cars.[108] Butler's trailer-mate Willis Bruce met the officers, and one marshal told Bruce that he had a warrant to arrest Butler. Butler, who was not wearing shoes, then came out of the trailer and was arrested.[109]

There was no way to avoid the debris surrounding the trailer in conveying Butler to the officers' cars.[110] A marshal asked Butler if he had any shoes to protect his feet. Butler stated that he had shoes, but that they were in the trailer.[111] Bruce asked his girlfriend to retrieve the shoes, but the marshal stated " 'Well, let's go on in and get them.' "[112] While retrieving the shoes, the marshal observed a loaded shotgun in Butler's room which, as a convicted felon, Butler could not legally possess.[113] The marshal seized the firearm.[114]

At trial, Butler moved to suppress the shotgun. The trial court relied heavily on *Chrisman* in denying Butler's motion, and Butler was ultimately convicted.[115] Butler appealed the trial court's denial of his motion to suppress the shotgun.[116] The Tenth Circuit affirmed the trial court's ruling, holding that *Chrisman* supported the characterization of the marshal's presence as lawful, and the shotgun seizure as valid under the plain view doctrine.[117]

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104. *Id.* at 674-75.

105. *Id.* at 675. In addition, the court held that the arrest outside of the room would not permit the characterization of the search inside the room as a search incident to a lawful arrest, because that search is allowed only for the purposes of discovering and removing weapons or preventing the destruction of evidence. Its scope is limited to areas within the arrestee's immediate control. *Id.* (citing Chimel v. California, 395 U.S. 752, 762-63 (1969)).

106. 980 F.2d 619 (10th Cir. 1992).

107. *Id.* at 620.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* 18 U.S.C. § 922(g)(1) (1988).

114. *Butler*, 980 F.2d at 621.

115. *Id.* at 620-21.

116. *Id.* at 620.

117. *Id.* at 621-22.

1. Majority Opinion[118]

The court initially discussed *Chrisman*, acknowledging that the defendant in *Chrisman* had invited the officer into his dorm room. In *Butler*, the marshal instigated the intrusion and Butler protested the marshal's entry.[119] Ignoring that distinction, the court proceeded to argue that the marshal's intrusion was based on a genuine concern for Butler's welfare and was not pretextual; that is, the marshal's intrusion was not made in "bad faith."[120] Further, the court argued that even without an invitation, as in *Chrisman*, police may "conduct a limited entry into an area for the purpose of protecting the health or safety of an arrestee."[121] The court relied primarily on two cases from the Second Circuit, *United States v. Titus*[122] and *United States v. Di Stefano*[123], for its holding that police can legally accompany an arrestee into his home in order to obtain clothing.[124]

Finally, the court distinguished *Anthon* by arguing that in that case there existed no "legitimate and significant" threat to Anthon's health which required that the police enter his hotel room.[125] In the instant case, however, the marshal had a good faith belief that a significant threat to Butler's safety existed. The threat to Butler's safety was an exigent circumstance which allowed the marshal to enter Butler's trailer.[126]

2. Dissenting Opinion

In her dissent, Judge Seymour stressed that the invasion of the privacy of a person's home is the primary evil against which the Fourth Amendment is directed.[127] The dissent disagreed with the majority's characterization that Butler's lack of footwear constituted an exigent circumstance because he was in danger of being injured.[128] The dissent noted that the majority ignored the fact that Butler and his companions had just walked back and forth across the debris in order to bathe in the river. In addition, Butler neither evinced apprehension that he would injure his feet on the walk to the officers' cars, nor requested that he be provided with shoes.[129]

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118. The majority opinion was authored by Patrick F. Kelly, District Judge, sitting by designation.

119. *Butler*, 980 F.2d at 621.

120. *Id.*

121. *Id.*

122. 445 F.2d 577 (2d Cir.) (holding that officers lawfully in defendant's house for arrest purposes could seize items in plain view), *cert. denied*, 404 U.S. 957 (1971).

123. 555 F.2d 1094 (2d Cir. 1977) (holding that an officer could lawfully accompany the defendant into her room so that she could change her clothes after she was arrested).

124. *Butler*, 980 F.2d at 621.

125. *Id.* at 622. *See also* text accompanying notes 103-05.

126. *Id.*

127. *Butler*, 980 F.2d at 622 (Seymour, J., dissenting).

128. *Id.* at 623.

129. *Id.*

The dissent also argued that the instant case was significantly different from *Chrisman*.[130] The dissent stated that *Chrisman* stood for the proposition that a police officer could accompany an arrested defendant into his home at the defendant's request. *Chrisman* did not represent that an officer could take an arrestee into the arrestee's house without his consent; the arrestee's request was the linchpin to the *Chrisman* holding.[131] Since Butler did not request permission to enter his house or consent to the marshal's entry, the seizure effected in the instant case did not fall under *Chrisman*. The marshal was not legally in Butler's house when he observed the shotgun.[132] Therefore, the plain view doctrine would not validate the shotgun seizure.[133]

The dissent further argued that *Anthon* was indistinguishable from the case at bar.[134] The holding in *Anthon* was derived from facts in which there were no exigent circumstances, the defendant did not request to return to his room, and the defendant did not offer consent for the officers to enter his room.[135] Butler, like Anthon, was not in danger, did not request to enter his house, and did not consent to the marshal's entry.[136]

Finally, the dissent argued that the holding in *Titus* was based on an exigent circumstance, namely, the prevention of the defendant's escape.[137] The instant case was distinguishable from *Titus* in that there was no exigent circumstance to legalize the warrantless entry into Butler's home.[138] The majority's view that an exigency existed therefore eroded the protection of the Fourth Amendment by trivializing the exigency requirement.

C. *Analysis*

The majority in this case allowed an officer to intrude into the defendant's trailer without any of the justifications which the Supreme Court and the Tenth Circuit specifically require for such an action. The marshal did not have a warrant authorizing his entry into the defendant's trailer. The arrest took place outside the trailer; therefore, a protective sweep, which likely would not justify the marshal's actions in any case, does not apply. The only possible justifications, as the majority recognized, were

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130. *Id.* at 622.
131. *Id.* at 623.
132. *Id.*
133. *Id.*
134. *Id. See also* text accompanying notes 125-26.
135. *Id.* (citing United States v. Anthon, 648 F.2d 669, 675 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982)).
136. *Butler*, 980 F.2d at 623 (Seymour, J., dissenting).
137. *Id.* at 624.
138. *Id.* In distinguishing *Titus* the dissent stated "[t]he warrantless entry of a home to prevent the escape of a defendant the police have probable cause to arrest is not analogous to an entry to obtain shoes for a barefoot arrestee who does not request them." *Id.* The dissent also noted that the holding in *Di Stefano* offered no additional support for the majority's position since that case was from the same circuit as *Titus* and merely followed *Titus* as precedent. *Id.*

either that exigent circumstances existed, authorizing the marshal's entry, or that the *Chrisman* rationale allowed the marshal to take Butler into his own trailer, even absent a request from Butler.

Under the former rationale, there were no exigent circumstances which could have justified the marshal's entering the trailer. As traditionally defined,[139] none of the exigent circumstance categories applied to the situation in *Butler.* The only category which possibly could have applied is the emergency situation, which the Supreme Court has narrowly construed.[140] In order to argue that the emergency situation legalized the marshal's entry to obtain Butler's shoes, the majority would have to argue that the emergency situation made the marshal's entry imperative.[141]

In this case, the danger was that of the defendant cutting his feet. Not only is this type of danger relatively minor when compared with what the Supreme Court has defined as an emergency situation,[142] but in fact there existed no danger at all to the marshal or to Butler.[143] Butler did not request the entry into his trailer to obtain shoes, and he evinced no concern that he would injure his feet.[144] The majority based its holding partially on the marshal's good faith attempt to protect Butler's feet.[145] The majority, however, cited no authority for the proposition that a good faith attempt to protect a minor safety interest allows an officer to enter an arrestee's home. Considering the low safety interest the marshal believed he was protecting and its unlikely classification under any exigent circumstance category, the marshal's presence in Butler's trailer cannot be justified under an exigent circumstance exception to the warrant requirement.

The majority's reliance on *Chrisman* also is misplaced. The *Chrisman* holding does not represent that an officer may return an arrestee to his room and accompany the arrestee into his room for any reason. Rather, the arrestee must somehow indicate that he desires to return to his room. In that situation, the officer may accompany the arrestee for security purposes. Other United States Courts of Appeals have interpreted *Chrisman* in such a manner.[146]

Moreover, the Court in *Chrisman* specifically authorized the officer's presence in the dorm room to monitor the arrestee and to protect the officer himself.[147] Nowhere did the *Chrisman* Court imply that the protection of an *arrestee* would authorize an officer to force the arrestee to enter his own home and allow the officer to enter as well. In *Butler,* there was no indication that Butler requested or desired to enter his home to obtain

139. *See supra* notes 87-90 and accompanying text.
140. *See supra* note 90 and accompanying text.
141. McDonald v. United States, 335 U.S. 451, 456 (1948).
142. *E.g.,* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (holding that officers were acting under exigent circumstances when they entered a dwelling to search for an armed robbery suspect and weapons and where a delay in action would have endangered lives of officers and citizens).
143. *Butler,* 980 F.2d at 623 (Seymour, J., dissenting).
144. *Id.*
145. *Id.* at 621.
146. *See supra* notes 101-02.
147. Washington v. Chrisman, 455 U.S. 1, 7 (1982).

shoes. The majority's misinterpretation of *Chrisman* led to a holding which is both unprecedented and unjustified based on Supreme Court and Tenth Circuit cases.

Finally, the court in *Butler* failed to distinguish *Anthon* in any meaningful way. The majority's attempt to separate *Anthon* hinged on its statement that there was in *Butler* "a legitimate and significant threat" to Butler's safety whereas in *Anthon* there was no such threat.[148] However, as the dissent correctly noted, there was no legitimate threat because the defendant had just safely crossed the very area with which the marshal was concerned.[149] In addition, walking across glass and beer cans is hardly a "significant threat."[150] The holding that the danger of minor cuts qualifies as a significant threat allows the exigent circumstances exception to swallow up the warrant requirement. The holding in *Butler* disregards Tenth Circuit precedent and the precedent of other courts.

CONCLUSION

During the survey period, the Tenth Circuit brought its precedent in line with other circuits in the area of warrant severability in the *Brown* case, but unfortunately did not provide any meaningful direction to the trial courts in determining when the doctrine should be applied. The Tenth Circuit departed significantly from established precedent in the area of warrantless entry in the *Butler* case, but offered no support for its trivialization of the exigent circumstances exception to the warrant requirement. Hopefully, the Supreme Court will address the difficult issues these cases raise in order to avoid the confusion which the Tenth Circuit's decisions will create in this area.

Paul Faraci

148. *Butler*, 980 F.2d at 622.

149. The dissent stated that "[t]aking an arrestee in bare feet across a littered yard he has just traversed safely presents no greater exigency than taking an arrestee to the police station in his bathing suit." *Id.* at 624 (Seymour, J., dissenting) (referring to *Anthon*).

150. *See supra* note 142 and accompanying text.