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# United States Supreme Court Review of Tenth Circuit Decisions

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# UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

## INTRODUCTION

In its 1992 session, the United States Supreme Court decided seven cases originating from the Tenth Circuit.[1] This survey discusses two cases, *United States v. Williams* and *United States v. Felix*, involving important sections of the Fifth Amendment of the Constitution that will have direct impacts on prosecutorial actions and defendants' Fifth Amendment protections. Both decisions make it easier for prosecutors to bring suspects to trial. In *Williams*, the Supreme Court negated the Tenth Circuit's requirement that prosecutors present possible exculpatory evidence to the grand jury.[2] In *Felix*, the Court, again reversing the Tenth Circuit, held (1) that admission of evidence of a crime at one trial does not bar subsequent prosecution of that crime[3] and (2) that conspiracy to commit a crime and the actual crime itself are separate offenses for double jeopardy purposes.[4]

## I. *UNITED STATES V. WILLIAMS*: AN OTHERWISE VALID INDICTMENT MAY NOT BE DISMISSED SOLELY BECAUSE THE GOVERNMENT DID NOT PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

### A. *Introduction*

The grand jury was first established in the 12th century by King Henry II, to give him a means to enforce his dealings with the state and to gain greater control over the administration of justice.[5] However, the idea of the grand jury as a protector did not develop until the late 17th century, when King Charles II tried to use the grand jury to indict the Earl of Shaftesbury and Stephen Colledge for treason. These two men were well-known Protestants who were, with popular support, trying to

1. United States v. Williams, 112 S. Ct. 1735 (1992); Barnhill v. Johnson, 112 S. Ct. 1386 (1992); United States v. Felix, 112 S. Ct. 1377 (1992) [*Felix II*]; McCarthy v. Madigan, 112 S. Ct. 1081 (1992); Arkansas v. Oklahoma, 112 S. Ct. 1046 (1992); Dewsnup v. Timm, 112 S. Ct. 773 (1992); United States v. Ibarra, 112 S. Ct. 4 (1991). For a discussion of *Arkansas v. Oklahoma*, a landmark water pollution law case, see Cynthia McNeill, Comment, *The States Square off in* Arkansas v. Oklahoma: *And the Winner Is . . . the EPA*, 70 DENV. U. L. REV. — (1993).

2. *Williams*, 112 S. Ct. at 1742.

3. *Felix II*, 112 S. Ct. at 1382. References to the Tenth Circuit disposition of this case, United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), *rev'd*, 112 S. Ct. 1377 (1992), are also *Felix II*. References to United States v. Felix, 867 F.2d 1068 (8th Cir. 1989) are *Felix I*.

4. *Felix II*, 112 S. Ct. at 1383.

5. *See, e.g.*, MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 6-7 (1977); Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1078 (1984).

prevent the King from reestablishing the Catholic Church in England. The grand jury refused to act under the King's orders and did not issue an indictment.[6] English colonists brought the concept of the grand jury to the new world. The framers of the Constitution incorporated it into the Fifth Amendment of the Bill of Rights,[7] intending that the grand jury should act as a shield against improper indictment.[8] Today, however, the grand jury acts as both a shield and a sword.[9] In the criminal justice system, the function of the grand jury is to issue indictments.[10] This function has become a powerful tool in the hands of prosecutors, a tool that has great potential for abuse because of lack of control by the courts over prosecutors' actions.[11] The lower federal courts and the Supreme Court have shown little propensity to permit judicial supervision of grand jury proceedings, fearing the generation of collateral proceedings and disruptive delaying tactics by the defense.[12] For instance, in *Bank of Nova Scotia v. United States*,[13] the Court held that federal courts may not dismiss an indictment for errors in grand jury proceedings absent a showing of prejudice to the defendant.[14] In *United States v. Williams*, the Court decided only the narrow question of whether prosecutors should present exculpatory evidence to grand juries, holding that there was no duty for prosecutors to do this.[15] However, the broader effect of *Williams* will be to functionally negate the entire idea of judicial supervision.[16]

### B. *Facts*

John H. Williams, Jr. was an investor and businessman in Tulsa, Oklahoma.[17] Between September 1984 and November 1985, Williams obtained loans and loan renewals from four banks in Tulsa. With each request for a loan or renewal, Williams provided the banks with two

6. FRANKEL & NAFTALIS, *supra* note 5, at 9; Currier, *supra* note 5, at 1078.

7. The Fifth Amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

8. Anne Bowen Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L.Q. 885 (1990).

9. *Id.* at 885-86.

10. Currier, *supra* note 5, at 1078.

11. Poulin, *supra* note 8, at 886-87; Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 549-54, 565-69 (1980).

12. Poulin, *supra* note 8, at 887-89.

13. 487 U.S. 250 (1988).

14. *Id.* at 263. *Cf.* Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (defendant may not appeal trial court's denial of a motion to dismiss the indictment for alleged violation of Rule 6(e) of the Federal Rules of Criminal Procedure); United States v. Mechanik, 475 U.S. 66, 71 (1986) (a postconviction appeal of a violation of Rule 6(d) of the Federal Rules of Criminal Procedure must be reviewed under a harmless-error standard); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (no dismissal of indictment based on illegally seized evidence because accused may challenge evidence at trial); Costello v. United States, 350 U.S. 359, 364 (1956) (no dismissal of indictment based solely on hearsay evidence). *See generally* Poulin, *supra* note 8; Currier, *supra* note 5.

15. United States v. Williams, 112 S. Ct. 1735, 1742 (1992).

16. See *infra* notes 74-80 and accompanying text.

17. *Williams*, 112 S. Ct. at 1737.

types of financial statements: a "Market Value Balance Sheet" and a "Statement of Projected Income and Expenses."[18]

The "Market Value Balance Sheet" contained a category labeled "Current Assets."[19] Williams included as current assets $5 million to $6 million in notes receivable from three venture capital companies in which he had invested. Each of the companies had a negative net worth at the time. However, Williams' financial statements carried a disclaimer that these assets were carried at cost rather than at market value.[20] The second type of financial statement, the "Statement of Projected Income and Expense," listed as a source of income the interest income payable on these notes receivable. However, it did not indicate that these interest payments were entirely funded by Williams' own loans to the venture capital companies.[21]

In May 1988, after a six-month investigation, a federal grand jury indicted Williams on seven counts of knowingly making false statements or reports for the purpose of influencing the actions of a federally insured financial institution,[22] in violation of the Crimes and Criminal Procedures Act.[23] The indictment accused Williams of supplying the banks with "materially false" statements that willfully overvalued his current assets and interest income.[24]

Shortly after his arraignment, Williams filed a motion to compel the government to disclose any evidence that tended to exculpate him.[25] The government indicated that it would comply with its duty under *Brady v. Maryland*[26] to provide exculpatory evidence, but failed to do so. The district court then ordered the government to provide any exculpatory material. The government agreed to provide Williams with edited portions of the grand jury transcripts and to provide the unedited transcript to the court.[27]

After reviewing this material, Williams filed a motion to dismiss the indictment, claiming that the government failed to present substantial exculpatory evidence to the grand jury, citing prior Tenth Circuit precedent in *United States v. Page*.[28] In *Page*, the Tenth Circuit adopted the rule that prosecutors must reveal to the grand jury substantial exculpa-

18. *Id.*

19. The label "current assets" describes assets that will be realized in cash within one year. United States v. Williams, 899 F.2d 898, 899 (10th Cir. 1990), *rev'd*, 112 S. Ct. 1735 (1992).

20. *Williams*, 112 S. Ct. at 1737.

21. *Williams*, 898 F.2d at 899.

22. *Williams*, 112 S. Ct. at 1737.

23. 18 U.S.C. § 1014 (1988 & Supp. III 1991).

24. *Williams*, 899 F.2d at 899.

25. *Id.*

26. Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring the government to disclose evidence favorable to the accused when the evidence is material to either guilt or punishment).

27. *Williams*, 899 F.2d at 899.

28. 808 F.2d 723, 728 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987) (holding that when substantial exculpatory evidence is discovered during an investigation, it must be revealed to the grand jury).

tory evidence discovered during an investigation, or risk dismissal of the indictment.[29] The rationale for adopting this rule was the promotion of judicial economy. The Tenth Circuit, in adopting this rule, chose to follow decisions of the Second and Seventh Circuits[30] rather than decisions of the Sixth, Eighth and Ninth Circuits which held that prosecutors need not present exculpatory evidence.[31] Williams argued that his financial records (consisting of ledgers, tax returns and financial statements) and his deposition from a contemporaneous Chapter 11 bankruptcy proceeding showed that his methods of accounting and financial reporting were consistent with the financial statements he had provided to the banks.[32] This evidence of consistency, Williams argued, this "exculpatory evidence," would have exonerated him. The district court denied the motion to dismiss the indictment.[33]

Williams then entered a motion to reconsider this dismissal. Upon reconsideration, the district court dismissed the grand jury indictment without prejudice. The court found that the evidence " 'raises reasonable doubt about the defendant's intent to defraud' "[34] and that the lack of this evidence "rendered the grand jury's indictment 'gravely suspect.' "[35]

### C. *The Tenth Circuit Opinion*

The issue on appeal before the Tenth Circuit was whether the government had presented all the necessary evidence required under *Page*. The government argued that "under its theory" of the case (that Williams intended to influence the banks' actions), the government had presented "all relevant evidence" to the grand jury.[36] The Tenth Circuit thoroughly discussed the district court's findings with respect to this contention. In first reviewing the district court's findings under a "clearly erroneous" standard,[37] the Tenth Circuit concluded that the district court's choice among more than one permissible view of the evidence could not be clearly erroneous.[38] The Tenth Circuit then reviewed the materials on which Williams based his argument that the government should have presented exculpatory material to the grand jury. These materials consisted of Williams' financial records and his

29. *Id.*

30. Unites States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979).

31. United States v. Adamo, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985); United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984); United States v. Civella, 666 F.2d 1122 (8th Cir. 1981).

32. *Williams*, 112 S. Ct. at 1737-38.

33. *Williams*, 899 F.2d at 900.

34. *Id.* (quoting the District Judge's Order).

35. *Id.*

36. *Id.* at 901.

37. *Id.* at 900. *See* United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986) (explaining that the rule of civil procedure that questions of fact are reviewed under a clearly erroneous standard may be applied to certain issues in criminal proceedings).

38. *Williams*, 899 F.2d at 900 (citing Lone Star Steel Co. v. United Mine Workers, 851 F.2d 1239, 1242 (10th Cir. 1988)).

deposition given in an earlier bankruptcy proceeding. The Tenth Circuit's goal was to determine whether the government should have presented this material to the grand jury as part of proving one of the essential elements of its case—whether Williams intended to influence the banks' action by use of false statements.[39]

The Tenth Circuit followed the district court in separating the questionable evidence into two categories: (1) the bankruptcy deposition and (2) the financial statements and tax records prepared by Williams and his accounting firm.[40] The Tenth Circuit found that although the statements Williams made in his bankruptcy depositions were "irrelevant and self-serving" under the government's theory of the case, they were not necessarily so under a different theory that the grand jury could have reasonably adopted.[41] Because there could be more than one view of this evidence, the district court's finding that the deposition contained exculpatory evidence was not clearly erroneous.[42] After examining the financial statements, the Tenth Circuit found that a grand jury could reasonably conclude that Williams had a different understanding of "current assets" than the government or the banks and that because of these different meanings, Williams did not intend to mislead the banks. The government urged the court to review the grand jury transcript, arguing that this evidence was presented to the grand jury by the testimony of its witnesses. The Tenth Circuit was unable to review the grand jury transcript, however, because the government did not designate it as part of the record.[43] The court was therefore forced to conclude that the district court's finding that the government withheld exculpatory evidence was not clearly erroneous.[44]

The Tenth Circuit then briefly discussed whether Williams was prejudiced by the failure of the government to present the exculpatory evidence and whether the district court abused its discretion by dismissing the indictment. The court found that by withholding the exculpatory evidence, the government " 'substantially influence[d]' " the grand jury's decision to indict, or at least raised a " 'grave doubt that the decision to indict was free from such substantial influence.' "[45] This met the *Bank of Nova Scotia* standard for errors that prejudice the defendant: whether the violations substantially influenced the grand jury's decision to indict.[46] These circumstances were sufficient for the Tenth Circuit to find that the district court did not abuse its discretion by dismissing the indictment.[47]

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39. *Id.* at 901.
40. *Id.* at 901-03.
41. *Id.* at 902.
42. *Id.*
43. *Id.* at 903.
44. *Id.*
45. *Id.* at 903 (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988)).
46. *Bank of Nova Scotia*, 487 U.S. at 263.
47. *Williams*, 899 F.2d at 904.

D. *The Supreme Court Decision*

1. The Majority Opinion

Justice Scalia wrote the 5-4 opinion for the Supreme Court reversing the Tenth Circuit decision. The opinion held that district courts may not dismiss an otherwise valid indictment because the government failed to disclose substantial exculpatory evidence to the grand jury.[48] The holding extended a line of cases confirming the Court's reluctance to challenge the validity of grand jury indictments and curtailing judicial supervision of grand juries.[49]

The Court considered two issues: (1) whether certiorari had been properly granted and (2) whether prosecutors should present exculpatory evidence to grand juries. The Court first considered whether it properly granted certiorari, since the government (the petitioner) did not previously argue that *Page* was wrongly decided. Traditionally, a question not "pressed or passed upon below" is not reviewed by the Supreme Court.[50] This rule ensures the development of the factual record and gives the Justices the full benefit of competing arguments.[51] Justice Scalia determined, however, that the Tenth Circuit had indeed "passed on" the prosecutor's obligation to tell the grand jury about exculpatory evidence in its decision in *United States v. Williams*.[52] Two previous cases established that an issue not pressed could be reviewed so long as it had been passed upon.[53] Justice Scalia then stated a new rule to permit the Supreme Court to review a question even though it was not contested below:

> It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent.[54]

The Court next considered the substantive issue: whether a district court may dismiss an otherwise valid indictment because the government failed to disclose substantial exculpatory evidence to the grand jury. Justice Scalia first considered whether the supervisory power of the federal courts extends to the grand jury. The federal courts possess the authority to establish procedural rules not specifically required by the Constitution or the Congress,[55] but Justice Scalia found that this

48. United States v. Williams, 112 S. Ct. 1735, 1742 (1992).
49. *See supra* notes 12-14 and accompanying text.
50. *Williams*, 112 S. Ct. at 1738.
51. David O. Stewart, *Advantage Government: Is It Easier for the Government to Win in the Supreme Court?*, 78 A.B.A. J. 46 (1992).
52. 112 S. Ct. at 1740 n.4; *See Williams*, 899 F.2d at 900.
53. Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2761 (1991); Stevens v. Department of Treasury, 111 S. Ct. 1562, 1567 (1991).
54. *Williams*, 112 S. Ct. at 1740-41 (footnote omitted).
55. United States v. Hasting, 461 U.S. 499, 505 (1983).

authority applies only to the court's power to control its *own* procedures.[56] Even though *Bank of Nova Scotia* made it clear that this supervisory power could be used to dismiss an indictment because of misconduct before the grand jury,[57] this power only applies to misconduct that violates "clear rules . . . drafted . . . by this Court and by Congress."[58] Stressing the grand jury's "operational separateness" from the courts,[59] Scalia held that the supervisory power of the courts cannot be used to prescribe prosecutorial misconduct before a grand jury.[60]

Justice Scalia then considered whether Fifth Amendment "common law" justified the Tenth Circuit's ruling in order to preserve the effectiveness of the grand jury's constitutional role as an " 'independent and informed' " body.[61] He concluded that "requiring the prosecutor to present exculpatory . . . evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."[62] For a balanced presentation to be made in this situation, the person under investigation should be the one to present such evidence, not the prosecutor; yet this conflicts with more than 200 years of grand jury practice.[63] Also, the grand jury itself can decide not to hear more evidence when it believes it has enough to bring an indictment, even though the prosecutor offers more. If the grand jury is not required to hear exculpatory evidence, the prosecutor should not be obliged to present it.[64] The Court concluded that a prosecutor has no duty to present exculpatory evidence to a grand jury, reversing the Tenth Circuit.

2. The Dissenting Opinion

Justice Stevens, writing for the dissent, sharply differed with both holdings of the majority. In arguing that certiorari should have been denied, Justice Stevens said that the Tenth Circuit did not "pass upon" *Page* in its opinion; it simply restated *Page* and applied it as settled law.[65] In addition, the government not only failed to challenge *Page* in the Tenth Circuit case, but actually urged the court to follow *Page*'s holding and find that the evidence was not exculpatory.[66] The government did not actually challenge *Page* until it petitioned the Supreme Court for certiorari. The majority's holding that the Supreme Court can grant certiorari in such circumstances, Justice Stevens concluded, may result in a significantly expanded caseload.[67] More important, it gives an unfair

56. *Williams*, 112 S. Ct. at 1741.
57. *Id.* (citing Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)).
58. *Id.* (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986)).
59. *Id.* at 1743.
60. *Id.* at 1742.
61. *Id.* at 1744 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)).
62. *Id.*
63. *Id.* at 1744-45.
64. *Id.* at 1745.
65. *Id.* at 1747-48 (Stevens, J., dissenting).
66. *Id* at 1747.
67. *Id.* at 1748.

advantage to the United States because the United States is the most frequent litigant in federal courts. This advantage, warned Justice Stevens, will compromise the Court's duty to act impartially.[68]

Justice Stevens also objected to the majority's substantive holding. Unlike the majority, the dissent maintained that the courts have the power to supervise grand juries. The dissent found considerable support for the idea that the grand jury, although independent, is and has always been subject to the control of the Court.[69] The dissent also found previous recognition by the Supreme Court of its authority to create and enforce limited rules applicable to grand jury proceedings, even though the Court has declined exercise this authority.[70] The application of this supervisory power is necessary to curb prosecutorial misconduct, which is varied and not infrequent.[71] Justice Stevens considered this conduct intolerable because the prosecutor represents a sovereign that is obliged to govern impartially.[72] Justice Stevens advocated adopting the standard of the United States Department of Justice. This standard holds that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of an investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment."[73]

### E. *Analysis and Conclusion*

The Supreme Court, in reversing the Tenth Circuit, extended its reluctance to question the validity of grand jury indictments. In effect, the language of the decision foreclosed any meaningful judicial supervision of the grand jury in any context, not just that of an incomplete presentation of evidence. By stressing the traditional independence of the grand jury from the courts,[74] and by affirming that the procedural rules formulated by courts apply only to the courts' own procedures,[75]

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68. *Id.* at 1748-49.

69. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 346 n.4 (1974); Brown v. United States, 359 U.S. 41, 49 (1959), *overruled on separate point by* Harris v. United States, 382 U.S. 162, 167 (1965); Blair v. United States, 250 U.S. 273, 283 (1919); Falter v. United States, 23 F.2d 420, 426 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

70. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); *Calandra*, 414 U.S. at 343; Costello v. United States, 350 U.S. 359, 364 (1956).

71. *See, e.g.*, United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979) (prosecutor failing to inform grand jury of its authority to subpoena witnesses); United States v. Basurto, 497 F.2d 781, 786 (9th Cir. 1974) (prosecutor presenting perjured testimony); United States v. Lawson, 502 F. Supp. 158, 162 nn.6-7 (D. Md. 1980) (prosecutor misstating the facts on cross-examination of a witness); United States v. Roberts, 481 F. Supp. 1385, 1389 n.10 (C.D. Cal. 1980) (prosecutor misstating the law); United States v. Gold, 470 F. Supp. 1336, 1346-51 (N.D. Ill. 1979) (prosecutor operating under a conflict of interest); United States v. Phillips Petroleum, Co., 435 F. Supp. 610, 615-17 (N.D. Okla. 1977) (prosecutors failing to inform grand jury of exculpatory evidence obtained from a witness questioned outside the grand jury).

72. *Williams*, 112 S. Ct. at 1750 (Stevens, J., dissenting).

73. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, ch. 11, ¶ 9-11.233 (1988) (amended 1990).

74. *Williams*, 112 S. Ct. at 1743.

75. *Id.* at 1741.

the Supreme Court cut the grand jury loose from any hobbles applied by the lower courts. A grand jury indictment may be dismissed only when the prosecutor violates a constitutional or statutory restriction.[76] At bottom, the Court fears that greater supervision[77] will lead to collateral proceedings and disruptive delaying tactics by the defense, consuming "valuable judicial time"[78] and "run[ning] counter to the whole history of the grand jury institution."[79] The grand jury, moving far from its traditional role as an accusatory body, will become an adjudicatory force. Criminal investigations will be impeded.[80]

As a practical matter, prosecutors will find it even easier to convince the grand jury to indict. Defendants, having lost the protection given by *Page* and similar decisions,[81] can depend only on other rules that may influence prosecutors, such as the rule of the Department of Justice that requires United States attorneys to disclose substantial exculpatory evidence to the grand jury or face reprimands.[82] Justice Scalia accepted the government's argument that such rules would indeed act to curb overzealous prosecutors.[83] It remains to be seen whether Congress will agree with the Court's decision, or find it necessary to enact statutory restrictions governing prosecutors' failure to present exculpatory evidence to grand juries.[84]

## II. *UNITED STATES V. FELIX*: ADMISSION OF EVIDENCE OF A CRIME IS NOT THE SAME AS PROSECUTION OF THAT CRIME AND DOES NOT ESTABLISH A DOUBLE JEOPARDY VIOLATION; SUBSTANTIVE CRIME AND CONSPIRACY TO COMMIT THAT CRIME ARE NOT THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES

### A. *Introduction*

The Fifth Amendment states in part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[85] It is unfortunate that a concept so basic[86] and with so long a history[87] should have become such a quagmire in modern jurispru-

76. *Id. See also* Steven A. Shaw, *It's 'No Holds Barred' in the Grand Jury Room*, TEX. LAW., July 13, 1992, at 10.

77. *See* Poulin, *supra* note 8; Currier, *supra* note 5.

78. *Williams*, 112 S. Ct. at 1746.

79. *Id.* at 1744.

80. *See* Arenella, *supra* note 11, at 566-67 (discussing the ramifications of requiring prosecutors to present exculpatory evidence).

81. *See supra* notes 28-29 and accompanying text.

82. *See supra* note 73 and accompanying text.

83. *See Justices Hear Debate on Government Duty to Give Grand Jury Exculpatory Evidence*, 60 U.S.L.W. 1128 (1992) (summarizing the government's argument before the Supreme Court).

84. For a discussion on this point, see Stuart Taylor, Jr., *End the Grand Jury Charade*, AM. LAW., June 1992, at 32.

85. U.S. CONST. amend. V. The Fourteenth Amendment incorporates the double jeopardy clause; thus, its prohibitions apply to state prosecutions. Benton v. Maryland, 395 U.S. 784, 794 (1969).

86. Eli J. Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 274 (1992).

87. *See* Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting)

dence.[88] The sticking point is the phrase "same offence." Courts in literally thousands of decisions[89] have struggled to define this phrase. The Supreme Court has struggled in the same way and to much the same result. *United States v. Felix*[90] represents the Court's most recent attempt to clarify a very small piece of this very large fogbank.

The basic functions of the double jeopardy clause are at least clear. Double jeopardy protects defendants in four ways: (1) it provides finality; (2) it prevents prosecutorial harassment; (3) it preserves the jury's prerogatives to resolve factual issues; and (4) it bars successive prosecutions (resulting from several proceedings) and multiple punishments (resulting from one proceeding).[91] Discussions of "same offense" sprang from the constitutional bar against successive prosecutions and multiple punishments. *Blockburger v. United States*[92] enunciated the first test of whether double jeopardy exists in the context of multiple punishments. This test, however, was later seen to be insufficient for the analysis of successive prosecutions.[93] Two recent cases, *Dowling v. United States*[94] and *Grady v. Corbin*,[95] attempted to clarify the steps to be taken in analyzing this problem by adopting conduct-based standards. *Grady*, however, marked a break from the Court's earlier double jeopardy jurisprudence[96] and cannot be reconciled with the *Dowling* decision, because evidence ruled admissible in *Dowling* would be barred by *Grady*.[97] Also, the lower courts have applied the *Grady* standard inconsistently,[98] or have failed to apply it in the manner the Supreme Court envisioned.[99]

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(explaining that the guarantee against double jeopardy dates back to the days of Demosthenes, who stated that "the laws forbid the same man to be tried twice on the same issue") (quoting 1 Demosthenes 589 (J. Vance trans., 4th ed. 1970)). *See generally* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 (1986) (noting that the law of double jeopardy dates back to ancient Greek, Hebrew and Roman law).

88. Justice Rehnquist has described law in the double jeopardy area as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator," Albernaz v. United States, 450 U.S. 333, 343 (1981), and as a "Gordian knot," *Whalen*, 445 U.S. at 702 (Rehnquist, J., dissenting).

89. Thomas, *supra* note 87, at 330.

90. 112 S. Ct. 1377 (1992) [*Felix II*].

91. Tat Man J. So, *Double Jeopardy, Complex Crimes and* Grady v. Corbin, 60 FORDHAM L. REV. 351, 352 (1991).

92. 284 U.S. 299 (1932). *Blockburger* established the standard that where the same act may violate two different statutes, the two statutory offenses are not the same if each requires proof of a fact that the other does not. *Id.* at 304.

93. Grady v. Corbin, 110 S. Ct. 2084, 2092 (1990).

94. 493 U.S. 342 (1990) (admission of testimony from a previous prosecution in which defendant was acquitted does not violate the collateral-estoppel component of the double jeopardy clause).

95. 110 S. Ct. 2084 (1990). "[T]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the Government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2087.

96. *Id.* at 2101 (Scalia, J., dissenting).

97. *Id.* at 2095-96 (O'Connor, J., dissenting).

98. United States v. Felix, 112 S. Ct. 1377, 1381 n.2 (1992) [*Felix II*].

99. *Id.* at 1382 ("we think that this is an extravagant reading of *Grady*"); *id.* at 1384 ("we decline to read the language so expansively . . . because of difficulties which have already arisen in [*Grady*'s] interpretation.").

For instance, the Second and Tenth Circuits bar conspiracy prosecutions if the defendant has already been prosecuted for the substantive offenses supporting the conspiracy charge, while the First and Fourth Circuits allow such prosecutions.[100] The Court used *Felix* both to clarify the meaning of *Grady* and to reconcile it with *Dowling*.

B. *Facts*

Sometime in the spring of 1987, a meeting between Frank Dennis Felix and unindicted co-conspirator Paul Roach resulted in an agreement that Felix would supply Roach with financing, chemicals and equipment in exchange for Roach's instructions on how to manufacture ("cook") methamphetamine.[101] Felix then bought the chemicals and equipment needed from George Dwinnells, a United States Drug Enforcement Administration (DEA) confidential informant, who sold chemicals and equipment to Felix on a number of occasions.[102] Felix told Dwinnells he was trying to make "dope."[103] In May 1987, Roach and Felix set up a methamphetamine laboratory in a trailer parked on an oil lease near Beggs, Oklahoma, in which they manufactured methamphetamine four to six times[104] from June 1 to July 13, 1987.[105] Felix paid Roach $4000 for Roach's part of the laboratory work.

On July 13, 1987, DEA officials seized the unattended Beggs trailer while a "cook" was in progress.[106] They seized methamphetamine oil, illegal precursor chemicals, manufacturing equipment and other evidence, some of which inculpated Felix.[107] Felix himself escaped capture in a time-honored way—he hid in the woods.[108]

Shortly thereafter, Felix telephoned Dwinnells and arranged a meeting at a Tulsa, Oklahoma, bar.[109] At this meeting on August 26, 1987, Felix gave Dwinnells a matchbook cover with a list of chemicals and equipment for making methamphetamine. Felix also gave Dwin-

100. The Second Circuit barred conspiracy prosecutions when the defendant had previously been prosecuted for a conspiracy where the actions entirely encompassed the actions of the second conspiracy. United States v. Calderone, 917 F.2d 717 (2d Cir. 1990). Later, the Second Circuit held that a conspiracy prosecution is barred if overt acts supporting the conspiracy charge involve substantive offenses for which the defendant has already been prosecuted. United States v. Gambino, 920 F.2d 1108 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 54 (1992). The Tenth Circuit followed the *Gambino* reasoning in its decision in *Felix II*, 926 F.2d 1522 (1991).

In contrast, the First Circuit and the Fourth Circuit have come to the opposite conclusion, that subsequent conspiracy prosecutions are not barred. United States v. Rivera-Feliciano, 930 F.2d 951 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1676 (1992); United States v. Clark, 928 F.2d 639 (4th Cir. 1991).

101. United States v. Felix, 926 F.2d 1522, 1524 (10th Cir. 1991), *rev'd*, 112 S. Ct. 1377 (1992) [*Felix II*]. Roach later became a government witness at Felix's trial.

102. United States v. Felix, 867 F.2d 1068, 1070 (8th Cir. 1989) [*Felix I*].

103. *Id.*

104. *Id.*

105. *Felix II*, 926 F.2d at 1524 n.1.

106. *Id.* at 1524.

107. *Id.* A car owned by Felix was seized at the laboratory. *Felix I*, 867 F.2d at 1070 n.3.

108. *Felix I*, 867 F.2d at 1070.

109. *Felix II*, 926 F.2d at 1524.

nells a down payment of $7500, told him to get a trailer to transport the items and gave him directions and a phone number so the items could be delivered.[110] DEA agents observed this meeting.[111] In a later telephone conversation, Felix told Dwinnells to deliver the items to the Joplin, Missouri, Holiday Inn; Dwinnells informed the DEA of this arrangement.[112]

The DEA arranged a controlled delivery to be made by Dwinnells in Joplin on August 31, 1987, with DEA agents and the Missouri Highway Patrol providing surveillance. Dwinnells drove his vehicle from Tulsa to Joplin with the trailer attached. Felix met Dwinnells at the Joplin Holiday Inn, where Felix, after checking the trailer's contents, attached new locks to its rear doors and hitched it to his car. The DEA arrested Felix shortly thereafter.[113]

### C. *The Federal District Court Decisions*

#### 1. The Missouri District Court

On September 15, 1987, a federal grand jury indicted Felix in Missouri and charged him with one count of attempting to manufacture methamphetamine between August 26 and 31, 1987,[114] in violation of the Controlled Substances Act.[115] Felix's defense was that he never had criminal intent, but believed that he was working in a covert operation for the DEA.[116] To support its case that Felix had the requisite intent, the government introduced the evidence of Felix's earlier activities in Oklahoma[117] under Federal Rule of Evidence 404(b).[118] In his instructions to the jury, District Judge Russell G. Clark carefully cautioned the jury that this evidence should be considered only to determine Felix's state of mind with respect to his Missouri activities, not to determine his guilt with respect to that evidence.[119] The judge's instructions were in accordance with the Eighth Circuit's relevant pattern instruction.[120]

110. *Felix I*, 867 F.2d at 1070.

111. *Felix II*, 926 F.2d at 1524.

112. *Id.* at 1525.

113. *Felix I*, 867 F.2d at 1070-71. Felix did not tell the arresting officers at this time that he was working as a covert operator for the DEA, even though he used this as a defense at trial. *Id.* at 1071.

114. *Id.*

115. 21 U.S.C. § 841(a)(1) (1988) and Pub. L. No. 91-513, 84 Stat. 1265 (1970) (current version at 21 U.S.C. § 846 (1988)). Section 841(a) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally" (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

Section 846, since amended, provided: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

116. *Felix I*, 867 F.2d at 1074.

117. *See supra* notes 101-07 and accompanying text.

118. "Evidence of prior acts is admissible to show 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' " *Felix II*, 112 S. Ct. at 1380 (quoting FED. R. EVID. 404(b)).

119. *Felix I*, 867 F.2d at 1075.

120. *Id.*

The jury convicted Felix, and he was fined and sentenced to seven years in prison.[121] The Eighth Circuit Court of Appeals affirmed the conviction.[122]

2. The Oklahoma District Court

On February 16, 1989, the government charged Felix in Oklahoma with violations of the Controlled Substances Act and named him in eight counts of an eleven-count indictment.[123] Count 1 charged Felix and others with conspiring from about May 1, 1987, to August 31, 1987, to manufacture methamphetamine. Two of the overt acts supporting this charge were based on conduct that was the subject of the Missouri prosecution.[124] Counts 2 through 6 charged Felix with substantive crimes (manufacturing methamphetamine and phenylacetone, possession of methamphetamine with intent to distribute and maintaining a place for manufacturing methamphetamine), and Counts 9 and 10 charged Felix with interstate travel with intent to promote the manufacture of methamphetamine.[125]

Before the April, 1989, trial, Felix moved to dismiss the indictment on double jeopardy grounds.[126] The trial court denied this motion. Felix was then convicted on all counts after a jury trial.[127]

D. *The Tenth Circuit Decision*

1. The Majority Opinion

On appeal to the Tenth Circuit, Felix raised only one issue: that the Oklahoma district court trial subjected him to double jeopardy because the evidence introduced at the Oklahoma trial was identical to that used to prosecute him in the Missouri trial. The Tenth Circuit, in an opinion written by William J. Holloway, Jr., Chief Judge, agreed, affirming in part and reversing in part.[128]

The Tenth Circuit began by determining that *Grady v. Corbin* applied in this situation.[129] *Grady* held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already

121. *Id.* at 1070.
122. *Id.*
123. *Felix II*, 926 F.2d at 1524 (10th Cir. 1991). See *supra* note 115 for the text of the Controlled Substances Act.
124. Overt act 17 charged that "[o]n August 26, 1987, Frank Dennis Felix, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Overt act 18 charged that "[o]n August 31, 1987, Frank Dennis Felix, while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Felix II*, 112 S. Ct. at 1380.
125. *Felix II*, 926 F.2d at 1524 n.1.
126. *Id.* at 1525.
127. *Id.* at 1524.
128. *Id.* at 1531.
129. *Id.* at 1528.

been prosecuted."[130] In a *Grady* analysis, the focus is on the defendant's conduct, not on the evidence the government uses to prove that conduct. The Tenth Circuit, applying this standard to the counts listed in the Oklahoma district court indictment,[131] found that for Counts 1 through 6, the duplication of the conduct proved in the Missouri trial and the Oklahoma trial was extensive; thus, the counts could not stand.[132] The Tenth Circuit's opinion actually expanded the protections given by *Grady* by holding that presenting evidence at one trial bars a subsequent prosecution on other charges using the same evidence.

2. The Dissenting Opinion

Tenth Circuit Judge Stephen H. Anderson wrote a vigorous dissent. The majority, he wrote, expanded *Grady* far beyond the interpretation intended by the Supreme Court, even "dangerously" beyond.[133] The dissent claimed that the majority ignored the plain meaning of *Grady*. The majority interpreted *Grady* to establish a "same conduct" test. But in *Grady*, the dissent pointed out, "conduct" meant only that conduct "that constitutes an offense for which the defendant has already been prosecuted."[134] The majority failed to analyze Felix's conduct in this way. In addition, the majority confused "conduct" with "evidence." Although the majority said it was applying a same conduct test, it proceeded to analyze, not the *conduct* proved, but the *evidence* presented at each trial. *Grady* explicitly made a distinction between previously prosecuted conduct and evidence used to prove that conduct.[135]

The dissent also warned that the majority's interpretation "eviscerates" Federal Rule of Evidence 404(b) because, by the majority's analysis, introduction of Rule 404(b) prior bad act evidence to prove intent is the same as prosecution for that bad act. Thus, Rule 404(b) evidence could never be used when the defendant had already been prosecuted for that bad act, nor could this evidence, once used, be used in the same way in another trial.[136] The Supreme Court never intended that *Grady* should be interpreted in this way.[137]

E. *The Supreme Court Decision*

The Supreme Court moved decisively in a unanimous decision to

130. Grady v. Corbin, 495 U.S. 508, 521 (1990).

131. *See supra* notes 124-25 and accompanying text.

132. *Felix II*, 926 F.2d at 1529-31. Counts 9 and 10, charging interstate travel to promote the manufacture of methamphetamine, did not prove the same conduct as the Missouri trial, and Felix's convictions of these counts were affirmed. *Id.* at 1531.

133. *Id.* at 1532 (Anderson, J., dissenting).

134. *Id.*

135. *Id.* at 1533 (citing *Grady*, 495 U.S. at 521).

136. *Id.* at 1534.

137. In fact, the Supreme Court specifically said in *Grady* that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Id.* at 1534 n.5 (quoting *Grady*, 495 U.S. at 521-22 (1990)).

quash the Tenth Circuit's expansion of the *Grady* test[138] and to clear up a difference in the circuits on the application of *Grady* to conspiracy prosecutions.[139] The Court, in an opinion written by Chief Justice Rehnquist, first considered whether the Tenth Circuit had erred in overturning Felix's convictions on substantive Counts 2 through 6[140] on the basis that he was prosecuted for the same conduct in both the Missouri trial and the Oklahoma trial. The Court determined that there was no common conduct linking the crimes for which Felix was prosecuted in Oklahoma and Missouri.[141] Even though evidence of the Oklahoma conduct was introduced at the Missouri trial, Felix was never prosecuted in Missouri for any crimes other than those he committed in Missouri. The Tenth Circuit was mistaken in making the assumption that offering evidence of one crime in a trial for another crime barred a subsequent prosecution for the former crime.[142] *Dowling v. United States*[143] implied that the introduction of evidence of misconduct is not the same as prosecution for that misconduct, and *Grady v. Corbin* endorsed this principle.[144] The Court specifically declined to accept a rule that admission of evidence under Rule 404(b) constituted prosecution of that crime[145] and stated that such an interpretation of *Grady* was "extravagant."[146]

The Court then considered whether the Double Jeopardy clause barred Count 1 of the Oklahoma indictment, the conspiracy charge. The various circuits interpreted *Grady* differently with respect to conspiracy charges,[147] and Rehnquist conceded that the *Grady* language[148] cast some doubt on Felix's conspiracy conviction when taken out of context and read literally.[149] But previous decisions of the Supreme Court are at odds with *Grady* and its interpretation that conspiracy prosecutions are barred by the Double Jeopardy clause. These decisions determined that a conspiracy to commit an offense and the offense itself are distinct and that, for double jeopardy purposes, the offenses are separate.[150] The *Felix* Court chose to follow this established line of cases rather than use *Grady* to determine whether double jeopardy applies. Thus, *Felix* establishes that the Double Jeopardy clause does not bar prosecution of a conspiracy when the defendant has already been convicted of the substantive crimes that resulted from the conspiracy.

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138. *Felix II*, 112 S. Ct. at 1381.
139. *See id.* at 1381 n.2.
140. *See supra* notes 124-25 and accompanying text.
141. *Felix II*, 112 S. Ct. at 1382.
142. *Id.*
143. 493 U.S. 342 (1990).
144. *See supra* note 137 and accompanying text.
145. *Felix II*, 112 S. Ct. at 1383 n.3.
146. *Id.* at 1382.
147. *See supra* note 100.
148. *See supra* text accompanying note 130.
149. *Felix II*, 112 S. Ct. at 1383.
150. *E.g.*, United States v. Bayer, 331 U.S. 532, 542 (1947) ("the agreement to do the act is distinct from the act itself"); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (a "substantive offense and a conspiracy to commit it are separate and distinct offenses . . . [a]nd the plea of double jeopardy is no defense").

F. *Analysis and Conclusion*

In reversing the Tenth Circuit, the Supreme Court firmly put to rest any attempts to expand *Grady* beyond its facts and established a small bit of solid ground in the murky world of double jeopardy analysis. The Court closely followed Judge Anderson's analysis in the Tenth Circuit dissenting opinion.[151] The Court preserved the use of Federal Rule of Evidence 404(b)[152] by holding that overlapping proof does not establish a double jeopardy violation.[153] The Court's holding resolved conflicting circuit decisions on the use of *Grady* in conspiracy prosecutions and affirmed that conspiracy is not the same offense as the substantive crime for double jeopardy purposes. *Felix* shows that the Court intended that *Grady* should be narrowly interpreted; *Grady* does not hold that offering evidence of misconduct in one prosecution bars a subsequent prosecution for that misconduct. The *Felix* decision put an end to the idea that *Grady* requires a same evidence test. However, *Felix* does nothing to define the scope of the same conduct test that it affirms. Double jeopardy analysis remains "enmeshed in . . . subtleties."[154]

## CONCLUSION

*Williams* confirmed the reluctance of the Supreme Court to supervise the activities of grand juries, and made it clear that prosecutors must fear only the threat of reprimands and sanctions by administrative agencies, absent some action by Congress to prescribe limitations on their behavior. *Felix*, by affirming a narrow interpretation of *Grady*, made the prosecutor's task easier. *Felix* allows a more generous interpretation of what evidence is admissible without jeopardizing subsequent prosecutions and ensures the separation of conspiracies and the substantive crimes attached to them. Both decisions support the opinion that the Court is joining in the efforts of other governmental powers in the war on crime[155] by eroding constitutional protections relied on by potential

151. *Felix II*, 926 F.2d at 1532 (Anderson, J., dissenting).

152. *See id.* at 1534 (stating that rule 404(b) will be "eviscerated" because the Tenth Circuit's decision holds that introduction of prior bad act evidence to prove intent is the same as prosecution for that bad act); Grady v. Corbin, 495 U.S. 508, 526 (O'Connor, J., dissenting) (the Court's decision "casts doubt on the continued vitality of Rule 404(b)"); Richardson, *supra* note 86, at 303-05 (if the Court chooses to interpret *Grady* narrowly, rule 404(b) will not be diluted).

153. *Felix II*, 112 S. Ct. at 1382.

154. *Id.* at 1385. *See, e.g.*, Richardson, *supra* note 86; Thomas, *supra* note 87; So, *supra* note 91, at 370-71. *But see* James M. Herrick, Note, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 847, 866 (1990-91) ("[*Grady*] alleviate[s] the confusion in [this] doctrinal area . . . .").

155. *See, e.g.*, Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (codified as amended in scattered sections of 18 U.S.C.):

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

defendants.[156]

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156. For instance, the narrow interpretation of *Grady* supported by the *Felix* decision will prevent *Grady* from being applied in a RICO context. For a discussion of *Grady's* effect on RICO criminal prosecutions, see Ramona L. McGee, *Criminal RICO and Double Jeopardy Analysis in the Wake of* Grady v. Corbin: *Is This RICO's Achilles Heel?*, 77 CORNELL L. REV. 687 (1992).