Denver Law Review

Volume 63
Issue 2 *Tenth Circuit Surveys*

Article 13

January 1986

Criminal Procedure

Elizabeth Kohnen

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Recommended Citation
Elizabeth Kohnen, Criminal Procedure, 63 Denv. U. L. Rev. 343 (1986).

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Criminal Procedure

Overview

Because of the numerous issues encompassed under the topic of criminal procedure, this article will discuss only a few subjects within that broad topic, subjects that are in a developmental stage in the Tenth Circuit. Many areas have been addressed by the court during this survey period that will not be considered in this discussion, not because they are not noteworthy or because changes or new precedent in these areas have not been developed, but rather because they are not considered to be among the major issues relevant to criminal procedure law.

This article will discuss the fine line distinguishing a *Terry* stop from a full-fledged arrest, primarily in the context of a car search. The many inroads to fourth amendment protections such as the exceptions of exigency, independent source and attenuation will be considered, along with the Tenth Circuit's strict compliance with a valid and knowing consent to search. Next, this article will discuss the fifth amendment rights of the accused, namely, what constitutes a waiver of those rights and the consequences of counsel's comment on the defendant's invocation of those rights as well as how privileges and immunities can operate to vitiate fifth amendment protections. Finally, issues arising out of the sixth amendment protections will be discussed; for example: when a defendant has the right to counsel; if the defendant has the right to counsel of his choice; the sufficiency of a waiver of counsel; the collateral use of an uncounseled conviction; and the right to effective assistance of counsel in various contexts. There is also some commentary on the Tenth Circuit's treatment of the defendant's sixth amendment right to confront his witnesses and the use of an absent witness's deposition at trial.

I. Fourth Amendment

A. *Car Searches: A* Terry *Stop Followed by Consent*

1. *United States v. Recalde*

In *United States v. Recalde*,[1] an Argentinian citizen was stopped in New Mexico for speeding. The officer testified at trial that because he had a "gut instinct" that Recalde was transporting narcotics,[2] he asked Recalde if he could look into the trunk of the car. Recalde immediately obliged the officer. Upon inspecting the trunk, the officer spotted a briefcase and asked if he could search its contents. Without hesitation, Recalde consented to the search.[3] The officer found nothing suspicious in Recalde's trunk or brief-case, but did notice that a number of screws in the automobile's interior had been tampered with. At this point, Re-

1. 761 F.2d 1448 (10th Cir. 1985).
2. *Recalde*, 761 F.2d at 1451.
3. *Id.* at 1452.

calde was either asked or directed to accompany the officers to the police station for further investigation.[4] When they arrived at the station, the officer gave Recalde his *Miranda* warnings and began to interrogate him. Recalde indicated that he did not want to answer any questions, but he agreed to sign a consent-to-search form and allowed the officers to search his car. Upon searching the car, the officers discovered ten kilograms of cocaine stashed inside the interior quarter panels, and, as a result, the officer placed Recalde under arrest.[5] Recalde was convicted on one count of possession with intent to distribute cocaine. On appeal to the Tenth Circuit, he argued that the district court erred in denying his motion to suppress the evidence seized during the search of his car.[6]

In its response to the defendant's motion to suppress, which alleged that the evidence seized from Recalde's car was based on an illegal search, the prosecution did not rely on any of the exceptions to the warrant requirement,[7] such as a car search incident to an arrest,[8] a personal search incident to an arrest[9] or exigent circumstances.[10] Instead, the prosecution asserted the search was valid because Recalde had voluntarily signed a consent form at the police station. The prosecution alternatively argued that even if the court concluded that Recalde's consent to accompany the police officers to the police station and his later consent at the station to have his car searched was not entirely voluntary, any intrusive invasions of privacy were justified as lawful measures taken following a *Terry* stop.[11]

Judge Seymour, writing for a unanimous three judge panel, first determined that the government had failed to establish that there was an

4. At trial, Recalde testified that he was ordered to accompany the officers to the police station; conversely, the officers testified that they had merely asked Recalde to go with them to the station. *Recalde*, 761 F.2d at 1452. Recalde was never told that he was either free to go or free to refuse to accompany the officers to the police station. Neither officer denied this. Furthermore, Recalde's undisputed testimony revealed that because the officer had retained his driver's license and vehicle registration, he did not feel free to leave at any time. The trial record also disclosed that when Recalde drove from the roadside stop to the police station, his car was protectively sandwiched between the two officers' squad cars. *Id.*

5. *Recalde*, 761 F.2d at 1452.

6. *Id.* at 1451.

7. The seminal case requiring the issuance of a warrant before any search may be conducted is Katz v. United States, 389 U.S. 347 (1967).

8. When the police make a lawful arrest of the occupants of an automobile, they may also search the car's passenger compartment without obtaining a warrant. *See* New York v. Belton, 453 U.S. 454 (1981).

9. Chimel v. California, 395 U.S. 752 (1969). In *Chimel*, the Court held that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested . . . [without obtaining a warrant]." *Id.* at 762-63.

10. Carroll v. United States, 267 U.S. 132 (1925) (contraband hidden in the seats of a car was validly seized by an arresting officer without a warrant because it was in the control of one who was legally arrested).

11. *Recalde*, 761 F.2d at 1454. In Terry v. Ohio, 342 U.S. 1 (1968), the United States Supreme Court permitted police officers to conduct a limited search of an individual based on less than probable cause, provided the police officer has an articulable basis for suspecting criminal activity. *See also* Michigan v. Summers, 452 U.S. 692 (1981) (extending the *Terry* search to allow a search for weapons in an automobile's passenger compartment based on less than probable cause).

absence of duress or coercion when the officers obtained Recalde's consent. Judge Seymour gleaned from the testimony that Recalde perceived himself to be in a coercive custodial situation in which he had no other option but to comply with the officers' requests.[12] Following *United States v. Mendenhall*,[13] *Schneckloth v. Bustamonte*,[14] and *United States v. Prichard*,[15] the Tenth Circuit held that "consent" is a question of fact to be determined from the totality of the circumstances.[16] The trial court must determine whether the consent is in fact voluntary, or the product of some form of duress or coercion. The burden is on the government to prove an absence of duress or coercion, and, if the "consent" is given after an illegal stop, the government has an even heavier burden of proof to carry than it would if the consent had been given after a permissible stop.[17]

The Tenth Circuit found that the government in *Recalde* was unable to meet its weighty burden to refute duress or coercion; therefore, the transport of the defendant to the station exceeded the scope and reasonableness of a *Terry* stop. The record divulged not only that the officer retained Recalde's driver's license and vehicle registration at all times prior to the car search, but also that Recalde had signed the consent form only moments after being placed in a small interrogation room with two police officers.[18] These facts substantiated the court's conclusion that Recalde had perceived himself to be in a coercive custodial situation.

Because the Tenth Circuit concluded that the government was unable to sustain its burden to refute the existence of duress or coercion, it turned to the prosecution's alternative contention that these actions were permissible and reasonable because they were proper precautionary measures following a *Terry* stop. In analyzing the validity of the investigative roadside stop, the Tenth Circuit looked to see if the officer's actions were justified at the inception of the stop and whether the extent of the officer's actions were reasonably related in scope to the circumstances which justified the initial interference.[19] Judge Seymour stated that the court's assessment is essentially a balancing test which weighs

12. *Id. But cf.* United States v. Obregon, 748 F.2d 1371, 1376 (10th Cir. 1984) (The defendant testified that he told the officer he could search his car "because that way I felt he would let me go or something." The Tenth Circuit in *Obregon* found that the record amply supported the district court's decision that the defendant had voluntary consented to the car search despite the defendant's perception of a coercive situation.). *See infra* notes 55-57 and accompanying text.

13. 446 U.S. 544 (1980).

14. 412 U.S. 218 (1973).

15. 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981).

16. *See also* United States v. Obregon, 748 F.2d 1371, 1376 (1984) (Given the totality of the circumstances, the defendant, who had stated he did not want to make a statement and wanted to see a lawyer, made a knowing and intelligent waiver of his rights by signing a consent form.).

17. *Recalde*, 761 F.2d at 1457 (citing United States v. Troutman, 590 F.2d 604, 606 (5th Cir. 1979) and United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978)).

18. *Recalde*, 761 F.2d at 1454.

19. *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Sharpe, 105 S. Ct. 1568 (1985)); *see also* United States v. Obregon, 748 F.2d 1371 (10th Cir. 1984).

the nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the governmental interests alleged to justify the intrusion.[20] The court conceded that the initial stop and the subsequent demand for Recalde to display his driver's license and vehicle registration were reasonable and minimally intrusive because he was driving in excess of the maximum speed limits. It further found that Recalde's consent to search the trunk of his car and his briefcase was entirely voluntary under the circumstances. On the other hand, when Recalde was "persuaded" to accompany the police officers to the station, the court concluded that the officers had crossed over the line of reasonableness and converted their investigative *Terry* stop into an arrest, requiring a threshold of probable cause which the court determined had not been met.[21]

Judge Seymour relied on *Dunaway v. New York*[22] and *Hayes v. Florida*.[23] *Hayes* describes the line separating a brief detention and a full fledged arrest to be "[w]hen the police . . . forcibly remove a person from his home [or other place in which he is entitled to be] and transport him to [a police] station, where he is detained, although briefly, for investigative purposes . . . ."[24] Accordingly, in moving and subsequently detaining Recalde, involuntarily and without probable cause, the policemen had exceeded the limits of a *Terry* stop and violated Recalde's fourth amendment rights. Therefore, the evidence, ten kilograms of cocaine found in the search, was properly suppressed.[25]

2. *United States v. Gonzalez*

Two weeks after the Tenth Circuit handed down the *Recalde* opinion, it considered *United States v. Gonzalez*,[26] a case involving an almost identical factual situation as that in *Recalde*. Gonzalez was driving down a New Mexico highway and was pulled over for speeding. Here again, the officer testified to having a "gut feeling" or intuition that the defendant was transporting narcotics; this was partly because the officer had smelled deodorizer in the car, a tactic often used to mask the scent of narcotics.[27] Nevertheless, the officer could not articulate with any degree of specificity what facts could give rise to justify a search, the minimum requirement laid down in *Terry*.

Once stopped, Gonzalez was asked to produce his driver's license and vehicle registration. When the officer saw that Gonzalez's driver's

20. " 'When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure on less than probable cause.' " *Recalde*, 761 F.2d at 1454 (quoting United States v. Place, 462 U.S. 696, 703 (1983)) (emphasis omitted).

21. *Recalde*, 761 F.2d at 1455.

22. 442 U.S. 200 (1979).

23. 105 S. Ct. 1643 (1985).

24. *Id.* at 1644. *See generally* Y. KAMISAR, W. LA FAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 256-415 (4th ed. 1974).

25. *Recalde*, 761 at 1459.

26. 763 F.2d 1127 (10th Cir. 1985).

27. *Id.* at 1128.

license was from New York but the car was registered in California, he became suspicious that the vehicle was stolen. The officer returned to his own vehicle and conducted a computer check to verify the propriety of the registration and license. Although the computer check disclosed that no problems existed, the officer's suspicions of criminal activity still remained. At this point, the officer requested that the defendant accompany him to the police station for further interrogation.[28] Once at the station, the officer promptly prepared a speeding citation along with a consent-to-search form, both of which the defendant signed. The car search uncovered eighty pounds of cocaine underneath the back seat and within the side door panels. The defendant was immediately placed under arrest.[29]

The Tenth Circuit's rationale and conclusion in *Gonzalez* was similar to that in *Recalde*: the court explained that the officer, once he transported Gonzalez from the side of the highway to the police station, had stepped over the line separating the minimally intrusive actions permitted in a *Terry* stop into the realm of a full-fledged arrest necessitating probable cause. Because there was no probable cause to arrest the defendant, the officer had clearly invaded Gonzalez's constitutionally protected right against unlawful searches and seizures. The government had, as in *Recalde*, failed to overcome its burden to prove that, under the circumstances, Gonzalez had been free from coercion or duress when he signed the consent-to-search form.

An interesting point made by Judge Logan in his analysis of the illegal roadside seizure was that the length of time that Gonzalez was detained, twenty minutes, was only minimally intrusive and that this, if standing alone, was reasonable.[30] He acknowledged that if *United States v. Sharpe*[31] was relied upon to determine whether this was an illegal seizure, the twenty minute stop would pass constitutional muster. It was not, however, the brevity of the detention that the court was concerned with; rather, it was the conduct of the officer during the detention that became the decisive factor in the constitutional assessment. The court therefore looked to *Hayes v. Florida*[32] where the focus was on the police conduct during the stop, not the duration of the stop itself. The *Hayes* Court announced that the proper inquiry is whether the defendant has perceived, either implicitly or explicitly, a loss of freedom when taken from his house to a police station and detained against his will.[33] The Tenth Circuit accepted the district court's finding that Gonzalez had perceived that there was no option other than to accompany the officer, no matter how polite the officer was in phrasing his request. Just as in

28. *Gonzalez*, 763 F.2d at 1129-30.
29. *Id.* at 1129.
30. *Id.* at 1131.
31. 105 S. Ct. 1568, 1575 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, . . . it [is] appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . .").
32. 105 S. Ct. 1643 (1985).
33. *Id.* at 1647.

Recalde, the officer had retained the defendant's driver's license and vehicle registration. Because the officers lacked sufficient probable cause to justify a full-fledged arrest, the court concluded that Gonzalez' trip to the station was a clear violation of his fourth amendment rights.[34]

Judge Logan noted that the officer detaining Gonzalez had reasonable alternatives to a forced trip to the police station. The officer could have requested a backup officer,[35] or he could have attempted to obtain a consent to search the vehicle on the spot.[36] Additionally, as the Supreme Court noted in *Michigan v. Long*,[37] if there are reasonable and articulable grounds for a belief that the suspect is dangerous and that he may gain immediate control of any weapons, the officer may conduct a brief search of the automobile, limited to those areas in which a weapon may be placed or hidden.[38] The *Long* holding is similar to the Tenth Circuit opinion of *United States v. Romero*,[39] decided prior to *Long*. The *Romero* decision held that just as an officer may search a car for weapons during a lawful *arrest*,[40] an officer who has lawfully stopped a suspect whom he reasonably believes is armed and dangerous may conduct a limited search of the suspect's car.[41]

Romero also was important because it followed the Tenth Circuit precedent[42] that adopted the "independent source" exception to the exclusionary rule. This exception, carved out in *Silverthorne Lumber Co. v. United States*,[43] recognized that the "fruits of the poisonous tree"[44] doctrine would not apply where the evidence obtained could have come from two sources, one of which was legitimate. The *Silverthorne* Court stated that evidence obtained through illegal searches does not automatically become sacred and insulated from the judicial process; if the government can prove that the evidence was obtainable from an independent and constitutionally permissible source, it will be admissible.[45]

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34. *Gonzalez*, 763 F.2d at 1133.

35. The atmosphere of the detention appeared threatening to the officer. It was dark outside; the stop occurred on an isolated stretch of highway; and, furthermore, there were two occupants inside the vehicle and only one officer at the scene. *Id.* at 1132.

36. *Id.* at 1133.

37. 463 U.S. 1032 (1983); *see supra* note 11.

38. *Long*, 463 U.S. at 1049.

39. 692 F.2d 699 (10th Cir. 1982).

40. *Id.* at 703; *see infra* notes 61-69 and accompanying text.

41. *Romero*, 692 F.2d at 703; *see also* United States v. Pappas, 735 F.2d 1232 (10th Cir. 1984) (limited car search for weapons conducted immediately after defendant's arrest for protective measures was not a violation of the fourth amendment).

42. *See* Aiuppa v. United States, 393 F.2d 597 (10th Cir. 1968), *cert. denied*, 404 U.S. 871 (1971).

43. 251 U.S. 395 (1920).

44. In Wong Sung v. United States, 371 U.S. 471 (1963), the Supreme Court held that any evidence obtained directly *or indirectly* as a result of illegal police conduct will be suppressed.

45. *Silverthorne's* holding did not explicitly go quite this far, but later decisions have confirmed its broad application. In Segura v. United States, 104 S. Ct. 3380 (1984), the police entered the defendant's apartment without first obtaining a search warrant. The Court permitted this unlawful entry because at the time of the entry, the officers already had the requisite probable cause they would have needed to obtain a search warrant. Ex-

The court in *Gonzalez* excluded the evidence found in the car search labeling it "tainted fruit" from an illegal seizure.[46] If the government had argued that a limited *Romero* search of the car's passenger compartment based upon articulable facts would have unearthed the cocaine hidden beneath the back seat, and alleged that this limited search was a legal and "independent" source of discovery of the evidence,[47] the eighty pounds may have withstood the motion to suppress. The government, however, instead alleged that when Gonzalez voluntarily consented to have his car searched, he "purged the taint"[48] of the illegal stop, cleansing the otherwise defective subsequent seizure of evidence of any constitutional violations.

The Supreme Court has recognized several situations where a victim of illegal police conduct cannot use the exclusionary rule to suppress evidence. One such situation is when there is sufficient attenuation between the illegal stop and a consent to search. This "attenuation" doctrine was recently adopted by the Tenth Circuit in *United States v. Carson*.[49] In *Carson*, the court held that the evidence found in a second search was admissible because the defendant's voluntary consent to the second search was an independent act sufficient to break the causal connection between the illegal first search and the second search.[50] Notwithstanding the *Carson* opinion, the *Gonzalez* court, based on the facts, could not find sufficient attenuation to justify the admission of evidence found in a search preceded by an illegal detention.[51]

In *Gonzalez*, Chief Judge Holloway dissented in a lengthy opinion in which he admonished the majority for failing to adequately protect the

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clusion of the evidence as "fruit of the poisonous tree," explained the Court, is not warranted due to that independent source. In Payton v. New York, 445 U.S. 573 (1980), the officers were not entitled to enter Payton's home without a warrant in the absence of exigent circumstances. However, the officers did have probable cause to obtain an arrest warrant for Payton, and this probable cause furnished an "independent source" permitting the warrantless search and seizure of the narcotics that were in plain view in Payton's apartment.

46. *Gonzalez*, 763 F.2d at 1133.

47. Had the officer been alert enough to conduct a limited *Romero* search for weapons and chanced to stumble upon the narcotics during this search, he could have seized the cocaine under the "plain view" doctrine, an independent and legitimate source of discovery. The Tenth Circuit adopted the United States Supreme Court's "plain view" doctrine, announced in Harris v. United States, 390 U.S. 234 (1968), in United States v. Merryman, 630 F.2d 780, 782 (10th Cir. 1980). *Merryman* discusses the "plain view" doctrine in terms of not requiring the officers to "close their eyes" if they run across evidence of other crimes while conducting a limited *Terry* search. *See also* United States v. Obregon, 748 F.2d 1371, 1376 (10th Cir. 1984) ("If, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes." (quoting *Merryman*, 630 F.2d at 782-85)) (emphasis omitted).

48. The principle of the "purged taint" doctrine is that if enough additional factors intervene between the original illegality of the search and the final discovery of evidence, then neither the "deterrence" nor the "judicial fairness" rationale behind the exclusionary rule apply. Therefore, the evidence may be admissible despite the fact that it would not have been discovered "but for" the illegality. *See* Wong Sung v. United States, 371 U.S. 471, 484-88 (1963).

49. 762 F.2d 833 (10th Cir. 1985).

50. *Carson*, 762 F.2d at 836 (citing United States v. Fike, 449 F.2d 191, 193 (5th Cir. 1971)).

51. *Gonzalez*, 763 F.2d at 1133.

governmental interests of crime prevention and police protection. Judge Holloway advocated the use of a balancing test that would weigh a limited violation of an individual's privacy interests against the governmental interests in protecting the police officer's safety and preventing and detecting crime.[52] He distinguished the facts in *Hayes*, the decision most heavily relied upon by the majority, and noted that even this decision recognized that exigent circumstances may justify a trip to the police station. He additionally emphasized the importance of a court's consideration of "the totality of the circumstances," rejecting a reading of *Hayes* that would cause *any* move to a police station for investigative purposes, unless justified by probable cause, to be in violation of an individual's fourth amendment rights.[53] Judge Holloway's argument for compassion towards police officers in their attempts to combat crime and his attempt to give them more discretion and power to effectuate their "gut feelings" or "intuitions" does not seem to have gained much acceptance in view of the majority opinions in the cases decided in the Tenth Circuit during this survey period.

It appears that the Tenth Circuit is becoming increasingly sympathetic to individual rights where no probable cause exists to search the defendant or his car and a consent to search is not voluntarily given. The evidence was suppressed in three of the cases discussed,[54] *Recalde*, *Gonzalez*, and *Carson*, but not in one case, *United States v. Obregon*.[55] *Obregon* can be distinguished from the other three because the initial stop and subsequent detention were lawful, and, in addition, Obregon gave his consent to search his car within minutes of the initial stop.[56] After looking at the "totality of the circumstances," the court found that the trial court's record amply supported a finding that Obregon's consent was devoid of any coercion or duress and accordingly held that no constitutional rights had been breached.[57]

Despite an apparent censure of police power in the area of fourth amendment rights, the Tenth Circuit has left a few doors open for police officers suspicious of criminal activity. The law enforcement officer can first attempt to gain the suspect's voluntary consent to a roadside search of his vehicle. He may also lawfully conduct a limited search of the passenger compartment of the vehicle under *Romero*[58] if he has a reasonably articulable suspicion of criminal activity. At this point, he may seize any evidence of another crime he may happen to "stumble upon" during his limited weapons search.[59] This limited search could likely unearth evidence that could be used to form the basis of probable cause, thus enabling the officer to proceed with a full-fledged *Belton* search.[60]

52. *Id.* at 1135 (Holloway, C.J., dissenting)
53. *Id.* at 1135-37 (Holloway, C.J., dissenting).
54. *See infra* notes 70-74 and accompanying text.
55. 748 F.2d 1371 (10th Cir. 1984).
56. *Id.* at 1376.
57. *Id.*
58. 692 F.2d 699 (10th Cir. 1982).
59. *See supra* note 47.
60. *See infra* notes 61-74 and accompanying text.

B. *Car Search Incident to Arrest: The* Belton *Rule*

1. *United States v. Cotton*

In *United States v. Cotton*,[61] the Tenth Circuit adopted the United States Supreme Court's holding in *New York v. Belton*,[62] which declared that when the police make a lawful "custodial arrest"[63] of the occupant of an automobile, they may, incident to that arrest, conduct a search of the entire passenger compartment of the vehicle, including any interior compartments or contents of any containers.[64] The rationale for the *Belton* decision was to protect and ensure the safety of the officers and to prevent the destruction of evidence — the very reasons the Supreme Court in *Chimel v. California*[65] allowed a warrantless search of an arrestee and the area within his immediate control. The defendant in *Cotton* argued that the *Belton* opinion should not apply because he was handcuffed outside his car, thereby eliminating the danger that he could have reached into his car and grabbed a weapon.[66] The court was not persuaded by this argument and instead adopted a *per se* permissible "car search incident to arrest" that does not require the arresting officer to undergo any analysis whatsoever to determine whether the arrestee could or could not reach into the car and grab a weapon or destroy some evidence.[67] This "bright line" rule, contended the court, does not operate to promote police misconduct that may result in violations of the fourth amendment. The court reasoned that an individual has a diminished expectation of privacy in an automobile and that relaxation of the exclusionary rule is therefore appropriate in this context.[68] The court seemed to sympathize with the police officers' need for some concrete guidelines in their efforts to protect themselves and to prevent the destruction of evidence.

61. 751 F.2d 1146 (10th Cir. 1985).
62. 453 U.S. 454 (1981).
63. This is to be distinguished from a *Terry* stop for non-custodial traffic violations such as speeding, registration checks and defective vehicle stops.
64. *Belton*, 453 U.S. at 460. This holding limits the search to the inside of the passenger compartment only. The *Belton* rule does not permit a search of the trunk of the automobile incident to a custodial arrest. The theory behind this exception derives from the fact that the trunk will be inaccessible to the suspect once he is apprehended. However, if there is probable cause to search the car and the trunk, this may be permissible without a warrant pursuant to the general "automobile exception." *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (because police had lawfully stopped automobile and had probable cause to believe contraband was contained therein, they could conduct a thorough warrantless search). *But see* United States v. Sharpe, 105 S. Ct. 1568 (1985). *See generally* Alpert & Haas, *Judicial Rulemaking and the Fourth Amendment: Cars, Containers and Exclusionary Justice*, 35 ALA. L. REV. 23 (1984) (providing an analysis of the Supreme Court's opaque interpretation of the fourth amendment and the concomitant effect of judicial rulemaking which attempts to achieve more clarity in ambiguous situations); Note, *Privacy Rights v. Law Enforcement Difficulties: The Clash of Competing Interests in* New York v. Belton, 59 DEN. L.J. 793 (1982) (discussing the development of justifications for a permissible search incident to arrest with respect to the individual's privacy interest balanced against the government's interest in law enforcement).
65. 395 U.S. 752 (1969).
66. *Cotton*, 751 F.2d at 1148.
67. *Id.* at 1149.
68. *Id.*

It is interesting to note that the *Cotton* court adopts a "bright line" rule, but then qualifies its holding. The court instructs the officers to always consider the "totality of circumstances" before acting.[69] Although it appears that this opinion was intended to create an absolute rule, a fairer analysis may be that the Tenth Circuit is attempting to formulate a "workable" rule whereby the officer can have more discretion when making a decision concerning his safety and the preservation of evidence.

2. *United States v. Pappas*

In *United States v. Pappas*,[70] the Tenth Circuit upheld a limited car search incident to arrest which uncovered a loaded hand-gun despite conflicting testimony as to whether or not the defendant was in his car at the time of his arrest.[71] After discovering the hand-gun in the initial search of the car, the arresting officer impounded the car and conducted a full-blown inventory search.[72] Looking to the Supreme Court's decision in *South Dakota v. Opperman*[73] for guidance, the court found there was no justifiable reason for the car's impoundment and subsequent inventory search.[74] Because the officer exceeded the permissible scope of a *Belton* search when he transported the suspect's vehicle to the police station, the illegal sawed-off shotgun found underneath the seat of the defendant's car during the inventory search was suppressed. This case is significant in that it acknowledged that a *Belton* search incident to arrest was permissible, but once the officer impounded the vehicle and looked in the trunk, he violated the defendant's fourth amendment rights.

C. *Warrantless Car Searches:* United States v. Swingler

The issue of whether a car search incident to an arrest based on probable cause requires a warrant was addressed in *United States v. Swingler*.[75] In *Swingler*, arrests of four defendants were made based upon

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69. "The act of the officer in seizing the bank bag under the *totality of circumstances* presented here was therefore reasonable." *Cotton*, 751 F.2d at 1149 (emphasis added). "*Upon an examination of the facts of each case*, the court need do no more than examine the reasonableness of the officer's actions *under the totality of the circumstances* and in view of the above-stated concerns." *Id.* at 1150 (emphasis added).

70. 735 F.2d 1232 (10th Cir. 1984).

71. Under a *Belton* search, only the passenger compartment may be searched if a defendant is placed under arrest while in the vehicle. *See supra* note 64 and accompanying text.

72. *Pappas*, 735 F.2d at 1233.

73. 428 U.S. 364 (1976).

74. *Pappas*, 735 F.2d at 1234. *Opperman* set forth three situations in which an impoundment and a subsequent inventory search of a car is constitutionally permissible: 1) to protect the owner's property in police custody; 2) to protect the police against claims of lost or stolen property; or 3) to protect police from potential danger. *Opperman*, 428 U.S. at 369.

75. 758 F.2d 477 (10th Cir. 1985). This case also addressed the amount and quality of information necessary for probable cause to make a warrantless search. In Wyoming, the state in which the crimes in *Swingler* took place, the courts and legislature have adopted the "totality of the circumstances" test established in Illinois v. Gates, 462 U.S. 213 (1983)

probable cause and in three of those instances, warrantless searches were conducted of the cars being driven by the defendants. Those searches revealed controlled substances and various paraphenalia used in the production of those substances.[76] After holding that there was sufficient probable cause to make the arrests, the Tenth Circuit, Judge Bohanon writing,[77] decided whether the searches and seizures of these suspects and vehicles could take place without a warrant. The Tenth Circuit cited to *Carroll v. United States*[78] and *United States v. Ross*,[79] the two landmark cases that carved out the "automobile exception" to the general rule requiring a warrant before any search is conducted.[80] The Supreme Court in *Carroll* announced that the police may search a vehicle without a warrant if such search is necessary to preserve evidence, as will be the case when the car can be quickly driven out of the jurisdiction.[81] This exception is known as "exigent circumstances." The *Ross* decision later clarified the extent of such a search. In this case, the Court sanctioned a warrantless search of the vehicle, and stated that the scope of such a search could be "no broader and no narrower" than one approved by a magistrate. Thus, every part of the vehicle or its contents, where contraband might be stored, could be inspected.[82] The Court explained that "[t]he scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found."[83] Thus, if the officers have probable cause to search a vehicle, they may do so without a warrant.

The defendants in *Swingler* argued that this *Carroll/Ross* automobile exception applies only when there are exigent circumstances. They asserted that in their case, the officers should have obtained a warrant prior to searching their automobiles because the officers knew the description and make of the suspected vehicles far enough in advance to obtain a warrant. Judge Bohanon rejected this contention noting that the Supreme Court has never endorsed the view that the automobile

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to evaluate the adequacy of information received and used to constitute probable cause for a warrantless search. *See* Bonsness v. Wyoming, 672 P.2d 1291, 1293 (Wyo. 1983); WYO. STAT. § 7-2-103 (1977). In *Swingler*, the informant's information was mainly hearsay acquired through her husband. Independently, however, the informant was found to be trustworthy, and her testimony was corroborated and uncontradicted by further police investigations. The court thus concluded that by looking at the "totality of the circumstances," the information was not disqualified as a valid source of probable cause, and the subsequent warrantless search of the car was proper. *Swingler*, 758 F.2d at 487.

76. *Swingler*, 758 F.2d at 484-86.

77. Judge Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma sat by designation.

78. 267 U.S. 132 (1925).

79. 456 U.S. 798 (1982).

80. The case requiring a warrant before a search is Katz v. United States, 389 U.S. 347 (1967).

81. *Carroll*, 267 U.S. at 162.

82. *Ross*, 456 U.S. at 825.

83. *Id.* at 824.

exception applies only in situations involving exigent circumstances.[84] Thus, the Tenth Circuit abandoned any exigency requirement for warrantless car searches and will not require the issuance of a warrant for an inventory search when a car is seized under the newly expanded *Carroll/Ross* exception.

Looking to the Supreme Court case law defining the elements required under a *Carroll/Ross* car exception, the holding in *Swingler* appears to be unjustified because of the Tenth Circuit's failure to require exigent circumstances. An argument can be made that in future cases, the Tenth Circuit's abandonment of the exigency requirement should not be applied to the *Carroll/Ross* exception. On the other hand, it would not be unreasonable to assume that the *Swingler* opinion has drastically broadened the scope of the *Carroll/Ross* exception by throwing out exigency as a requirement. If future decisions accept this interpretation, it will significantly contribute to the erosion of individuals' fourth amendment protections.

II. FIFTH AMENDMENT

A. *Waiver*

The Supreme Court has ruled that after being advised of his *Miranda* rights, an accused may validly waive his right against self incrimination and respond to police interrogation.[85] The Court has stressed, however, that the prosecution bears a heavy burden to demonstrate a knowing and intelligent waiver which cannot be presumed merely from the fact that the defendant was advised of his rights.[86] On the other hand, the accused need not expressly state that he wishes to waive his rights; a waiver can be inferred from the fact that he voluntarily answered questions after receiving the *Miranda* warnings, provided the court is satisfied that the defendant was fully aware of the relevant circumstances and likely consequences when he volunteered information.[87]

1. *Fernandez v. Rodriguez*

In *Fernandez v. Rodriguez*[88] the defendant, Fernandez, was initially charged with voluntary manslaughter, and entered into a stipulation with the state wherein he agreed to submit to a polygraph examination. This agreement provided that the results of the test would be admissible in court. Fernandez was unable to speak and understand the English language fluently, and testified that he did not understand the stipula-

84. *Swingler*, 758 F.2d at 489-90 (citing Michigan v. Thomas, 458 U.S. 259, 261 (1982)). The *Carroll/Ross* automobile exception is not dependent on the mobility or immobility of the vehicle and does not depend on the likelihood that the evidence within the automobile would be tampered with during the period of time that it would take for the police to secure a search warrant.

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

86. Tague v. Louisiana, 440 U.S. 469 (1980).

87. North Carolina v. Butler, 441 U.S. 369 (1979).

88. 761 F.2d 558 (10th Cir. 1985).

tion he signed, or the polygraph test itself. In addition, he testified that his attorney never warned him that the results of the polygraph could be used against him; to the contrary, he alleged that his attorney led him to believe that it was a routine and mandatory test.[89] Following the polygraph examination, the prosecution filed a more serious charge of murder with firearm enhancement. Fernandez's attorney then withdrew from the case and public defenders were appointed, who immediately filed a motion to suppress the results of the polygraph examination. Following a hearing, the trial court found that the defendant adequately understood the polygraph stipulation and concluded that a valid waiver of his right to remain silent was given.[90]

The Tenth Circuit, Judge Doyle writing, remarked on the overwhelming amount of evidence in Fernandez's favor and did not hesitate to reverse the trial court's holding. "Unquestionably the defendant made his decision to sign the polygraph stipulation without knowing that he was thereby convicting himself; with the advice of his then counsel."[91] The primary reason the court decided that Fernandez had not given a knowing and intelligent waiver was due to his meager grasp of the English language. Had he understood the significance of the polygraph test, the court explained, he would not have agreed to participate. Judge Doyle stated that under such circumstances, "it was imperative that his attorney explain to him the possible consequences . . ." and he did not.[92] As a result, the court stated that the totality of the circumstances indicated that Fernandez did not comprehend the consequences of the stipulation, and found the district court's conclusion to be clearly erroneous.

B. *Courtroom Comment on the Right of Silence*

1. *Velarde v. Shulsen*

Just as the right to remain silent has been given a high degree of protection by the judiciary, the courts have also safeguarded a defendant's right to be free from any comment to the jury or judge about his invocation of his fifth amendment privilege to remain silent.[93] Although there have been several cases in this survey period that have not found such a violation to be reversible error,[94] the latest such decision, *Velarde v. Shulsen*,[95] reversed the lower court's decision and found that comments made regarding the defendant's silence resulted in harmful constitutional error.

In *Velarde*, the prosecutor engaged in questioning designed to call attention to the fact that the defendant, Velarde, did not make any ex-

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89. *Id.* at 560.
90. *Id.* at 560-61.
91. *Id.* at 561.
92. *Id.*
93. For a textual discussion of the right of the accused not to testify, see J. SCARBORO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE 464-613 (1977), 97-123 (Supp. 1980).
94. *See infra* notes 103-08 and accompanying text.
95. 757 F.2d 1093 (10th Cir. 1985).

culpatory statements at the time of his arrest. This was, in effect, an inquiry into the defendant's post-arrest, post-*Miranda* warning silence. There were repeated defense counsel objections to this line of questioning, but the magistrate overruled those objections. Later, the magistrate acknowledged that certain portions of the prosecutor's examination were constitutional error, but concluded that this error was harmless beyond a reasonable doubt.[96]

The Tenth Circuit, in a per curiam opinion, agreed that there was constitutional error specifically prohibited by the fifth and fourteenth amendments, and relied on *Doyle v. Ohio*[97] in determining that the prosecutor's comments violated Velarde's right to remain silent. The Supreme Court in *Doyle* held:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.[98]

Once the Tenth Circuit decided that the comments violated Velarde's due process rights, it turned to the next issue: Did the prosecutor's questions and remarks constitute harmless error beyond a reasonable doubt?[99] In 1984, the Tenth Circuit, in *United States v. Barton*,[100] ruled that once a court finds a constitutional error of this nature, the government has the burden to prove beyond a reasonable doubt that the comments made with regard to the defendant's silence were harmless.[101] In *Velarde* the prosecution's case was entirely circumstantial, and much turned on the jury's evaluation of Velarde's credibility. Citing *United States v. Polsinelli*,[102] the court decided that because the defendant's credibility was a pivitol issue in the case, the government had not met the required burden of proof.

2. *United States v. Cotton*

The Tenth Circuit, though watchful and protective of the criminal defendant's constitutional rights, will not uphold those interests without justification. In *United States v. Cotton*,[103] Judge Finesilver, writing for a unanimous three judge panel, held that an attempt by the prosecutor to comment on the defendant's right to remain silent was not reversible error because defense counsel was quick to interpose an objection to

96. *Id.* at 1095.
97. 426 U.S. 610 (1976).
98. *Id.* at 618.
99. *Velarde*, 757 F.2d at 1095.
100. 731 F.2d 669 (10th Cir. 1984).
101. *Id.* at 675.
102. 649 F.2d 793, 798 (10th Cir. 1981). *See also* United States v. Johnson, 495 F.2d 242, 246 n.5 (10th Cir. 1974) (If the very essence of the case is the jurors' assessement of the witness' credibility, the admission of tainted evidence cannot be considered harmless.).
103. 751 F.2d 1146 (10th Cir. 1985). Judge Finesilver of the United States District Court for the District of Colorado sat by designation.

the unconstitutional line of questioning.[104] The court also pointed out that the defense counsel requested, and the court gave, an immediate admonition to the jury, thus curing any potential problem raised.[105]

3. *United States v. Swingler*

Reluctance to find reversible error without reasonable basis is also evident in *United States v. Swingler*.[106] In this case, the defense counsel *inadvertently* elicited testimony from a government witness regarding the defendant's silence upon arrest. Although he did not object or move to strike the testimony, defense counsel immediately minimized its effect by more artfully rephrasing his question. The Tenth Circuit, Judge Bohanon writing,[107] concluded that because the witness had not intended to comment improperly on defendant's right to remain silent and any prejudice was "ameliorated by the succeeding questions and answers," any error was harmless.[108]

C. *Privilege, Immunity, and the Fifth Amendment*

1. The Marital Privilege

The confidentiality of spousal communications has been safeguarded in the courtroom because the judiciary is in favor of fostering family peace and promoting marital harmony. This privilege, however, is not absolute. The Tenth Circuit has recognized at least two exceptions and discussed them in two opinions handed down during the survey period and authored by Judge Barrett.

In *United States v. Kapnison*,[109] the defendant's wife was granted immunity[110] from prosecution by the government and was willing to testify against her husband. Kapnison, the defendant-husband, alleged that his wife's voluntary cooperation with the government and her testimonial

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104. *Cotton*, 751 F.2d at 1150.

105. *Id.*

106. 758 F.2d 477 (10th Cir. 1985).

107. Judge Bohanon of the United States District Court for the Eastern and Western Districts of Oklahoma sat by designation.

108. *Swingler*, 758 F.2d at 500.

109. 743 F.2d 1450 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2017 (1985).

110. Pursuant to 18 U.S.C. § 6002 (1982), the privilege against self-incrimination does not provide total immunity for a witness who does not want to testify. The statute provides in pertinent part:

Immunity Generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —
>
> 1) a court or grand jury of the United States . . .
>
> . . .
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, *the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination*; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. (emphasis added).

appearances before the grand jury and the trial jury were in violation of his fifth and sixth amendment rights. Quoting extensively from *Trammell v. United States*,[111] the Tenth Circuit held that the marital privilege should be circumscribed so that only the witness-spouse has the privilege to refuse or agree to testify adversely concerning his or her spouse's affairs; the witness-spouse may not be compelled or foreclosed from testifying by the other spouse.[112] This modification of the marital privilege does not promote a deterioration of the family unit because if one spouse is willing to testify against the other in a criminal proceeding, their relationship is almost certainly in a state of disrepair. In addition, a two-sided marital privilege could actually operate to undermine the marital relationship. The state would be reluctant to grant immunity to a spouse if it knew her spouse could prevent her from giving adverse testimony; thus the privilege could have the unfortunate effect of permitting one spouse to escape prosecution at the expense of the other. The Supreme Court thus concluded in *Trammell*, and the Tenth Circuit agreed in *Kapnison*, that the newly defined marital privilege continues to further the important public interest of the spousal relationship without unduly burdening legitimate state interests.[113]

The *Kapnison* opinion is unclear in describing the precise nature and extent of the testimony that one spouse can volunteer in court against the other uncooperative spouse based on this "modified" privilege alone. When Mr. Kapnison objected to testimony relating to information Mrs. Kapnison obtained directly from him during the course of their marriage,[114] Judge Barrett accepted the admissibility of the testimony relying not on the "modified" unilateral marital privilege, but rather because Mrs. Kapnison qualified as a participant under the "crime-fraud" exception to the marital privilege. The "crime-fraud" exception operates to negate the marital privilege when a husband and wife conspire or otherwise actively participate in an unlawful activity.[115] The theory behind this exception is that marital communications having to do with the commission of a crime do not concern the marriage itself and therefore do not fall within the protections of the marital privilege. Because Mrs. Kapnison acknowledged that she was an active participant in an unlawful scheme,[116] Mr. Kapnison's allegation that his wife's testimony was in violation of confidential marital communications was without merit.[117]

111. 445 U.S. 40 (1980).

112. *Kapnison*, 743 F.2d at 1454 (citing Trammel v. United States, 445 U.S. 40, 53 (1980)).

113. *Kapnison*, 743 F.2d at 1454.

114. Judge Barrett noted that there must be strict enforcement of the lower court's ruling that Mrs. Kapnison's testimony be limited to those statements made by Mr. Kapnison to Mrs. Kapnison in the presence of other persons, or testimony relating to acts committed by Mr. Kapnison. Such testimony is not protectd by the fifth amendment. *Id.* at 1455.

115. *Id.*

116. *Id.*

117. *Id.* at 1454.

In another opinion, *United States v. Neal*,[118] handed down on the same day as *Kapnison*, the Tenth Circuit attempted to more clearly define the application of a "modified" marital privilege to a case that also involved the "crime-fraud" exception. Mrs. Neal was an accessory after the fact to a robbery and murder allegedly committed by her husband. Similar to the facts in *Kapnison*, Mrs. Neal was granted immunity from prosecution in exchange for truthful testimony pertaining to her husband's suspected criminal activity. Mr. Neal appealed the district court's decision and contended that the court erred in allowing Mrs. Neal to testify about communicative acts in contravention of the marital privilege.[119]

Judge Barrett first pointed out that because Mrs. Neal was an accessory after the fact to a robbery committed by her husband, Mr. Neal could not cling to the cloak of marital immunity when his wife, who enjoyed the fruits of the crime, gave incriminating testimony under a grant of immunity. Second, Judge Barrett described the now applicable "modified" marital immunity that permits the witness-spouse to testify against his or her spouse without that spouse's approval. "[W]e conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying."[120]

In the *Neal* decision, Judge Barrett defined the applicability of this "modified" privilege rule, and cleared up obscurities that were not addressed in the *Kapnison* decision. This modified rule, he explained, operates to exclude the testimony of one spouse against another only when the "*sole* knowledge and information and/or participation *involves a conversation wherein the spouse who committed the crime discloses that fact to the other spouse*."[121] In the *Neal* case, however, Mrs. Neal actively participated in the cover-up of her husband's crime and enjoyed the fruits of his criminal activity; thus, the "crime-fraud" exception to the marital communications privilege was applied rather than the "modified" privilege rule. Because Mrs. Neal was an accessory after the fact in her husband's crime, the Tenth Circuit upheld the lower court's admission of her testimony concerning the crime.

2. Immunity and Waiver of the Right to Remain Silent

When immunity is granted to a witness, the witness waives his or her right to invoke the fifth amendment right to silence. The grant of "transactional" immunity has two limitations on it not present in a general grant of immunity. First, transactional immunity does not preclude a subsequent prosecution for perjury based on the immunized testimony. Second, transactional immunity does not extend to matters not related to the elicited testimony. Thus, a witness cannot gain immunity

118. 743 F.2d 1441 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1848 (1985).
119. *Neal*, 743 F.2d at 1444.
120. *Id.* at 1445 (emphasis omitted).
121. *Id.* at 1446 (emphasis by the court).

from all prosecution for all previous criminal acts by simply including a reference to those acts in his testimony without regard to the subject on which he was asked to testify.[122]

In *Wolff v. United States*,[123] a witness accepted an offer of immunity in exchange for giving incriminating testimony against the defendant, Wolff. In a later habeus corpus proceeding, Wolff alleged that the immunized witness committed perjury while on the stand and that the government knowingly used this perjured testimony against him. Furthermore, he claimed that his confrontational and due process rights were violated when this critical witness was granted immunity.[124] The government took the position that the immunity granted to the witness was "transactional" and therefore the witness was subject to prosecution for perjury for his proferred testimony. Wolff, however, contended that the immunity was much broader and that the witness was exempt from prosecution for perjury. Therefore, Wolff argued, the oath the witness had to take before testifying was destroyed, and his due process and confrontational rights were violated.[125]

Without addressing the distinctions between "transactional" and "non-transactional" immunity, the court, Judge McWilliams writing, simply stated that the immunity granted the witness did not specifically include or exclude the witness' immunity from perjury. Because counsel for the defense knew the underlying basis of immunity and had failed to either make an appropriate objection at trial or determine the exact extent and effect of the immunity granted, the court held that the defendant was barred from raising the immunity issue on appeal.[126] The court mentioned that if the defendant could have shown good cause for not having raised this issue at the trial level and have further shown that there was actual prejudice resulting from this error, appellate relief might have been available. The defense counsel was unable to demonstrate either, and the defendant was left without means for relief.

In *United States v. Hembree*,[127] the issue of perjury with respect to immunized testimony arose again. The Tenth Circuit again did not address "transactional" or "non-transactional" immunity; rather, it described the grant of immunity to be one that was given in exchange for *truthful* testimony. The immunized witness, Hembree, testified at trial that she had lied to the grand jury. Based on this testimony, Hembree's probation for an unrelated offense was revoked. She later recanted the testimony she gave at trial which had implicated the defendant and, as a result, she was charged and convicted for perjury. On appeal from the

122. *See* Note, *The Federal Witness Immunity Acts In Theory And In Practice: Treading The Constitutional Tightrope*, 72 YALE L.J. 1568, 1578-80 (1963).
123. 737 F.2d 877 (10th Cir.), *cert. denied*, 105 S. Ct. 575 (1984).
124. *Id.* at 878.
125. *Id.*
126. *Id.* at 880. The trial was actually a military proceeding for court martial. The military courts have adopted the general rule that appellate courts can only review issues or errors presented at the lower court level. *Id.* (citing United States v. Anderson, 10 M.J. 743, 746 (N.C.M.R. 1981) and United States v. Dupuis, 10 M.J. 650, 652 (N.C.M.R. 1980)).
127. 754 F.2d 314 (10th Cir. 1985).

perjury conviction, Hembree claimed that her immunity rights were violated or, alternatively, that her fifth amendment rights had been violated. It was her contention that because the court did not honor her immunity agreement with the United States Attorney, which had included a promise not to participate in probation revocation proceedings, she had given up her right against self-incrimination and received nothing in return.[128]

The Tenth Circuit has described the federal immunity statute to be one that represents an accommodation between the right of the government to compel testimony on the one hand, and the constitutional right to remain silent, on the other.[129] The purpose of immunizing a witness is to reach the truth, and when the testimony cannot be used against the testifying witness, the fear of incrimination is removed. "The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination."[130] The agreement made between the United States Attorney and the witness was to exchange the witness' trustworthy testimony for immunity. Because the witness gave inconsistent testimony and therefore failed to uphold her side of the bargain, the Tenth Circuit held that the grant of immunity was void *ab initio*.[131]

It appears that the Tenth Circuit is not concerned with the semantics of "transactional" or "non-transactional" immunity. If a witness is granted immunity and does not tell the truth when giving testimony, he or she will be subject to a charge for perjury, and a subsequent claim that his or her fifth amendment rights or immunity rights have been violated will not be recognized.

The *Hembree* court upheld the perjury conviction because the immunity granted was informal, meaning that no court order, as required by 15 U.S.C. § 6002, was obtained.[132] Therefore, the court explained, the immunity agreement was merely a contract with the United States Attorney that did not bind the district court.[133] Finally, it pointed out that the fifth amendment privilege against self-incrimination applies only in criminal cases, and the law is settled that probation revocation proceedings are not criminal in nature.[134]

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128. *Id.* at 316.

129. United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978) (citing United States v. Tramunti, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974)).

130. *Trammel*, 583 F.2d at 1168 (citing Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976), *aff'd sub nom.* Childs v. Schlitz, 556 F.2d 1178 (4th Cir. 1977)).

131. *Hembree*, 754 F.2d at 317.

132. *See supra* note 110.

133. *Hembree*, 754 F.2d at 317.

134. *Id.* (citing Minnesota v. Murphy, 104 S. Ct. 1136, 1147 n.7 (1984); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

III. SIXTH AMENDMENT

A. *Right to Counsel*

1. Custodial Interrogation: *United States v. Leach*

In *United States v. Leach*,[135] the defendant, who was convicted on five counts of passing forged and counterfeited bills, had originally volunteered to be interrogated in response to a telephone call from a Secret Service agent. On appeal, Leach claimed that he was not properly advised of his *Miranda* rights informing him of his right to have an attorney present when being interrogated by police officers. Judge Barrett, writing for the court, held that because Leach was not in custody and because he volunteered to be interrogated at the time and place of his choice, the law enforcement agents were not under a legal duty to advise him of his *Miranda* rights. The landmark *Miranda* case declared that an individual has a right to be informed of his fifth and sixth amendment rights once the individual becomes subject to a custodial interrogation. The Supreme Court, in *Rhode Island v. Innis*,[136] defined "custodial interrogation" to be whenever law enforcement officers deprive an individual of his freedom and begin to question him. The Court described this "deprivation of freedom" to include a situation wherein the individual is placed in an environment where he perceives himself to be subjugated to the will of the interrogator.[137] Other Supreme Court decisions have maintained that the constitutional right to an attorney exists only at or after the time adversary judicial proceedings have been initiated against the defendant, or even as late as when the proceedings are in a "critical stage."[138]

The Tenth Circuit considered when the right to counsel attaches in *United States v. Bridwell*.[139] The *Bridwell* court, keeping in mind the prerequisite of "custody" or "deprivation of freedom," held that when a physician was questioned in his office and no indicia of coercion is alleged, the *Miranda* warnings were not required. A few years later, in *United States v. Miller*,[140] the court found no violation of the right to an advisement of *Miranda* warnings when a suspect was questioned in his home prior to his arrest. This finding was based upon the fact that the defendant was not deprived of his freedom, nor was the questioning coercive in nature.

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135. 749 F.2d 592 (10th Cir. 1984).

136. 446 U.S. 291 (1980).

137. *Id.* at 298-99. *See generally* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS 780-832 (3d ed. 1975), 188-202 (Supp. 1979) (discussion and case support for the right to counsel and when it may be invoked).

138. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 688 (1972) (adversarial judicial proceedings are when the defendant is formally charged at his preliminary hearing, when he is indicted, or when he is arraigned); *accord* United States v. Ash, 413 U.S. 300 (1973) (The sixth amendment does not guarantee a defendant the right to counsel at a post-indictment photographic display because this does not constitute a "critical stage" in the judicial proceedings. A "critical stage" is when the accused requires aid in coping with legal problems or confronting his adversary.); *see also infra* note 149 and accompanying text.

139. 583 F.2d 1135 (10th Cir. 1978).

140. 643 F.2d 713 (10th Cir. 1981).

Following the precedent set down in these decisions, Judge Barrett explained in *Leach* that because the defendant voluntarily spoke to the two law enforcement agents about his suspected criminal activity, he was neither coerced nor in any way deprived of his freedom. Consequently, the court concluded that Leach's sixth amendment rights were not violated.[141]

2. A Right to the Attorney of Your Choice? — *United States v. McConnell*

Criminal defendants have frequently asserted that they are constitutionally entitled to a particular attorney despite the potentially disruptive effect this request may have upon judicial proceedings. In *United States v. McConnell*,[142] the defendant, McConnell, wanted to be represented by his co-defendant's attorney.[143] Because the attorney's dual representation would have created a conflict of interest, McConnell asserted that he was entitled to a severance of his claims. Insisting that this particular attorney was the only attorney who could effectively represent him, he contended that his sixth amendment rights would be violated unless the court granted a trial separate from that of his co-defendant. The Tenth Circuit, Judge Bohanon writing for the court, somewhat aghast at this preposterous request, held that the sixth amendment right to counsel did not extend so far as to entitle a criminal defendant to a severance merely because he expressed a preference for an ineligible attorney.[144] The court, relying on several earlier Tenth Circuit cases,[145] concluded that the sixth amendment does not include an absolute right to counsel of one's choice. The court stated that "[t]he right to retain counsel of one's choice 'may not be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.' "[146]

141. The court rejected Leach's argument that because he was a "target of investigation," he was "in custody" for *Miranda* purposes. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (Police officers are not required to administer *Miranda* warnings to everyone whom they question; nor are the warnings required simply because the questioning takes place at the station house or because the questioned person is one whom the police suspect.).

142. 749 F.2d 1441 (10th Cir. 1984).

143. The *McConnell* case also discussed the economic requirement necessary in order for a defendant to be entitled to appointed counsel. Although McConnell contended that the court did not make the proper inquiry into his financial standing, or advise him that he need not be indigent to qualify for court-appointed counsel, the court found that it was incapable of determining such eligibility because McConnell had flatly refused to disclose his assets and had repeatedly told the trial court that he could afford to hire an attorney. *Id.* at 1450.

144. *Id.* at 1450.

145. United States v. Gipson, 693 F.2d 109 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983); United States v. Peister, 631 F.2d 658 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); United States v. Weninger, 624 F.2d 163 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

146. *McConnell*, 749 F.2d at 1450 (citing *Gipson*, 693 F.2d at 111 (quoting United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979)).

3. No Right to Counsel at Post Line-up Interview: *Hallmark v. Cartwright*

On appeal from the United States District Court for the Northern District of Oklahoma, the defendant in *Hallmark v. Cartwright*[147] cited *Richardson v. State*,[148] an Oklahoma decision he considered to be controlling, and argued that the right to counsel at a line-up should be extended to include the right to have counsel present at a post line-up interview between the witnesses and the police.[149] The Tenth Circuit was not persuaded by *Richardson* and remarked that while a few states have extended a right to counsel to post line-up interviews,[150] the trend within the federal courts is not to require the presence of counsel under such circumstances.[151] Accordingly, the *per curiam* decision stated that the appellant's sixth amendment rights were not violated when he was not permitted the presence of counsel at his post line-up interview.

B. *Waiver of the Right to Counsel*

In order to effectively waive the right to counsel, the Supreme Court has held that the sixth amendment requires an "intentional relinquishment or abandonment of a known right or privilege."[152] In 1980, the Tenth Circuit, in *United States v. Weninger*,[153] adopted a test which requires that before a defendant can relinquish his sixth amendment right to counsel, the judge must personally address the defendant and inform him of the nature of the charges made against him, the statutory offenses included within them, and the range of punishments to which he may be subjected. The court must also apprise the defendant of the possible defenses or mitigating factors that might be available to him.[154]

In *United States v. McConnell*,[155] another case decided during this survey period, the Tenth Circuit decided that there was an effective waiver

147. 742 F.2d 584 (10th Cir. 1984).

148. 600 P.2d 361 (Okla. Crim. App. 1979).

149. A suspect has an absolute right to counsel at any pretrial confrontation. Such confrontations include, but are not limited to line-ups and one-man show-ups. *See* United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

150. *See* People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971) (defendant was entitled to the presence of counsel in a post line-up indentification).

151. The court cited several federal circuit court opinions refusing to extend the right to counsel to post line-up interviews: United States v. White, 617 F.2d 1131, 1135 (5th Cir. 1980); United States v. Bierey, 588 F.2d 620, 624 (8th Cir. 1978), *cert. denied*, 440 U.S. 927 (1979); United States v. Tolliver, 569 F.2d 724, 727 (2d Cir. 1978) (recording of interview should be made available to defense counsel); United States v. Parker, 549 F.2d 1217, 1223 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977); United States v. Wilcox, 507 F.2d 364, 370 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975).

152. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Brewer v. Williams, 430 U.S. 387 (1977) (There is a heavy burden on the state to prove that an effective waiver had been given. To determine this, the courts must look to the circumstances of each case, including the defendant's background and the setting in which the alleged waiver took place.).

153. 624 F.2d 163 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980). This test was also reasserted in United States v. Gipson, 693 F.2d 109 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983).

154. *Weninger*, 624 F.2d at 164.

155. 749 F.2d 1441 (10th Cir. 1984).

of counsel despite the trial court's failure to apply the *Weninger* test. The court instead looked to the "total circumstances of [the] . . . case, including background, experience and the conduct of the accused person."[156] In *McConnell* the facts revealed that the defendant had attended two and one half years of law school, that he had read his entire indictment and asserted that he understood it, that he had already begun to prepare his defense, and that he was fully aware of the seriousness of the penalty he faced.[157] Furthermore, the trial judge repeatedly attempted to persuade McConnell to retain an attorney, but the defendant disregarded his advice. Despite the fact that strict compliance with the *Weninger* test was not required to recognize a waiver of an individual's right to counsel in *McConnell*, this decision, in view of the particular facts of the case, has not significantly diminished the importance of a *knowing* waiver and has not set the stage for a mere hollow compliance with this revered constitutional mandate in the future.[158] The apparent abandonment of the *Weninger* requirements in *McConnell* should not be attributed to a decline or deterioration of an individual's right to an intelligent and knowing waiver of his sixth amendment right to counsel.

During the previous survey period, in *United States v. Dressel*,[159] the Tenth Circuit outlined the minimum requirements to find an effective waiver of counsel in a situation of joint representation. The court declared that the defendant must be made aware of his right to separate representation if he so desires and he must also understand the hazards inherent in a case where one attorney is representing two defendants. Turning to Federal Rule of Criminal Procedure 44(c),[160] the court further noted that the presiding judge should elicit a narrative response from each defendant stating that he has been advised of his right to an *effective* assistance of counsel and that he fully understands the perils of joint representation and voluntarily and intelligently waives his right to counsel.[161]

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156. *Id.* at 1451 (citing *Weninger*, 624 F.2d at 164 (quoting United States v. Warledo, 557 F.2d 721, 727 (10th Cir. 1977)); *see also infra* note 171 and accompanying text.

157. *McConnell*, 749 F.2d at 1451.

158. In another case decided during this survey period, United States v. Dressel, 742 F.2d 1256 (10th Cir. 1984), the court stated: "Notwithstanding the trial court's compliance with all of the suggested procedures to ensure that any waiver is fully informed and voluntary, under some circumstances 'even full disclosure and consent . . . may not be adequate protection.' " *Id.* at 1258 (quoting the advisory committee notes to FED. R. CRIM. P. 44(c)).

159. 742 F.2d 1256 (10th Cir. 1984).

160. This rule states in relevant part:

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation . . . .

FED. R. CRIM. P. 44(c).

161. *Dressel*, 742 F.2d at 1258 (quoting United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975)).

C. *Collateral Use of an Uncounseled Conviction*

The sixth amendment prohibits collateral use of an invalid uncounseled conviction in order to enhance a subsequent conviction or sentence. This principle has been espoused by the Supreme Court on numerous occasions,[162] and the Tenth Circuit recently adopted it in *Santillanes v. United States Parole Commission.*[163] In *Santillanes,* the trial court upheld the parole commission's order that Santillanes forfeit his street time in a revocation of parole hearing due to a state court conviction for driving while intoxicated. Santillanes contended on appeal to the Tenth Circuit that the forfeiture was constitutionally improper because the conviction was obtained without the assistance of counsel and without a waiver of his right to counsel. Judge McKay, writing for the Tenth Circuit, explained that the proper use of a prior constitutionally infirm conviction depends on its reliability rather than the mere fact of conviction; *ergo* the use of such an invalid prior conviction on one charge to support a subsequent guilty conviction on another charge, or to enhance a later punishment for an unrelated offense, erodes the safeguard established in *Gideon v. Wainright.*[164] Accordingly, the court could not accept the use of Santillanes' prior conviction for driving while intoxicated while on parole as a basis for ordering a forfeiture of his "street time" because the driving while intoxicated conviction had been obtained without the assistance or effective waiver of counsel.[165] Under *Santillanes,* an uncounseled and therefore constitutionally infirm conviction is *per se* unreliable.

D. *Effective Assistance of Counsel*

1. The Requisite Elements of Proof: *McGee v. Crist*

In *McMann v. Richardson,*[166] the Supreme Court declared "the right to counsel is the right to effective assistance of counsel" in criminal prosecutions.[167] Last year, in *Strickland v. Washington,*[168] the Court set forth elements that a convicted criminal must prove in order to establish a denial of the sixth amendment right to counsel. The convicted defendant must persuade the court that his counsel's assistance was so defective as to require a reversal. In order to do so, the defendant must establish that his counsel's performance was deficient; that is, that the attorney was not functioning in a manner minimally guaranteed by the sixth amendment, that standard being guided by reasonableness under current professional norms. Additionally, the defendant must establish that the deficient performance actually prejudiced his defense to such a

162. *E.g.*, Baldasar v. Illinois, 446 U.S. 222 (1980); Scott v. Illinois, 440 U.S. 367 (1979); Burgett v. Texas, 389 U.S. 109 (1967).
163. 754 F.2d 887 (10th Cir. 1985).
164. 372 U.S. 335 (1963).
165. *Santillanes*, 754 F.2d at 890.
166. 397 U.S. 759 (1970).
167. *Id.* at 771 n.14.
168. 104 S. Ct. 2052 (1984).

degree that he was not afforded a fair trial. Unless the defendant can make both of these showings, the conviction will stand.[169]

In the 1980 decision of *Dyer v. Crisp*,[170] the Tenth Circuit found the right to effective assistance of counsel to be one that "demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney."[171] Until the *Strickland* decision came down in 1984, the Tenth Circuit had only the opaque and highly subjective standard of *Dyer* to wrangle with. When the "fair trial doctrine" approach, with its tangible and more objectively defined elements, was handed down in *Strickland*, the Tenth Circuit was given an opportunity to pull together its somewhat unpredictable and often irreconcilable holdings.[172] During the current survey period, the Tenth Circuit adopted the *Strickland* holding by applying its two-prong test in *McGee v. Crist*.[173] In *McGee*, the defendant claimed that his sixth amendment right to effective assistance of counsel was breached, and attempted to establish both a deficient representation by his attorney and actual prejudice to his case as required by *Strickland*. McGee claimed that due to inadequate research by his attorney, a key witness who could have testified at trial and supported his defense did not testify for fear of incriminating himself. This, alleged McGee, resulted in actual prejudice to his case.[174]

The Tenth Circuit noted that notwithstanding his attorney's failure to discover New Mexico's immunity statute, McGee's attorney actually could not have secured any immunity for the defendant's absent "key" witness. Under New Mexico law, only the prosecuting attorney may apply to the court and request a grant of immunity for a witness.[175] Because this request was only available to the state and not to the defense attorney, McGee was unable to establish the prejudice necessary to find a denial of effective assistance of counsel as required under *Strickland*.

2. Multiple Representation: *United States v. Burney*

In situations where counsel is burdened by a conflict of interest, the *Strickland* Court found that a presumption of prejudice arises.[176] The Supreme Court in *Cuyler v. Sullivan*[177] qualified this presumption by stating that it materializes only if the "defendant shows that his counsel actively represented conflicting interests . . . [and] . . . that an actual

169. *Id.* at 2064.

170. 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980).

171. *Id.* at 278.

172. *See, e.g.*, Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1984); United States v. Winkle, 722 F.2d 605 (10th Cir. 1983).

173. 739 F.2d 505 (10th Cir. 1984).

174. *Id.* at 506.

175. *Id.* at 508. "If a person has been or may be called to testify . . . the district court . . . may, *upon application of the prosecuting attorney*, issue an order requiring the person to testify . . . notwithstanding his privilege against self-incrimination." N.M.R. CRIM. P. 58(a) (emphasis added).

176. *Strickland*, 104 S. Ct. at 2067. *But cf.* Holloway v. Arkansas, 435 U.S. 475, 482 (1978) (multiple representation of co-defendants is not per se a violation of the sixth amendment).

177. 446 U.S. 335 (1980).

conflict of interest adversely affected his lawyer's performance."[178]

In a recent Tenth Circuit opinion, *United States v. Burney*,[179] the court was faced with the issue of whether the sixth amendment imposes a burden upon the court to initiate an inquiry concerning the potentially prejudicial effects of multiple representation upon the co-defendant. In *Burney*, one attorney represented four defendants and the trial judge did not make any inquiry into the effect this had on the adequacy of representation afforded to each defendant. It is noteworthy, however, that the attorney did not bring this potential conflict to the attention of the trial judge.[180] This fact was critical in the protection of the defendants' right to effective assistance of counsel. The *Burney* court, Judge Seymour writing, cited Federal Rule of Criminal Procedure 44(c),[181] although it appeared to pay the rule no regard. Judge Seymour acknowledged that an attorney conflict of interest implicates the sixth amendment; nevertheless, she cited three circuit opinions and one United States Supreme Court opinion[182] as authority for the principle that the sixth amendment "does not require a court to initiate an inquiry when no party either objects to multiple representation or raises a conflict issue."[183] Because the *Burney* court decided that no violation of the sixth amendment occurs when neither the court nor any party raises an objection at trial to multiple representation, the defendant must demonstrate to the court that an actual conflict of interest adversely affected his lawyer's performance as required by *Strickland*.[184] Burney failed to demonstrate any such conflict. A trial court's failure to comply with Rule 44(c) will not *ipso facto* justify a reversal of a conviction; a defendant must show that his counsel actively represented conflicting interests.[185]

E. *Police Interrogation Following a Defendant's Invocation of His Right to Counsel*

In 1981, the United States Supreme Court announced that all police interrogation must stop once the accused has expressed his desire to deal with the police only in the presence of his attorney.[186] It is not until the accused is furnished with an attorney or until the *accused* initiates further communications, exchanges or conversations with the of-

178. *Id.* at 350.

179. 756 F.2d 787 (10th Cir. 1985).

180. *Id.* at 791.

181. *See supra* note 157.

182. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); United States v. Unger, 700 F.2d 445, 453 n.17 (8th Cir.), *cert. denied*, 104 S. Ct. 339 (1983); United States v. Benavidez, 664 F.2d 1255, 1258 (5th Cir.), *cert. denied*, 457 U.S. 1135 (1982). *Cf.* United States v. Foster, 469 F.2d 1, 4-5 (1st Cir. 1972).

183. *Burney*, 756 F.2d at 791.

184. *Id.* (citing *Cuyler*, 446 U.S. at 349-50).

185. *Id.* The court also cited United States v. Alvarez, 696 F.2d 1307, 1309 (11th Cir.), *cert. denied*, 461 U.S. 907 (1983); United States v. Arias, 678 F.2d 1202, 1205 (4th Cir.), *cert. denied sub nom.* Faircloth v. United States, 459 U.S. 910 (1982); and *Benavidez*, 664 F.2d at 1258-59, for its authority in this decision.

186. Edwards v. Arizona, 451 U.S. 477 (1981); *see also* Oregon v. Bradshaw, 462 U.S. 1039 (1983).

ficers that the officers may begin to question the criminal suspect.[187] In *United States v. De La Luz Gallegos*,[188] the Tenth Circuit recognized this limitation on police communications, but refused to find any sixth amendment violation. In *De La Luz Gallegos*, the defendant was advised of his *Miranda* rights when he was approached by an agent of the Bureau of Indian Affairs concerning a gunshot incident the previous day. He indicated that he understood his rights and requested an attorney. Then De La Luz Gallegos made some statements tending to show that he was in possession of the shotgun involved. Judge Cook,[189] writing for the Tenth Circuit, explained that although De La Luz Gallegos had invoked his right to counsel, he subsequently made spontaneous declarations; his statements were plainly volunteered and unprovoked. The law enforcement officer had scrupulously honored the defendant's request for an attorney, and even went so far as to advise him to keep silent until his attorney arrived. Because the defendant ignored this advice and initiated further conversation with the police officers, the court could find no violation of the defendant's sixth amendment rights.[190]

De La Luz Gallegos additionally asserted that the prosecution acted improperly when it commented to the jury in its opening statement that the defendant had requested an attorney upon his arrest. Though comment to a jury on an individual's invocation of his right to keep silent under the fifth amendment may constitute error,[191] the Tenth Circuit held that any reference to a defendant's request for an attorney is proper and relevant for the purpose of laying a foundation for the admission of any subsequent statements made by the defendant.[192] This is so the jury can determine whether or not the defendant's subsequent statements were voluntary and what weight they should be accorded.[193]

F. *The Confrontation Clause*

In conducting a criminal trial, the court must protect the rights of the defendant under the sixth amendment, including the defendant's right to confront the witnesses who provide evidence or testimony against him.[194] During this survey period, the Tenth Circuit considered several cases that illustrate the nature and scope of this clause in various contexts.[195]

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187. *Edwards*, 451 U.S. at 484-85.

188. 738 F.2d 378 (10th Cir.), *cert. denied*, 105 S. Ct. 574 (1984).

189. Judge Cook, Chief United States District Judge for the Northern District of Oklahoma, sat by designation.

190. *De La Luz Gallegos*, 738 F.2d at 381. *See also* United States v. Obregon, 748 F.2d 1371, 1380-81 (10th Cir. 1984) (Because the defendant initiated further dialogue with the police officer after he had requested to see an attorney, the court held the defendant's sixth amendment right to counsel was not violated when the police continued further discussion with him.).

191. *See supra* notes 94-108 and accompanying text.

192. *De La Luz Gallegos*, 738 F.2d at 381 (citing United States v. Wycoff, 545 F.2d 679, 681 (9th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977)).

193. *Id.* at 381-82.

194. U.S. CONST. amend. VI.

195. For a general discussion of the right to confront witnesses, see F. MILLER, R. DAW-

1. A Limited Examination: *United States v. Morgan*

United States v. Morgan[196] is helpful in that it sets forth the rights implicit in the sixth amendment's confrontation clause. In *Morgan*, the defendant claimed that his rights under the confrontation clause were violated because the trial court granted a motion limiting the defense counsel's examination of a government's witness. The court had directed defense counsel to refrain from asking questions about the witness's pending murder charges and those to which the witness could invoke the fifth amendment.

Before addressing the relevant requirements to *Morgan*, the Tenth Circuit, Judge Saffels[197] writing, listed the rights implicitly contained in the confrontation clause. First, the confrontation clause limits the prosecution's use of hearsay evidence. Before any hearsay can be raised in court against the accused, there must be sufficient "indicia of reliability as to the statement."[198] The prosecution must demonstrate the unavailability of the declarant and establish that it has made a good faith effort to obtain the declarant at trial.[199] If at all possible, the defendant must be given an opportunity to cross examine the government's witness.[200] Second, the confrontation clause does not provide the accused with a guarantee that the government must call each and every witness it has to testify against him.[201] The accused generally does not have the right to confront an informant who does not provide any evidence at trial.[202] Finally, the court spoke to the relevant issue in *Morgan* and recognized a third element of the confrontation clause: the accused has a right to use cross-examination as a way to present a defense to the charges brought against him.[203]

SON, G. DIX, R. PARTNAS, CRIMINAL JUSTICE ADMINISTRATION 1253, 1288 (4th ed. 1976), 244 (Supp. 1979).

196. 757 F.2d 1074 (10th Cir. 1985).

197. Judge Saffels, United States District Judge for the District of Kansas, sat by designation.

198. *Morgan*, 757 F.2d at 1076 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)).

199. *Id.* (citing Barber v. Page, 390 U.S. 719, 724-25 (1968)); *see also* Mancusi v. Stubbs, 408 U.S. 204 (1972) (A showing that the witness is outside of the the country is sufficient *per se* to establish "unavailability" and avoid the requirement that the prosecution make a good faith effort.).

200. *Morgan*, 757 F.2d at 1076 (citing California v. Green, 399 U.S. 149 (1970)); *see, e.g.*, United States v. Kapnison, 743 F.2d 1450, 1458-59 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2017 (1985). In *Kapnison*, the defendant attempted to admit a deposition of a declarant that was taken in a previous civil action, claiming that it had an adequate indicia of reliability because the deponent was cross-examined by other parties during the deposition. The Tenth Circuit refused to allow the admission of this testimony in view of the fact that the government did not have the opportunity to cross examine the deponent during this civil action.

201. *Morgan*, 757 F.2d at 1076 (citing Cooper v. California, 386 U.S. 58, 62 n.2 (1967)).

202. *Id.* (citing United States v. Francesco, 725 F.2d 817, 822 (1st Cir. 1984); United States v. Kabbaby, 672 F.2d 857, 864 (11th Cir. 1982); United States *ex rel.* Meadows v. New York, 426 F.2d 1176, 1184 (2d Cir. 1970), *cert. denied*, 401 U.S. 941 (1971)).

203. *Id.* (citing Younger, *Confrontation*, 24 WASHBURN L.J. 1, 28 (1984)); *see also* United States v. Swingler, 758 F.2d 477, 497 (10th Cir. 1985) ("[T]he sixth amendment confrontation clause . . . [gives the defendant] the right [to an] 'effective' cross examination when attempting to show the existence of possible bias or prejudice on the part of a government witness.").

In most instances, the prosecution calls its informant to the stand to testify against the accused, but in *Morgan* it did not. Because the defense wanted to prove that the informant coerced the defendant into selling cocaine, it called the informant to the stand as a hostile witness.[204] The Tenth Circuit cited language in the Supreme Court case of *Chambers v. Mississippi*[205] which stated that "[t]he right of confrontation does not depend upon whether the witness was put on the stand by the accused or by the prosecution."[206] However, when Morgan's counsel asked the informant about his own involvement in criminal activity, the informant invoked the fifth amendment. In allowing a limitation on questions asked by the defense to which the informant could invoke this privilege, the court stated that the trial court had adequately balanced all competing interests and did not abuse its discretion in limiting the informant's testimony.[207] Thus Morgan was not denied his right of confrontation.[208]

2. Unavailable Witness and Reliable Information: *Ewing v. Winans*

In *Ewing v. Winans*,[209] the accused, Ewing, appealed the trial court's decision to allow the prosecution to read portions of Ewing's girlfriend's deposition to the jury and further allowing the prosecution to read the entire deposition into the record. Under the New Mexico Rules of Evidence, any part or all of a deposition may be used as evidence if the declarant is unavailable.[210] The statute further states that a witness is unavailable if the proponent of the statement is unable to procure the declarant's attendance by process or other reasonable means.[211] When deciding whether reasonable means were taken to secure the attendance of the witness at trial, the courts look to the totality of the circumstances.[212] Under the New Mexico rules, the Tenth Circuit, Judge Barrett writing, found that the trial court did not err in allowing the deposition to be read into the record and to be read to the jury.[213] The record clearly showed that she was an uncooperative witness.[214]

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204. *Morgan*, 757 F.2d at 1075. The prosecution apparently did not object to an element of the confrontation clause as discussed by the Tenth Circuit in this case: "[T]he accused generally may not confront an informant who provides no evidence at trial." *See supra* note 202 and accompanying text.

205. 410 U.S. 284 (1973).

206. *Morgan*, 757 F.2d at 1077 (citing *Chambers*, 410 U.S. at 298).

207. *Id.* The court noted that the questions which the defense wished to ask the informant involved matters collateral to the issues at trial and, additionally, other evidence was introduced to accomplish the same purpose as such testimony would have accomplished. *Id.*

208. *Accord* United States v. Ramirez, 622 F.2d 898 (5th Cir. 1980).

209. 749 F.2d 607 (10th Cir. 1984).

210. N.M. STAT. ANN. § 804(a) (1983).

211. *Id.* at § 804(a)(5) (1983). *See also* State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (state has burden to prove the unavailability of its witnesses), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979).

212. *Vialpando*, 599 P.2d at 1092.

213. *Ewing*, 749 F.2d at 611.

214. *Id.* at 610-11. The facts clearly established that the investigator had considerable

In addition to satisfying the procedural rules of evidence, the trial court must ensure that the defendant's constitutional right to confront the witness is protected. To determine whether this was done, the Tenth Circuit relied on the guidelines set forth in *Ohio v. Roberts*.[215] If the prosecution wishes to admit a deposition into the record or read passages of it to the jury, first it must either produce the declarant at trial, or sufficiently demonstrate to the court that the declarant is unavailable.[216] Second, it must establish that the deposition is trustworthy and reliable.[217] The Tenth Circuit found that the prosecution had sufficiently established the unavailability of the declarant when it satisfied the requirements under the New Mexico Rules of Evidence.

The defendant, however, contended that the deposition was inadmissible because it lacked the trustworthiness required by the confrontation clause of the sixth amendment. The court was not persuaded. When the witness appeared at the grand jury and at her deposition, she was represented by counsel. She was examined and cross-examined under oath. In addition, there were no significant or material inconsistencies among her statements, her testimony at the grand jury, and her testimony at her deposition. The *Ewing* court accordingly held that the reliability requirement was satisfied and concluded that the defendant was not deprived of his right to confront his witness. The right to confront a witness, in short, cannot be equated to a right to cross examine.[218]

3. The Co-conspirator Hearsay Exception

a. United States v. Shepherd

When a hearsay declarant is not available for trial, the confrontation clause requires, as stated above, a sufficient showing of unavailability of the witness, and reliability of the statements. In *United States v. Shepherd*,[219] the defendant appealed from his convictions for conspiracy to transport explosives in interstate commerce. The government had based its case on testimony of a federally protected witness who had conspired with the defendant. The Tenth Circuit allowed admission of the protected witness's testimony as to out-of-court statements. Judge Logan found the statements were not hearsay in that they were not offered for the truth of the matter asserted, rather they were offered to prove that the statements were in fact made, thereby showing the existence of a conspiracy. Because the court found, based on the record, that

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difficulty in serving the witness for her grand jury appearance and for her deposition; moreover, she had refused to come to the district attorney's office to discuss the case and had moved from her previous address without notifying the officials.

215. 448 U.S. 56 (1980). *See also* United States v. Rothbart, 653 F.2d 462, 465-66 (10th Cir. 1981).

216. *Roberts*, 448 U.S. at 65 (citing Mancusi v. Stubbs, 408 U.S. 204, 216 (1972); Barber v. Page, 390 U.S. 719, 724-25 (1968)).

217. *Ewing*, 749 F.2d at 612 (citing Synder v Massachusetts, 291 U.S. 97, 107 (1934)).

218. *Id.* at 613.

219. 739 F.2d 510 (10th Cir. 1984).

the jury had ample opportunity to evaluate the credibility of the defendant, it held there was no violation of the confrontation clause.[220] The court did not engage in a discussion of the trustworthiness of the absent declarant's statements; rather, it seemed satisfied that because one of the co-conspirators, the defendant, was present at trial, there was an opportunity to test the reliability of the statement through cross-examination of the present co-defendant.

b. United States v. Alfonso

The court was more articulate in discussing the confrontational rights with respect to the co-conspirator exception to the hearsay rule in *United States v. Alfonso*.[221] In *Alfonso*, the court, in a per curiam opinion, stated "[i]t is true that 'testimony which . . . hurdle[s] the hearsay rule via an exception can still run afoul of the Sixth Amendement.' "[222] Here, the confrontation clause violation had been objected to at trial, unlike *Shepherd*, and the Tenth Circuit was willing to specifically address the issue. Because there was a substantial showing of truthfulness in addition to compliance with the hearsay rule, the court held that the defendant's sixth amendment rights had not been breached.[223]

In *Alfonso*, the defendant objected at trial to the admission of statements made by a co-conspirator outside the defendant's presence. Included was the co-conspirator's statement to an undercover officer that the defendant, Alfonso, was his partner in a cocaine distribution conspiracy. Relying on guidelines set forth in several Supreme Court cases, the Tenth Circuit found an adequate "indicia of reliability" which justified the admission of the co-conspirator's statements although he was not confronted by Alfonso at trial.[224] First, the prosecution established that the out-of-court declarant knew the identity and role of the other conspirator. Second, the court was persuaded that the declarant's statements were not based on faulty recollections, or that such a possibility was extremely remote. Third, the court found that the declarant's statements tended to incriminate himself; that is, they tended to be statements made against his own interest. Fourth, the statements were not ambiguous. Finally, these hearsay statements were not critical to the government's case.[225] Because the prosecution was able to establish these five things, the Tenth Circuit was convinced that there was in fact a sufficient "indicia of reliability" to justify the admission of the hearsay statements by the co-conspirator.[226]

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220. *Shepherd*, 739 F.2d at 514.
221. 738 F.2d 369 (10th Cir. 1984).
222. *Alfonso*, 738 F.2d at 372 (quoting United States v. Roberts, 583 F.2d 1173, 1177 (10th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979)).
223. *Alfonso*, 738 F.2d at 372.
224. *See Green*, 399 U.S. at 161-62; *Dutton*, 400 U.S. at 88-89; *see also Roberts*, 583 F.2d at 1176.
225. *Alfonso*, 738 F.2d at 372.
226. *Id.*