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CRIMINAL LAW AND PROCEDURE

OVERVIEW

During the period covered by this survey, the usual host of cases in the field of criminal law and procedure was decided by the Tenth Circuit Court of Appeals.[1] The discussion which follows is a sampling of the more significant and interesting cases, but, even then, only a brief review will be possible. It is the goal of this survey to furnish the practitioner with introductory

1. The Tenth Circuit Court of Appeals reviewed over 225 cases on criminal law and procedure. Over ninety of the opinions were published.

material in significant areas of the criminal field, thereby providing the reader with guidance for further research.

I. FOURTH AMENDMENT

A. *Standing*

In *United States v. Rios*,[2] one of the issues confronting the Tenth Circuit was whether the defendant Rios had standing to object to an allegedly illegal search and seizure. Rios was charged with conspiracy to commit various federal drug offenses, possession of heroin with intent to distribute, and the actual distribution of heroin. He sought to suppress the seized heroin on the basis that the search warrant's supporting affidavit contained significant misrepresentations. Rios asserted that the search warrant was thereby deficient for lack of probable cause.[3]

In an opinion written by Judge Holloway, the Tenth Circuit court noted that the proponent of a motion to suppress has the burden of establishing standing to assert a fourth amendment claim.[4] Initially, Rios had claimed standing as the legal owner of the mobile home where the questioned search took place. He actually had sold the home and was no longer in possession thereof, but he had retained legal title pursuant to the purchase agreement.[5] The Tenth Circuit observed that "bare legal ownership" did not support Rios' standing claim.[6] While intricate analysis of legal and equitable ownership may be important in the area of property law, a distinction between legal and equitable ownership becomes meaningless in fourth amendment claims, unless viewed in terms of a legitimate expectation of privacy.[7] The court of appeals found that no privacy interest was created by Rios' use of the mobile home nor by any pendent legal rights which he may have possessed in the home.[8]

Rios successfully contended that he had standing to object to the search because of the "automatic standing rule," which purportedly confers standing on a defendant to assert a fourth amendment claim when the criminal charge involves a possessory offense.[9] Since Rios was charged with possession of heroin, the Tenth Circuit turned to the merits of his claim. The court addressed the issue of whether the search warrant was defective.

Although the warrant had authorized the search of four closely situated

2. 611 F.2d 1335 (10th Cir. 1979). Also decided within this survey period was United States v. Montgomery, 620 F.2d 753 (10th Cir. 1980) (similar facts).

3. 611 F.2d at 1343.

4. *Id.* at 1344 (quoting Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978)).

5. Rios had sold the home to a co-defendant. Thereafter, Rios neither lived there, nor kept any personal effects there, nor had a key. Legal title was to be transferred only after all payments were made.

6. 611 F.2d at 1345.

7. Rakas v. Illinois, 439 U.S. 128, 143 (1978) (fourth amendment does not recognize "arcane distinctions developed in property and tort law"); Jones v. United States, 362 U.S. 257, 266 (1960) (fourth amendment analysis should not be guided by subtle property law distinctions).

8. 611 F.2d at 1345.

9. Jones v. United States, 362 U.S. 257 (1960). *But see* Rakas v. Illinois, 439 U.S. 128 (1978) (government may be able to contest defendant's standing in possessory offense).

structures,[10] it did not specify independent probable cause justifying a search of each structure. While one affidavit and one warrant may sanction the search of several places, probable cause must be shown for each location to be searched.[11] In the present case, however, the court of appeals considered that the buildings identified in the affidavit were but a single place, because they were all used for one individual's residence or business. The court concluded, therefore, that separate probable cause would not be required for each structure.[12]

Rios was more successful in challenging the affidavit by claiming that the affiant had made material and intentional misrepresentations. At trial, the defendant offered to prove that the alleged criminal activity, which formed the basis of probable cause, had not occurred at either the place searched or at any of the other structures listed in the warrant. The district court had found no reason to proceed beyond the face of the affidavit and had refused to hold an evidentiary hearing on the matter.[13] The Tenth Circuit reversed on this point, holding that, in view of the substantial offer of proof made and the significant questions raised, a hearing should have been conducted to decide the issue.[14]

The Tenth Circuit ruling in *Rios* is undeniably correct in all of its aspects. It should be noted, however, that the automatic standing rule, which allowed Rios to object to the search, has been limited by the Supreme Court's decision in *United States v. Salvucci*.[15] In *Salvucci*, the Court held that "defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."[16] As a result, the current standing test permits a defendant to assert a fourth amendment violation only when he can demonstrate a legitimate expectation of privacy in the place where the allegedly illegal search or seizure occurred.[17] If the *Salvucci* standard had been applied in *Rios*, the defendant likely would have lacked standing since the court had determined that the challenged search was neither at his home nor in a structure in which Rios had a privacy interest.[18]

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10. The buildings were a warehouse, a garage, a camping trailer, and a mobile home.

11. United States v. Olt, 492 F.2d 910 (6th Cir. 1974). *See* State v. Ferrari, 80 N.M. 714, 460 P.2d 244 (1969).

12. 611 F.2d at 1347 (dictum). *See generally* Williams v. State, 95 Okla. Crim. 134, 240 P.2d 1132 (1952).

13. 611 F.2d at 1348.

14. *Id.* (citing Franks v. Delaware, 438 U.S. 154 (1978)). *See* Comment, Franks v. Delaware: *Granting the Right to Challenge the Veracity of Search Warrant Affidavits*, 45 BROOKLYN L. REV. 391 (1979).

The Tenth Circuit reversed on two additional grounds, finding 1) that it was error by the trial court not to give a limiting instruction concerning the admissibility of a co-conspirator's statements, 611 F.2d at 1339-41, and 2) that an improper closing argument had been made by the prosecution, *id.* at 1341-43.

15. 100 S. Ct. 2547 (1980). *See also* United States v. Montgomery, 621 F.2d 753 (10th Cir. 1980) (critiquing the automatic standing rule).

16. 100 S. Ct. at 2549. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969).

17. 100 S. Ct. at 2551 n.4. *See* Rakas v. Illinois, 439 U.S. 128, 140-48 (1978).

18. *See also* Rawlings v. Kentucky, 100 S. Ct. 2559 (1980) (defendant did not have reasonable expectation of privacy in a companion's purse); United States v. Salvucci, 100 S. Ct. at 2555 (remanding for a determination of whether defendant had privacy expectation in mother's home). *But see* United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) (defendant had fourth

B. *Probable Cause*

In *United States v. Diltz*,[19] the Tenth Circuit was faced with the factual determination of whether there was probable cause to justify making the defendant a "target" of a wiretap.[20] The supporting affidavit declared that the main purpose of the wiretap was the acquisition of incriminating evidence on a suspect named Bremson. The defendant, Diltz, was mentioned only as one person with whom Bremson had been in contact over the phone. Based in part on the evidence obtained from the wiretap, the defendant, Diltz, was indicted and convicted of illegal drug distribution. Diltz argued that he had always been a putative target and, since he had not been named as such, no probable cause was shown to justify the wiretap involving him.[21]

The Tenth Circuit court confined itself to the government's sixty-one page affidavit to determine if there was probable cause to believe that the defendant was engaged in illegal activities. The court concluded, in a rather confusing opinion, that the evidence was "inconsequential and inconclusive in establishing anything more than suspicions" that Diltz was engaged in criminal activity.[22] The court stated that the present standard for probable cause is

> the test which is set forth in *Brinegar* [*v. United States*] requiring that the facts and circumstances within the officer's knowledge based on reasonably trustworthy information be sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed, ... Sometimes it is said that it is a reasonable ground for belief of guilt, although less than evidence to justify conviction.[23]

The Tenth Circuit observed that hearsay may support the finding of

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amendment rights in suitcase left in a friend's apartment); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972) (defendant had fourth amendment rights in containers left in a friend's attic).

19. 622 F.2d 476 (10th Cir. 1980).

20. The wiretap was instigated pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

21. 622 F.2d at 476-78. A person who has been the subject of a wiretap has four basic rights under the Act: 1) the right to refuse to answer questions by the grand jury which are based on illegally seized evidence; 2) the limited right to inspect intercepted communications; 3) the right to move to suppress illegally obtained evidence; and 4) the right to recover civil damages for violation of title III. 18 U.S.C. §§ 2515, 2518(8), 2518(10)(a), 2520 (1976).

Defendant also claimed that the warrant was defective because of mistaken name identification. Throughout the affidavit, the government had referred to the defendant as Robert Diamos. Only later was it discovered that Robert Diltz was the same man. The court of appeals dismissed defendant's contention that this name confusion rendered the wiretap illegal. It found that the government had no reason to believe that Diltz and Diamos were the same man, and that the name confusion had no effect on the determination of probable cause under the affidavit. 622 F.2d at 479, 483.

22. 622 F.2d at 480. The majority opinion curiously dismissed United States v. Donovan, 429 U.S. 413 (1977), as irrelevant. *Donovan* had held that a failure to name all persons required by statute was not an automatic constitutional violation requiring suppression of evidence. 429 U.S. at 436-40 (construing 18 U.S.C. § 2518(1)(b)(iv) (1976)).

23. 622 F.2d at 481. *See* Brinegar v. United States, 338 U.S. 160 (1949). With respect to search warrants, it has been said that "probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the law enforcement officer's affidavit." United States v. Williams, 605 F.2d 495, 497 (10th Cir.), *cert. denied*, 444 U.S. 932 (1979).

probable cause but emphasized that "[w]hat is needed are facts that speak out as to the existence of probable cause. Whether the evidence is hearsay is not significant, but if it is hearsay, it should be factual, relevant and also trustworthy."[24] Since the government's supporting affidavit was based on insufficient factual material, it failed to meet the test for probable cause.[25]

In *United States v. Matthews*,[26] two of the many fourth amendment issues present also involved the determination of probable cause. Military police became suspicious of the defendant, Matthews, when they noticed his car on the military base. The car had military license plates, yet it was not painted like a military car. During questioning, the police specifically asked for the customary military "log book" which should have matched the license plates. Matthews could not produce such a book. He did produce car registration, but the registration was for a Chevrolet, and the car in question was a Ford. The defendant then was taken, with the car, to the military police station for additional questioning.[27]

The Tenth Circuit noted that police custodial detentions must be based on probable cause, regardless of whether they technically constitute an arrest.[28] The court found that there were sufficient grounds to justify the military police in reasonably believing that an offense was being, or had been, committed.[29] The court of appeals found that probable cause was present in that Matthews' civilian car bore military plates, a military log book corresponding to the plates was absent, and the registration which Matthews produced was for a different make of car.[30]

In *Matthews*, the Tenth Circuit court also addressed the question of whether probable cause existed so as to justify a search of the car. Matthews' car was searched for evidence of ownership at the time of his custodial interrogation at the military police station. The court of appeals noted that for a warrantless search to be proper, there must be both probable cause and exigent circumstances.[31]

The appellate court observed that the probable cause requirement was satisfied "when the officers conducting the search have 'reasonable or probable cause' to believe that they will find an instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."[32] The court found probable cause for a search in the same facts which supported the probable cause for arrest. The court also found an exigent circumstance in the fact that the car was in a relatively public area, a military base, where it was vulnerable to being taken. The search was further justi-

24. 622 F.2d at 483. *See, e.g.*, People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973); People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

25. 622 F.2d at 483.

26. 615 F.2d 1279 (10th Cir. 1980).

27. *Id.* at 1281, 1283.

28. *Id.* at 1284. *See* Dunaway v. New York, 442 U.S. 200, 215 (1979) (probable cause is needed whenever the magnitude of an intrusion reaches a "crucial" level, regardless of the intrusion's label under state law). *See also* Payton v. New York, 445 U.S. 573 (1980).

29. 615 F.2d at 1284. *See* text accompanying note 23 *supra*.

30. 615 F.2d at 1284.

31. *Id.* at 1287.

32. *Id.* (citing Dyke v. Taylor Implement Co., 391 U.S. 216, 221-22 (1968)).

fied in that it preserved evidence and safeguarded the car's contents for the true owner.[33] Consequently, all evidence used by the government in the defendant's trial was deemed to have been obtained legally and was therefore not suppressible.

In *United States v. Coker*,[34] the defendant, Coker, was arrested and indicted for unlawfully possessing marijuana with the intent to distribute. The Tenth Circuit was presented with the task of determining whether Coker's warrantless arrest was supported by probable cause.

Police had discovered marijuana growing in a federal game reserve. The police were told by informants that defendant was planning to harvest the marijuana the following day. While both informants were considered reliable, neither had personal knowledge of this information, but instead were relying on the reports of others. The police watched the marijuana patch and observed Coker in the general vicinity. Although freshly cut marijuana was found the next day, Coker was never seen at the patch. The police subsequently spotted Coker's truck, being driven by Coker's wife, with the defendant as a passenger. When Coker saw the police, he ducked down in the seat in an attempt to avoid being seen. The police stopped the truck and found that Coker was wet from the waist down and covered by plants, stickers, and seeds. While the plant debris was not characteristic of any specific area of the wildlife refuge, there was a river running through the refuge near the marijuana patch. The police placed Coker under arrest.[35]

The Tenth Circuit affirmed the trial court's finding that the government had not met its burden of showing probable cause for the warrantless arrest.[36] The government failed to present sufficient evidence to support the informants' rumor.[37] There was also no direct evidence linking the defendant to the cut marijuana or even to the marijuana patch.[38] Since a prudent person would not be warranted in believing that Coker was committing an offense, the court held that there was no probable cause to support the arrest.

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33. *Id.* at 1287-88.

34. 599 F.2d 950 (10th Cir. 1979).

35. *Id.* at 951-53.

36. *See* United States v. Watson, 423 U.S. 411 (1976) (warrantless felony arrest may be made on probable cause alone); Draper v. United States, 358 U.S. 307 (1959) (lawfulness of arrest depends on probable cause).

37. Informant information can form the basis of probable cause only if both the informant and his source are shown to be reliable. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *See* United States v. Williams, 605 F.2d 495 (10th Cir.), *cert. denied*, 444 U.S. 932 (1979); Livermore, *The* Draper-Spinelli *Problem*, 21 ARIZ. L. REV. 945 (1979). Since, in this case, the informants themselves received only hearsay information about Coker, the government did not meet the second prong of the test.

38. The opinion summarized the important facts in this manner:

> Defendant was stopped because he ducked down in the car; he was arrested because he had been seen in the general area of the marijuana patch, because the condition of his person indicated he had been in the general area of the marijuana patch, and because rumor had linked him to the patch.

599 F.2d at 952. *But see id.* at 953-54 (McWilliams, J., dissenting) (asserting that the facts did support a finding of probable cause).

C. *Warrantless Searches*

1. Personal Container Searches

In *United States v. Meier*,[39] the defendant, Meier, was arrested for driving while intoxicated. Meier was taken to jail, and his car was towed to a storage warehouse. Later, the car was searched and a backpack was found. The police, without first obtaining a search warrant, searched the backpack and discovered marijuana inside. The defendant was charged with unlawful possession of a controlled substance.[40] On appeal, Meier asserted that his fourth amendment rights were violated by the warrantless search of his backpack.

The inherent mobility of cars has been considered an exigent circumstance, permitting a warrantless search.[41] When a suitcase or a backpack is seized, however, the exigency of mobility is not present since the police exercise exclusive control and dominion over the item.[42] In such a case, the courts, in determining whether there has been a fourth amendment violation, will look at the degree of the defendant's expectation of privacy in the container seized.[43] The Tenth Circuit, per Judge McWilliams, saw this case as the factual equivalent of *Arkansas v. Sanders*,[44] where a warrantless search of a suitcase was held to be in violation of the Constitution. The Tenth Circuit explained that the definitive mark of containers with a high expectation of privacy are those which function "as a repository for personal items when one wishes to transport them."[45] A backpack was found not significantly dissimilar to a suitcase, and, therefore, the warrantless search was deemed to have violated the fourth amendment.

In *United States v. Kralik*,[46] the Tenth Circuit, per Judge Breitenstein, decided the issue of whether a search warrant is required for the search of a closed container located within another closed container. In this case, the police had obtained a search warrant based upon probable cause that there was a shotgun in the trunk of a car owned and used by a convicted felon. The police opened the car's trunk but found no gun. They did, however, find a closed suitcase. When the police opened the suitcase, they discovered the shotgun underneath some clothing. The defendant argued that although there was a search warrant for the car, there were no exigent circumstances excusing the police from obtaining another warrant for a search of the suitcase.[47]

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39. 602 F.2d 253 (10th Cir. 1979).

40. *See* 21 U.S.C. § 841(a) (1976).

41. Chambers v. Maroney, 399 U.S. 42, 51 (1970) (warrantless search of an automobile justified because of inherent mobility of the car and possibility that evidence within the car may disappear); United States v. Roberts, 583 F.2d 1173, 1178 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979) (warrantless search of automobile justified by its inherent mobility when suspect observed placing package of drugs inside). *See* Colorado v. Bannister, 101 S. Ct. 42 (1980).

42. 602 F.2d at 255.

43. *See* United States v. Chadwick, 433 U.S. 1, 12 (1977) (higher degree of privacy expected in contents of double-locked footlocker taken from trunk of car than in car itself).

44. 442 U.S. 753 (1979).

45. 602 F.2d at 255 (citing Arkansas v. Sanders, 442 U.S. 753, 762 (1979)).

46. 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953 (1980).

47. *Id.* at 345.

The Tenth Circuit held that only one warrant was needed for both the car and the suitcase. The court distinguished *Arkansas v. Sanders*[48] and *United States v. Chadwick*[49] by noting that the searches challenged in those cases were conducted without any search warrant at all. In the instant case, there was a valid warrant authorizing the search of the car. The court of appeals also rejected defendant's contention that a warrant, to withstand judicial scrutiny, must precisely identify all things to be searched, that is, both a car and a suitcase when such items are to be searched. An additional warrant was declared not to be necessary "for each container within a larger container when the warrant covers the search of the larger for a specified item."[50]

In *United States v. Rengifo-Castro*,[51] the defendant's vehicle was stopped by the border patrol at some distance from the Mexican border. Neither the defendant, who initially claimed Panamanian citizenship, nor a passenger, had a passport. Later, both individuals claimed to be from Columbia. They were taken to a nearby office for further questioning. In the office, each suspect was "directed to identify his suitcase, open it, and sit back down."[52] A search of the defendant's open suitcase uncovered cocaine, and subsequently, he was convicted of unlawful possession with intent to distribute.

The Tenth Circuit court found that the warrantless search of the suitcases violated the defendant's fourth amendment rights. The court noted that a person has a reasonable expectation of privacy in his personal luggage.[53] The appellate court reasoned that since the border agents had complete control over the suitcases, there were no exigent circumstances justifying the warrantless search, even if there had been probable cause.[54] The defendant's conviction was reversed.[55]

2. Airplane Searches

The defendant in *United States v. Gooch*[56] contended that his conviction for unlawful possession of marijuana was based upon illegally seized evi-

48. 442 U.S. 753 (1979).

49. 433 U.S. 1 (1977). *See* note 43 *supra*.

50. 611 F.2d at 345. *See* W. LAFAVE, SEARCH AND SEIZURE § 4.10(b) (1978) (warrant sufficiently describing premises need not particularly describe receptacles therein where personal effects may be found).

51. 620 F.2d 230 (10th Cir. 1980) (per curiam).

52. *Id.* at 232.

53. *Id.* at 233. Defendant had a legitimate expectation of privacy because he had not been stopped at the border checkpoint. *Cf.* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches of vehicles without probable cause or consent invalid anywhere but at the border or its functional equivalent). Of course, if this had been a border search, the border patrol would have had the authority to search the defendant's luggage on less than probable cause. *See* 8 U.S.C. § 1357(c) (1976). *See also* Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (dictum) (searches of personal baggage required to determine if belongings are entitled to enter the country).

54. 620 F.2d at 232. *But see* United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir.), *cert. denied*, 419 U.S. 878 (1974) (border patrol agent, not at the border, permitted to conduct a warrantless search of a suitcase on probable cause). While *Nevarez-Alcantar* apparently is inconsistent with the present case, the probable explanation for the holding is that it was decided before *Chadwick* and *Sanders*. *See* notes 42-44 *supra* and accompanying text.

55. 620 F.2d at 233.

56. 603 F.2d 122 (10th Cir. 1979).

dence. Defendant's airplane had been detected by radar and tracked by United States Customs officials. When the plane landed, the defendant jumped out and began running away, as the plane turned to take off. The plane was stopped, and the defendant and the pilot were arrested. The subsequent warrantless search of the plane resulted in the discovery of over 1,100 pounds of marijuana.

In its opinion, the Tenth Circuit noted that it was the government's burden to justify a warrantless search.[57] The police had claimed that they observed, through an open door, "several large bags and smelled marijuana coming from the interior of the airplane."[58] The government argued that this was sufficient probable cause to justify a search under the *Chambers v. Maroney* rule.[59]

The Tenth Circuit agreed. The *Chambers* decision held that the inherent mobility of automobiles constitutes an exigent circumstance which permits a warrantless search, if the search is based on probable cause.[60] The Tenth Circuit had previously held that the exigent circumstances exception is equally applicable to airplanes, because of the lesser expectation of privacy and extreme mobility associated with an airplane.[61]

The court of appeals also addressed the search of the bags found in the plane. The court observed "that the sacks which contained the marijuana were mere cargo rather than personal luggage."[62] Since no affirmative steps were taken to isolate the cargo, the court assumed that there was a lesser degree of privacy expected in the bags containing marijuana than in a briefcase, which also had been searched.[63] The Tenth Circuit, therefore, upheld this warrantless search and affirmed its findings in a short opinion issued after rehearing.[64]

3. Controlled Delivery Searches

United States v. Andrews[65] was a significant opinion with regard to "controlled delivery" searches and seizures. The facts indicated that a man presented a package to an airline cargo service in Miami and requested that it be shipped to Denver. The airline employee, suspicious of the manner in which it was wrapped, opened the package.[66] He found cocaine inside and

57. *Id.* at 124 (citing Chimel v. California, 395 U.S. 752, 762 (1969)); United States v. Jeffers, 342 U.S. 48, 51 (1951).

58. 603 F.2d at 123.

59. 399 U.S. 42 (1970). *See* United States v. Soto, 591 F.2d 1091, 1099 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979) (probable cause existed to justify search of a heavily-loaded van stopped near area of smuggling activities when odor of marijuana was detected).

60. 399 U.S. at 51. *But see* Judge McKay's comment: "To the extent that mobility rather than privacy is the key in this area, it is troubling that inherent as opposed to actual mobility is determinative." 603 F.2d at 125 n.3. *See also* Colorado v. Bannister, 101 S. Ct. 42 (1980).

61. United States v. Sigal, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974).

62. 603 F.2d at 125. *See* Arkansas v. Sanders, 442 U.S. 753 (1979).

63. 603 F.2d at 126. The Tenth Circuit invalidated the briefcase search. *Id.* at 125-26.

64. *Id.* at 126.

65. 618 F.2d 646 (10th Cir.), *cert. denied*, 101 S. Ct. 84 (1980). *See also* United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979) (similar facts).

66. The airline employee was suspicious because packages sent by corporations normally were packed in cardboard boxes, personalized with a printed corporation trademark. This

notified the police. The police called a Denver agent of the Drug Enforcement Administration (DEA), and it was decided that the Miami police would remove a small quantity of cocaine, reseal the package, and send it to Denver. When the package arrived in Denver, the DEA agent took custody of it. The next morning, defendant Andrews presented himself to claim the package. The DEA agent, posing as an airline employee, took Andrews aside, and told him that he knew that drugs were inside the package and that he wanted money in return for not telling the police. Andrews paid, took the package, and was arrested when he left the airport building. The agent retrieved the package and removed the cocaine.

Andrews was charged with possession of a controlled substance.[67] He moved to suppress the evidence on the grounds that the package was opened without a search warrant, in violation of his fourth amendment rights. The trial court suppressed the evidence, and the government took an interlocutory appeal. Since the initial search was purely private, not subject to fourth amendment protection,[68] the basic issue was whether the reopening of the package after Andrews' arrest was a continuation of the first legal search or a new, second search.[69] Andrews argued that the latter was the case, claiming that he had a reasonable expectation of privacy in the package after it was delivered to him.

The Tenth Circuit, in a well reasoned opinion by Judge Barrett, held that the series of actions constituted a single search, legal at its inception.[70] *United States v. Ford*,[71] a case with similar facts,[72] was cited in support of the majority opinion. The *Ford* court had held that an authorization to ship contraband was an initial act of police dominion and control, dominion which was maintained continuously by close surveillance until physical possession was reasserted after the arrest.[73] The *Andrews* majority found the same official dominion and control to be present.[74] The court of appeals also discounted the existence of any privacy expectation after the DEA agent

package identified the sender as a corporation but was wrapped in brown paper with all designations handwritten. 618 F.2d at 648.

67. *See* 21 U.S.C. § 841(a)(1) (1976).

68. The fourth amendment protects against unreasonable governmental intrusions, not against the acts of private individuals, unless they are working as government agents. Burdeau v. McDowell, 256 U.S. 465, 474 (1921). Therefore, a search made by a common carrier, on its own initiative, does not come within the ambit of the fourth amendment. United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979) (search by airline employee not governmental action); United States v. Ford, 525 F.2d 1308 (10th Cir. 1975); United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971) (seizures by non-governmental personnel not suppressible).

69. 618 F.2d at 651.

70. *Id.* at 654.

71. 525 F.2d 1308 (10th Cir. 1975).

72. An airline employee, in California, discovered heroin in a package addressed to Oklahoma City. Police in both jurisdictions cooperated in tracing the package and arresting the defendant when he claimed it. *Id.* at 1311.

73. The *Ford* court emphasized that the airline officials could not have shipped the contraband without government authorization. *Id.*

74. A different situation would have arisen if the government had lost control of the package. Instead of simply retrieving the package when Andrews was arrested, the government agents would have had to have made a new intrusion into Andrews' privacy. Such an intrusion would have required a warrant or an exception to the warrant requirement.

informed the defendant that he knew the package contained drugs.[75] Since the whole transaction was but one search, the district court's grant of the motion to suppress was reversed.[76]

In an equally thoughtful opinion, Judge Seymour dissented from the majority's analysis and from the previous holding in *Ford*. The judge reasoned that it was incongruous for the majority to hold that the cocaine was in the "dominion and control" of the police when Andrews was charged with a crime of possession.[77] Furthermore, Judge Seymour disagreed with the proposition that a search conducted "by different police in a different state at a different time" could be a continuation of a previous search.[78] Finally, Judge Seymour noted that "certainly an individual's expectation of privacy in a sealed package is as legitimate as his expectation of privacy in an unlocked suitcase."[79] She argued that this privacy expectation was evident from the fact that Andrews actually paid money to the DEA agent to keep the information private.[80] Judge Seymour concluded that the motion to suppress should have been upheld.

4. Open Field—Curtilege

United States v. Carra[81] arose from a situation where a state narcotics agent had information that land leased by the defendant, Carra, contained a substantial crop of marijuana. The agent observed that the marijuana was growing within a fenced area behind the defendant's home. One of the questions confronting the Tenth Circuit court on appeal was whether there was an illegal search and seizure when the agent picked and left with a marijuana leaf.[82] The agent testified that the leaf was protruding through the fence at the time it was seized. The court, per Judge McKay, held that the

75. 618 F.2d at 652. It is questionable whether a stranger's knowledge of the contents of an otherwise personal container would destroy one's reasonable expectation of privacy. A better analysis, producing the same result in this case, might be that Andrews had a lesser expectation of privacy by using a public carrier to transport his package. *Cf.* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (use of motor vehicles on public thoroughfares creates an expectation of privacy which is less than the privacy expected in homes).

76. 618 F.2d at 654.

77. *Id. See* note 57 *supra* and accompanying text.

Compare Jones v. United States, 362 U.S. 257, 263-64 (1960) (government may not assert that defendant possessed illegal goods for conviction and simultaneously deny such possession for fourth amendment protections) *with* United States v. Salvucci, 100 S. Ct. 2547, 2552 (1980) (prosecution may charge defendant with criminal possession and nevertheless deny that defendant has standing to claim fourth amendment violation). *See also* United States v. Jackson, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) (constructive possession of a controlled substance need not be exclusive; government must prove defendant's dominion and control over the drug); United States v. Martinez, 588 F.2d 495 (5th Cir. 1979) (constructive possession may be joint or exclusive).

78. 618 F.2d at 655. *But see* United States v. DeBerrey, 487 F.2d 448, 451 n.4 (2d Cir. 1973).

79. 618 F.2d at 655 (citing Arkansas v. Sanders, 442 U.S. 753 (1979)). *See* Walter v. United States, 100 S. Ct. 2395 (1980) (sealed package in mail); United States v. Chadwick, 433 U.S. 1, 16 (1977) (foot locker); United States v. Gooch, 603 F.2d 122, 125-26 (10th Cir. 1979) (briefcase).

80. 618 F.2d at 648, 655-56.

81. 604 F.2d 1271 (10th Cir.), *cert. denied*, 444 U.S. 994 (1979).

82. On the basis of the plucked marijuana leaf, a warrant was obtained for a more thorough search of the house and yard. Firearms were found, and the defendant was convicted of

search was not illegal because the leaf was in an "open field," outside of the "curtilege" of the house.[83]

The Tenth Circuit did not cite any authority for its holding,[84] and the analysis in *Carra* disregards the Supreme Court's observation that the "fourth amendment protects persons, not places."[85] While the open fields-curtilege dichotomy and the reasonable expectation of privacy standard may produce similar results, this is not always true. For example, if a person allows marijuana to grow on his front porch, certainly the marijuana is within the curtilege of his house, but he could not have the reasonable expectation that a passerby would not observe his plants.[86] Conversely, if marijuana were growing in an open field, hundreds of yards from the nearest farmhouse, with fences prohibiting one's view and "No Trespassing" signs posted, a search warrant would be needed since the occupants of the land had taken all reasonable precautions to protect their privacy in that area.[87] It is apparent, therefore, that the terms "curtilege" and "open field" cannot be used "in some talismanic sense or as a substitute for reasoned analysis."[88]

Unfortunately, the Tenth Circuit did not make a specific determination of whether Carra had a reasonable expectation of privacy that was violated by the picking of the marijuana leaf. Such an analysis would have required resolving such issues as whether the marijuana could have been seen from adjoining lands and whether the landlord's permission justified the agent's entry on property leased by the defendant.

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illegal possession of firearms and for making false statements in the acquisition of a firearm. *See* 18 U.S.C. §§ 922(h)(1), 924(a) (1976).

83. 604 F.2d at 1272-73.

84. *Cf.* Hester v. United States, 265 U.S. 57 (1924) (fourth amendment protection does not extend to open fields); Care v. United States, 231 F.2d 22 (10th Cir. 1955) (fourth amendment applies to buildings within the curtilege, but not to open fields).

85. Katz v. United States, 389 U.S. 347, 351 (1967). *See* United States v. Salvucci, 100 S. Ct. 2547, 2552-53 (1980); Rakas v. Illinois, 439 U.S. 128, 143 (1978); Jones v. United States, 362 U.S. 257, 266 (1960).

86. United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

87. *See* W. LAFAVE, SEARCH AND SEIZURE § 2.4(a) (1978) (citing Commonwealth v. Janek, 242 Pa. Super. 380, 363 A.2d 1299 (1976)).

88. United States v. Gooch, 603 F.2d 122, 126 (10th Cir. 1979). *See* note 7 *supra* and accompanying text. *See generally* W. LAFAVE, SEARCH AND SEIZURE § 2.3(d) (1978) where it is stated that:

> One of the virtues of *Katz v. United States* is that it makes it apparent that the curtilege concept should not be employed to arbitrarily limit the reach of the Fourth Amendment's protections. Under *Katz*, it is a search to violate "the privacy upon which [one] justifiably relied," and unquestionably a person can have such an expectation of privacy as to garages and barns and the like even when they are not in "close proximity" to his dwelling.

II. FIFTH AMENDMENT

A. *Custodial Interrogation of a Juvenile*[89]

In *United States v. Palmer*,[90] defendant Palmer, a seventeen-year old juvenile was convicted, under the Juvenile Delinquency Act,[91] of aiding and abetting an assault on a car and its occupants. Palmer and his friends had attacked a car by smashing the windows and headlights, slashing the tires, and beating the car body with pipes. The car's driver was stabbed to death while several other occupants were seriously injured.[92]

The following day, a policeman appeared at Palmer's home and told his mother that Palmer would be picked up after school for questioning. According to Palmer's mother, the policeman also said that she could not be present at the questioning. The policeman testified that the mother gave permission to the police to question her son. Later that same day, the policeman tried again to contact the mother but was unsuccessful. The mother did not try to reach her son. During the questioning of the defendant, the mother was not present. Defendant Palmer refused to sign a waiver of his *Miranda* rights, but he did make a statement.[93]

The general issue confronting the Tenth Circuit concerned the competency of a minor to make, without the guidance of a parent or attorney, an intelligent and voluntary waiver of his constitutional rights. The Tenth Circuit, per Judge Breitenstein, observed that "admissibility of statements obtained during custodial interrogation requires 'inquiry into the totality of the circumstances surrounding the interrogation.' "[94] The court concluded that Palmer's waiver was made knowingly and voluntarily, and it upheld the admissibility of the policeman's testimony regarding Palmer's statement.[95] The Tenth Circuit was swayed by the fact that *Miranda* rights were read to Palmer, that he understood them, and that he did not request a lawyer or his mother's presence at the questioning.

Judge McKay dissented. He noted that for a waiver of constitutional

89. Within this survey period, the Tenth Circuit enumerated the basic factors it will look to when analyzing whether "interrogation" took place in a custodial or non-custodial setting. "These factors are 1) whether there is probable cause to arrest, 2) the subjective intent of the police, 3) the subjective belief of the defendant, and 4) the focus of the investigation." United States v. Clay, No. 77-2009, slip op. at 35 (10th Cir. June 9, 1979).

90. 604 F.2d 64 (10th Cir. 1979).

91. 18 U.S.C. §§ 5031-5042 (1976).

92. 604 F.2d at 65.

93. *Id.* at 66. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

94. 604 F.2d at 67 (citing Fare v. Michael C., 442 U.S. 707 (1979)). The Supreme Court has listed the many factors to be considered in determining the voluntariness of a juvenile's waiver, including the age, education, background, and intelligence of the minor, the juvenile's capacity to understand the warning given, and his appreciation of the consequences of waiving constitutional rights. 442 U.S. at 725. *See also* West v. United States, 399 F.2d 467 (5th Cir. 1968); State v. Hinkle, 206 Kan. 472, 479 P.2d 869 (1971).

95. 604 F.2d at 67. The Supreme Court, in Fare v. Michael C., 442 U.S. 707 (1979), held that although a juvenile's request to see his probation officer did not invoke his fifth amendment rights, a request for an attorney did call forth such rights. 442 U.S. at 718-22. The Tenth Circuit did not mention whether a request for a parent is comparable to a request for a probation officer or to a request for an attorney. *But see, e.g.*, COLO. REV. STAT. § 19-2-102(3)(c)(I) (1973) (requiring parent's or attorney's presence during police questioning of juvenile). *See generally* People v. Patrick Steven W., 104 Cal. App. 3d 615, 163 Cal. Rptr. 848 (1980).

safeguards to be valid, a defendant must have the capacity to execute a knowing and intelligent waiver,[96] and he argued that "incapacity should be presumed in the case of a minor."[97] Judge McKay thought that the government had failed to meet its burden of showing the requisite mental capacity, thus rendering defendant's statement inadmissible.[98]

B. *Due Process*

1. Pre-Indictment Delay

In *United States v. Comosona*,[99] the Tenth Circuit had to decide whether the due process clause of the fifth amendment was violated considering the fact that the defendant was indicted 435 days after the crime was committed.[100] The Tenth Circuit held that it was appropriate to apply a balancing test in cases of pre-indictment delay. In balancing the rights of the defendant against the tardy actions of the state, the following elements must be evaluated:

> First, there must be demonstration of actual prejudice to the defendant resulting from the delay. Generally, such prejudice will take the form of either a loss of witnesses and/or physical evidence or the impairment of their effective use at trial. Second, the length of delay must be considered. Finally, the Government's reason for the delay must be carefully considered.[101]

The court also set out the method of proof:

> Upon a *prima facie* showing of fact by a defendant that the delay in charging him has actually prejudiced his ability to defend, and that this delay was intentionally or purposefully designed and pursued by the Government to gain some tactical advantage over or to harrass him, the burden of going forward with the evidence shifts to the Government. Once the Government presents evidence showing that the delay was not improperly motivated or unjustified, the defendant then bears the ultimate burden of establishing the Government's due process violation by a preponderance of the evidence.[102]

Since Comosona failed to show any prejudice to his ability to defend as a

96. *See* Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (defendant needs to know his legal rights and understand the consequences of waiver for the waiver to be knowing and voluntary).

97. 604 F.2d at 68.

98. *See* Commonwealth v. Webster, 466 Pa. 314, 353 A.2d 372 (1975) (the younger the age of the minor, the greater is the government's responsibility to provide counseling by a parent or an attorney).

99. 614 F.2d 695 (10th Cir. 1980). Also decided within this survey period was United States v. McManaman, 606 F.2d 919 (10th Cir. 1979) (five month delay, during which witness died, not prejudicial).

100. The sixth amendment right to a speedy trial does not vest until a person has been arrested or indicted. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971). Therefore, protection against pre-indictment delay is governed by statutes of limitations and by the due process clause of the fifth amendment. *Id.* at 322-24.

101. 614 F.2d at 696. It has been stated that a defendant must show actual and substantial prejudice to establish a due process violation. *See, e.g.*, United States v. Blevins, 593 F.2d 646 (5th Cir. 1979); United States v. Ramos, 586 F.2d 1078 (5th Cir. 1978).

102. 614 F.2d at 696-97.

result of the pre-indictment delay, his efforts to make a prima facie showing of a due process deprivation were unavailing.[103] His conviction was affirmed.

2. Deprivation of Life and Liberty

The due process claims which arose in *Yanez v. Romero*[104] stemmed from a confrontation between defendant and police officers. Upon observing defendant, Yanez, enter a service station restroom, the police burst into the restroom and found a used hypodermic needle and fresh needle marks on the arm of Yanez. Yanez was arrested and transported to a hospital, where he refused a police request to give a urine sample until threatened with catheterization. Based on evidence obtained from the urine sample, Yanez was convicted of unlawful possession of morphine. After challenging his conviction through all possible state forums, Yanez sought a writ of habeas corpus in federal court.

Defendant's first contention was that he had been criminally punished because of his status as a drug addict, in violation of the Supreme Court's ruling in *Robinson v. California*.[105] The *Robinson* Court held that while possession of narcotics was punishable, drug addiction was a disease and, as such, could not be made a crime.[106] Judge Doyle, writing for the Tenth Circuit, compared the *Robinson* ruling with the Supreme Court's decision in *Powell v. Texas*,[107] in which the Court upheld a conviction based on a public drunkenness statute. Judge Doyle concluded that the conviction in this case was more similar to *Powell* than to *Robinson*, and, therefore, valid.[108]

Defendant's second contention was that the production of the urine sample violated his fifth amendment rights under the rule of *Rochin v. California*.[109] In the *Rochin* case, evidence of narcotics was obtained by the forcible pumping of the defendant's stomach. The Tenth Circuit characterized *Rochin* as an extraordinary case, restricted to its set of facts.[110] Instead, the court of appeals found this case more akin to *Schmerber v. California*,[111] where

103. *Id.* at 697. For examples of other unsuccessful attempts to show prejudice as a result of pre-indictment delay see United States v. Radmall, 591 F.2d 548 (10th Cir. 1978) (loss or "dimming" of memory); United States v. Francisco, 575 F.2d 815 (10th Cir. 1978) (unavailability of witnesses); Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (death of victim); United States v. Smyth, 556 F.2d 1179 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977) (loss of evidence).

The length of pre-indictment delay seems to have little effect on the grant or denial of a due process claim. Courts have denied claims when the delay has been one year, Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978), three years, United States v. Bursten, 560 F.2d 779 (7th Cir. 1977), and four years, United States v. Radmall, 591 F.2d 548 (10th Cir. 1979). A due process claim has been dismissed in a case where the government had waited to file charges until only a few hours before a five year statute of limitations would have run, United States v. Parker, 586 F.2d 422 (5th Cir. 1978).

104. 619 F.2d 851 (10th Cir. 1980).

105. 370 U.S. 660 (1962).

106. *Id.* at 666.

107. 392 U.S. 514 (1968).

108. 619 F.2d at 852. Based on evidence from the urine sample, Yanez was convicted, not for the status of addiction, but for possession of morphine. *Id.* at 851.

109. 342 U.S. 165 (1952).

110. 619 F.2d at 854.

111. 384 U.S. 757 (1966).

the Supreme Court upheld the unconsented withdrawal of blood on the basis of the existence of probable cause to arrest. In distinguishing *Rochin*, the Tenth Circuit noted that the urine sample demand and the arrest in the present case were based on the solid ground of probable cause.[112] Since there was probable cause to arrest and since there was no actual use of catheterization, the admissibility of the evidence was sustained.[113]

Judge McKay, in a vigorous dissent, found that the threat of catheterization violated all canons of decency and fairness. He stated that "it would astound me if our law approved official threats of the type of indecencies condemned in *Rochin*, while disapproving only actual consummation of the threatened indignities."[114]

Yanez exemplifies the inherent conflict between *Rochin* and *Schmerber*. In all three cases, there had been probable cause to search. The police in *Rochin* had observed pills being swallowed, in *Schmerber* they had observed drunkenness, and in *Yanez* the police had observed a used hypodermic needle and fresh needle marks. In all three cases, the police had obtained evidence of a crime by using intrusive medical procedures without the truly voluntary consent of the defendant.

The factors distinguishing *Rochin* from *Schmerber* may be found in Justice Frankfurter's statement that the facts in *Rochin* represented "conduct that shocked one's conscience."[115] The totality of the shocking circumstances in *Rochin* included the police entrance into the defendant's home without a warrant, the forcible entrance into the defendant's bedroom while he and his wife were in bed, and the pumping of his stomach to retrieve pills wanted as evidence. Although the police may have had probable cause to arrest the defendant and an exigent circumstance in the need to preserve evidence, this probable cause had arisen from a violation of basic constitutional rights.[116]

In contrast, the totality of the circumstances in *Schmerber* were not as offensive or shocking. There was no violation of a highly held privacy right, for defendant was in the hospital immediately after, and as a result of, his car accident. The police arrested defendant shortly after he committed the crime of driving while intoxicated. The medical procedure for withdrawing blood is significantly less offensive than pumping one's stomach.

Yanez lies somewhere between *Rochin* and *Schmerber*. In *Yanez*, the police burst into a public restroom and, like the situation in *Rochin*, probably violated defendant's justifiable expectation of privacy.[117] Unlike the case in

112. 619 F.2d at 854.

113. *Id.* at 855-56.

114. *Id.* at 856 (McKay, J., dissenting).

115. 342 U.S. at 172.

116. Perhaps the result in *Rochin* also can be reached by applying the later developed "fruit of the poisonous tree" analysis. Any evidence obtained by the "shocking" conduct of pumping Rochin's stomach might also have been suppressible because it was acquired as a direct result of a patently illegal entry into Rochin's home. *See* Wong Sun v. United States, 371 U.S. 471, 484-87 (1963). *See also* Payton v. New York, 445 U.S. 573 (1980) (warrant needed to enter a suspect's home to make felony arrest).

117. *See* Katz v. United States, 389 U.S. 347 (1967); People v. Triggs, 8 Cal. 3rd 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973), *overruled on other grounds*, People v. Lilienthal, 22 Cal. 3d 891,

Rochin, however, the privacy expected in a public restroom is not the same as that expected in one's own bedroom. And while catheterization is as offensive as stomach pumping, unlike the *Rochin* situation, in *Yanez* there was only a threat to use a catheter.[118] Truly then, this case is a hybrid of the *Rochin-Schmerber* fact pattern and perhaps the only resolution available in such a case is each judge's determination of what "shocks" his legal and personal conscience.

III. SIXTH AMENDMENT

A. *Effective Assistance of Counsel*

In *Dyer v. Crisp*,[119] the Tenth Circuit, in an *en banc* decision, held that effective assistance of counsel is accomplished when a criminal "defense counsel exercises the skill, judgment and diligence of a reasonably competent defense attorney."[120] Judge Doyle, writing for the court, noted that all of the circuits, save the Second[121] and Tenth,[122] had abandoned the "sham, farce, and mockery" test[123] for the stricter "reasonably competent" test.[124] The Tenth Circuit in this case decided that the more stringent standard would better fulfill the sixth amendment's guarantee of effective assistance of counsel.

While the new test is stated clearly in this opinion, its proper procedural application in the Tenth Circuit remains an open question. Some circuits have ruled that once the defendant presents a prima facie case showing attorney ineffectiveness, prejudice to the defendant is presumed, and the bur-

587 P.2d 232, 150 Cal. Rptr. 910 (1978); State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970); W. LAFAVE, SEARCH AND SEIZURE § 2.4(c) (1978) (surveillance of a closed restroom constitutes a fourth amendment search).

118. The majority opinion stated that catheterization "is nevertheless an undesirable practice which ultimately is likely to produce a fact situation which will be ruled shocking and unlawful." 619 F.2d at 854.

119. 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980). The sixth amendment's guarantee of right to assistance of counsel means right to effective assistance. McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

Also during this survey period, the Tenth Circuit decided *Brown v. Schiff*, which held that, for the purpose of an ineffective assistance of counsel claim, court-appointed attorneys do not act under the color of state law as required in section 1983 actions. 614 F.2d 237 (10th Cir. 1980). *See* 42 U.S.C. § 1983 (1976). In addition, the Tenth Circuit ruled that a Kansas recoupment statute, which provided that criminal defendant's were liable for the fees of court-appointed counsel, was unconstitutional. Olson v. James, 603 F.2d 150 (10th Cir. 1979). *See also id.* at 155 (guidelines for reviewing recoupment statutes).

120. 613 F.2d at 278. *See, e.g.*, Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Gard, *Inadequate Assistance of Counsel-Standards and Remedies*, 41 MO. L. REV. 483 (1976); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. DeCoster, 93 HARV. L. REV. 752 (1980); Note, *Current Standards for Determining Ineffective Assistance of Counsel; Still a Sham, Farce or Mockery?*, 1979 SO. ILL. UNIV. L.J. 132. *See also*, Dear, *Adversary Review: An Experiment in Performance Evaluation*, 57 DEN. L.J. 401 (1980).

121. *E.g.*, Rickenbacker v. Warden, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977). *See* Brinkley v. Lefevre, 621 F.2d 45, 47-48 (2d Cir. 1980) (Weinstein, J., dissenting and advocating reversal of the farce and mockery standard).

122. *E.g.*, Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977).

123. *See, e.g.*, Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

124. 613 F.2d at 276-78.

den shifts to the government to show the lack of prejudice.[125] Other circuits require that the defendant prove both incompetence of counsel and resulting prejudice.[126] The procedures applicable to the new test in the Tenth Circuit will have to await future opinions.[127]

B. *Juvenile's Right to Trial by Jury*

In *United States v. Duboise*,[128] the Tenth Circuit held that a juvenile is not entitled to a jury trial under the Juvenile Delinquency Act.[129] The defendant, Duboise, an Indian boy of sixteen, was charged with the murder of a teenage acquaintance. Although the defendant did not request to be tried as an adult, he did make a motion for a jury trial. The motion was denied, and the federal district court judge found Duboise to be delinquent. On appeal, the defendant claimed that his right to a jury trial could not be waived by his simply electing to be tried in accordance with the Juvenile Delinquency Act.[130]

As originally enacted, the Act contained an express provision precluding jury trial; the current Act merely says that a juvenile will be tried as such unless the youth requests to be tried as an adult.[131] In *McKiever v. Pennsylvania*,[132] the United States Supreme Court held that due process did not require a jury trial in state juvenile delinquency proceedings.[133] The Court, however, has never decided specifically whether the federal government could preclude jury trial in Delinquency Act proceedings.

The Tenth Circuit ruled that *McKeiver*, nevertheless, controlled the outcome of the case.[134] The *McKeiver* opinion indicated that a jury was not a prerequisite to accurate factfinding, and that the informal nature of juvenile proceedings might be better suited to protecting and rehabilitating youthful offenders.[135] In addition to agreeing with the Supreme Court's rationale,

125. United States v. DeCoster, 624 F.2d 196 (D.C. Cir.), *cert. denied*, 444 U.S. 944 (1979); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

126. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977); United States v. Johnson, 531 F.2d 169 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

127. For a helpful and specific delineation of the various standards of conduct, which give structure and meaning to the "reasonably effective assistance" test, *see* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (approved draft 1970).

128. 604 F.2d 648 (10th Cir. 1979).

129. 18 U.S.C. §§ 5005-5042 (1976).

130. 604 F.2d at 648-50.

131. Federal Youth Corrections Act, ch. 645, 62 Stat. 857 (1948) (current version at 18 U.S.C. § 5032 (1976)). Section 5032 also provides that the Attorney General may, by motion, transfer the juvenile's case to state court for criminal prosecution, provided that the case involves a juvenile, over sixteen, who has committed a major felony.

132. 403 U.S. 528 (1971).

133. The decision in *McKiever* did not change statutory or case law providing jury trials in juvenile proceedings. Most states in the Tenth Circuit do furnish juveniles with the possibility of a jury trial. *See* COLO. REV. STAT. § 19-1-106(4) (1973); KAN. STAT. ANN. § 38-808(a) (Supp. 1979); OKLA. STAT. tit. 10, § 1110 (Supp. 1979); WYO. STAT. § 14-6-223(c) (1977). *See also* Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968). *But see* UTAH CODE ANN. § 78-3a-33 (1953) (jury not provided).

134. 604 F.2d at 652.

135. 403 U.S. at 543-48.

the Tenth Circuit noted that the Act left defendant the option of being tried as an adult, with a jury.[136] The court held that there was therefore no right to a jury trial under the Juvenile Delinquency Act.[137]

C. *Jury Prejudice*

In *United States v. Greer*,[138] the Tenth Circuit held that juror contact with a United States Marshal required reversal of a defendant's conviction. At a recess during defendant Greer's trial, a juror asked a marshal a question on sentencing in an unrelated case. During another recess, the juror and the marshal continued the conversation and discussed sentencing under the Federal Youth Corrections Act (FYCA) in general.[139] Apparently, upon overhearing this dialogue, a second juror asked a general question as to the applicability of the FYCA to yet another unrelated case, to which the marshal responded that the FYCA did apply.[140]

These conversations were reported by another juror to the trial judge, who immediately held an evidentiary hearing on the matter.[141] It was determined that six of the jurors did not know of the conversation, three jurors remembered hearing some generalized comments on the FYCA but not in reference to defendant Greer, and the remaining three jurors had participated in the conversation with the marshal.[142] The trial court found that the conversations did not prejudice Greer in any manner, but the judge gave cautionary instructions to the jury.[143] The defendant was later convicted of federal drug violations.

The Tenth Circuit, per Judge McKay, reversed the trial court and remanded for a new trial. Judge McKay noted the fundamental importance of an impartial jury. He cited the Supreme Court case of *Remmer v. United States*[144] to the effect that "[a]ny private contact with jurors during trial about the matter pending before them is 'presumptively prejudicial.' "[145]

Under the *Remmer* ruling, the government has the burden of showing that third party contact with a juror was harmless to the defendant.[146] This procedure is difficult to apply when considered with Federal Rule of Evi-

136. 604 F.2d at 651-52.

137. *Accord*, United States v. Hill, 538 F.2d 1072 (4th Cir. 1976); United States v. Torres, 500 F.2d 944 (2d Cir. 1974); United States v. Salcido-Medina, 483 F.2d 162 (9th Cir.), *cert. denied*, 414 U.S. 1070 (1973); United States v. King, 482 F.2d 454 (6th Cir.), *cert. denied*, 414 U.S. 1076 (1973); Cotton v. United States, 446 F.2d 107 (8th Cir. 1971).

138. 620 F.2d 1383 (10th Cir. 1980). This case may have limited precedential value in light of the fact that each judge on the panel wrote a separate opinion.

139. *See* 18 U.S.C. §§ 5005-5042 (1976).

140. 620 F.2d at 1384.

141. The failure to question a jury when there is a reasonable belief of the presence of prejudice may be a denial of the sixth amendment right to trial by an impartial jury. *See* Aston v. Warden, 574 F.2d 1169 (4th Cir. 1978). *See generally* United States v. Wood, 299 U.S. 123, 145-146 (1936).

142. 620 F.2d at 1389-90 (Holloway, J., dissenting).

143. *Id.* at 1390.

144. 347 U.S. 227 (1954).

145. 620 F.2d at 1385 (citing Remmer v. United States, 347 U.S. at 229). *See also* United States v. Gigax, 605 F.2d 507 (10th Cir. 1979).

146. 347 U.S. at 229.

dence 606(b).[147] Rule 606(b) essentially states that jurors are not allowed to testify to any matter, statement, or component of their deliberation process.[148] This prohibition of juror testimony as to the juror's state of mind when combined with the analysis used in *Remmer*, prompted Judge McKay to conclude that the "presumption of prejudice cannot be overcome once a jury has reached its verdict."[149]

Judge Doyle concurred with the result in *Greer* but he felt that the presumption of prejudice was a rebuttable presumption, not a conclusive one.[150] The judge found that the trial court in this case had violated rule 606(b).[151] Judge Doyle read this rule as allowing only juror testimony as to whether there had been prejudicial information, and not, as the trial judge permitted, evidence as to its effect on the jury.[152] This type of testimony required reversal.

Judge Barrett dissented. He emphasized that the trial judge was in the best position to determine what is prejudicial to the jury, and his findings in these matters should be given great weight and deference.[153] Judge Barrett felt that the trial judge's findings were supported in this case. In his discussions with the jurors, the marshal had never referred to the defendant or to the possible sentence Greer might receive if found guilty. In addition, the jurors were specifically instructed and admonished that sentencing was exclusively the court's function and was not to be considered in arriving at their verdict.[154] Judge Barrett argued that the majority decision discarded ninety years of Supreme Court precedent.[155] The dissenting judge pointed

147. Once an extrinsic influence on the jury has been reported, it is proper for the judge to presume that it is prejudicial and to conduct a hearing. *See* Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) (hearing should be held immediately upon learning of an intrusion). Since rule 606(b) prohibits inquiry into the *actual effect* of the influence, the judge must evaluate the irregularity and determine whether it would probably have a prejudicial effect sufficient to require requiring a mistrial. Miller v. United States, 403 F.2d 77, 83 n.11 (2d Cir. 1968). *See* note 148 *infra*. A trial judge cannot examine the mental processes of the jurors, but he can receive evidence on the existence of conditions or events which may show prejudice. Maddox v. United States, 146 U.S. 140, 149 (1892) (juror may testify as to the *existence* of any extraneous influence although not as to how that influence operated on his mind).

148. FED. R. EVID. 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

149. 620 F.2d at 1385.

150. *Id.* at 1386.

151. *See* note 148 *supra* and accompanying text.

152. 620 F.2d at 1387 (Doyle, J., concurring).

153. *Id.* at 1388.

154. *Id.* at 1389. *See* United States v. Jones, 554 F.2d 251, 252 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977) (trial judge's repeated instructions to the jury not to talk about the case, among themselves or with others, negated any prejudice which may have arisen when juror attempted to question marshal).

155. *Id.* at 1391. *See* Maddox v. United States, 147 U.S. 140, 150 (1892) (communications between jurors and third persons are forbidden, "unless their harmlessness is made to appear").

out that if the conclusive presumption of prejudice standard were the court's holding, the Tenth Circuit would be the only federal circuit so holding.[156]

IV. PRISONERS' RIGHTS

A. *Right to Parole*

In *Shirley v. Chestnut*,[157] the Tenth Circuit considered the claims of a group of inmates from various Oklahoma prisons. The inmates asserted that due process was ignored when they were denied parole. Specifically, the inmates sought declaratory and injunctive relief to the effect that due process "requires published criteria for parole release, access to adverse material in inmate files, [the] right to subpoena witnesses at the [parole] hearing, and written reasons for the denial of parole."[158] The Tenth Circuit found that these claims were comparable to those presented in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*[159] and, therefore, the court of appeals applied the principles articulated in that case.

In *Greenholtz*, the Supreme Court found that the Nebraska law outlining parole standards codified a liberty interest protectable by due process.[160] The Nebraska statutes entitle each inmate to a parole review every year. At the hearing, the inmate may present any oral or written evidence and may be represented by counsel. The parole board interviews the inmate and reviews his record. Thereafter, the Nebraska parole board must release an eligible prisoner unless it finds at least one of four statutory reasons for denying parole. If denied parole, the prisoner is given a written explanation.[161]

Although this statutory scheme created a legitimate expectation of parole, entitled to due process protection,[162] the Supreme Court emphasized that the Nebraska system of parole was unique. "Whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis."[163] The important issue, therefore, in *Shirley v. Chestnut* was the evaluation of the rights and procedures provided in the Oklahoma parole system.

The Oklahoma statutes provide for automatic review of each inmate on or before the expiration of one-third of his term.[164] At the parole hearing, the inmate may present evidence and be represented by counsel. Unlike the Nebraska system, however, the Oklahoma statutes do not provide that the parole board "shall" release a prisoner "unless" a statutorily designated reason is found; nor does the Oklahoma parole system require specific criteria to be considered.[165] "The Board's only statutory guidance in the exercise of its

156. *See, e.g.*, Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980); United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979).

157. 603 F.2d 805 (10th Cir. 1979) (per curiam).

158. *Id.* at 806.

159. 442 U.S. 1 (1979).

160. *Id.* The Supreme Court, however, held that the Nebraska statutes provided, of themselves, sufficient due process protections. *Id.* at 13-16.

161. *Id.* at 4-5; NEB. REV. STAT. § 83-1-114(1) (1971).

162. *Cf.* Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoner with cognizable liberty interest entitled to procedural due process).

163. 442 U.S. at 12.

164. OKLA. STAT. tit. 52, § 332 (1971).

165. *Id. See generally* Dye v. United States Parole Comm'n, 558 F.2d 1376 (10th Cir. 1977)

discretion is that it act as the public interest requires, and the sole existing statutory criteria dictate only the time of parole consideration."[166] Because of these distinctions, the Tenth Circuit found that, unlike *Greenholtz*, the Oklahoma parole statute did not create a constitutionally cognizable liberty interest, protected by due process, and the court of appeals denied the relief sought by the inmates.[167]

B. *Access to the Courts*

In the case of *Battle v. Anderson*,[168] the Tenth Circuit reviewed the question of whether furnishing prisoners with a law library but denying them access to civilian legal advisors violated the mandates of *Bounds v. Smith*.[169] The Supreme Court, in *Bounds*, held that a prison system must provide prisoners with reasonable access to a law library or to persons trained in the law.[170] Such access was deemed necessary to fulfill the due process requirement that persons have adequate, effective, and meaningful representation in the courts.[171]

Since prison riots in 1973, the federal district court has supervised the resolution of such issues as over-crowding, sanitation, fire-safety, water, ventilation, and sewage systems within the Oklahoma penal system. This appeal was a product of a district court finding, pursuant to *Bounds*, that prisoners' constitutional right of access to the courts is a desirable and necessary goal; a goal usually neglected in the state's penal system.[172] The district court had ordered that both an adequate library system and competent civilian advisors were necessary "to insure inmates the means to frame and present legal issues effectively for judicial consideration."[173] The petitioner contended on appeal that while the law libraries were adequate, a system of civilian legal advisors had not been provided. As a result, the illiterate or legally ignorant prisoners had to rely on "jailhouse lawyers," who may practice chicanery in one form or another.[174]

The Tenth Circuit, per Judge Barrett, was unable to resolve the issue because the requirement of civilian legal assistants was apparently abandoned, or at least modified, by a later order of the trial judge.[175] Because this order was unclear, the Tenth Circuit remanded the case for additional findings of fact.[176]

(parole commission can consider factors which would be unconstitutional if considered by a court of law). *But cf.* Morrissey v. Brewer, 408 U.S. 471 (1972) (due process protection applies to parole revocation).

166. 603 F.2d at 807.

167. *Id.*

168. 614 F.2d 251 (10th Cir. 1980). *See also* Battle v. Anderson, 594 F.2d 786 (10th Cir. 1979).

169. 430 U.S. 817 (1977).

170. *Id.* at 828. *See* Johnson v. Avery, 393 U.S. 483, 485 (1969) (access of prisoners to the court system must not be obstructed).

171. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

172. Battle v. Anderson, 457 F. Supp. 719, 739 (E.D. Okla. 1978).

173. *Id.*

174. 614 F.2d at 255.

175. *Id.* at 256.

176. *Id.*

Both Judges McKay and Doyle concurred, offering possible guidelines for the district court. They indicated that consideration should be given to the dangers inherent in affording jailhouse "writ writers" unreasonable control over their fellow inmates and suggested the use of volunteer assistants from the legal community as an alternative.[177]

In *Harrell v. Keohane*,[178] the Tenth Circuit was confronted with the issue of whether a prisoner is denied access to the courts when denied access to free photocopying. The Oklahoma Bureau of Prisons had promulgated three procedural options for inmate copying. Harrell claimed that he could not comply with any of the options: he could not afford to pay the ten cents per copy that the prison charged; he could not have friends or family do the copying because they were also poor; and he could not adequately reproduce the needed complex documents with a typewriter and carbon paper.[179]

The Tenth Circuit, following the mandate of *Bounds v. Smith*,[180] found that "[r]easonable regulations are necessary to balance the legitimate interests of inmate litigants with budgetary considerations and to prevent abuse."[181] The appellate court's ruling, denying free access to a photocopying machine, was in accordance with a previous holding which held that prison inmates do not have an unrestricted right to free postage or use of a typewriter.[182]

The court of appeals also summarily dismissed appellant's contention that the limited seating capacity of the prison law library denied court access. Appellant did not claim deprivation of a legal right because of the lack of space, nor did he assert that there were insufficient legal materials in the crowded library.[183] Since appellant was deemed not to be prejudiced in any manner, the Tenth Circuit court dismissed his claim.

C. *Availability of Federal Habeas Corpus Relief*

In *Sanders v. Oliver*,[184] the Tenth Circuit considered the question of what constitutes an "opportunity for full and fair litigation" of fourth amendment claims in state court. When an unconstitutional search or seizure is claimed, a federal court may grant habeas corpus relief to a state prisoner only if he has been denied the opportunity to fully and fairly litigate his claim in the state forum.[185]

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177. *Id.* at 259.

178. 621 F.2d 1059 (10th Cir. 1980) (per curiam).

179. *Id.* at 1060.

180. 430 U.S. 817 (1977) (one month wait for use of library deemed not to be a violation of prisoner's right of access to the courts).

181. 621 F.2d at 1061.

182. Twyman v. Crisp, 584 F.2d 352, 359 (10th Cir. 1978). *But see* Jones v. Diamond, 594 F.2d 997, 1024 (5th Cir. 1979) (when only prison procedure available to inmates is ordering books from county law library, prisoners are denied free access to courts); Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (forty-five minute limitation on use of law library restricts meaningful access).

183. 621 F.2d at 1061.

184. 611 F.2d 804 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 90 (1980).

185. This standard was first articulated in Stone v. Powell, 428 U.S. 465, 494 (1976). The holding in *Stone* essentially stated that federal courts will not entertain claims involving a denial of fourth amendment rights "where the state has provided an opportunity for full and fair

Defendant Sanders was convicted by the State of Kansas for possessing marijuana with the intent to sell.[186] Before trial he sought to suppress the marijuana, which was seized in his house pursuant to a search warrant. At the preliminary hearing, Sanders proved that the warrant's supporting affidavit was riddled with false statements. Despite these findings, the magistrate court held that the affidavit was still sufficient to support the probable cause needed for the warrant. A further evidentiary hearing on the matter was denied by the trial court.[187]

After his conviction in state court, Sanders exhausted all of the possible state procedural remedies, going so far as to seek a rehearing of his certiorari petition by the United States Supreme Court.[188] Sanders then filed the present habeas corpus action in federal district court, asserting again that the affidavit was inaccurate and insufficient to support the search warrant. The federal district court held that Sanders had already received the opportunity for full and fair litigation of his fourth amendment claim and therefore denied his petition for federal habeas corpus relief.[189] Sanders appealed the decision to the Tenth Circuit, arguing that "the *refusal* by the trial court to hear testimony concerning factual assertions in the affidavit denied him an opportunity for full and fair litigation."[190]

Chief Judge Seth, writing for the court, first noted that both the state district and supreme courts had held that the affidavit information was sufficient to support the search warrant, even after the inaccuracies were removed.[191] The Tenth Circuit agreed, however, with the federal district court that the governing issue was whether the petition for federal habeas corpus relief was barred by *Stone v. Powell*.[192] The Tenth Circuit split its consideration of this issue by dividing the standard into two parts: first, the "oppportunity," and second, "full and fair" litigation.

The definition for the requisite "opportunity" to litigate fourth amendment claims was an issue left open by the Supreme Court decision of *Stone v. Powell*. In this case, the Tenth Circuit interpreted "opportunity" as mean-

litigation" of the claim. *Id.* at 494. For recent commentaries on the meaning of this standard, *see* Note, *Habeas Corpus After* Stone v. Powell: *The "Opportunity For Full And Fair Litigation" Standard*, 13 HARV. C.R.-C.L. L. REV. 521 (1978); Note, *The 'Opportunity' Test of* Stone v. Powell: *Toward a Predefinition of Federal Habeas Corpus*, 23 VILL. L. REV. 1095 (1978); Note, *Applying* Stone v. Powell: *Full and Fair Litigation for Fourth Amendment Habeas Corpus Claims*, 35 WASH. & LEE L. REV. 319 (1978).

186. State v. Sanders, 222 Kan. 189, 563 P.2d 461 (1977).

187. 611 F.2d at 806.

188. The complete and orderly procedure Sanders followed was: 1) he filed a motion to suppress the seized evidence at the preliminary hearing in the magistrate court; 2) he filed a pretrial motion to suppress; 3) he submitted a motion for new trial in the state district court; 4) he took an appeal to the Kansas Supreme Court; 5) he filed a motion for rehearing by the Kansas Supreme Court; 6) he submitted a petition for writ of certiorari to the United States Supreme Court; 7) he petitioned for rehearing to the United States Supreme Court; 8) he filed a petition for habeas corpus relief in federal district court; 9) he sought a rehearing by the federal district court; and 10) he submitted a certificate of probable cause for appeal to the Tenth Circuit. *Id.* at 806-07.

189. *Id.* at 807.

190. *Id.* at 808 (emphasis in original). *See* text accompanying note 187 *supra*.

191. *Id.* at 807.

192. 428 U.S. 465 (1976). *See* note 185 *supra* and accompanying text.

ing the "procedural opportunities to raise a claim, and it includes a full and fair hearing."[193] This definition indicates that the *Stone* standard is basically a procedural adequacy one, requiring the opportunity for an actual hearing, in some form, on the claim.[194] The Tenth Circuit ruled that the evidentiary hearing in the state magistrate court provided this "opportunity."[195]

The court also decided that the evidentiary hearing constituted a "full and fair" hearing under the requirement of *Stone*.[196] The opinion noted that the defendant's examination of the affiant took up some sixty pages of the evidentiary hearing transcript, and that the warrant was the principal issue at trial.[197] The Tenth Circuit concluded that "one complete and unrestricted evidentiary hearing with subsequent review by the state courts of the issue and the facts so developed would seem sufficient under *Stone*."[198]

V. CRIMINAL LAW AND STATUTORY INTERPRETATION

A. *False Statements and the "Exculpatory No" Defense*

In *United States v. Fitzgibbon*,[199] defendant Fitzgibbon was convicted of violating the federal false statement statute.[200] Fitzgibbon had traveled from Canada to Denver by airplane and, upon arrival, he was greeted by customs officials with various forms which needed to be filled out. One form question inquires as to whether the traveler is entering the United States with more than $5,000. Fitzgibbon checked the "no" box and also gave a negative response when questioned by a customs official about importing money. When the official observed him to be hesitant and nervous, Fitzgibbon was searched, and over $10,000 was found in his boots. After being convicted for willfully making a false statement to a government agency, the defendant filed a habeas corpus petition, arguing that he was denied effective assistance of counsel because an "exculpatory no" defense was not raised at trial.[201]

The "exculpatory no" defense provides that a negative response, of it-

193. 611 F.2d at 808.

194. *See* Johnson v. Meachem, 570 F.2d 918 (10th Cir. 1978) (defendant's waiver of hearing opportunity barred habeas corpus review).

195. 611 F.2d at 808.

196. *Id. See* Gamble v. Oklahoma, 583 F.2d 1161 (10th Cir. 1978) (evidentiary hearing and at least a colorable application of correct fourth amendment constitutional standards required); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977) (consideration of disputed facts by fact-finding court and the availability of appeal required).

197. 611 F.2d at 808.

198. *Id.* Judge McKay concurred in the result. He felt that the court should have simply affirmed the state court finding that the remaining truthful allegations in the affidavit supported probable cause. Under this analysis, the *Stone* question would need not have been addressed. *Id.*

199. 619 F.2d 874 (10th Cir. 1980).

200. 18 U.S.C. § 1001 (1976). The section provides:

> Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

201. 619 F.2d at 875.

self, cannot serve as proof of the intent needed to convict under the federal false statement statute.[202] The federal statute was designed to prevent the perpetration of intentional frauds which hinder government agencies in fulfilling their administrative duties.[203] In cases similar to Fitzgibbon's, courts have upheld the "exculpatory no" defense on the ground that defendant's negative response may only indicate an intention to enter the country with more than $5000, which is not a crime.[204] Without specifically informing defendants of the statutory requirements, it is almost impossible to prove that false statements are intended to frustrate government functioning. For example, an immigrant may make untruthful customs statements only because of the mistaken belief that currency over $5000 would be confiscated.[205]

In this case, the Tenth Circuit found that Fitzgibbon completely understood that completion of the form was required prior to entry into the United States, and that "the false statements he made were designed to conceal information relevant to the administrative process."[206] The court noted that prominent posters advised incoming travelers of the obligation to report currency over $5000, and that the custom's form clearly stated that false statements were punishable by law.[207] In addition, the Tenth Circuit held that the reporting requirement did not violate Fitzgibbon's fifth amendment right against self-incrimination.[208] If defendant had reported correctly the currency amount, he would not have committed any crime. His habeas corpus petition was therefore denied.

B. *Weapons Used in Bank Robbery*

In *United States v. Lucas*,[209] the defendant, Lucas, was convicted of bank robbery. On appeal, Lucas asserted that there was insufficient evidence to support the finding that the robbery was committed by "force and violence, or by intimidation."[210] Upon entering the bank, Lucas brandished a toy gun and demanded money. Every teller followed standard bank instructions not to take any action or to respond in any way to a bank robber's directions. While all of the tellers eventually noticed that the pistol was a toy, a few

202. *Id.* at 876. *See* Note, *Fairness In Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316 (1977).

203. 619 F.2d at 877-78. *See* Bryson v. United States, 396 U.S. 64 (1969); United States v. Bramblett, 348 U.S. 503 (1955).

204. United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978); United States v. Granada, 565 F.2d 922 (5th Cir. 1978).

205. *See* United States v. Granada, 565 F.2d at 926..

206. 619 F.2d at 880.

207. *Id.*

208. *Id.* at 881.

209. 619 F.2d 870 (10th Cir. 1980).

210. 18 U.S.C. § 2113(a) (1976). The section reads in part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .
>
> . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

testified that they were frightened, shaken, or quite concerned about the obviously stressful situation.[211] The Tenth Circuit court found that this testimony constituted "objectively intimidating facts," facts which were sufficient to support the jury's conclusion that the "intimidation" element was satisfied.[212]

In *United States v. Shannahan*,[213] the defendant was charged under the same bank robbery statute applied in *Lucas*.[214] Defendant, Shannahan, had given a bank drive-up teller a bag which contained what appeared to be dynamite, together with a note demanding money. Believing that the defendant did have dynamite, the teller gave him several hundred dollars. Shannahan later was convicted of bank robbery by force. The issue on appeal was whether the elements of "a dangerous weapon or device" which "puts in jeopardy the life of any person" during a bank robbery were satisfied by the use of the two fake sticks of dynamite.[215]

Shannahan asserted that since the dynamite was not real, it was not capable of putting the life of a person in jeopardy, and the prosecution, therefore, failed in establishing its burden of proof. The Tenth Circuit, per Judge Pickett, noted that some jurisdictions have held that the prosecution must show that the weapon had an actual capability to cause death or physical harm.[216] Other jurisdictions, including the Tenth Circuit, have held that it is sufficient if the weapon or device *appeared* dangerous, putting the robbery victim in reasonable apprehension of death or serious bodily injury.[217] In *Shannahan*, the court reaffirmed this latter construction, stating that the test was one of a subjective state of danger, that is, what the reasonable victim believes the danger to be, rather than what is the actual capability of the weapon used.[218]

C. *Interstate Transportation of a Forged Security*

In *United States v. Sparrow*,[219] defendant Sparrow was convicted on two counts of interstate transportation of a falsely made or forged security.[220] The security involved in the first count was an original Oregon certificate of

211. 619 F.2d at 870-71.
212. *Id.* at 871.
213. 605 F.2d 539 (10th Cir. 1979).
214. 18 U.S.C. § 2113(a) (1976). For the text of the statute, see note 210 *supra*.
215. 605 F.2d at 540. *See* 18 U.S.C. § 2113(d):

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

216. *See, e.g.*, United States v. Cobb, 558 F.2d 486 (8th Cir. 1977); Bradley v. United States, 447 F.2d 264 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 567 (1972).
217. *See, e.g.*, United States v. Waters, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972); United States v. Beasley, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971).
218. 605 F.2d at 542.
219. 614 F.2d 229 (10th Cir. 1980).
220. 18 U.S.C. § 2314 (1976) states, in pertinent part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . . .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

title for an automobile which defendant had transported from Utah to Idaho. The security in the second count was a duplicate certificate which was sent from Oregon to Utah.

The facts were somewhat complicated. Sparrow bought a used Cadillac in Utah with a bank loan. The bank recorded its lien on the back of the original certificate of title, which had been issued in Oregon. Sparrow then went to Idaho, where he obtained a clear title to the car by submitting a different version of the Oregon certificate, on which Sparrow was listed as both owner and lienholder. Sparrow returned to Utah and exchanged the Cadillac for a compact car and cash. He reported the Cadillac as stolen and filed a claim with his insurance company. Sparrow proceeded to apply for a duplicate Oregon certificate of title and transfer, which was issued in his name and sent to the Utah bank as lienholder.[221]

The defendant challenged the first count of his conviction, contending that the government did not present evidence demonstrating the interstate transportation element of the crime. Although there was a strong indication that defendant had presented an altered certificate of title in Idaho, there was no showing that the alteration had taken place in Utah. In fact, defendant argued that there was a legal presumption that a forged instrument was forged in the location where it was first found in its changed state.[222]

The Tenth Circuit, per Judge Barrett, rejected defendant's argument. Instead, the court of appeals found that the essence of the statutory offense was the fraudulent scheme, and that the interstate transportation element was included "solely to afford federal jurisdiction."[223] The appellate court noted that Sparrow's continued possession of the altered title was not questioned and that the document was the focus of his interstate scheme to defraud.[224] The interstate transportation element was satisfied because the fraudulent scheme "had both its *origin* and *consummation*" in another state and the "interstate movement of the certificates of title was, at all times, the central means of accomplishing the criminal design."[225]

The second count charged that Sparrow had caused a duplicate title certificate to be sent from Oregon to the bank in Utah, "knowing the same to have been falsely made, forged and altered."[226] Sparrow contended that at all times, including its travel between states, the duplicate title was genuine, and not a forgery. The Tenth Circuit noted that the words "forged" and "falsely made" had been interpreted to include "spurious or fictitious"

The defendant was also convicted of submitting a false bank statement. 18 U.S.C. § 1014 (1976). This count was not appealed.

221. 614 F.2d at 230.

222. *See, e.g.*, United States v. Owens, 460 F.2d 467, 469 (5th Cir. 1972).

223. 614 F.2d at 232. *See* United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

224. 614 F.2d at 232-33.

225. 614 F.2d at 233. *But see id.* at 235-36 (McKay, J., dissenting) (criminal statutes must be strictly construed and interstate transportation must be proved as an essential element of the crime).

226. *Id.* at 230.

execution of documents genuine on their face.[227] The court found that Sparrow knew that the duplicate title, purporting to show that he was the owner of the Cadillac, "*could not be genuine* inasmuch as he no longer owned the vehicle and had not owned it for several months."[228] The court of appeals affirmed Sparrow's conviction.[229]

D. *Theft From Interstate Commerce*

In *United States v. Luman*,[230] the defendant, Luman, was charged with and convicted of stealing goods which were in interstate commerce.[231] The goods consisted of a truckload of automobile tires, shipped from Wisconsin to Tulsa, Oklahoma. The consignee did not sign the delivery receipt because there was not enough time to unload all of the tires and verify the contents. The consignee's employees, however, broke the seal of the trailer, removed the packing slip, and padlocked the trailer, retaining the key. The trailer was taken by the defendant during the night.[232]

The main issue confronting the Tenth Circuit was whether the tires were still in interstate commerce at the time of the theft. The Tenth Circuit said that "no single event can be isolated as the point at which chattels lose their character as an interstate shipment and become an intrastate shipment or inventory."[233] The court reviewed the decisions of other jurisdictions,[234] noting that a consignee's acceptance and exercise of custody over goods renders them intrastate in character.[235] In this case, however, both factors were not present: while the consignee had taken custody of the tires, he had not accepted delivery.

In reviewing the facts, the Tenth Circuit noted that the testimony of both the carrier and the consignee demonstrated that neither regarded the delivery as completed nor the goods as under the control or care of the consignee.[236] The appellate court also observed that, at the time of the theft, the tires remained on the trailer, separated from the consignee's inventory. Furthermore, the court noted that the employees had not signed the delivery receipt. The Tenth Circuit concluded that this was a sufficient factual basis

227. *Id.* at 234 (quoting United States v. Crim, 527 F.2d 289 (10th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976); and United States v. Williams, 498 F.2d 547 (10th Cir. 1974)).

228. *Id.* (emphasis in original).

229. *Id.*

230. 622 F.2d 490 (10th Cir. 1980).

231. *See* 18 U.S.C. § 659 (1976) which states, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . motor truck, or other vehicle . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property . . . .
>
> . . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

232. 622 F.2d at 491.

233. *Id.* at 492.

234. *E.g.*, United States v. Cousins, 427 F.2d 383 (9th Cir. 1970); Chapman v. United States, 151 F.2d 740 (8th Cir. 1945); O'Kelley v. United States, 116 F.2d 966 (8th Cir. 1941).

235. 622 F.2d at 493.

236. *Id.* at 493-94.

for the jury to find that the goods were in interstate commerce at the time of the theft.[237]

Judge Holloway dissented, remarking that the federal government should have allowed this crime to be prosecuted in state court. Judge Holloway concluded, from the pertinent facts, that "effective possession and control of the tires" was in the consignee.[238] The judge rejected any notion that uncompleted paperwork could be considered a salient factor in the distinction between interstate and intrastate commerce. He asserted, instead, that the sole factor to be considered was who had actual dominion and control over the property.[239]

E. *Lesser Included Offenses*

In *United States v. Pino*,[240] the defendant Pino, an Indian, was convicted of involuntary vehicular manslaughter while on an Indian reservation. The evidence showed that Pino was driving home after drinking with a few friends. He collided with a disabled car, killing the driver who had been making repairs under the hood.[241] Pino argued on appeal that he was wrongfully denied a jury instruction on the lesser included offense of careless driving.

The Tenth Circuit, per Judge Holloway, first noted that the Supreme Court decision in *Keeble v. United States*[242] declared that a defendant is entitled to an instruction on a lesser included offense if the evidence is such as to permit a jury to rationally find him guilty of the lesser offense and to acquit him of the greater offense.[243] The prosecution contended that in the Tenth Circuit, the applicable standard provides that an instruction is proper only when a lesser included offense is such that " 'it is impossible to commit the greater without having first committed the lesser.' "[244] Since involuntary manslaughter may be committed independently of the careless driving of an automobile, the government argued that the instruction request was properly denied by the trial court.

The Tenth Circuit court impliedly rejected its former test. The court of appeals held that a defendant is entitled to a lesser included offense instruction when evidence which is necessary and offered to prove the greater offense establishes the lesser offense.[245] This standard was viewed as a practical one; its application is to be determined by the offense charged and by the evidence developed at trial.[246] The court concluded that the prosecution's case in *Pino* had established all of the elements of a careless driving

237. *Id.* at 493.
238. *Id.* at 494 (Holloway, J., dissenting).
239. *Id.* at 494-95.
240. 606 F.2d 908 (10th Cir. 1979).
241. 606 F.2d at 910-14.
242. 412 U.S. 205 (1973) (an Indian prosecuted under the Major Crimes Act of 1885 is entitled to a lesser included offense instruction). *See also* FED. R. CRIM. P. 31(c).
243. 412 U.S. at 212-14.
244. 606 F.2d at 915 (relying on Larson v. United States, 296 F.2d 80, 81 (10th Cir. 1961)).
245. 606 F.2d at 916 (citing with approval United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971)).
246. *Id.*

charge, and therefore, the defendant was entitled to a jury instruction on the lesser included offense of careless driving.[247]

In *United States v. Chapman*,[248] the Tenth Circuit ruled that a defendant is only entitled to an instruction on a lesser included offense when the evidence reasonably supports such a theory. The defendant, Chapman, was convicted of premeditated murder.[249] Witnesses testified that Chapman had driven his truck to a house where the victim was located, that Chapman had called the victim over to the truck, and that after a short discussion, Chapman shot the victim with a sawed-off shotgun.[250] Chapman claimed that the shooting was an accident and his attorney tendered an instruction for the lesser included offense of voluntary manslaughter. The trial court refused the request because it felt that the evidence did not justify a lesser included offense instruction.[251]

The Tenth Circuit court ruled that the trial court did not commit error. The court of appeals stated that the decision whether to give an instruction on a lesser included offense is within the sound discretion of a trial court.[252] The court cited *Keeble v. United States*[253] for the proposition that an instruction need not be given when the evidence does not rationally support defendant's theory.[254] Chapman's own testimony indicated that the shooting was an accident, that he was happy at the time of the shooting, and that he had only wanted to scare the victim. The majority of the court felt that this testimony dispelled the notion that the shooting was done in the heat of passion, an element required in the crime of voluntary manslaughter.[255]

Judge Holloway dissented. Chapman had also testified about previous disputes with the victim and about being drunk and being taunted immediately prior to the shooting. Judge Holloway felt that this was evidence to support a voluntary manslaughter instruction.[256] He argued that a trial court has no discretion to refuse an instruction if there is some evidence to support a lesser included offense, even when the evidence is weak or contradicted by other testimony.[257]

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247. *Id.* at 916-17.

248. 615 F.2d 1294 (10th Cir. 1980).

249. *See* 18 U.S.C. § 1111 (1976) (murder); *id.* § 1153 (offenses committed within Indian country).

250. 615 F.2d at 1295-96.

251. *Id.* at 1298.

252. *Id.*

253. 412 U.S. 205 (1973). *See* note 242 *supra* and accompanying text.

254. 615 F.2d at 1299. *See* United States v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974) (listing the dispositive factors of a lesser included offense).

255. 615 F.2d at 1300. The court commented that if the defendant had not testified, he might have persuaded the trial court to give a voluntary manslaughter instruction. *Id.*

256. *Id.* at 1302-03 (Holloway, J., dissenting).

257. *Id.* at 1301 (citing United States v. Swallow, 511 F.2d 514, 523 (10th Cir.), *cert. denied*, 423 U.S. 845 (1972)).

The main distinction between the majority and the dissenting opinions seems to be the individual judge's opinions as to the quantum of factual proof necessary to support a lesser included offense instruction. Simply stated, the majority felt that the trial judge may deny, as a matter of law, a lesser included offense instruction when there is not enough evidence for the jury to rationally conclude that the lesser offense was committed. Alternatively, the dissenting judge believed that if there is some evidence to support the defendant's claim, the jury, not the trial judge, should decide whether a lesser included offense is merited by the facts.

VI. TRIAL MATTERS

A. *Discovery*

In *United States v. Bump*,[258] the defendant, Bump, requested discoverable information under rule 16(a) of the Federal Rules of Criminal Procedure. In response to the government's reciprocal request under rule 16(b),[259] Bump's attorney disclosed that he intended to introduce a charge card receipt for an airplane ticket and hotel registration records showing that the defendant was out of town during the time of the alleged conspiracy.[260] These documents were never produced. At trial, Bump testified as to his alibi but did not mention any supporting evidence. During cross-examination, the prosecutor used the attorney's earlier representation of documentary evidence, and its apparent nonexistence, for impeachment purposes. Bump contended, on appeal, that this line of questioning was an impermissible intrusion into confidential statements made between attorney and client, that it deprived him of the effective assistance of counsel, and that it made him a witness against himself in violation of the fifth amendment.[261]

The Tenth Circuit, per Judge Logan, quickly dismissed the attorney-client privilege contention. The court observed that even when a privilege exists with regard to a statement made between a client and his attorney, the privilege is waived once the statement is revealed to a third party.[262] Since Bump failed to demonstrate that the disclosures made by his attorney were without his consent, he did not uphold his burden of proving that the communication was privileged.[263]

The Tenth Circuit examined Federal Rule of Criminal Procedure 16(b) for a disposition of defendant's other claims. The court of appeals had diffi-

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258. 605 F.2d 548 (10th Cir. 1979). Also within this survey period the Tenth Circuit decided United States v. Gallagher, 620 F.2d 797 (10th Cir. 1980) (Federal Rule of Criminal Procedure 17(b) does not require a trial court to grant a defendant's motion for the subpoena of a witness where the witness would only provide cumulative testimony).

259. FED. R. CRIM. P. 16(b) provides, in part:

> (1) Information Subject to Disclosure.
>
> (A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.
>
> . . . .
>
> (2) Information Not Subject to Disclosure.
>
> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

260. 605 F.2d at 550.

261. *Id.*

262. *See* Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956) (client's statement made to attorney, with intent that it be communicated to others, is not privileged).

263. 605 F.2d at 551. *See, e.g.*, United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (defendant failed to carry burden of proving that evidence was privileged).

culty in determining whether the representations of Bump's attorney were nondiscoverable statements under rule 16(b)(2) or whether they were discoverable documents under rule 16(b)(1)(A).[264] The appellate court skirted this issue by assuming that the discovery rule required Bump's attorney to disclose his client's statements concerning what the documents purported to prove.[265] Relying on analogous Supreme Court precedents,[266] the court of appeals held that the forced disclosure did not violate Bump's rights to be protected against self-incrimination and to effective assistance of counsel.[267]

The Tenth Circuit also found that the government's use of the representations of defendant's attorney was not prejudicially unfair.[268] The representations were used only for impeachment when defendant took the stand. The court of appeals compared this situation, involving discovered evidence, to that where statements obtained in violation of constitutional rights are used for impeachment purposes. The Supreme Court, in *Harris v. New York*,[269] held that evidence suppressed because of a fifth amendment violation may be used to impeach a defendant's exculpatory testimony. Similarly, the Tenth Circuit has held that discovered evidence could be used for impeachment purposes even if the defendant has not specifically utilized it in his defense.[270]

As mentioned earlier,[271] the Tenth Circuit did not decide whether rule 16(b) requires disclosure of a defendant's statements concerning document relevancy as well as the documents themselves. Under rule 16(b), a defendant, after requesting discovery under rule 16(a), must permit inspection of documents which he intends to introduce at trial.[272] In this case, however, the defendant apparently had no exculpatory document within his "possession, custody or control" at the time of the rule 16(b) request.[273] If and when these exculpatory documents were found, the defendant would have been required to disclose them immediately.[274] Until the time when the actual documents are in the attorney's hands, any attorney-client communications as to their existence and potential use at trial should be nondiscoverable.[275] In view of the *Bump* decision, defense attorneys would be wise not to

264. *See* note 259 *supra* for text of FED. R. CRIM. P. 16(b).

265. 605 F.2d at 551.

266. United States v. Nobles, 422 U.S. 225, 235 (1975) (forced pre-trial disclosure applies only to evidence that defendant intends to introduce at trial and applies only when defendant makes discovery request); Williams v. Florida, 399 U.S. 78 (1970) (state rule, which required defendant to disclose intention to rely upon alibi defense, declared to be constitutional).

267. 605 F.2d at 552.

268. *Id.*

269. 401 U.S. 222 (1971).

270. 605 F.2d at 552. *See also* United States v. Havens, 100 S. Ct. 1912 (1980) (evidence suppressed as fruit of unlawful search and seizure may be used to impeach false testimony offered on cross-examination); United States v. McManaman, 606 F.2d 919 (10th Cir. 1979) (evidence suppressed, because obtained in violation of right to counsel, may be used to impeach false testimony).

271. *See* text accompanying notes 264-65 *supra*.

272. *See* note 259 *supra* for the text of FED. R. CRIM. P. 16(b).

273. FED. R. CRIM. P. 16(b)(1)(A). *See* note 259 *supra*.

274. FED. R. CRIM. P. 16(c).

275. *See id.* 16(b)(2). *See* note 259 *supra*.

Clearly, the purported evidence showing that Bump was in St. Louis at the time of the conspiracy constituted an alibi. Although this evidence was revealed pursuant to rule 16(b),

voluntarily disclose the existence of exculpatory documents unless certain that they will be used at trial. If the documents are not found, or, when found, are not used as evidence, the representations of their existence may prejudice the client by providing the prosecution with impeachment ammunition.

B. *Judge Recusal*

In *United States v. Gigax*,[276] one of the issues before the Tenth Circuit court was whether the district court judge should have recused himself because of personal prejudice against the defendant. The defendant, Gigax, was convicted of willfully making false statements on the Internal Revenue Service's W-4 form, where he claimed twenty-one allowances and exemptions. The defendant alleged that the judge had made statements, at the post-conviction hearings, which displayed personal prejudice against the defendant and against tax protesters in general.[277]

The Tenth Circuit, per Judge Barrett, began its analysis by comparing the two federal statutes pertaining to judge recusal.[278] Section 144 essentially states that, ten days before trial, an affidavit may be filed relating facts which demonstrate a personal prejudice, by the judge, for or against one of the parties in the case.[279] When a trial judge is presented with an affidavit under section 144, he must accept as true the facts alleging personal prejudice.[280] It is the challenged judge who then determines whether the factual allegations are legally sufficient to justify recusal.[281] Section 455, on the other hand, states that a judge, on his own initiative, must recuse himself when a reasonable man may question his impartiality.[282] The Tenth Circuit

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rather than as an alibi under rule 12.1, an argument could be made that a reasonable interpretation would apply provision (f) of rule 12.1 in either case. Rule 12.1(f) states that "evidence of an intention to rely upon alibi defense, later withdrawn; or of statements made in connection with such intention, is not admissible in any civil or criminal proceedings against a person who gave notice of the intention." FED. R. CRIM. P. 12.1(f). The Tenth Circuit, however, found similar statements admissible in this case on the grounds that although rule 16 was amended at the same time as rule 12.1, the "inadmissible" language was not included in the former. 605 F.2d at 552. Bump's statements, however, could not have been protected under rule 12.1(f) since he retained his alibi defense when testifying.

276. 605 F.2d 507 (10th Cir. 1979).

277. *Id.* at 513.

278. *Id.* at 510-12. *See* 28 U.S.C. §§ 144, 455 (1976 & Supp. II 1978).

279. Apparently, this remedy was not used by the defendant, for the alleged personal prejudice did not become apparent until the post-conviction hearings.

The Tenth Circuit has enforced strict compliance with the provisions of 28 U.S.C. § 144. Scott v. Beams, 122 F.2d 777 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942); Freed v. Inland Empire Ins. Co., 174 F. Supp. 458 (D. Utah 1959).

280. *See* Mitchell v. United States, 126 F.2d 550, 552 (10th Cir.), *cert. denied*, 316 U.S. 702 (1942).

281. United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976). *See* Note, *Disqualification of a Federal District Judge for Bias—The Standard under Section 144*, 57 MINN. L. REV. 749 (1973).

282. *See* Note, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538 (1973).

The judge must determine whether a reasonable person would believe that a personal, as opposed to a judicial bias, existed. Judicial bias is simply an opinion on the law or facts developed during trial and is not sufficient to require disqualification of a judge. In contrast, personal bias stems from an extrajudicial source, such as a racial prejudice, and results in a decision

concluded that, under both statutes, the appropriate standard to be used is "whether a reasonable person would have questioned the district judge's impartiality," for the appearance of impartiality is virtually as important as the fact of impartiality.[283]

The alleged prejudicial conduct arose after the trial, at sentencing and bond hearings. The Tenth Circuit observed that a trial court judge has wide and almost unrestricted discretion during post-conviction hearings.[284] The judge may consider all of the pertinent circumstances relating to the defendant's background and the nature of the crime.[285] The Tenth Circuit believed that the trial judge in *Gigax* was only exercising this broad discretion, albeit in an aggressive manner. The court of appeals concluded that " '[a] judge cannot be disqualified because he believes in upholding the law, even though he says so with vehemence.' "[286]

C. *Trial Court Discretion*

In *United States v. Taylor*,[287] the Tenth Circuit was asked to review a discretionary order of the trial court. The district court had refused to grant a mistrial after a police officer testified, in front of the jury, that he had previously "worked a case on" defendant Taylor. The judge found it sufficient to exclude the evidence and to instruct the jury to disregard the testi-

based on irrelevancies. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Hall, 424 F. Supp. 508 (W.D. Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir. 1976). *See also* Davis v. Cities Service Oil Co., 420 F.2d 1278 (10th Cir. 1970).

283. 605 F.2d at 512. *See* Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977); United States v. Hall, 424 F. Supp. 508 (W.D. Okla. 1975). If the allegations of bias and prejudice are merely the selfish and subjective opinions of a few, the judge has a duty not to disqualify himself. *See generally* Laird v. Tatum, 409 U.S. 824, 837 (1972); United States v. Bray, 546 F.2d 851 (10th Cir. 1976); United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977); Antonello v. Wunsch, 500 F.2d 1260 (10th Cir. 1974). When a judge's conduct might reasonably be questioned as motivated by bias or prejudice, it is mandatory that the judge recuse himself even if he holds a good faith belief that he could conduct an impartial proceeding. Blizard v. Fielding, 454 F. Supp. 318 (D. Mass. 1978), *aff'd sub nom.*, Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979).

284. 605 F.2d at 512. *See* 18 U.S.C. § 3577 (1976) (no limitation on information concerning "background, character, and conduct" for sentencing convicted defendant); United States v. Tucker, 404 U.S. 443, 446-47 (1972) (no limitation on either the source or kind of information which can be considered by a sentencing judge). *But see* United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973) ("[u]nder § 144 a defendant is entitled to trial before a judge who is not biased against him at any point of the trial and, indeed, most importantly, at sentencing."). *See also* Williams v. New York, 337 U.S. 241, 246-52 (1949) (discussion of different evidentiary rules governing trial and sentencing procedures).

Judicial prejudice exhibited during trial is treated differently. In *Hayes v. National Football League*, the court stated that "when a trial judge makes hostile remarks in the presence of a jury the courts use entirely different criteria to determine their prejudicial effect, reversal being premised upon the prejudicial effect upon the jury, rather than the personal bias or prejudice possessed by the judge." 463 F. Supp. 1174, 1182 (C.D. Cal. 1979).

285. 605 F.2d at 513-14. *See* United States v. Ochs, 595 F.2d 1247, 1262 (2d Cir. 1979) (sentencing judge's consideration of defendant's general character and prior record is permissible); United States v. Hayes, 589 F.2d 811, 827 (5th Cir. 1979) (consideration of defendant's background is within the judge's discretion).

286. 605 F.2d at 514 (quoting Knapp v. Kinsey, 232 F.2d 458 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956)). *See also* Montgomery v. United States, 344 F.2d 955 (10th Cir. 1965) (sentencing judge may use forceful and emphatic language).

287. 605 F.2d 1177 (10th Cir. 1979).

mony.[288] The Tenth Circuit, per Judge Logan, noted that great deference is accorded to such a determination since the trial judge is in the best position to measure the impact of improper evidence on the jury.[289] The court of appeals enumerated the major factors to be considered in determining the necessity of a mistrial after impermissible remarks upon a defendant's criminal record:

> Mistrial is most likely to become necessary when the evidence is admitted, indicates on its face that defendant has been guilty of a prior crime, and the evidence plays a prominent part in the conduct of the trial. Conversely, prejudicial error is least likely to occur when the evidence is excluded, the jury is instructed to disregard it, and the reference is both vague and passing in nature.[290]

The court concluded that, in light of the fact that there was no further reference to the prior case involving Taylor, the short and insignificant nature of the remark, the cautionary instruction given to the jury, and the more than adequate evidence to sustain the conviction, there was no error.[291]

D. *Guilty Pleas*

In *Sena v. Romero*,[292] the defendant Sena petitioned for federal habeas corpus relief on the basis that his guilty plea in state court was uninformed, involuntary, and lacking a factual basis; all in violation of the Supreme Court decision in *Boykin v. Alabama*.[293] The *Boykin* Court held that due process requires that a plea of guilty be voluntary and intelligent since the plea involves the waiver of several constitutional rights.[294] While a fixed procedure need not be followed, the trial judge does have the affirmative duty to make an on the record examination of the accused to insure that he completely comprehends the consequences of his guilty plea.[295]

In *Sena*, the federal district court had ordered that an evidentiary hearing be held before a magistrate since the state court transcript was deficient, if not totally silent, on the guilty plea issue.[296] Although there was conflict-

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288. *Id.* at 1178.

289. *Id.* at 1179. *See* Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978) (trial judge responsible for conducting fair trial); United States v. Evans, 542 F.2d 805 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977) (mistrial order is within sound discretion of trial court).

290. 605 F.2d at 1179.

291. *Id. See* United States v. Cline, 570 F.2d 731, 736-37 (8th Cir. 1978); United States v. Dorn, 561 F.2d 1252, 1257 (7th Cir. 1977).

292. 617 F.2d 579 (10th Cir. 1980).

Also within this survey period, the Tenth Circuit held that a defendant's motion, made before sentencing, to withdraw his plea of guilty must be examined carefully and liberally. The court of appeals reversed a trial court's denial of the motion since there was no hearing on the plea withdrawal, and no reasons for denying the request were stated. United States v. Hancock, 607 F.2d 337 (10th Cir. 1979). *See* FED. R. CRIM. P. 32(d). *See also* Dorton v. United States, 447 F.2d 401, 411-12 (10th Cir. 1971).

293. 395 U.S. 238 (1969).

294. *Id.* at 242.

295. *Id.* at 243 (a waiver of constitutional rights cannot be presumed from a silent record); Carnley v. Cochran, 369 U.S. 506 (1962). *See also* McCarthy v. United States, 394 U.S. 459 (1969). *But cf.* United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978) (defendant need not be informed of collateral consequences of a guilty plea).

296. 617 F.2d at 580.

ing evidence as to the adequacy of the trial court's inquiry into Sena's desire to plead guilty, the magistrate concluded that the defendant had failed to meet his burden of proof and that the preponderance of the evidence demonstrated that defendant's plea was voluntarily and knowingly made. The federal district court adopted these findings and denied the habeas corpus petition.[297]

The Tenth Circuit, per Judge Logan, reversed on the issue of burden of proof. The court of appeals held that, where there is a silent record, the burden is on the government to make "an affirmative showing" that the guilty plea and waiver of the defendant's constitutional rights were "knowingly, voluntarily and intelligently made."[298]

E. *Sentencing*

In *United States v. Klusman*,[299] the main issue presented was whether a judge's recollection of a defendant's earlier conviction is an improper consideration in sentencing. The trial judge remembered placing Klusman on probation for a previous drug offense. Before pronouncing sentence, the judge told the defendant that he was unsure of "what it is going to take to convince you that the drug business isn't a profitable business."[300]

The defendant's first conviction was as a juvenile and was subsequently set aside pursuant to the Federal Youth Corrections Act (FYCA).[301] Klusman argued that any subsequent consideration of this "expunged" conviction violated the statute. The government contended that the FYCA was intended to facilitate rehabilitation of youthful offenders and not to interfere with judicial discretion in subsequent sentencing matters.

The Tenth Circuit, per Judge Doyle, found it unnecessary to decide the issue of expungement. The court of appeals expressed doubt as to whether setting aside a conviction under the FYCA is the equivalent of expungement,[302] but Judge Doyle asserted that even if it is, there is no right to ex-

297. *Id.* at 581.

298. *Id. See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); United States v. Pricepaul, 540 F.2d 417, 423-24 (9th Cir. 1976) (nothing more than a silent record is needed to shift the burden of proof to the government). *But cf.* Stinson v. Turner, 473 F.2d 913, 915-16 (10th Cir. 1973) (record indicating a voluntary and intelligent plea need not show express waiver of each constitutional right).

299. 607 F.2d 1331 (10th Cir. 1979). Within this survey period, the Tenth Circuit also decided United States v. Haney, 615 F.2d 907 (10th Cir. 1980) (judge may not commit defendant convicted under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b) (1976), and also impose a special parole term provided in 21 U.S.C. § 841(b)(1)(A) (1976)), and United States v. Sisneros, 599 F.2d 946 (10th Cir. 1979) (failure to advise the defendant of special parole term is only a technical violation when the total sentence imposed is less than the maximum sentence which the court had told defendant he might receive).

300. 607 F.2d at 1333.

301. 18 U.S.C. § 5021 (1976). *See* United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980); United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977); United States v. Fryer, 545 F.2d 11 (6th Cir. 1976).

302. 607 F.2d at 1334. *See* United States v. Doe, 556 F.2d 391 (6th Cir. 1977) (FYCA provides a "unique shield" from prejudicial effects of conviction, but does not provide for expungement); United States v. McMains, 540 F.2d 387 (8th Cir. 1976). *See also* cases cited in note 301 *supra*.

punge a judge's memory.[303] The broad sentencing discretion vested in a trial judge permits consideration of relevant facts within his personal knowledge.[304] The court of appeals concluded that the judge "could be mindful of the prior conviction in the present circumstances."[305]

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303. 607 F.2d at 1334.

304. Judge Doyle also noted that the less than maximum sentence imposed reflected no prejudicial effect from the previous conviction. *Id.* at 1333. *See generally* United States v. Eaton, 579 F.2d 1181, 1183 (10th Cir. 1978); United States v. Green, 483 F.2d 469 (10th Cir.), *cert. denied*, 414 U.S. 1071 (1973).

305. 607 F.2d at 1334. *Cf.* Roberts v. United States, 445 U.S. 552 (1980) (no limitations, including consideration of defendant's lack of cooperation with the government, should be placed on sentencing considerations). *But cf.* United States v. Tucker, 404 U.S. 443, 447-49 (1972) (due process forbids trial court reliance on unconstitutional convictions in sentencing decisions).