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CRIMINAL PROCEDURE

OVERVIEW

This article will discuss five criminal procedure cases decided by the Court of Appeals for the Tenth Circuit during the survey period. In the first case, *United States v. Andrews*,[1] the Tenth Circuit upheld the validity of a guilty plea attacked on grounds of ineffective assistance of counsel. The court held that representation need not be error free, but must be what can be expected of a reasonably competent attorney. Furthermore, the court held that the counsel's conflict of interest was not serious enough to render representation ineffective. The Tenth Circuit, in *United States v. Broce*,[2] upheld a defendant's right to a double jeopardy challenge of a charge even after the defendant had entered a counseled plea of guilty to the charge. In *United States v. Hooks*,[3] the Tenth Circuit determined that a jury may find a defendant guilty even though only circumstantial evidence has been presented.

Finally, this survey will examine two fourth amendment cases concerned with privacy interests. In *United States v. Remigio*,[4] the Tenth Circuit interpreted the "knock and announce" statute as permitting officers in possession of a valid search warrant to enter through an open door without having to announce their identity and purpose. In *United States v. Owens*,[5] the court upheld a motel guest's right to a reasonable expectation of privacy against a warrantless search. The Tenth Circuit held that the good faith exception to the exclusionary rule, as enunciated in *United States v. Leon*,[6] would not be expanded to include a warrantless search.

I. INEFFECTIVE ASSISTANCE OF COUNSEL AND VALIDITY OF THE GUILTY PLEA: *UNITED STATES V. ANDREWS*

A. *Facts*

Lee Travis Andrews was arraigned on October 6, 1983, and pled not guilty to the following charges: conspiracy to transport stolen goods in interstate commerce, transporting stolen meat in interstate commerce, transporting a stolen truck, and theft of meat from an interstate shipment. On November 7, 1983, the jury was selected and court was adjourned indefinitely.[7] On November 30, 1983, Andrews received notification that trial was set for January 23, 1984. Andrews filed a motion

1. 790 F.2d 803 (10th Cir. 1986).
2. 781 F.2d 792 (10th Cir. 1986).
3. 780 F.2d 1526 (10th Cir.), *cert. denied*, 106 S. Ct. 1657 (1986).
4. 767 F.2d 730 (10th Cir.), *cert. denied*, 106 S. Ct. 535 (1985).
5. 782 F.2d 146 (10th Cir. 1986).
6. 468 U.S. 897 (1984). This article will not attempt to assess the correctness of the Supreme Court's decision in *Leon*.
7. United States v. Andrews, 790 F.2d 803, 805 (10th Cir. 1986).

to dismiss under the Speedy Trial Act[8] on December 22, 1983, which was denied on January 3, 1984.[9]

Mark Lee, the attorney for Andrews, was planning to leave the practice of law to pursue pre-medical studies; therefore, in early January, the defendant asked that counsel be replaced since classes would most likely conflict with Andrews' trial date.[10] The court denied the request. A plea bargain was arranged and Andrews pled guilty on January 23, 1984.[11] At the sentencing hearing, Andrews' attorney was relieved of further involvement.[12] No new attorney was appointed for the purposes of appeal.[13]

Andrews was ill, on medication, groggy and incoherent for the two weeks following the sentencing.[14] He never received the entry of judgment; nevertheless, he mailed a notice of intent to appeal on March 12, 1984.[15] It was received March 27, 1984 at the court of appeals and forwarded to the district court where it was filed on March 30, 1984. Subsequently, Andrews, represented by new counsel, filed a motion for extension to file an appeal due to excusable neglect. The district court ruled that Andrews' filing of appeal was untimely, having been filed after the thirty day extension period.[16]

B. *Background*

1. Ineffective Assistance of Counsel

Until *Dyer v. Crisp*,[17] the Tenth Circuit had followed the "sham and mockery" test articulated in *Gillihan v. Rodriguez*,[18] to determine effectiveness of counsel's assistance under the sixth amendment. Most of the

8. 18 U.S.C. § 3161 (1982) provides: "In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall . . . set the case for trial on a weekly or other short-term trial calendar . . . so as to assure a speedy trial . . . ." 18 U.S.C. § 3161(a) (1982) provides: "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . ."

9. *Andrews*, 790 F.2d at 805.

10. *Id.*

11. Andrews pled guilty to conspiracy and misprision of felony. In return for the guilty plea, the government dismissed the other charges, agreed to contact the state in respect to any other charges, and to not pursue possible insurance fraud. *Id.* at 813.

12. *Id.* at 805.

13. *Id.* Andrews asked the court how to proceed, but his questions were never answered.

14. *Id.*

15. Andrews appealed his conviction for conspiracy to transport stolen goods in interstate commerce and misprision of felony on the grounds that his rights were violated under the Speedy Trial Act. He asserted that his guilty pleas did not waive his right to assert his speedy trial claim, but even if they did, the guilty pleas were involuntary because counsel was ineffective. *Id.*

16. *Id.*

17. 613 F.2d 275 (10th Cir.), *cert. denied*, 100 S. Ct. 1342 (1980). The *Dyer* court stated that "indeed it is our belief that even though courts in this circuit have articulated the 'sham and mockery' test, they have in fact been applying the more stringent 'reasonably competent' test, and that formal adoption of this standard represents a change in name." *Id.* at 278.

18. 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977); *see* Note, *United States Supreme Court Review of Tenth Circuit Decisions*, 62 DEN. U.L. REV. 363 (1985).

other circuits had been following *McMann v. Richardson*[19] which provided the higher standard of reasonably effective assistance of counsel.[20] In *Dyer* the Tenth Circuit held that "the [s]ixth [a]mendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney."[21] Dyer had petitioned the district court for a writ of habeas corpus claiming a violation of his sixth amendment right to effective assistance of counsel in his criminal trial. The petition was denied and he appealed to the Tenth Circuit. The court reviewed the standards used to determine effective assistance of counsel in the various circuits and determined that the trend was toward the more stringent "reasonably competent" test.[22]

The test presently applied by the Supreme Court for ineffective assistance of counsel can be found in *Strickland v. Washington.*[23] In *Strickland*, the Supreme Court adhered to the reasonableness test of *McMann*[24] but elaborated on the requirements, reiterating that the purpose behind the sixth amendment is to "ensure a fair trial."[25] The Court held that "the benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[26] The test for ineffective assistance of counsel is twofold. The court outlined that: "[f]irst, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense."[27]

According to *Strickland*, prejudice is presumed when there is actual or constructive denial of counsel, or when the state interferes with counsel's assistance.[28] Prejudice is also presumed when counsel has an actual conflict of interest. However, prejudice is only presumed if the defendant proves that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance."[29]

The *Strickland* Court also noted that review is limited to the record, and must encompass all of the circumstances contained in the record.[30] Scrutiny of the record must be highly deferential to counsel.[31] If the

19. 397 U.S. 759 (1970).
20. *Id.* at 770-71.
21. *Dyer*, 613 F.2d at 278.
22. *Id.* at 275-78. The court discussed the trend away from the sham and mockery standard to the reasonableness standard among the various circuits. For a discussion in support of the fair trial guarantee and movement away from the sham and mockery test see Note, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380 (1983).
23. 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).
24. *McMann*, 397 U.S. at 770-71.
25. *Strickland*, 466 U.S. at 680.
26. *Id.*
27. *Id.*
28. *Id.* at 685.
29. *Id.*
30. *Id.* at 683.
31. *Id.*

record reflects that the trial court was alerted to a possible disqualifying conflict and yet failed to make further inquiry, then the case should be remanded for a hearing to determine if an actual conflict existed.[32]

C. *Instant Case*

1. Majority Opinion

The Tenth Circuit held that as a matter of law Andrews established that the tardy filing of his notice of appeal due to his illness, was excusable neglect[33] and that he was entitled to the thirty day extension under Rule 4(b).[34] The thirty day extension period did not expire until April 2. Andrews' appeal was filed on March 30.[35]

Addressing Andrew's speedy trial appeal, the appellate court followed the ruling in *United States v. Gonzalez*[36] and held that voir dire constitutes the beginning of a trial for purposes of assessing the seventy day period under the Speedy Trial Act.[37] Consequently, a prolonged recess between voir dire and the commencement of the actual trial is not in the spirit of the Act and is thus improper.[38] In this case there was a delay of over two and one-half months between voir dire and the actual trial date. In holding that Andrews' right to a speedy trial was violated, the court noted that trial was postponed due to a heavy criminal docket, legal holidays, and the judge's absence for a judicial seminar. The Speedy Trial Act specifically prohibits delay due to congestion of the court's calendar or a judge's schedule conflicts.[39]

The court, however, ruled that Andrew's guilty plea waived his Speedy Trial Act claim. The majority pointed out that it is firmly entrenched in common law that a guilty plea waives all non-jurisdictional claims.[40] In order to preserve his speedy trial claim, Andrews needed to enter a conditional plea of guilty reserving his right to attack the convic-

32. *See* Wood v. Georgia, 450 U.S. 261 (1981) (The Supreme Court remanded the case in order to determine if the defendants were denied due process by having an attorney representing conflicting interests. The attorney in this case was being paid by the defendants' employer who had an interest that conflicted with that of the defendants.).

33. *Andrews*, 790 F.2d at 806.

34. "In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from . . . . Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision." FED. R. APP. P. 4(b).

35. *Andrews*, 790 F.2d at 807.

36. 671 F.2d 441 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982).

37. *Andrews*, 790 F.2d at 808.

38. *See Gonzalez*, 671 F.2d at 444.

39. *Andrews*, 790 F.2d at 808. "No continuance under paragraph (8)(a) of this subsection shall be granted because of general congestion of the court's calendar. . . ." 18 U.S.C. § 3161(h)(8)(C) (1982).

40. *Andrews*, 790 F.2d at 809; *see* United States v. Yunis, 723 F.2d 795 (11th Cir. 1984) (right to speedy trial is non-jurisdictional and waived by a plea of guilty); Mahler v. United States, 333 F.2d 472 (10th Cir. 1974), *cert. denied*, 379 U.S. 933 (1975) (a voluntary guilty plea waives all non-jurisdictional defenses).

tion on speedy trial grounds.[41]

Finally, the majority held that Andrews' claim of ineffective assistance of counsel was without merit.[42] The Tenth Circuit noted that the record showed that the trial judge addressed the issue of a conflict of interest and that the judge felt Andrews had received very good representation.[43] According to the majority, Andrews failed to show that he was prejudiced by counsel's representation.[44]

2. Concurring and Dissenting Opinion

Judge Seymour was in agreement with the majority in all aspects of the case except Andrews' ineffective assistance of counsel claim.[45] According to Judge Seymour, there was a possiblity of a conflict of interest that rendered counsel ineffective, and therefore, following the procedure adopted in *Wood v. Georgia,*[46] the case should have been remanded for a hearing to determine if an actual conflict existed.[47] If an actual conflict existed and rendered Andrews' guilty plea invalid due to ineffective assistance of counsel, then his speedy trial claim would not have been waived and the charges should have been dismissed.[48]

D. *Analysis*

Two issues of ineffective assistance of counsel are presented here. First, in requesting to be withdrawn, counsel actively represented that a potential conflict of interest existed. This representation should have resulted in the case being remanded for further fact finding regarding a potential conflict.[49] Second, had counsel advised Andrews to enter a conditional plea of guilty, Andrews would have had the charges dismissed since he would have retained the right to challenge the charges on speedy trial grounds.[50]

Admission by counsel of a conflict of interest does not create a presumption of prejudice per se, but prejudice will be found if the defendant can show that counsel's "actual conflict of interest adversely affected his lawyer's performance."[51] Counsel for Andrews "actively represented" that there was a possibility of a conflict of interest.[52] The defendant was never given the opportunity to show that the conflict

41. *Id.* at 809, 810; FED R. CRIM. P. 11(a)(2). The court rejected Andrews' argument that he preserved his speedy trial claim by moving for dismissal prior to entering a plea of guilty. *See* McMann v. Richardson, 397 U.S. 759 (1970) (by voluntarily pleading guilty upon the evidence of counsel, the defendant avoids trial and all uncertainties that a trial entails).

42. *Andrews*, 790 F.2d at 814.

43. *Id.* at 815.

44. *Id.*

45. *Id.* (Seymour, J., concurring in part and dissenting in part).

46. 450 U.S. 261 (1981).

47. *Andrews*, 790 F.2d at 817 (Seymour, J., concurring in part and dissenting in part).

48. *Id.*

49. *Id.* at 811.

50. *Id.* at 809.

51. *Id.* at 817.

52. *Id.* at 811.

adversely affected his lawyer's performance. A hearing should have been held to determine if counsel sought to avoid trial by encouraging Andrews to enter a guilty plea and, thus, relinquished Andrews' right to a speedy trial claim.[53]

The court asserted that Andrews' counsel's plans to enter school to pursue a new profession presented a conflict with his representation.[54] Since trial would likely have interfered with counsel's schedule, it was in counsel's best interest to have Andrews accept the plea bargain and thus dispose of the case before trial. The question of counsel's conflict of interest should have been explored more fully since counsel had petitioned the court to be dismissed as counsel.[55]

The dissent correctly pointed out that a hearing should have been held to determine if an actual conflict of interest did indeed exist which resulted in Andrews' premature guilty plea. At the hearing, the question of ineffective assistance of counsel could have been more fairly assessed.[56] The majority, following *Strickland*, relied solely on the record as the basis for their determination that Andrews received effective assistance of counsel.[57] However, the record cannot always be relied on to show that counsel's assistance was ineffective or that there was actual prejudice. It may be counsel's ineffectiveness which is the cause for the absence of these elements from the record. A hearing on the matter is necessary to investigate more thoroughly any oversights, especially considering counsel's explicit statements as to the presence of a conflict.[58]

Had counsel preserved Andrews' speedy trial claim, Andrews would not be facing a prison term. The right to a speedy trial is especially important where, as here, the defendant is incarcerated for the entire period before the trial due to his inability to raise bail.[59] In failing to preserve Andrews' speedy trial claim, counsel denied Andrews effective representation. The defendant deserved the opportunity to prove that an actual conflict existed and resulted in his proffering a plea of guilty.

II. DOUBLE JEOPARDY: *UNITED STATES V. BROCE*

A. *Facts*

The defendants, Raymond C. Broce and Broce Construction Company, Inc., were indicted on November 7, 1981 and charged with con-

53. *See* United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976); *see generally* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752, 772 & n.115 (1980).

54. *See* Barker v. Wingo, 407 U.S. 514, 520-21 (1972).

55. *Andrews*, 790 F.2d at 805.

56. *See generally* Wood v. Georgia, 450 U.S. 261 (1981) (due process is denied when an attorney represents conflicting interests); Holloway v. Arkansas, 435 U.S. 475 (1978) (the trial court failed to take adequate steps in response to the defendant's and counsel's representations that a conflict of interest existed).

57. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

58. *Andrews*, 790 F.2d at 810, 811.

59. *Id.* at 817 (Seymour, J., dissenting); *see* United States v. Winkle, 722 F.2d 605 (10th Cir. 1983).

spiracy in violation of the Sherman Act.[60] Broce was also charged with mail fraud.[61]

A second indictment on February 4, 1982, charged Broce and Broce Construction Company with another violation of the Sherman Act. Pursuant to a plea bargain arrangement, Broce entered guilty pleas to the two indictments for both himself and for the corporation as its president. The corporation received two separate $750,000 fines, one for each indictment. Broce was sentenced to concurrent two year terms, plus a $50,000 fine for each indictment.[62]

One year after entering their guilty pleas, the defendants filed Rule 35(a)[63] motions to vacate their convictions on the second indictment as violative of the double jeopardy clause of the fifth amendment.[64] The district court denied relief and the defendants appealed. The district court decision was reversed by the Tenth Circuit. That opinion was vacated and a rehearing was granted in order to determine if the defendants, by pleading guilty, waived their double jeopardy claims and admitted that two separate conspiracies existed.[65]

The Rule 35(a) motions were filed as a result of a decision in a companion case, *United States v. Beachner Construction Company, Inc.*[66] The defendants in the instant case and the Beachner Constuction Company were engaged in the highway construction business in Kansas. They were all indicted on charges of conspiracy to rig bids. Beachner Construction was acquitted on the charge of conspiracy to rig bids on one particular highway project. After acquittal, the company was charged with conspiracy to rig bids on a different highway project. Beachner successfully challenged the second indictment on double jeopardy grounds.[67] The trial court found that a pervasive conspiracy to rig bids had been going on for a period of over twenty years. The Tenth Circuit

60. 15 U.S.C. § 1 (1982). The Sherman Act provides that:

> Every contract . . . or conspiracy, in the restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

61. 18 U.S.C. § 1341 (1982). This statute instructs that:

> Whoever, having devised or intended to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

62. United States v. Broce, 781 F.2d 792, 793-94 (10th Cir. 1986).

63. FED. R. CRIM. P. 35(a) provides: "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time herein provided for the reduction of sentence." A motion to reduce sentence may be made within 120 days after the sentence is imposed.

64. U.S. CONST. amend. V provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

65. *Broce*, 781 F.2d at 794.

66. 555 F. Supp. 1273 (D. Kan. 1983).

67. *Broce*, 781 F.2d at 794.

upheld the trial court's decision in *Beachner*.[68] Unlike the defendants in *Beachner*, however, the defendants in *Broce* were charged simultaneously with two conspiracies.

B. *Background*

The Tenth Circuit has traditionally adhered to the principle that a plea of guilty made intelligently and voluntarily waives all non-jurisdictional defects including alleged violations of constitutional rights.[69] The prohibition against double jeopardy is found in the fifth amendment. The double jeopardy clause protects individuals from the imposition of unlawful multiple punishments and successive prosecutions.[70] A defendant is said to have been placed in jeopardy of successive prosecution, for purposes of the fifth amendment, in jury cases when the jury is sworn, or in a bench trial when the first witness is called. Once either of these events occur, a defendant may not be subjected to a successive prosecution unless he is found guilty, appeals, and is retried.[71]

In contrast, the prohibition against multiple punishments is statutory. Generally speaking, the double jeopardy clause protects a defendant from being punished twice for the same offense.[72] However, a defendant may receive multiple punishments under two different statutes if multiple punishments are specifically authorized by the legislature.[73] If multiple punishment is not prescribed by statute, the court must decide if the conduct constitutes a single offense or multiple offenses which deserve separate punishments.[74]

The right not to be placed twice in jeopardy for the same offense has been considered a personal right which is subject to waiver.[75] The Tenth Circuit has held in the past that a guilty plea waives the defense of double jeopardy.[76]

These Tenth Circuit double jeopardy cases, however, appear to be

68. United States v. Beachner Construction Co., 729 F.2d 1278 (10th Cir. 1984).

69. *See* Mahler v. United States, 333 F.2d 472 (10th Cir. 1964), *cert. denied*, 379 U.S. 993 (1965).

70. For a more thorough discussion of the double jeopardy clause and the use of guilty pleas, see Comment, Ohio v. Johnson: *Prohibiting the Offensive Use of Guilty Pleas to Invoke Double Jeopardy Protection*, 19 GA. L. REV. 159 (1984) (hereinafter Comment).

71. *See* Green v. United States, 355 U.S. 184 (1957). Other exceptions to the rule against successive prosecution are invoked when a mistrial is granted at the request of the defendant, *see* United States v. Dinitz, 424 U.S. 600 (1982), and when a trial is bifurcated and the defendant is to be tried on a greater or lesser charge, *see* Jeffers v. United States, 432 U.S. 137 (1977).

72. *See* Comment, supra note 70, at 164 nn.23-25.

73. *See* Missouri v. Hunter, 459 U.S. 359 (1983) (cumulative sentences imposed in a single trial do not violate double jeopardy if the sentences are shown to be prescribed by clear legislative intent).

74. Blockberger v. United States, 284 U.S. 299 (1932).

75. Caballero v. Hudspeth, 114 F.2d 545, 547 (10th Cir. 1940); *see* Special Project, *Criminal Law Survey*, 18 LOY. L.A.L. REV. 1, 500 (1985).

76. Cox v. Crouse, 376 F.2d 824, 825 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967); *Caballero*, 114 F.2d at 547.

in conflict with a recent decision of the United States Supreme Court.[77] In *Blackledge v. Perry*,[78] the Court upheld a defendant's right to challenge his plea of guilty to a felony conviction as violative of the double jeopardy clause. Again, in *Menna v. New York*,[79] which followed *Blackledge*, the Court stated that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."[80] The constitutional right against double jeopardy is intended to prevent the prosecution from bringing an improper charge and unlawfully subjecting an individual to trial, and to prevent excessive punishment.

C. *Instant Case*

1. Majority Opinion

The Tenth Circuit, on rehearing en banc, decided the case in two parts. Part 1 discussed whether a defendant's plea of guilty waives a defense of double jeopardy, and Part 2 discussed whether the indictments legitimately charged two conspiracies. In Part 1, the majority rejected the government's argument that an unconditional plea of guilty is a waiver of the right to assert a double jeopardy claim.[81] In addition, the majority rejected the notion that since the judgment was final, collateral attacks undermine the finality of the conviction.[82] Following the reasoning in *Blackledge*, the majority asserted that if the government had no authority to file a charge in the first place, then a guilty plea cannot strip a defendant of rights which are guaranteed by the constitution.[83]

In Part 2 the majority rejected the government's contention that since the defendants pled guilty to both charges, they had confessed to taking part in two conspiracies.[84] Neither indictment contained specific language alleging that the conspiracy in the first indictment was separate from that contained in the second indictment.[85] The defendants, in their counseled pleas of guilty, admitted only that their acts constituted a conspiracy and not that there were two separate conspiracies.[86]

The majority found that the trial court had made no factual deter-

77. Menna v. New York, 423 U.S. 61 (1975) (per curiam); Blackledge v. Perry, 417 U.S. 21 (1974).

78. 417 U.S. 21 (1974).

79. 423 U.S. 61 (1975).

80. *Id.* at 62.

81. *Broce*, 781 F.2d at 795.

82. The Tenth Circuit also rejected the government's argument that the plea bargain estops the defendants from challenging the validity of the charge. Since the government would be without authority in the second indictment if there is only one conspiracy, it cannot raise an objection to the challenge. *Id.* at 796.

83. *Id.*

84. *Id.*

85. *Id.* The indictments did not specifically allege separate conspiracies. The second indictment did not contain a specific charge that the conspiracy itself was separate from that in the first indictment.

86. *Id.*

mination as to whether one or two conspiracies existed.[87] Consequently, the majority remanded the case to the trial court to determine the number of conspiracies presented by the original evidence at trial.[88]

2. McKay - Concurring

Judge McKay concurred in Part 1 of the majority's opinion. As to Part 2, Judge McKay was of the opinion that the record established as a matter of law that there was only one conspiracy and that the second indictment was a violation of the double jeopardy clause.[89] He would have vacated the judgment and argued for dismissal of the second indictment.[90]

3. Seymour - Concurring in part and dissenting in part

Judge Seymour agreed that the defendants' guilty pleas were not a waiver of their right to assert a claim of double jeopardy. The judge disagreed, however, with the broad conclusion of the majority that the double jeopardy clause is an absolute prohibition on the government to bring any charges at all.[91] Judge Seymour argued for retaining a defendant's right to waive his constitutional right against double jeopardy if the waiver is knowing, voluntary, affirmative and unambiguous.[92] He contended, though, that a plea of guilty is not necessarily a waiver.[93] Judge Seymour contended that the double jeopardy clause was in fact violated, and he would have vacated the second conspiracy conviction.

4. Barrett - Dissenting

Judge Barrett stated that he would have upheld the trial court's denial of relief. He argued that the two indictments were not facially illegal and that the majority's reliance on *Menna* was misplaced. In *Menna*, the indictment was on its face violative of the double jeopardy clause.[94] Judge Barrett contended that the Tenth Circuit still has not addressed whether a guilty plea waives the right to a double jeopardy challenge of indictments not facially violative.[95]

87. *Id.* at 797.
88. *Id.* at 798.
89. *Id.* (McKay, J., concurring).
90. However, Judge McKay had no objection to joining the majority opinion and giving the trial court the first opportunity to review the issue. *Id.* at 798 (McKay, J., concurring).
91. *Id.* at 799 (Seymour, J., concurring in part and dissenting in part).
92. *Id.* at 800-802 (Seymour, J., concurring in part and dissenting in part).
93. Judge Seymour also addressed Judge Barrett's dissenting opinion claiming that failure to raise the issue below forfeited the double jeopardy claim. Judge Seymour pointed out that FED. R. CRIM. P. 12(b)(2) excepts jurisdictional issues from those that must be raised before trial. A 12(b)(2) motion asserts as a defense that the court lacks jurisdiction over the defendant. The Supreme Court's opinion in *Blackledge* makes it clear that failure to make a Rule 12(b)(2) motion is not a bar to raising a claim of double jeopardy post-trial because the right asserted by the defendant is the right not to be haled into court at all. *Blackledge*, 417 U.S. at 30.
94. *Broce*, 781 F.2d at 807 (Barrett, J., dissenting); *see Menna*, 423 U.S. at 62 n.2.
95. *Broce*, 781 F.2d at 807 (Barrett, J., dissenting).

Since the defendants pled guilty to two separate indictments which alleged two distinct conspiracies, Judge Barrett expressed the belief that the defendants agreed with the government's contention that two separate conspiracies existed.[96] He argued that the defendants waived their double jeopardy claim by pleading guilty to the two indictments which were charged as separate and distinct conspiracies.[97]

Judge Barrett argued that the defendants waived their right to a double jeopardy challenge by failing to preserve the challenge by a pre-trial Rule 12(b)(2)[98] motion. In addition, the defendants, rather than employing a pre-trial motion, could have instead entered conditional pleas of guilty thereby preserving the right to a double jeopardy challenge.[99] Judge Barrett asserted that the trial court's decision denying the defendants' motion to vacate the second conspiracy conviction should be affirmed.

5. Doyle - Dissenting

Judge Doyle contended that the defendants waived their rights under the double jeopardy clause by voluntarily entering pleas of guilty. Nonetheless, he believed that even if the guilty pleas did not constitute a voluntary waiver, the pleas of guilty admitted that two separate conspiracies existed.[100]

D. *Analysis*

The double jeopardy clause mandates that no person shall be put in jeopardy twice for the same offense. The question here is whether by pleading guilty to two separately charged conspiracies the defendants waived their right to challenge the second conspiracy as violative of the double jeopardy clause.[101]

The dissenters contended that allowing defendants to attack their sentences long after their pleas of guilty would undermine the finality of convictions. They argued that defendants should not be allowed to walk

96. *Id.* at 808 (Barrett, J., dissenting). The dissent quotes extensively from Kerrigan v. United States, 644 F.2d 47, 49 (1st Cir. 1981). In *Kerrigan*, Judge Campbell held that by pleading guilty to two separate conspiracies that appeared facially to be distinct, the defendant accepted the government's theory that two separate conspiracies existed. Judge Barrett's dissent further contended that the decision reached in *Beachner* should have no effect on the validity of the two guilty pleas since it should not have retroactive applicability. Furthermore, Judge Barrett expressed his belief that allowing defendants' challenges to their guilty pleas would undermine the effectiveness of the criminal justice system and the finality of a conviction and would discourage prosecutors from entering into plea bargains.

97. *Broce*, 781 F.2d at 808 (Barrett, J., dissenting).

98. FED. R. CRIM P. 12(b).

99. *Broce*, 781 F.2d at 813, 814 (Barrett, J., dissenting).

100. *Id.* at 823, 824 (Doyle, J., dissenting).

101. *See generally* Special Project, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-84*, 73 GEO. L. J. 555 n.1755 (1984) (The government by clever drafting could possibly create multiple conspiracies out of what is in reality only one conspiracy) [hereinafter Special Project].

away from a previously agreed upon plea bargain arrangement.[102] According to Judge Barrett's dissent, the government refrained from prosecuting other charges by the acceptance of these pleas.[103]

However, if the bid rigging conspiracy was as pervasive as the *Beachner* trial court found,[104] then there would appear to be an ongoing conspiracy which involved many different highway projects. In fact, the Tenth Circuit held as such in *Beachner*.[105] Therefore, Judge McKay's concurring opinion correctly asserted that there was no need for a remand to determine the validity of the second indictment because it was void. Even though different highway projects were involved, the bid rigging was part of one continuing conspiracy.[106]

The main concern in this case is whether defendants who have pled guilty unconditionally should be allowed at a later date, even after the completion of their prison sentence, to challenge the validity of their guilty plea. Because the double jeopardy clause bars the government from putting an individual twice in jeopardy for the same offense, the courts have held that the clause is a bar to prosecution of a constitutionally duplicitous charge.[107] Hence, a judgment on a duplicitous charge cannot be final and a guilty plea does not waive the right to sustain a challenge.[108] For a court to hold otherwise would allow the government to act unconstitutionally.

The impact of the *Blackledge* ruling, as the Tenth Circuit points out in *Broce*, is to provide the defendant with the constitutional right not to be haled into court on a constitutionally duplicitous charge. Thus, a guilty plea under these circumstances should be invalid as the government had no authority to bring the charge in the first place.[109] The government would obtain an unlawful advantage in plea bargaining agreements if the prosecution could persuade defendants to plead guilty

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102. *Broce*, 781 F.2d at 811, 821-22 (Barrett, J., Doyle, J., dissenting).

103. *Id.* at 817 (Barrett, J., dissenting).

104. The *Beachner* trial court found that there was a pervasive conspiracy involving several construction companies over a period of more than twenty-five years. *Broce*, 781 F.2d at 794.

105. 729 F.2d 1278 (10th Cir. 1984), *aff'g* 555 F. Supp. 1273 (D. Kan. 1983).

106. The trial court in *Beachner*, 555 F. Supp. at 1277, following a three day evidentiary hearing pursuant to Abney v. United States, 431 U.S. 651 (1977), determined that there had been a single pervasive conspiracy.

107. *See* Launius v. United States, 575 F.2d 770 (9th Cir. 1978). For a full discussion on multiple charges and offenses, see Special Project, *supra* note 101. A constitutionally duplicitous charge is one which is unlawful because it presents a situation when two charges have been levied when only one is appropriate. *See Broce*, 781 F.2d at 796, 797.

108. *See* Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974).

109. *Blackledge*, 417 U.S. at 30-31. *See* Abney v. United States, 431 U.S. 651, 656 (1977) (defendant pleading double jeopardy argues that the government is without authority to hale him into court). *But see* United States v. Herzog, 644 F.2d 713, 716 (8th Cir.), *cert. denied*, 451 U.S. 1018 (1981) (failure to raise challenge before entry of guilty plea waives all nonjurisdictional defenses; double jeopardy is a personal defense and not jurisdictional); Brown v. Maryland, 618 F.2d 1057, 1058 (4th Cir.), *cert. denied*, 449 U.S. 878 (1980) (pleading guilty after entering into a favorable plea bargain waives right to double jeopardy claim); United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977) (double jeopardy is a personal right which must be affirmatively pleaded at trial or it will be regarded as waived).

to the same charge twice, thereby subjecting defendants to multiple punishments for the same offense. In finding that a guilty plea does not waive a double jeopardy challenge, the Tenth Circuit upholds an individual's fundamental right to be free from governmental harassment once he has answered a charge.

III. SUFFICIENCY OF THE EVIDENCE: *UNITED STATES V. HOOKS*

A. *Facts*

On the evening of July 28, 1984 in Oklahoma City, Oklahoma, Officer McLerran and his partner observed a pickup truck speeding and changing lanes without signaling. The officers stopped the truck, and the defendant, Wallace Hooks, got out of the truck and walked back to the police car.[110] Hooks was unable to produce a driver's license in response to Officer McLerran's request. The officer informed Hooks that traffic citations would be issued and instructed him to sit in the police car. Officer McLerran frisked Hooks and discovered a checkbook, which he handed to his partner.[111] Officer McLerran then asked for the defendant's name and Hooks gave the name Wallace McConnell. McLerran's partner, having looked at the checkbook, noted that it bore the name Wallace Hooks. Hooks then admitted that he had lied about his name and the officers put him under arrest.[112]

Oklahoma City Police Department policy requires that the vehicle of an arrested driver be impounded. Officer McLerran went to the truck to take an inventory of its contents. As he approached the truck he became aware of a very strong odor which he recognized as being phencyclidine (PCP). Inside the truck he found a bottle containing grain alcohol, a bottle of whiskey, and a quart jar containing a yellow liquid which the officer suspected was PCP.[113] Hooks was then informed that he was under arrest for possession of a controlled substance. After being given his Miranda warnings, Hooks told the officers that he did not own the truck and knew nothing about the quart jar found behind the seat. At this point, Hooks was thoroughly searched. The officers found a pocket knife and a plastic bag containing a white powder. The white powder was subsequently found to be bicarbonate of soda, an element used in the purification of PCP.[114]

At trial, Officer McLerran testified about the events occurring on the evening of Hook's arrest. A special agent of the Drug Enforcement Agency certified the amount of PCP in the quart jar to be twenty-two ounces with a street value of approximately $10,000.[115] He stated that

110. United States v. Hooks, 780 F.2d 1526, 1528 (10th Cir.), *cert. denied*, 106 S. Ct. 1657 (1986).

111. *Id.*

112. *Id.* at 1529. Hooks was arrested for interfering with an officer by giving false information.

113. *Id.*

114. *Id.*

115. *Id.* Hooks was convicted of intent to distribute on the basis of the large quantity of PCP in the jar.

the PCP in the jar was eighty-one percent pure and that PCP is usually sold in quantities of one ounce or less and smoked by placing a small amount on a cigarette. Finally, he testified that PCP gives off an odor which makes one "extremely nauseous."[116]

Hooks presented several witnesses who testified that he was not the owner of the truck and in fact had borrowed the truck in order to move some furniture. He had used the truck all day, returned it at five o'clock in the evening, and borrowed it again around eight o'clock to move a freezer.[117] Hooks' mother testified that McConnell is the name on Hooks' birth certificate but to her knowledge he never used that name. His wife testified that Hooks used the name McConnell for traffic tickets, and that she had never known him to use PCP or any other hallucinogens.[118]

B. *Background*

It is well settled that a jury verdict will be upheld if there is substantial evidence to support the verdict.[119] Appellate courts must always view the evidence in the light most favorable to the appellee.[120] The Tenth Circuit in *United States v. Massey*[121] explained that the reviewing court must make all reasonable inferences and credibility assessments in support of the jury verdict. It is not within the discretion of an appellate court to make an independent determination of the sufficiency of the evidence.[122] Further, the Supreme Court in *Jackson v. Virginia*[123] set out the appropriate scope of appellate review. An appellate court must determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt.[124]

In an appellate court's review of the sufficiency of the evidence, the same standard of review applies to both circumstantial and testimonial evidence.[125] The Supreme Court warned in *Holland v. United States*[126] that testimonial as well as circumstantial evidence may lead to an incorrect result. It is for the jury, therefore, to weigh the evidence and the jury's reasonable inferences are to be drawn from the evidence.[127]

116. *Id.* at 1527.
117. *Id.*
118. *Id.* Despite the testimony of Hooks' witnesses, he was convicted of intent to distribute under 21 U.S.C. § 841(a)(1) (1982).
119. Glasser v. United States, 315 U.S. 60, 80 (1942); Corbin v. United States, 253 F.2d 646, 648 (10th Cir. 1958).
120. Glasser, 315 U.S. at 80; *see* United States v. Massey, 687 F.2d 1348, 1354 (10th Cir. 1982); *Corbin*, 253 F.2d at 648.
121. 687 F.2d 1348, 1354 (10th Cir. 1982).
122. *See* United States v. Downen, 496 F.2d 314 (10th Cir.), *cert. denied*, 419 U.S. 897 (1974); Golubin v. United States, 393 F.2d 590 (10th Cir.), *cert. denied*, 393 U.S. 831 (1968).
123. 443 U.S. 307, 318-19 (1979).
124. *Id.*; *see* Woodby v. INS, 385 U.S. 276, 282 (1966).
125. *See* United States v. Parrott, 434 F.2d 294, 297 (10th Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); United States v. Nelson, 419 F.2d 1237, 1239 (9th Cir. 1969); Corbin v. United States, 253 F.2d 646 (10th Cir. 1958).
126. 348 U.S. 121, 139 (1954).
127. *See* Jackson v. Virginia, 443 U.S. 307 (1979); Woodby v. INS, 385 U.S. 276 (1966).

Before *Holland*, the Tenth Circuit had held that in cases based on circumstantial evidence, a criminal conviction could be reversed if the evidence was consistent with a reasonable hypothesis of innocence.[128] Since the *Holland* decision, the Tenth Circuit has rejected the reasonable hypothesis of innocence standard.[129] However, language in subsequent opinions has indicated that a conviction cannot be based upon circumstantial evidence consistent with both innocence and guilt.[130]

C. *Instant Case*

1. Majority Opinion

The Tenth Circuit held that there is only one standard of review that applies in reviewing sufficiency of the evidence in criminal cases and that the standard of review for testimonial evidence is the same as that for circumstantial evidence.[131] Following the Supreme Court's reasoning in *Jackson v. Virginia*,[132] the Tenth Circuit stated in *Hooks* that "the evidence — both direct and circumstantial, together with the reasonable inferences to be drawn therefrom — is sufficient if, when taken in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt."[133]

In reviewing the evidence, the Tenth Circuit noted that considering each item of circumstantial evidence by itself would not have been sufficient to sustain a conviction. However, viewed in its totality, with all the inferences that could have been drawn, the circumstantial evidence was legally sufficient for the jury to find the defendant guilty beyond a reasonable doubt.[134] The court held that the mere presence of the odor of PCP in the truck did not establish that the defendant knew it was concealed in the truck.[135] Considering all the other circumstantial evidence, such as the defendant's possession of bicarbonate of soda, his use of a fictitious name, and the large quantity of PCP possessed by the defendant, the jury could have reasonably believed that the defendant had the knowledge necessary for conviction of possession of a controlled substance.[136]

128. Sapir v. United States, 216 F.2d 722 (10th Cir. 1954), *aff'd*, 348 U.S. 373 (1955); Morgan v. United States, 159 F.2d 85 (10th Cir. 1947).

129. *Corbin*, 253 F.2d at 649 (the appropriate instruction to the jury is reasonable doubt).

130. Lewis v. United States, 420 F.2d 1089, 1091 (10th Cir. 1970); Brumbelow v. United States, 323 F.2d 703, 705 (10th Cir. 1963); Tyler v. United States, 323 F.2d 711, 712 (10th Cir. 1963).

131. *Hooks*, 780 F.2d at 1531.

132. 443 U.S. 307, 319 (1979).

133. *Hooks*, 780 F.2d at 1531.

134. *Id.* at 1532.

135. *Id.* at 1531.

136. *Id.* at 1532. The majority pointed out that the value of the PCP supported the jury's verdict that the defendant knowingly possessed PCP, as it is highly unlikely that a substance of such value would be carelessly left in the truck. *Id.* Judge Baldock concurred with the majority opinion with the exception that he regarded the strong odor of PCP in the truck as establishing the defendant's familiarity with PCP. *Id.* at 1536 (Baldock, J., concurring).

D. *Analysis*

Circumstantial evidence can be very damaging and not always reliable. In some cases, however, it can be at least as reliable as direct or testimonial evidence.[137] In reviewing a jury's verdict, appellate courts must give great deference to the jury's decision because the jury alone has had the opportunity to assess the credibility of the witnesses at trial.[138] Since the reviewing court cannot make an independent determination of the validity of the inferences and beliefs of the jury, they must review the record as a whole to determine if a reasonable jury could have found the defendant guilty beyond a reasonable doubt.[139] The jury verdict will be reversed only if the appellate court finds that a reasonable jury, as a matter of law, must necessarily have had a reasonable doubt.[140] The Tenth Circuit in *Hooks* determined that a reasonable jury could have found Hooks guilty beyond a reasonable doubt of possession of PCP with intent to distribute.[141]

The problem in *Hooks* is one that is pervasive in most cases that deal with charges of possession of controlled substances. Possession may be either constructive or actual; proof of possession may be based on numerous factors and does not solely require that the substance be physically on the defendant, in his home, or in his automobile.[142] Mere presence of an individual where controlled substances are found does not necessarily constitute constructive possession by that individual.[143] The fact that PCP was in the truck driven by the defendant, therefore, was not sufficient to prove possession.[144] But, all of the other surrounding circumstances such as Hooks giving a false name, the large quantity of PCP found in the truck, the purity of the drug, and the substances used to manufacture PCP that were found on Hooks, correctly served as a basis for constructive possession.

Proof of possession with intent to distibute requires three elements: 1) knowledge; 2) possession; and 3) intent to distribute.[145] Intent to distribute may be inferred from possession of large quantities of a con-

137. *Holland*, 348 U.S. at 139; United States v. Nelson, 419 F.2d 1237, 1239 (9th Cir. 1969).

138. *Massey*, 687 F.2d at 1354. *See* text accompanying notes 119-24.

139. *See* United States v. Niver, 689 F.2d 520, 529 (5th Cir. 1982); United States v. Barnes, 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

140. United States v. Vergara, 687 F.2d 57, 62-63 (5th Cir. 1982).

141. *See generally* United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir.), *cert. denied*, 404 U.S. 993 (1971) (evidence sufficient to sustain a verdict of guilty beyond a reasonable doubt must be substantial; therefore, it must do more than raise a mere suspicion of guilt).

142. *Compare* United States v. Vera, 701 F.2d 1349, 1357 (11th Cir. 1983) (dominion and control over a motor vehicle may be sufficient for constructive possession) *with* United States v. Moreno, 649 F.2d 309, 312 (5th Cir. 1981) (presence where drug is found is not sufficient for possession).

143. *See* United States v. Kincade, 714 F.2d 1064, 1065 (11th Cir. 1983); United States v. Moreno, 649 F.2d 309 (5th Cir. 1981); United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973).

144. United States v. Freeze, 707 F.2d 132, 136 (5th Cir. 1983) (ownership or control without knowledge will not support a conviction). *But see Vera*, 701 F.2d at 1358 (knowledge may be imputed from surrounding circumstances).

145. *Freeze*, 707 F.2d at 135.

trolled substance with substantial street value.[146] Courts have given very few guidelines as to what quantity of a controlled substance is sufficient for conviction of possession with intent to distribute. The Tenth Circuit in *Hooks* gave this requisite quantity issue very cursory treatment, assuming that twenty-two ounces of PCP with a street value of approximately ten thousand dollars is sufficient to support intent to distribute without further analysis. The court relied on *United States v. Gonzalez*[147] for this proposition, claiming that no specified amount needs to be indicated. However, in *Gonzalez* the defendant was driving a car containing fifteen kilograms of herion valued at approximately $37,500 per kilogram. This amount is far in excess of what was present in *Hooks*.[148] Although it is unlikely that the twenty-two ounces of PCP was in possession solely for personal use, guidelines as to what constitutes mere possession and what constitutes a quantity sufficient to infer intent to distribute have not been expressed in objective terms.

The mere presence of PCP in the truck and the odor in the truck did not establish knowing possession. Faced with all the other circumstantial evidence, the jury could have found that the defendant knowingly possessed PCP; nonetheless, knowing possession does not constitute an intent to distribute. More than mere quantity should be required to prove intent to distribute, especially when only circumstantial evidence is presented to convict a defendant.

IV. THE FOURTH AMENDMENT PRIVACY INTERESTS

A. *Application of the Knock and Announce Statute:* United States v. Remigio

1. Facts

The defendant, Patrick C. Remigio, was convicted of unlawfully conspiring to manufacture methamphetamines and unlawfully attempting to manufacture methamphetamines.[149] Remigio and two co-defendants had been under investigation for five months prior to the day of the search.[150] On the day that the search occurred, agents witnessed delivery to one of the co-defendant's residences of a substance necessary for the production of methamphetamines.[151] Later, the agents perceived an odor of ether coming from the premises and, thus, suspected that the occupants were involved with manufacturing methamphetamines. The agents then obtained a federal search warrant.[152]

The agents split into two groups, one group proceeding to the back

146. *Id.*; United States v. Gonzalez, 700 F.2d 196 (5th Cir. 1983).
147. 700 F.2d 196 (5th Cir. 1983).
148. *Cf.* United States v. Ortiz, 445 F.2d 1100 (10th Cir. 1971) (size of containers without proof of monetary amount or of sale was sufficient).
149. *United States v. Remigio*, 767 F.2d 730, 731 (10th Cir.), *cert. denied*, 106 S. Ct. 535 (1985).
150. *Id.*
151. *Id.* at 732.
152. *Id.*

of the premises and one to the front. As the agents approached the back of the residence, one of the co-defendants opened the back door.[153] An agent quickly subdued the co-defendant. The others entered and proceeded through a second open door into the kitchen announcing "Police" and "FBI."[154] They did not knock before announcing their presence.

2. Background

The purpose of the knock and announce statute[155] is to protect the privacy of citizens against unannounced intrusions by the government, to ensure the safety of the officers and the occupants of a dwelling, and to prevent unnecessary property damage.[156] There is disagreement among the circuit courts as to whether an unannounced entry through an open door, with a valid search warrant, constitutes an unlawful forcible entry, that is, a "break," or whether such entry is permissible.[157] The majority of the circuits have held that this type of entry through an open door is not a "breaking."[158] The Sixth, Seventh, and Ninth Circuits have held that entry through an open door without permission is reasonable under the fourth amendment.[159] In contrast, the D.C. Circuit has held that any entry without notification violates privacy interests.[160] The Second Circuit has held that a peaceable entry, though it may constitute a trespass, is not a "breaking."[161] The Supreme Court has not addressed this issue.

3. Instant Case

In upholding the officers' entry as lawful, the court of appeals noted that the officers entered the house through an open door in the presence of one of the defendants.[162] Therefore, there was no need to com-

153. *Id.*

154. *Id.*

155. 18 U.S.C. § 3109 (1982). "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in execution of the warrant." *Id.*

156. Miller v. United States, 357 U.S. 301, 306-08 (1958); State v. Coyle, 95 Wash. 2d 1, 3, 621 P.2d 1256, 1258 (1980) (en banc).

157. *See generally* United States v. Conti, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968) ("breaking" means forcible entry); Dickey v. United States, 332 F.2d 773 (9th Cir.), *cert. denied*, 379 U.S. 948 (1964) (officers employed a ruse to induce the occupants to open the door — court held no "breaking"); Keiningham v. United States, 287 F.2d 126 (D.C. Cir. 1960) (word "break" in the context of 18 U.S.C. § 3109 means to enter without permission).

158. *Remigio*, 767 F.2d at 732.

159. United States v. Lopez, 475 F.2d 537 (7th Cir.), *cert. denied*, 414 U.S. 839 (1973); Ng Pui Yu v. United States, 352 F.2d 626 (9th Cir. 1965); United States v. Williams, 351 F.2d 475 (6th Cir. 1965), *cert. denied*, 383 U.S. 917 (1966).

160. Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961); Keiningham v. United States, 287 F.2d 126 (D.C. Cir. 1960).

161. United States v. Conti, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968).

162. *Remigio*, 767 F.2d at 733.

ply with the knock and announce statute.[163]

The panel explained that this was a case of first impression in the Tenth Circuit regarding the issue of whether police should knock and announce their presence when the residence which they have a warrant to enter has its door open. The court recognized that a majority of circuits have found that such an entry is not a "breaking" within the meaning of the statute.[164] Since a defendant was at the door of the residence when the police arrived and the door was open, the Tenth Circuit chose to follow the majority of circuits and rule that this entry was not a "breaking."

4. Analysis

The purpose of the knock and announce statute is well settled. The safety of the officers and the occupants of the dwelling must be ensured.[165] Where officers startle an individual there is a reasonable possibility that violence or unexpected behavior leading to unnecessary violence may occur.[166] In addition, the statute entitles every citizen to protection against unlawful invasions into their home.[167]

Officers do not need to announce their purpose and identity when the gesture would be futile.[168] Compliance with the knock and announce statute is a useless gesture when the officers are almost certain that the occupants of the dwelling are aware of their presence, identity, and purpose.[169] If police can be reasonably certain that all occupants of the residence who may pose a threat to their safety are aware of their identity and purpose, then there is no need to knock and announce their presence.

It is not clear from the facts, however, that such was the case in *Remigio*. To ensure the safety of all concerned, the officers should have requested permission to enter and should have announced their identity and purpose.[170] The other occupants were apparently unaware of the officers' presence, and in failing to inform them of their presence the officers could have endangered themselves and the other occupants of

163. *Id.*

164. *Id.* at 732.

165. Miller v. United States, 357 U.S. 301, 306-08 (1958); State v. Coyle, 95 Wash. 2d 1, 3, 621 P.2d 1256, 1258 (1980).

166. *Coyle*, 95 Wash. 2d at 6, 621 P.2d at 1261 (compliance with the statute is necessary unless the officers are certain that the occupants are aware of their identity and purpose).

167. "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application . . . ." *Miller*, 357 U.S. at 313.

168. *Coyle*, 95 Wash. 2d at 6, 621 P.2d at 1261. *See also* United States v. Lopez, 475 F.2d 537 (7th Cir.), *cert. denied*, 414 U.S. 839 (1973)(facts of the case do not support compliance with knock and announce statute).

169. *Coyle*, 95 Wash. 2d at 6, 621 P.2d at 1261.

170. *Id.* at 1259; Sears v. Oklahoma, 528 P.2d 732 (Okla. Crim. App. 1974) (The officers knocked and the pressure opened the door. They pushed the door open to enter, entered, identified themselves and served the search warrant. The officers failed to announce their identity and presence and to ask permission to enter.); State v. Collier, 270 So.2d 451 (Fla. 1972) (The officers announced they were police and entered. They did not comply with the statute as they did not knock or otherwise announce their purpose.).

the house.[171] Therefore, in this situation, the purpose of the knock and announce statute was not adhered to. Knock and announce standards must be followed in order to ensure that citizens' homes are not unlawfully invaded and that the safety of all concerned is protected. Unfortunately, the *Remigio* court failed to set forth strict standards governing future applications of the knock and announce statute. The court simply accepted the majority position and ignored the potential danger of their decision.

Although the defendant who opened the door saw the officers approaching, there is no indication that he was aware of their identity and purpose. Furthermore, the other occupants of the residence were not likely to be aware of the presence of the approaching officers. Moreover, exigent circumstances did not excuse compliance. It is unlikely that the manufacturing operation the FBI assumed to be taking place could have been destroyed in the short time span that compliance would have required.[172] Although it may appear absurd to require compliance in a case where one of the defendants is aware that people are approaching,[173] allowing increasing exceptions to the rule tends to foster noncompliance.[174]

B. *No Good Faith Exception to the Excusionary Rule for Warrantless Searches*: United States v. Owens

1. Facts

Merle Ellis Owens checked into the Pebbletree Inn in Oklahoma City, Oklahoma on September 8, 1983, and paid for a single occupancy for one night.[175] He failed to check out by noon on September 9, 1983, and was asked by motel personnel if he intended to stay another night. At approximately 3:00 P.M. that day, an additional one hundred dollars was deposited at the front desk as advance payment for the room.[176]

On September 11, 1983, motel security became suspicious due to a high volume of calls to the room. The security officer, an off-duty police officer, watched the room from 10:30 P.M. until 7:00 A.M. He observed

171. *Remigio*, 767 F.2d at 732.

172. *See* United States v. Sabbath, 391 U.S. 585, 591 (1968) (agents had no basis for assuming the defendant was armed, might resist arrest, or that danger existed). *But see* United States v. James, 764 F.2d 885 (D.C. Cir. 1985) (discusses issue of probable imminent destruction of evidence after police knocked and announced their presence but were not permitted to enter).

173. *Compare* Ng Pui Yu v. United States, 352 F.2d 626 (9th Cir. 1965) (Occupant opened the door, saw officers and retreated. The officers entered without identifying their purpose and without consent. The court held that consent was not required.) *with* Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961) (The defendant opened the door, saw police approaching, turned and ran upstairs. The officers, without announcing their authority or purpose, opened the door and gave chase. The court held that the entry was illegal.).

174. Non-compliance could eventually lead to tragic consequences if the police are allowed to barge in with guns drawn. The facts in *Hair* could have led to one such situation. *Hair*, 289 F.2d at 894.

175. *United States v. Owens*, 782 F.2d 146, 147 (10th Cir. 1986).

176. *Id.* at 147-48.

several people coming, staying only a short time, and then leaving.[177] The officer ran a police check to see if the car Owens was driving had been stolen. The check showed that the car had not been stolen, but that the license plate was stolen.[178] The officer again watched the room from 7:30 A.M. until noon on September 12th.

At this time, a plain clothes officer went to Owens' room and requested that he move his car. When Owens got to his car, he was arrested for recieving stolen property.[179] He asked the officers not to enter his room, because a female companion, Cheryl Jones, was asleep on the bed and naked. However, the motel manager authorized police entry into the room for the purpose of removing Owens' companion.[180]

The police entered the room, observed Cheryl Jones sleeping, and saw marijuana, cocaine, and drug paraphenalia in plain view.[181] The officers, unsure of how to proceed, considered the situation for several minutes, called their sergeant and waited for him. Finally, when the sergeant arrived twenty minutes later, Jones was awakened, told to get dressed, removed from the room, and arrested. The officers, without attempting to obtain a search warrant, made a complete search of the room and the closed containers in the room. They discovered in excess of two ounces of cocaine inside a closed bag in the top drawer of the dresser.[182]

2. Background

Hotel guests have a reasonable expectation of privacy in their hotel rooms,[183] and are afforded constitutional protection against unreasonable searches and seizures.[184] It is well settled that a warrant is required to conduct a search where a reasonable expectation of privacy exists.[185]

There are, however, exceptions to the warrant requirement for searches and seizures. Unwarranted searches may be justified if exigent circumstances are present.[186] Following an arrest, the arresting officers

177. *Id.* at 148.
178. *Id.*
179. *Id.*
180. *Id.* at 148-49.
181. *Id.* at 149.
182. *Id.* Owens was subsequently charged with conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. He was aquitted of the conspiracy charge.
183. Hoffa v. United States, 385 U.S. 293, 301 (1966), *reh'g denied*, 386 U.S. 940 (1967); *see* Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).
184. Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48 (1951); United States v. Anthon, 648 F.2d 669 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164, *reh'g denied*, 455 U.S. 984 (1982).
185. *See* Walter v. United States, 447 U.S. 649 (1980); Mincey v. Arizona, 437 U.S. 385 (1978); Katz v. United States, 389 U.S. 347 (1967); Stoner v. California, 376 U.S. 483 (1964).
186. United States v. Riccio, 726 F.2d 638 (10th Cir. 1984) (The defendant shot at the officers from different places in the trailer; therefore the officers could not be sure if the defendant was alone. Exigent circumstances justified a sweep search.); United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982) (possibility of another armed person inside the hotel room hiding justified a warrantless sweep search).

may make a protective sweep of the premises if they have reasonable grounds to believe the sweep is justified.[187] A search of a person incident to arrest and the area within his immediate control is permitted.[188]

If evidence is seized in an unconstitutional search it may be suppressed under the exclusionary rule.[189] Historically, there have been three reasons given for suppression of the evidence under the exclusionary rule:[190] protection of the individual's right to privacy;[191] upholding the integrity of the courts by eliminating tainted evidence;[192] and deterrence of police misconduct.[193]

Over the past several years, the circuit courts and the Supreme Court have gradually eroded the broad power of suppression under the exclusionary rule[194] and the Supreme Court has recently recognized limited exceptions to the exclusionary rule. Officers acting on the assumption that the search warrant they have obtained is valid, if acting in good faith, may have the evidence introduced at trial even if the warrant is later ruled invalid.[195] In *United States v. Leon*,[196] a search warrant was issued based on a faulty affidavit and therefore the warrant was not supported by probable cause. *Leon* held, however, that the officers acted reasonably and with good faith in their reliance on the warrant. Similarly, in *Massachusetts v. Sheppard*,[197] the police were unable to find the proper warrant form, but were assured by the judge that all the necessary changes in the warrant had been made. Although the warrant was defective, the officers had acted in good faith with a reasonable basis for their belief that the warrant was valid. Consequently, the evidence was admitted under the good faith exception to the exclusionary rule. Inadmissibility of the evidence under the exclusionary rule in these circum-

187. The protective sweep exception provides for a brief search to secure the safety of people in the immediate area. *See, e.g.*, United States v. Sheikh, 654 F.2d 1057 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) (arresting officers have the right to check a suspect's residence after an arrest even when arrest is outside the residence if police believe others may be inside and present a security risk); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied sub nom*, Miller v. United States, 446 U.S. 912 (1980) (seizure of address books was justified as they were in plain view of officers lawfully in the residence). *But see* United States v. Kinney, 638 F.2d 941 (6th Cir.), *cert. denied*, 452 U.S. 918 (1981) (officers were not justified in conducting a security sweep as the only other suspect was in custody).

188. Chimel v. California, 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969).

189. United States v. Weeks, 232 U.S. 383 (1914) (evidence seized in violation of the fourth amendment is inadmissible).

190. For a brief discussion of the history of the exclusionary rule, see Comment, *Criminal Procedure - Search and Seizure: The Good Faith Exception to the Exclusionary Rule - How Should Tennessee Decide?*, 14 MEM. ST. U.L. REV. 549, 550-53 (1984).

191. Mapp v. Ohio, 367 U.S. 643, 656-57 (1961), *limited by* United States v. Leon, 468 U.S. 897 (1984).

192. Elkins v. United States, 385 U.S. 206, 222 (1960).

193. United States v. Calandra, 414 U.S. 338, 347 (1974).

194. *See* Comment, United States v. Leon: *The Long Awaited Good Faith Exception Has Finally Arrived*, 36 MERCER L. REV. 757 (1985).

195. Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984).

196. 468 U.S. 897 (1984).

197. 468 U.S. 981 (1984).

stances would not serve the purpose of protecting fourth amendment rights through the deterrence of unlawful police conduct.

Another limited exception to the exclusionary rule is the inevitable discovery rule recognized by the Supreme Court in *Nix v. Williams*,[198] and adopted by the Tenth Circuit in *United States v. Romero*.[199] Under this rule, evidence which would normally be suppressed is admissible if the court finds that the evidence inevitably would have been discovered through other constitutional procedures. "Inevitable discovery" therefore usually relies on independent investigation untainted by unlawful search and seizure.[200]

3. Instant Case

The Tenth Circuit upheld the trial court's decision that Owens had a reasonable expectation of privacy in his hotel room and in the contents of the bags found in his room, and suppressed admission of the illegally obtained evidence.[201] In overruling the trial court, the Tenth Circuit declined to expand the scope of the good faith exception to include warrantless searches. The court found the exception inapplicable to the circumstances in the instant case where the officers totally disregarded repeated opportunities to obtain a search warrant.[202] The Tenth Circuit declined to rule on whether the officers could rely on the protective sweep exception to the warrant requirement, because this search clearly exceeded the scope of a protective sweep.[203]

The Tenth Circuit also found that the inevitable discovery exception was inapplicable to the facts of this case. There was no evidence presented at trial of any independent investigation or of facts supporting a theory of inevitable discovery.[204]

4. Analysis

The Tenth Circuit was correct in reversing the trial court's decision. The good faith exception formulated by the Supreme Court in *Leon* is couched in terms of reasonableness. Yet, the reasonableness only ap-

198. 467 U.S. 431 (1984).

199. 692 F.2d 699 (10th Cir. 1982).

200. In *Nix*, the officers transporting Williams talked to him about an impending snowstorm and the possibility that the body of the slain little girl might never be found and afforded a proper Christian burial unless Williams directed them to the body. As they approached the town where the body was located, Williams, without further conversation, led the officers to the body. Search parties were scouring the area in the counties next to where the body was found. Testimony indicated that had Williams not cooperated, the searchers would have used the same techniques in the adjoining counties. This led the Court to believe that discovery of the body was inevitable. *Nix*, 467 U.S. at 435.

201. *Owens*, 782 F.2d at 150.

202. *Id.* at 152. The officers watched Owens' motel room for five and one-half hours without attempting to obtain a search warrant. Controlled substances were in plain view of the officers upon entering the room, and they still failed to obtain a search warrant. Even after the room was secured and the closed bags were in their possession, no attempt was made to obtain a search warrant. *Id.*

203. *Id.* at 151.

204. *Id.* at 152, 153.

plies to police action based on an appropriately obtained warrant. The Court's decision not to further limit the scope of the exclusionary rule was in keeping with fourth amendment individual rights and the deterrent effect of the rule.[205]

The government argued in *Owens*, however, that the evidence seized should have been admitted because the authorities reasonably believed that Owens was no longer entitled to the use of the room.[206] According to the manager, Owens' occupancy had been terminated for lack of payment and, additionally, an unregistered guest was using the room.[207] Previous cases have held that when tenancy has expired there is no entitlement to use and no expectation of privacy .[208]

The government also contended that the officers could have reasonably assumed that they were proceeding legally since a motel manager is free to consent to a search of the room if the tenancy has expired. However, the officers never obtained permission from the manager to search the room, much less permission from Owens to search the contents of closed containers.[209] Although the manager could give permission to enter the room,[210] a search founded on such permission could not include the closed containers over which the manager had no control.[211] As the Tenth Circuit pointed out, the officers disregarded several opportunities to obtain a search warrant choosing instead to proceed with a warrantless search.[212] Once closed containers are in the possession of the police there can be no excuse for their failure to obtain a search warrant.[213]

If the officers were legally in the room, the drug paraphenalia, marijuana, and cocaine in plain view could have been properly seized and would have given the officers probable cause for a search warrant.[214] The room was easily secured and the government provided no reasonable explanation for failing to follow the provisions of the fourth amendment.[215] There is no question that the officers' suspicion that more

205. *Leon*, 368 U.S. at 919.

206. *See generally* United States v. Lee, 700 F.2d 424 (10th Cir.), *cert. denied*, 462 U.S. 1122 (1983) (search of hotel room with owner's permission after rental has expired does not require a search warrant); United States v. Croft, 429 F.2d 884 (10th Cir. 1970) (when rental period elapses the former tenant has no right to use the hotel room and no reasonable expectation of privacy).

207. *Owens*, 782 F.2d at 148-49.

208. *See supra* note 206.

209. *Owens*, 782 F.2d at 151.

210. Although the manager had given the officers permission to enter the room and evict Cheryl Jones, he had not given permission for a search. Indeed, it was probably not within his power to give the officers permission to search the room, since the Tenth Circuit held that Owens had a reasonable expectation of privacy in his motel room and the closed contents therein. *Id.* at 150.

211. *See Lee*, 700 F.2d at 424.

212. *Owens*, 782 F.2d at 152.

213. *See* Walter v. Unites States, 447 U.S. 649 (1980). *But see* United States v. Jacobsen, 683 F.2d 296 (8th Cir. 1982), *rev'd*, 466 U.S. 109 (1984).

214. Once officers are legally on the premises, items in plain view may be legally seized. United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982); United States v. Sheikh, 654 F.2d 1057 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982).

215. *See* Mincey v. Arizona, 437 U.S. 385 (1978).

drugs might be found in the room was reasonable; however, that does not excuse their failure to obtain a search warrant.[216]

The Tenth Circuit properly recognized that the extension of the good faith exception to warrantless searches would open the door to the type of police behavior that the exclusionary rule is designed to deter.[217] When courts suppress illegally obtained evidence, police are encouraged to secure search warrants and to exercise restraint when considering a warrantless search. Admitting illegally seized evidence through the good faith exception erodes the constitutional provisions of the fourth amendment and discourages police from carefully assessing the privacy interests of suspects. If the good faith exception to the exclusionary rule is to be expanded to include warrantless searches, innocent people may have their privacy rights violated simply because an officer has a hunch and acts "reasonably" in pursuing that hunch. Privacy rights should not be infringed upon in this manner.

CONCLUSION

The Court of Appeals for the Tenth Circuit embraced a fairly conservative path during this survey period. The court was extremely deferential to counsel in reviewing an ineffective assistance of counsel claim. The Tenth Circuit upheld the validity of Andrews' guilty plea despite violation of the Speedy Trial Act, whereas in *Broce* the court held that a guilty plea was not a waiver of the right to claim a double jeopardy violation. The court in *Hooks* showed extreme deference to the trial court regarding evidentiary matters and allowed a conviction for possession with intent to distribute to stand with only the magnitude of the quantity constructively possessed as evidence of distribution. In *Remigio*, the Tenth Circuit followed the majority of the circuits and limited the application of the knock and announce statute, allowing police to enter without knocking or announcing their presence when a defendant is at an open door. The court disregarded the rights of a household dweller to be informed as to the identity and purpose of officers attempting to enter a private residence when the door is open. However, in *Owens*, the Tenth Circuit showed restraint in not further expanding the good faith exception to the exclusionary rule. This case is important in that it protects individual privacy rights and acts as a deterrent to police officers considering a warrantless search. In the future, it is hoped that the court will follow the precedents set forth in *Owens* and *Broce* in protecting the rights of the defendant.

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216. *See generally Irizarry*, 673 F.2d at 556, 559 (The officers seized contraband in plain view, then noticing that a ceiling panel was loose, an officer searched above the panel and found additional contraband. The First Circuit held that although the officer had a reasonable belief that more contraband could be found on the premises, no exigent circumstances justified the exploratory search without the prior approval of a detached and neutral magistrate.).

217. *Owens*, 782 F.2d at 152.