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Kay Graves Thomas

Karen A. Perez

David W. Miller

Amy T. Loper

CRIMINAL PROCEDURE

OVERVIEW

I. FOURTH AMENDMENT: SEARCH AND SEIZURE

A. Use of Electronic Tracking Device.

In *United States v Clayborne*,[1] the Tenth Circuit considered whether evidence found during a warrant search of a clandestine amphetamine laboratory was tainted by the warrantless use of an electronic tracking device or "beeper"[2] attached by Federal Drug Enforcement Administration agents to a drum of chemicals purchased by one of the defendants.

With permission of the vendor, DEA agents attached the beeper to a drum of ether ordered by one of the defendants from a chemical supply house. Thereafter, they observed the defendant's purchase of the chemicals and followed him to his home where they saw him unload the drum and take it into the house. Periodically, they monitored the beeper's presence to ensure that the drum was not moved. Contact with the beeper was lost and eventually reestablished when its signal was located at a commercial premises where DEA agents noted covered windows and detected the smell of ether. A search warrant was obtained and executed, and the search produced methamphetamines together with materials and paraphernalia for their manufacture. The defendants sought to suppress this evidence on the ground that their fourth amendment rights were violated by the DEA's initial failure to obtain a warrant for use of the beeper.[3]

The court commenced its analysis of the question by reference to the justifiable or reasonable expectation of privacy standard enunciated by the Supreme Court in *Katz v. United States*.[4] In *Katz*, F.B.I. agents, acting without a warrant, attached a lis-

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[1] 584 F.2d 346 (10th Cir. 1978).

[2] "The electronic beeper sends out periodic radio signals which allow its location to be established and monitored." *Id.* at 348. The operational aspects of such beepers are briefly described in United States v. Holmes, 521 F.2d 859, 861 (5th Cir. 1975), *aff'd en banc by an equally divided court*, 537 F.2d 227 (5th Cir. 1976). *See also*, 29 VAND. L. REV. 514, 514 n.5 (1976).

[3] 584 F.2d at 348.

[4] 389 U.S. 347 (1967). The "reasonable expection of privacy" standard was proposed by Mr. Justice Harlan in his concurring opinion in *Katz*. Many lower courts have adopted Justice Harlan's approach and the Supreme Court itself has appeared to endorse it. *See*, United States v. White, 401 U.S. 745, 752 (1971) and Mancusi v. DeForte, 392 U.S. 364, 368 (1968). A listing of lower federal court decisions adopting this view is found in Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 GA. L. REV. 75, 80 n.19 (1976).

tening device to the outside of a public telephone booth in order to monitor the suspect's conversations.[5] The Supreme Court held that such nontrespassory eavesdropping constituted a search and seizure under the fourth amendment because it "violated the privacy upon which [Katz] justifiably relied while using the telephone booth . . . ."[6] In rejecting the notion of "constitutionally protected areas,"[7] the Court stressed that the fourth amendment protects people, not places, and that that which a person exposes to the public may be the subject of fourth amendment protection, whereas that which he seeks to preserve as private, even in an area accessible to the public, may enjoy constitutional protection.[8]

Many courts have considered the beeper question under varying fact circumstances, primarily relating to drug investigations.[9] One of the cases cited by the Tenth Circuit was *United States v. Hufford,*[10] which focused upon the circumstances surrounding the attachment of the device. In *Hufford,*[11] the Ninth Circuit found that if the installation of the beeper is legal, as where the beeper is legally placed on the property before it comes into the suspect's possession, its continuing presence on the property does not violate the fourth amendment, even though attachment subsequent to acquisition might have been an unreasonable search.[12] In a dictum, the *Clayborne* court rejected this approach, adopting instead the First Circuit's treatment of the issue in *United States v. Moore.*[13] The Tenth Circuit indicated that were

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[5] 389 U.S. at 348.

[6] *Id.* at 353. The Supreme Court had heretofore limited fourth amendment protection to those searches which involved an actual trespass and to those seizures which comprised the taking of material objects. Olmstead v. United States, 277 U.S. 438 (1928). This "trespass doctrine" required the physical intrusion to be in a "constitutionally protected area," as in a house or office. Silverman v. United States, 365 U.S. 505, 512 (1960).

[7] 389 U.S. at 351.

[8] *Id.* at 351-52.

[9] For an exhaustive listing of the beeper cases, *see Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1462 n.5 and 1463-69 [hereinafter cited as *Tracking* Katz].

[10] 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

[11] With consent of a chemical manufacturer, a beeper was installed in a drum of caffeine prior to its delivery to the defendants. The Ninth Circuit held that the defendant's reasonable expectation of privacy had not been invaded, notwithstanding that the beeper was employed in a "probing, exploratory quest for evidence." 539 F.2d at 33. *See also*, United States v. Perez, 526 F.2d 859, 863 (5th Cir.), *cert. denied*, 429 U.S. 846 (1976).

[12] *Tracking* Katz, 86 YALE L. J. at 1465-66.

[13] 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). In *Moore*, federal

the point seriously argued, it would hold, as did the First Circuit in *Moore,* that the fact that the defendants initially had no rights in the chemicals was not of significance because they later obtained lawful possession, after which the agents sought to use the electronic device already in place.[14]

Another line of beeper cases measures the intrusiveness of the attachment according to the nature of the item to which the beeper is attached.[15] This mode of analysis was used by the Tenth Circuit in *United States v. Shovea,*[16] a case where a beeper was used for purposes of tracking a car to a clandestine drug laboratory. The theory of *Shovea* was that there is a minimal expectation of privacy in an automobile along a public road.[17] This analysis has also been applied with respect to contraband, where courts have found that the illegality of possession eliminates any reasonable expectation of privacy.[18]

The Tenth Circuit in *Clayborne* focused its inquiry on the nature of the places where the drum containing the beeper was stored. Citing its *Shovea* decision and the First Circuit's decision in *Moore,* the court approved the warrantless use of the beeper for monitoring the drum of chemicals while they were being transported via automobile from the vendor's premises to the defendant's home.[19] However, the court was careful to point to the First Circuit's holding in *Moore* that although electronic surveillance of an automobile may be conducted without a warrant, the same is not true of a home.[20] The court saw the crucial fact of the

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agents installed a beeper in a container of chemicals which had been ordered by the defendants. When delivery was taken, a second beeper was attached to their van and the agents followed them, partially by means of the beeper, to a house. The beeper in the container was subsequently used to monitor the presence of the chemicals in the house and a search warrant was later obtained. The court held that the evidence derived from the use of the beeper while the container was in the house had to be suppressed.

[14] 584 F.2d at 349.

[15] *Tracking* Katz, 86 YALE L. J. at 1466.

[16] 580 F.2d 1382 (10th Cir. 1978).

[17] The court cited United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976), *cert. denied,* 429 U.S. 1046 (1977) where use of a beeper on a car was approved in connection with an ongoing kidnap plot.

[18] United States v. Emery, 541 F.2d 887, 888 (1st Cir. 1976) (cocaine).

[19] 584 F.2d at 350. For the view that the warrantless installation of a tracking device on a motor vehicle to trace its movement constitutes a search in violation of the fourth amendment, *see* United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc by an equally divided court,* 537 F.2d 227 (5th Cir. 1976).

[20] 584 F.2d at 350.

present case to be that the beeper surveillance evidence within the home and that within the laboratory did not come together as a single connected transaction, inasmuch as the agents lost contact with the device following its movement from the house, and contact was reestablished only after an independent search by airplane picked up the beeper signal at the laboratory.[21] Seemingly, then, if the movement of the drum of ether had been traced directly from the house to the laboratory, the Tenth Circuit would have suppressed the evidence on the basis that the warrantless presence of the beeper within the defendant's home violated his reasonable expectation of privacy pursuant to *Katz*.

The court had to resolve one final issue before deciding that under the circumstances presented, the evidence in the laboratory had not been obtained by means of an illegal search. It phrased that issue as follows: "Given the proposition that the home cannot be invaded without a warrant, does it follow that a clandestine laboratory in which amphetamines are likely to be manufactured enjoys the same protection?"[22] The court resolved this issue by examining the defendant's expectation of privacy with respect to a commercial building such as the building where the laboratory was located. It found that strict privacy as in a home was not to be properly expected in this type of setting, differentiating the case from *Katz* on the basis of a comparison of the size and extent of the intrusion. It concluded:

> We consider the electronic beeper as a substitute for persistent extensive visual effort. We do not say that the laboratory stands on the identical footing as the automobile, and clearly it is not the same as [defendant's] home, which the Fourth Amendment protects from invasion. We are persuaded by the fact that the intrusion of the clandestine laboratory was slight. Also, it is not to be argued that defendant-appellant had a justifiable or reasonable expectation that there would not be any disturbance of privacy. Also, the use of the beeper within the laboratory was vastly different from the use of the recording device in the telephone booth in *Katz*. The invasion in *Katz* was of great magnitude in comparison with the intrusion here.[23]

Accordingly, the court held that the warrantless use of the beeper was not invalid under the fourth amendment.[24]

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[21] *Id.* at 349-50.
[22] *Id.* at 350.
[23] *Id.* at 351.
[24] *Id.*

B. *Use of Canine to Detect Illegal Drugs.*

Another case in which the Tenth Circuit applied the principles of *Katz*[25] was *United States v. Venema*,[26] where the court held that the warrantless use by the police of a cannabis sniffing canine did not violate the defendant's fourth amendment rights.[27]

Venema was under surveillance by local New Mexico drug agents because of his association with a person previously convicted of possession of marijuana. Venema was observed entering a locker at a storage company and returning with a box which appeared to be much heavier than when he had carried it into the locker. The following day, the agents returned to the storage company with Chane, a dog trained and certified to detect the presence of either marijuana or heroin, and, with permission of the owner of the storage company, Chane "worked" the side of the building where Venema's locker was located. On three occasions Chane "alerted" in front of Venema's locker,[28] indicating to the dog's handler that the locker contained either marijuana or heroin, or that such substances had very recently been in the locker.[29] On the basis of Chane's reaction, a state district court judge issued warrants authorizing search of the defendant's locker, truck, and residence, where quantities of marijuana, hashish, and LSD were found. The defendant was convicted on charges relating to possession of the drugs with intent to distribute. On appeal, he contended that use of Chane to "sniff out" his locker constituted a search and was not based on probable cause. He argued that inasmuch as the ensuing searches of his locker, truck, and home were fruits of the poisonous tree, they should have been suppressed at his trial.[30]

The Tenth Circuit rejected these arguments, finding that the defendant had no justifiable expectation of privacy in the areaway in front of his locker which was semi-public in nature.[31] This finding was buttressed by testimony that when the defendant

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[25] 389 U.S. 347 (1967).

[26] 563 F.2d 1003 (10th Cir. 1977).

[27] *Id.* at 1004.

[28] The dog's handler testified that the dog "alerts" by changing direction and pawing whenever he smells either marijuana or heroin. *Id.* at 1004-05.

[29] *Id.* at 1005.

[30] *Id.*

[31] *Id.* at 1005-06.

initally rented the locker he was warned by the manager of the storage company that from time to time she permitted the police on the premises for purposes of using dogs to sniff out marijuana and that should he store marijuana in his locker, he did so at his own risk.[32]

Even absent these special circumstances, it is likely the court would have reached the same conclusion, for it went on to note several cases in which other circuits and an Arizona state court have held that the use of marijuana-sniffing dogs was not an unreasonable search violative of the fourth amendment.[33] However, with exception of the *Quatsling* state court case, the Tenth Circuit failed to analyze the underlying rationale of these cases, thus refusing to grapple with some of the difficult issues presented by the use of canines to detect the presence of illegal drugs.[34] In addition, the precedential value of *United States v. Fulero*,[35] one of the cases relied upon by the court, is limited because the District of Columbia Circuit provided no discussion

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[32] *Id.* at 1006.

[33] United States v. Solis, 536 F.2d 880 (9th Cir. 1976) (use of dogs to sniff air outside a semi-trailer parked at the rear of a filling station was not an "unreasonable" search); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976) (sniffing, nipping and biting by a "canine cannabis connoisseur" at a suitcase in the baggage area of an airport terminal did not constitute a search or seizure); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (canine allowed to sniff the air around a footlocker in a bus depot); and State v. Quatsling, 24 Ariz. App. 105, 536 P.2d 226 (1975) (dog trained to detect explosives "reacted" in front of defendant's storage locker; subsequent search of the locker was not violative of the locker renter's constitutional rights).

[34] As an example, the court cited without discussion United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), as authority for the proposition that use of a marijuana-sniffing dog does not constitute a search. An analysis of *Bronstein* reveals that the Second Circuit there relied upon the "plain smell" doctrine, which is an extension of the "plain view" doctrine. The central concept of that doctrine is that if an officer sees evidence or contraband while in a place where he has a right to be, he has not conducted a search within the meaning of the fourth amendment. Harris v. United States, 390 U.S. 234, 236 (1968). The *Bronstein* court reasoned that because the marijuana was within the dog's "plain smell," the defendant's fourth amendment rights were not violated. 521 F.2d at 461. However, as pointed out by one commentator, the Second Circuit cited no case law to support this view. The commentator further notes that "the major conceptual problem with this conclusion is that the officers themselves could not have detected the odor of the marijuana," and that when analagous detection aids, such as magnometers and x-ray machines, are used by police officers, they are held to be a search and must therefore be reasonable in order to satisfy the fourth amendment. *Search and Seizure—Marijuana Sniffing Dogs*, 42 Mo. L. REV. 331, 332 (1977) (citing United States v. Palazzo, 488 F.2d 942, 946 (5th Cir. 1974); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972)).

[35] 498 F.2d 748 (D.C. Cir. 1974). *See* note 33 *supra*.

or citation of authority for its flat rejection of the defendant's contention that the use of a marijuana-sniffing dog was a search in violation of the fourth amendment.

One commentator has cautioned that if the use of a marijuana-sniffing canine is not a search within the fourth amendment, then under the "plain smell" doctrine[36] law enforcement agencies may use the dog's sense of smell indiscriminately without any fourth amendment limitations as to reasonableness, so long as the officer is in a place where he has a right to be.[37] Another commentator, recognizing the danger in placing the uninvited canine nose outside the protection of the fourth amendment, has suggested that the courts have adopted a methodology similar to that enunciated by the Supreme Court in *Terry v. Ohio*,[38] which would recognize that the government engages in activity subject to the fourth amendment's proscriptions when it utilizes dogs to detect contraband, but that this usage does not necessarily constitute a full search.[39] Professor Peebles continues: "The reasonableness of such a subsearch would be gauged by a balancing process in which the primary considerations would be the individual's expectations of privacy on the one hand and both the degree of the intrusion and the circumstances occasioning that intrusion on the other."[40] Use of this approach, Professor Peebles believes, would result in more effective judicial control over surreptitious, sense-enhancing police investigative techniques such as the uninvited canine nose than the formula mandated by *Katz*.[41]

One can only hope that the Tenth Circuit will at least consider this approach in deciding future cases where the defendant possesses a more justifiable expectation of privacy than was present under the facts of this case.

C. *Search and Seizure Within a Prison.*

In *United States v. Ready*,[42] the Tenth Circuit considered the

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[36] *See* note 34 *supra*.

[37] *Search and Seizure—Marijuana Sniffing Dogs*, 42 MO. L. REV. 331, 334 (1977).

[38] 392 U.S. 1 (1968). *See* notes 86-90 and accompanying text *infra*.

[39] Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 GA. L. REV. 75, 94 (1976).

[40] *Id.* at 95.

[41] *Id.* at 103-04.

[42] 574 F.2d 1009 (10th Cir. 1978).

applicability of the fourth amendment to a prison search.

It appears from the court's recital of the facts that the defendant Ready had been imprisoned following his conviction for income tax fraud and was interned at the Leavenworth Penitentiary honor camp. Shortly before the indictment with respect to the charges forming the subject matter of the present case, the security supervisor of the prison directed that Ready be moved from the honor camp to the prison. During the customary inventory of Ready's property at the honor camp prior to his transfer, various items of correspondence were taken to the security supervisor based on his earlier instructions. He and another prison official searched through the property and found certain tax forms filed by Ready and a notebook containing references to tax matters which were subsequently turned over to Internal Revenue Service agents. This material was entered into evidence at Ready's trial, and he was convicted on eight counts of income tax fraud. On appeal, he contended that the warrantless search and seizure of papers in his honor camp room at the time of his transfer to the main penitentiary was in violation of his fourth amendment rights and that the papers should have been suppressed.[43]

The Tenth Circuit briefly reviewed the few cases dealing with the issue of a prisoner's right to privacy and fourth amendment protection while incarcerated. It pointed out that despite the Supreme Court's dicta in *Lanza v. New York*[44] to the effect that the claim of fourth amendment protection while one is in a public jail is "at best a novel argument," the Court has since held that prisoners do not give up all constitutional rights while in prison.[45] Moreover, the Tenth Circuit noted that Mr. Justice Stevens, while a circuit judge, had invoked the fourth amendment, holding that a prisoner enjoys its protection "at least to some minimal extent," to support, along with due process grounds, relief for a prisoner who had a trial transcript taken from his cell in a warrantless shakedown search.[46] On the other hand, the court pointed

[43] *Id.* at 1011-13.

[44] 370 U.S. 139, 143 (1961).

[45] Wolff v. McDonnell, 418 U.S. 539 (1974).

[46] Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975). *See also,* United States v. Dawson, 516 F.2d 796, 806 (9th Cir.), *cert. denied,* 423 U.S. 855 (1975) (sufficient showing of justifiable purpose required); United States v. Savage, 482 F.2d 1371, 1373 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974) (some justifiable purpose of imprisonment or prison security must be demonstrated); Inmates of Milwaukee Co. Jail v. Peterson, 353

to its own recent decision permitting rectal searches of prisoners under sanitary and nonhumiliating conditions as "a necessary and reasonable concomitance of appellants' imprisonment"[47] and the Ninth Circuit's *per curiam* opinion holding that it is not reasonable for a prisoner to consider his cell private, and therefore a cell search did not violate the fourth amendment.[48]

The Tenth Circuit then disposed of the defendant's fourth amendment claims in two short paragraphs, the first of which stated:

> Certainly in a federal prison the authorities must be able to search the prisoners' cells without notice and at any time, for concealed weapons and contraband which threatens the security or legitimate purposes of the institution. This is done routinely at Leavenworth when a prisoner is transferred from the honor camp outside the walls, back inside, for obvious reasons.[49]

Of course there are many legitimate governmental security interests that may restrict prisoners' fourth amendment rights, but it appears that the Tenth Circuit has in this case "merely intoned the phrase 'prison security' as the basis of its holding without any further examination."[50] The court at the very least could have inquired into the "security" justification for a detailed, content-oriented search of the defendant's notebook and tax forms when a cursory search of such materials would have sufficed to detect the presence of contraband or weapons. The court, however, disposed of the issue by stating:

> It is virtually impossible for the Court to ascertain motives of prison officials, *e.g.*, here whether the transfer back inside prison was to impede an escape which the prisoner might attempt if he learned of the investigation, or whether it was to provide an excuse to look through his papers. If the search procedure is routine and reasonably designed to promote the discipline of the institution, we will not require a search warrant . . . . This situation clearly meets that test.[51]

F. Supp. 1157, 1168 (E.D. Wis. 1973) (probable cause required).

[47] Daugherty v. Harris, 476 F.2d 292, 295 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973).

[48] United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

[49] 574 F.2d at 1013.

[50] Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045, 1071 (1976). The authors opine that many courts have taken this somewhat perfunctory approach. *Id.* at 1071 n.173-74.

[51] 574 F.2d 1014 (citing Stroud v. United States, 251 U.S. 15 (1919)). The court's reference to the motives of prison officials relates to the motivational analysis applied by some courts in determining whether the activity of government agents constitutes a search

Presumably, the facts supported a finding that an intensive examination of notebooks and documents such as tax forms was "routine" in these circumstances, but one may wonder how a content-oriented examination of tax forms bears any rational relationship to the legitimate governmental objective of preserving discipline in a penal institution.[52]

D. *Consent Search.*

In *United States v. Seely*,[53] the Tenth Circuit held that a valid search occurred when police officers, knowing that a search warrant had been issued and was in transit to the site, searched the defendant's automobile following his invitation to do so. Special circumstances existed which supported the court's finding of voluntariness of the consent in this case: prior to the search the police officers advised the defendant of his constitutional rights[54] and undertook the search only after consent was renewed following the defendant's receipt of legal advice in a telephone consultation with his attorney.[55] The court also noted that there was no hint that voluntariness was overcome by threat of a non-available search warrant.[56]

E. *"Misplaced Trust" Exception to Warrant Requirement.*

United States v. Oakes[57] presented the issue whether the pres-

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or seizure. Under this approach, only if their purpose is prosecutorial do the actions of law enforcement officials constitute a search within the meaning of the fourth amendment. Conversely, if the objective is not prosecutorial, there is no search. *See* Giannelli & Gilligan, *Prison Searches and Seizures*, 62 VA. L. REV. 1045, 1052 (1976).

[52] For a less mechanical model for determining the fourth amendment rights of prison and jail inmates, see Giannelli & Gilligan, *supra* note 50, at 1064-77.

[53] 570 F.2d 322 (10th Cir. 1978).

[54] Miranda v. Arizona, 384 U.S. 436 (1966). In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court adopted a totality of circumstances test to determine whether consent to search is voluntarily given. Knowledge of the right to refuse the police request is only one factor of the test and is not dispositive of the voluntariness of the consent. *Id.* at 227. The Court thus refused to engraft a *Miranda*-type warning of the right not to consent as an additional requirement to the consent exception. *See* Williams, *Institute on Exceptions to the Warrant Requirement under the Fourth Amendment*, 29 OKLA. L. REV. 659, 672-74 (1976).

[55] The defendant was advised by his lawyer that because the only authority for the search was his consent, he could terminate it at will. 570 F.2d at 323.

[56] *Id.* (citing Bumper v. North Carolina, 391 U.S. 543 (1968)). Inasmuch as the sole authority for the search was the defendant's voluntary consent, the court was not faced with the difficult problems presented by searches authorized by issued but undelivered warrants. *See* United States v. Woodring, 444 F.2d 749 (9th Cir. 1971).

[57] 564 F.2d 384 (10th Cir. 1977).

ence of a Treasury Department agent in the defendant's home, with consent of the defendant, for purposes of gathering evidence of illegal possession of firearms was a violation of the fourth amendment. The Tenth Circuit noted that the defendant had an arguable fourth amendment claim because the amendment reaches violations "by guile as well as by force."[58] The court, however, relying on the Supreme Court's decision in *Lewis v. United States*[59] which involved a similar fact situation, held that the defendant's fourth amendment rights had not been violated because the agent, although posing as a firearms dealer who was supplying weapons to domestic political groups, "entered the house by invitation and took away nothing that was not voluntarily given or sold by appellant."[60] The court rejected the appellant's attempt to distinguish the facts of the *Lewis* case from those at bar, stating that it was immaterial that the agent in *Lewis* was specifically invited into the home for the illegal purpose of purchasing marijuana whereas the agent in the instant case came only to investigate and no firearms changed hands until the third visit.[61] The court concluded:

> We do not believe that the purpose of either the defendant in extending the invitation, or the agent in accepting it is the critical factor. The fact is that the agent entered only at the defendant's invitation and removed only that which was freely offered. "What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection."[62]

The Tenth Circuit summarily dismissed the defendant's claim that his prosecution for illegal possession of an unregistered machine gun was violative of his second amendment right to bear

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[58] *Id.* at 386 (citing Hoffa v. United States, 385 U.S. 293, 301 (1966)).

[59] 385 U.S. 206 (1966).

[60] 564 F.2d at 386. In *Lewis*, an undercover narcotics agent was invited into the defendant's home for the purposes of buying marijuana. The Supreme Court found that the agent's seizure of the drug did not violate the fourth amendment, stating that the case "presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marijuana voluntarily transferred to him." 385 U.S. at 212. Other cases in which the Supreme Court has upheld warrantless searches when based on misplaced trust are: Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); and On Lee v. United States, 343 U.S. 747 (1952).

[61] 564 F.2d at 386.

[62] *Id.* at 386-87 (citing Katz v. United States, 389 U.S. 347, 351 (1967)). Ironically, the *Katz* Court had cited Lewis v. United States, 385 U.S. 206 (1966) for this proposition.

arms.[63] The court stated that even though the defendant was technically a member of the Kansas state militia, he had not demonstrated that the unregistered firearm kept at his home bore any connection to the militia.[64]

F. *Probable Cause.*

The Tenth Circuit considered an arrest and seizure without warrant in *United States v. McLemore,*[65] an appeal of convictions for possession of marijuana with intent to distribute in violation of federal law.[66] Following receipt by federal agents of a tip from the operator of the rental agency, the marijuana was seized from an airplane rented by the defendants. The operator had proved in the past to be a reliable informant. Further investigation by the agents prior to the arrest revealed several facts which strengthened the agents' suspicions that the defendants were using rented airplanes to pick up and deliver quantities of marijuana.[67]

At the outset the court noted that unless the search was incident to a lawful arrest, the large quantity of marijuana taken from the defendants, which formed the entire foundation for their conviction, would be inadmissible under the exclusionary rule of *Weeks v. United States.*[68] The inquiry thus focused upon whether the officers had probable cause to justify the warrantless arrest.[69]

The court used the customary totality of the circumstances

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[63] "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II.

[64] Citing United States v. Miller, 307 U.S. 174 (1939), the Tenth Circuit stated that the purpose of the second amendment was to preserve the effectiveness and assure the continuation of the state militia. 564 F.2d at 387. The defendant was a member of the Kansas militia by virtue of KANS. CONST. art. VIII, § 1, which provides that the state militia includes all "able-bodied male citizens between the ages of twenty-one and forty-five years . . . ." 564 F.2d at 387.

[65] 573 F.2d 1154 (10th Cir. 1978).

[66] 21 U.S.C. § 841(a)(1) (1976).

[67] 573 F.2d at 1155-57.

[68] 232 U.S. 383 (1914). The *Weeks* Court held that evidence secured by federal agents through an illegal search and seizure was inadmissible in a federal prosecution.

[69] In Beck v. Ohio, 379 U.S. 89, 91 (1964), the Supreme Court said that probable cause rests upon "whether at that moment the facts and circumstances within [the] knowledge [of the police officers] and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *See also,* Brinegar v. United States, 338 U.S. 160, 175 (1949), where the Supreme Court stated that probable cause relates to the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . ."

test in determining whether the arrest was in fact based on probable cause.[70] It found that although a possible explanation consistent with innocence existed for each separate fact or circumstance cited by the government as the agents' basis for probable cause, the "totality of the evidence" in the context reasonably appearing to the experienced officers supported the lower court's finding that probable cause existed for the warrantless arrest.[71] Hence, the seized material, which was within the immediate control of the defendants at the time of their arrest, was properly admitted into evidence.[72]

Another case in which the existence or absence of probable cause was crucial to the defendants' fourth amendment claims was *United States v. Rumpf.*[73] In *Rumpf,* the majority opinion reciting the following chain of events in support of its decision that federal Drug Enforcement Administration agents had probable cause to believe a felony was being committed which, in view of the exigent circumstances, justified their warrantless arrest and search of the defendants:[74] DEA agents learned that a load of marijuana being flown from Mexico would land on a state highway south of Grants, New Mexico; the defendants were observed driving into the area in vehicles having prior connection with marijuana transactions; the vehicles spent the night in the area and were seen the next morning emerging from the state road onto the interstate highway; the agents followed the vehicles eighty to ninety miles to a farm near Moriarty, New Mexico, observing that the camper trailer pulled by one of the vehicles was heavily loaded, inasmuch as it swayed from side to side whenever the camper changed lanes; when the agents arrived at the farm they entered it and found marijuana in plain sight in the barn and smelled it in the trailer in the barn.[75]

The majority disposed of the defendants' fourth amendment claims in one short paragraph:

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[70] 537 F.2d at 1157.

[71] *Id.*

[72] *Id.* at 1158. For an examination of the Burger Court's approach to the permissible scope of a search incident to a lawful arrest, as well as the timeliness thereof (the so-called contemporaneous requirement), see Lewis, Mannle & Allen, *The Burger Court and Searches Incident to a Lawful Arrest: The Current Perspective,* 7 CAP. L. REV. 1 (1977).

[73] 576 F.2d 818 (10th Cir. 1978).

[74] *Id.* at 823.

[75] *Id.*

> The record demonstrates that there was probable cause for the arrests and the search. The whole train of events, the prior connection of the vehicles with marijuana transactions, and the information that a plane would arrive were sufficient. The need to follow the defendants, and to take action immediately revealed exigent circumstances. . . . We have held that smell alone is sufficient probable cause for a search.[76]

Judge McKay penned a potent dissent, arguing that the warrantless arrests, searches, and seizures in this case were not based upon probable cause.[77] Judge McKay elucidated the "prior connection of the vehicles with marijuana transactions" cited by the majority as a crucial factor in finding the existence of probable cause: John Rumpf, known to be the driver of the Chevrolet van, once rented a storage locker which, sometime subsequent to his abandonment thereof, was discovered to contain an ounce of marijuana.[78] Judge McKay concluded: "The arrests and searches conducted here were based upon mere suspicion, not facts and circumstances that would warrant a man of prudence and caution in believing that the offense had been or was being committed."[79]

Judge McKay also criticized the majority's reliance on the plain view and plain smell doctrines, which he pointed out are applicable only when the observing officer has a right to be in a position to have that view or smell.[80] On the other hand, he continued, where officers trespass on private property in order to secure the view or smell, the courts have held that search unreasonable and in violation of the fourth amendment.[81] Judge McKay noted that the Tenth Circuit has previously sanctioned fourth amendment protection of the curtilage of private homes,[82] and that the marijuana discovered in this case was therefore inadmissible because "[t]he views and smells came only after the agents had trespassed the protected area of the curtilage. . . .

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[76] *Id.*

[77] *Id.* (McKay, J., dissenting).

[78] *Id.* at 828.

[79] *Id.* (citing Spinelli v. United States, 393 U.S. 410, 414 (1969); Jones v. United States, 357 U.S. 493, 497 (1958); and Nathanson v. United States, 290 U.S. 41, 46 (1933) for the proposition that although probable cause does not contemplate guilt beyond a reasonable doubt, it must rise above the level of mere suspicion).

[80] *Id.* at 829 (citing Harris v. United States, 390 U.S. 234, 236 (1968)).

[81] 576 F.2d at 829.

[82] Fullbright v. United States, 392 F.2d 432, 434-35 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968).

The evidence was not perceived by the eye or nose of an officer 'who [had] a right to be in the position to have that view [or smell],' but was uncovered by an unreasonable search."[83]

Judge McKay was particularly forceful in cautioning his colleagues on the court not to permit the fruits of an unlawful search to color their hindsight judgment of probable cause, noting that "[t]he tendency to evaluate the lawfulness of a search by the evidence it produces is especially strong in a case like this where 1500 pounds of marijuana are staring at the court."[84] Expressing concern that many judges have developed special rules on probable cause in drug cases, Judge McKay agreed with Judge Richey of the District of Columbia District Court that "[t]he battle to rid society of illicit drugs must be won within the framework of our Constitution lest we achieve a pyrrhic victory. The streets must be rid of the pusher, but not at the expense of justice, nor by the compromise of individual liberty."[85]

G. *Stop and Frisk under* Terry v. Ohio.

In *United States v. Mireles,*[86] the Tenth Circuit was called upon to decide the validity of a "stop and frisk" search as measured by the quidelines of *Terry v. Ohio.*[87] In *Terry,* the Supreme Court ruled that a police officer may temporarily detain a person and conduct a protective pat-down search for weapons on grounds of less than probable cause.[88] Under *Terry,* the validity of a stop and frisk is governed by a bifurcated "reasonable suspicion" test directed at determining (1) whether the facts confronting the officer justified the initial intrusion, and (2) whether the officer's actions were reasonably related in scope to the circumstances prompting the interference.[89] To justify his actions under either prong of this test, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences" reasonably warrant the officer's belief that the detained person was involved in criminal activity[90] or that the

[83] 576 F.2d at 829 (citing Harris v. United States, 390 U.S. 234, 236 (1968)).

[84] 576 F.2d at 829-30.

[85] *Id.* at 830 (citing United States v. Costa, 356 F. Supp. 606, 609 (D.D.C.), *aff'd,* 479 F.2d 921 (D.C. Cir. 1973)).

[86] 583 F.2d 1115 (10th Cir. 1978).

[87] 392 U.S. 1 (1968).

[88] 392 U.S. at 27, 29.

[89] *Id.* at 20-21.

[90] *Id.* at 21.

frisked person was armed and dangerous.[91]

Curiously enough, at the beginning of its opinion the Tenth Circuit affirmed the defendant's conviction for possession of an unregistered sawed-off shotgun in violation of federal law[92] on the basis that the officer had probable cause to seize the weapon.[93] However, the court later stated that the case comes within the rule of *Terry v. Ohio,* which was decided according to a less demanding standard than that of probable cause.

The facts of *Mireles* were as follows: A uniformed Albuquerque, New Mexico, police officer on routine patrol one evening stopped at the Rio Bravo Lounge, noted for its incidents of fights, stabbings, and shootings. While outside the lounge, the officer noticed that the defendant, who was wearing a long trench coat and a stocking cap, appeared to be overdressed for the weather. As the defendant entered the lounge, the officer observed a noticeable and suspicious bulge or lump behind the defendant's right shoulder, which the officer believed to be a bottle of liquor being secreted into the bar in violation of state law. In passing the defendant from the rear for the purpose of questioning him, the officer felt the bulge in Mireles' trench coat, and this act of touching convinced him Mireles was carrying a concealed weapon of some sort. The officer then opened Mireles' trench coat and saw a sawed-off shotgun, which he grabbed from a sling hanging from Mireles' neck.[94]

Mireles contended that the warrantless seizure of the shotgun from his person violated his fourth amendment rights. In particular, he argued that the officer should have engaged him in some preliminary conversation before he touched, from the outside, the lump in Mireles' trench coat. The Tenth Circuit rejected this argument, stating that a preliminary conversation was not required by *Terry:*

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[91] *Id.* at 29. *See* Terry *Revisited: Critical Update on Recent Stop-and-Frisk Developments,* 1977 WIS. L. REV. 877, 878-79 (1977) [hereinafter cited as Terry *Revisited*]. After studying the post-*Terry* cases, model codes, and police manuals, the commentator concludes that there are six primary variables which, alone or in combination, are increasingly relied upon in determining the validity of *Terry* stops: appearance, conduct, criminal record, environment, police purpose, and source of information. *Id.* at 885-92.

[92] 26 U.S.C. §§ 5861(d), 5871 (1976).

[93] 583 F.2d at 1116.

[94] *Id.*

> The Supreme Court in *Terry* stated that the reasonableness of any search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate. Reasonableness, then, cannot be determined through the use of a set formula. It depends upon the total picture.[95]

Inasmuch as the initial suspected criminal activity in this case was the mere possession of liquor unlawfully brought onto the premises, this decision may be subject to the same criticism as that directed by Mr. Justice Brennan at the majority's decision in *Adams v. Williams*.[96] Justice Brennan quoted with approval those portions of Judge Friendly's dissent to the Second Circuit's decision in *Adams*,[97] where Judge Friendly had asserted that *Terry* was intended to operate only in situations involving crimes of violence, and was especially inappropriate authority for cases involving mere possessory offenses.[98] Justice Brennan shared Judge Friendly's fear that the extension of *Terry*'s fourth amendment probable cause exception to alleged possessory crimes might result in "too much danger that instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."[99] It appears from the Tenth Circuit's recitation of the facts in *Mireles* that the officer's initial touching of Mireles was inadvertent. However, if the initial touching was in fact intentional, Justice Brennan's fears have come to pass, for in that

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[95] *Id.* at 1117.

[96] 407 U.S. 143 (1972). Sibron v. New York, 392 U.S. 40 (1968) had held inadmissible the fruits of a limited search undertaken pursuant to a stop made on suspicion of narcotics possession. The Supreme Court in *Adams* expanded the scope of stop and frisk to encompass criminal activity of a mere possessory character. Terry *Revisited*, 1977 WIS. L. REV. at 884.

[97] 407 U.S. 143 (1972)(Brennan, J., dissenting)(quoting Williams v. Adams, 436 F.2d 30, 38-39 (2d Cir. 1971)(Friendly, J., dissenting)).

[98] Williams v. Adams, 436 F.2d 30, 38-39 (Friendly, J., dissenting). Professor LaFave has also taken this position. *See* LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 MICH. L. REV. 39, 65-66 (1968). *See also*, United States v. Brignoni-Ponce, 442 U.S. 873, 888-89 (1975) (Douglas, J., dissenting).

[99] 407 U.S. at 151 (Brennan, J., dissenting)(quoting Williams v. Adams, 436 F.2d 30, 38 (1971)(Friendly, J., dissenting). Justice Marshall's *Adams* dissent echoed this fear by emphasizing that the officer's sole purpose in stopping the defendant was to make the frisk—that the search was in no way a protective measure undertaken to facilitate an investigative detention. 407 U.S. at 155-56 (Marshall, J., dissenting).

event the frisk was indeed the object of the stop, rather than the incident thereof.

H. *Limitation of Habeas Corpus for Fourth Amendment Claims.*

In *McDaniel v. State*[100] and *Johnson v. Meacham*,[101] the Tenth Circuit faced questions requiring the application of principles established by the Supreme Court in *Stone v. Powell*.[102] The *Stone* Court held that when a state has provided an "opportunity for full and fair litigation" of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial.[103] In both *McDaniel* and *Johnson*, the Tenth Circuit was asked to decide the question of what constitutes an "opportunity for full and fair litigation."

The habeas corpus claim raised in *McDaniel* arose out of the Oklahoma state trial court's receipt into evidence of a pocket knife seized during a warrantless search of the defendant's parked car following his arrest. The federal district court denied his petition for writ of habeas corpus, and on appeal the Tenth Circuit affirmed.[104]

The Tenth Circuit pointed to the facts that (1) McDaniel had objected to introduction of the knife at trial; (2) the court had admitted the evidence over his objection; and (3) he subsequently presented this issue on direct appeal to the Oklahoma Criminal Court of Appeals. In addition, this issue was considered in a full evidentiary hearing conducted by the state court on his application for post-conviction relief, and the denial of his application

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[100] 582 F.2d 1242 (10th Cir. 1978).

[101] 570 F.2d 918 (10th Cir. 1978).

[102] 428 U.S. 465 (1976).

[103] *Id.* at 494. This decision effectively removes state search and seizure cases from the ambit of federal habeas corpus. *See* Green, Stone v. Powell: *The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655 (1977). Professor Green traces the history of federal habeas corpus jurisdiction and asserts that *Stone* has fashioned a judicial exception to that jurisdiction for search and seizure claims which is not supported by either the language of the statute or its history. *Id.* at 658. He concludes that

> [t]he decision in *Stone* creates an exception to the broad language of the Habeas Corpus Act of the type one would expect to find in a proviso to a statute. The policy arguments amassed in the case are the type which would support limiting language in the Act. However, no such limitation appears in the statute. *Id.* at 677.

See also, id. at 676 n.100.

[104] 582 F.2d at 1243.

was affirmed on appeal to the Oklahoma Criminal Court of Appeals. On appeal to the Tenth Circuit of the federal district court's denial of habeas corpus, his primary contention was that the Oklahoma high court had skirted his fourth amendment claim by holding that there was substantial evidence apart from the pocket knife from which a jury could have found the defendant guilty, and that the introduction of the pocket knife was therefore harmless error.[105]

The Tenth Circuit rejected McDaniel's argument, noting that *Stone v. Powell* itself presented the question of whether the state court's ruling of harmless error with respect to the defendant's fourth amendment claim was reviewable by the federal district court pursuant to its habeas corpus jurisdiction.[106] Noting that under those circumstances the Supreme Court had found an opportunity for full and fair litigation of petitioner Powell's fourth amendment claim, the Tenth Circuit had no qualms about denying McDaniel's petition for habeas relief. It also pointed to a recent Sixth Circuit case where a harmless error ruling was held to preclude federal habeas relief under the *Stone* standard.[107]

A closer question was presented by *Johnson v. Meacham*,[108] where the Tenth Circuit had to decide whether the defendant Johnson had a full and fair opportunity to litigate his fourth amendment claim where the Wyoming Supreme Court refused to review that claim due to his failure to make a timely motion to suppress or a timely objection at trial.[109]

Had the Tenth Circuit faced this question prior to the Supreme Court's recent decision in *Wainwright v. Sykes*,[110] it would have been forced to choose between two conflicting circuit court interpretations of the "full and fair opportunity for litigation" standard mandated by *Stone v. Powell*. The Second Circuit in *Gates v. Henderson*[111] had concluded that a federal habeas court

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[105] *Id.* at 1243-44.

[106] In *Stone*, the California state court "found it unnecessary to pass upon the legality of the arrest and search because it concluded that the error, if any, in admitting the testimony . . . was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967)." 428 U.S. at 470.

[107] Moore v. Cowan, 560 F.2d 1298, 1300 (6th Cir. 1977).

[108] 570 F.2d 918 (10th Cir. 1978).

[109] *Id.* at 919.

[110] 433 U.S. 72 (1977).

[111] 568 F.2d 830 (2d Cir. 1977).

should apply the Supreme Court's *Townsend v. Sain*[112] test; thus under the Second Circuit's view unless a petitioner intentionally waives an opportunity to raise his fourth amendment right, a state court must decide his constitutional claim on the merits.[113] The Fifth Circuit in *O'Berry v. Wainwright*,[114] on the other hand, held that an opportunity for full and fair litigation is provided even though a state court never decides a petitioner's constitutional question because the petitioner has failed to comply with a state procedural requirement.[115]

The Tenth Circuit, adopting the Fifth Circuit's *O'Berry v. Wainwright* reasoning without so much as mentioning the Second Circuit's contrary ruling in *Gates v. Henderson*, stated:

> [W]e hold that where Johnson presented his Fourth Amendment claim to the Wyoming Supreme Court, where the Wyoming Supreme Court applied an adequate procedural ground in refusing to reach the merits of that claim, and where Johnson's claim of ineffective assistance of counsel is not related to this issue, habeas review of the Fourth Amendment claim is barred.[116]

The Tenth Circuit probably felt confident in ignoring the Second Circuit's *Gates v. Henderson* theory because of the Supreme Court's recent ruling in *Wainwright v. Sykes*,[117] which held that the defendant's failure to contemporaneously object to the admission of a confession at trial constitutes an independent state procedural ground which precludes habeas review.[118] The *Sykes* court expressly rejected the sweeping language of *Fay v. Noia*,[119] which had been the foundation of the Second Circuit's

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[112] 372 U.S. 293 (1963). *Townsend* provides a test by which a federal habeas court determines whether a state court has granted a petitioner a full and fair evidentiary hearing. The *Townsend* test incorporates the "deliberate bypass" or "knowing waiver" rule of Fay v. Noia, 372 U.S. 391 (1963). For a good discussion of *Townsend*, *Fay*, and the early lower court decisions applying Stone v. Powell, see Note, *Circuits Split over Application of* Stone v. Powell's *"Opportunity for Full and Fair Litigation,"* 30 VAND. L. REV. 881 (1977).

[113] *See* Note, *Circuits Split over Application of* Stone v. Powell's *"Opportunity for Full and Fair Litigation," supra* note 112 at 881.

[114] 546 F.2d 1204 (5th Cir. 1977).

[115] *See* Note, *Circuits Split over Application of* Stone v. Powell's *"Opportunity for Full and Fair Litigation," supra* note 112 at 881.

[116] 570 F.2d at 920.

[117] 433 U.S. 72 (1977).

[118] *Id.* at 86-87.

[119] 372 U.S. 391 (1963).

decision in *Gates v. Henderson.*[120] *Fay* had rendered a state's timely-objection rule ineffective to bar review of underlying federal claims in federal habeas proceedings unless the defendant had deliberately bypassed the right to so object.[121] Mr. Justice Rehnquist, writing for the *Sykes* court, believed the "deliberate bypass" rule accorded too little respect to the state timely objection rule, which he praised as contributing to the finality of criminal litigation. In contrast, he stated that the *Fay* rule may encourage defense lawyers to take their chances on a verdict of not guilty in a state trial court, intending to raise their constitutional claims in a federal habeas court if their initial gamble fails.[122] The *Sykes* majority instead adopted a rule which would bar federal habeas review in all cases where the defendant fails to timely object under a state contemporaneous objection rule, unless the defendant shows cause for the noncompliance and also shows actual prejudice.[123]

Although the Tenth Circuit cited *Wainwright v. Sykes* in support of its decision to deny habeas relief in *Johnson,*[124] it curiously stopped short of applying the "cause" and "prejudice" tests announced by *Sykes.* However, the court indirectly addressed those issues in at least one respect by noting that Johnson's claim of ineffective assistance of counsel was not related to his fourth amendment claim.[125]

II. FIFTH AMENDMENT

A. *Double Jeopardy*

The Tenth Circuit Court of Appeals decided four cases in which appellants' double jeopardy claims predominated. Although the court ultimately found all four claims to be without

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[120] 568 F.2d 830 (2d Cir. 1977). *See* notes 111-13 and accompanying text *supra.*

[121] 433 U.S. at 87.

[122] *Id.* at 88-89. Justice Rehnquist noted that a state timely objection rule also achieves other laudable objectives: it enables the record to be made with respect to a constitutional claim when witnesses' recollections are freshest, and it enables the trial judge who observed the demeanor of witnesses to make the factual determinations necessary for properly deciding the federal question. *Id.* at 88.

[123] *Id.* at 90-91. In enunciating this rule, the Court followed its earlier decision in Francis v. Henderson, 425 U.S. 536 (1976), where the defendant had failed to make a timely objection to the makeup of a grand jury.

[124] 570 F.2d at 920.

[125] *Id. See* text accompanying note 116 *supra.*

merit, one of the double jeopardy issues provoked an interesting and unusual split of opinion within the court.

In *United States v. Rumpf*[126] the Tenth Circuit rendered its decision on a case of first impression: the appealability of the denial of a motion to dismiss an indictment on double jeopardy grounds. The appellants' first trial on a charge of conspiracy to possess marijuana with intent to distribute ended in a declaration of mistrial. When they moved for dismissal in the second trial on double jeopardy grounds, their motion was denied. The appellants immediately lodged notices of appeal from this denial. The second trial commenced later the same day, resulting in appellants' convictions. On appeal, appellants urged that their notices of appeal from the denial of the motion divested the trial court of jurisdiction to proceed with the second trial.

In resolving the issue of the appealability of the motion's denial, the Tenth Circuit looked to *Abney v. United States*,[127] a Supreme Court case decided during the pendency of the appeal. The Supreme Court in *Abney* held that the district court's pretrial order denying petitioners' motion to dismiss the indictment on double jeopardy grounds was a "final decision,"[128] subject to immediate appeal. In support of this holding, the Supreme Court stressed the importance of protecting the defendant from exposure to the additional emotional strain and expense occasioned by a second trial before determination of the double jeopardy issue.[129]

The applicability of the *Abney* decision to the facts in *Rumpf* caused a split opinion in the Tenth Circuit case. The majority held the pretrial protection made possible under *Abney* inapplicable, since Rumpf's second trial was over before *Abney* was decided.[130] The majority stressed the fact that the appellants made no special effort to "perfect" the appeal either prior to or during the second trial.[131] Since *Abney* was held inapplicable, Rumpf's second trial was not barred by the double jeopardy prohibition, and the convictions were upheld.

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[126] 576 F.2d 818 (10th Cir. 1978).
[127] 431 U.S. 651 (1977).
[128] *Id.* at 662.
[129] *Id.* at 661.
[130] 576 F.2d at 821.
[131] *Id.* at 822 (McKay, J., dissenting).

In his dissenting opinion, Judge McKay addressed the specific issue raised by the appellants: did the appellants' notice of appeal divest the trial court of jurisdiction to proceed with the second trial? Generally, a trial court is divested of jurisdiction when there is a valid appeal from an appealable order; thus, Judge McKay's opinion analyzed what constitutes a valid appeal and an appealable order. He concluded: (1) that under the *Abney* holding orders rejecting double jeopardy claims are final decisions, *i.e.*, appealable orders;[132] and, (2) that since changes in the law are given effect when the case is on direct review,[133] *Abney* should apply to the *Rumpf* case. In contrast to the majority opinion, Judge McKay determined that there was no need to "perfect" the appeal; the timely filing of the notice of appeal was sufficient regardless of the fact that the trial court was proceeding as though the order were nonappealable.[134] In finding that the valid appeal taken from an appealable order terminated the trial court's jurisdiction, Judge McKay concluded that the second trial was a nullity and consequently that the judgments entered against the appellants should be vacated.[135]

The other three double jeopardy cases decided by the Tenth Circuit involved much more traditional issues and consequently received more summary treatment from the court.

In *United States v. Nelson*,[136] the defendant was convicted of possession of cocaine with intent to distribute after a mistrial had occasioned the need for a second trial. The defendant alleged that the second trial was both without manifest necessity and the result of prosecutorial overreaching.

In rejecting the defendant's first claim, the Tenth Circuit stressed that the mistrial was declared upon the express motion of defense counsel.[137] Furthermore, the court deemed the trial judge's evaluation of the effect of improper comment on the impartiality of the jury to be worthy of the "highest degree of respect."[138] In response to defendant's claim of prosecutorial over-

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[132] *Id.* at 825.
[133] *Id.*
[134] *Id.* at 826.
[135] *Id.*
[136] 582 F.2d 1246 (10th Cir. 1978).
[137] *Id.* at 1248.
[138] *Id.* at 1249. The court relied on Arizona v. Washington, 434 U.S. 497 (1978).

reaching, the court held that the double jeopardy clause is intended to protect defendants from prosecutorial actions intentionally designed to provoke a request for a mistrial.[139] In Nelson's case, there was no evidence indicating the presence of any such prosecutorial scheme, especially since the prosecution's case was not materially strengthened by the one-day delay resulting from the declaration of mistrial.[140] Therefore, the court concluded that defendant's double jeopardy claim was without merit.

In *United States v. Wagstaff,*[141] the Tenth Circuit considered the applicability of the double jeopardy bar to a prosecution following the dismissal of an indictment alleged to be insufficient for failure to cite the statute violated by the defendant. The defendant claimed that the dismissal was tantamount to a resolution of the cause in his favor.

Relying on *Lee v. United States,*[142] the court of appeals distinguished those rulings based on procedural or drafting inadequacies from those based on the merits, and ruled that the former are not tantamount to a merits resolution in the defendant's favor.[143] Thus, the Tenth Circuit concluded that a dismissal on formal or procedural grounds does not constitute sufficient jeopardy to bar reprosecution.[144]

The indictment, to be sufficient, must state those facts which describe the essential elements of the offense so as to sufficiently apprise the accused of the nature of the offense.[145] When these basic requirements are met, as they were in *Wagstaff,* the omission of the citation of the statute violated is not so significant as to justify dismissal.[146] Therefore, the court ordered the indictment reinstated.[147]

In *United States v. Martinez,*[148] the Tenth Circuit addressed the applicability of the double jeopardy bar to successive indictments in two different jurisdictions. In *Martinez,* the defendants

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[139] 582 F.2d at 1249. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976).
[140] 582 F.2d at 1249.
[141] 572 F.2d 270 (10th Cir. 1978).
[142] 432 U.S. 23 (1977).
[143] 572 F.2d at 272.
[144] *Id.*
[145] *Id.* at 273.
[146] *See* FED. R. CRIM. P. 7 (c)(3).
[147] 572 F.2d at 273.
[148] 562 F.2d 633 (10th Cir. 1977).

were first indicted in Texas for conspiracy to possess marijuana with intent to distribute, but were granted a directed verdict of acquittal after suppression of certain evidence. Subsequently, the defendants were indicted in Oklahoma on a very similar conspiracy charge which encompassed some of the same agreements and transactions which had formed the basis of the Texas indictment. The defendants argued that (1) the Texas indictment was merely a "slice" of the more comprehensive Oklahoma indictment; (2) the various agreements and transactions were part of one continuing conspiracy; and, (3) therefore the double jeopardy clause mandated dismissal of the Oklahoma indictment.

The Tenth Circuit discussed two tests in passing on the merits of defendants' double jeopardy claim. In determining whether or not the offenses charged were so identical in law and fact as to allow attachment of a double jeopardy claim, the court of appeals relied on the test enunciated in *Robbins v. United States*:[149] whether the facts alleged in one offense, if offered in support of the other offense, would sustain a conviction.[150] The court ruled that there was an insufficient connection between the agreements and dealings in the two indictments to satisfy the "identical" requirement.[151] In treating the specific issue of the degree of sameness of the conspiracies, the court recalled the test used in *Bartlett v. United States*:[152] whether evidence supporting the criminal agreement in one indictment would likewise establish the criminal agreement in the other indictment.[153] Under this test the court held that the defendants had not established that the agreements embraced by each indictment were equivalent to one overall conspiracy.[154] The court buttressed its denial of the double jeopardy claim by emphasizing that sameness of parties and similarity of transactions do not combine to prove that the two conspiracies are the same.[155]

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[149] 476 F.2d 26 (10th Cir. 1973).
[150] *Id.* at 32.
[151] 562 F.2d at 637.
[152] 166 F.2d 928 (10th Cir. 1948).
[153] *Id.* at 931.
[154] 562 F.2d at 638.
[155] *Id.*

B. Due Process

In *United States v. Revada,*[156] the government appealed the trial court's dismissal of an indictment for illegal possession of a shotgun on the basis of a twenty-one month delay between the discovery of the weapon and the issuance of the indictment. The Tenth Circuit enunciated principles governing the legal consequences of pre-indictment delay with reference to two recent United States Supreme Court cases.

In *United States v. Marion*[157] the Supreme Court suggested a two-pronged test for determining the propriety of dismissal of an indictment: (1) the delay must cause substantial prejudice to the defendant's right to a fair trial; and (2) the delay must have been merely a device used to gain tactical advantage over the accused.[158] The Tenth Circuit had previously construed *Marion* as requiring the satisfaction of both tests in order to establish a definitive due process violation.[159] The Supreme Court confirmed this interpretation in *United States v. Lovasco,*[160] a recent decision refining the principles announced in *Marion.*

Revada alleged that the lengthy delay dimmed recall of his activities during the period of time surrounding his arrest, and that this impairment of recall impeded his ability to defend on the charges. The government responded that the delay was unavoidable in light of the need to conduct further investigations. In addressing these contentions, the Tenth Circuit relied on the *Marion* and *Lovasco* decisions. *Marion* indicated that the possibility of loss of accurate recall does not so conclusively demonstrate denial of a fair trial as to justify dismissal of the indictment.[161] *Lavasco* develops the other prong of the *Marion* test by excluding preindictment investigative delay from the realm of maneuvers undertaken chiefly to gain an advantage over the accused.[162] In view of the trial court's failure to consider and apply the standards set out in *Marion* and reaffirmed in *Lovasco,* the appellate court remanded the case for determination of the

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[156] 574 F.2d 1047 (10th Cir. 1978).
[157] 404 U.S. 307 (1971).
[158] *Id.* at 325.
[159] 574 F.2d at 1048. *See* United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972).
[160] 431 U.S. 783 (1977).
[161] 404 U.S. at 325-26.
[162] 431 U.S. at 795-96.

actual prejudice and justifiable delay issues.

In *Von Atkinson v. Smith*,[163] the defendant was charged with violating a sodomy statute which was repealed before the defendant had pleaded guilty or been sentenced. The new statute recategorized the original offense as a misdemeanor and simultaneously created the new crime of forcible sodomy. The practical effect of the change on the defendant was simply to reduce his sentence for a crime with which he had not been technically charged and to which he had not pleaded guilty. The defendant alleged that such sentencing for an uncharged crime constituted a strict violation of his due process rights. The district court discharged defendant from custody pursuant to defendant's petition for writ of habeas corpus.

The Tenth Circuit not only affirmed defendant's discharge from custody, it also stressed that the new statutory provision for a lesser sentence was entirely irrelevant to the due process deprivation which necessarily arises when one is convicted and sentenced for an uncharged crime.[164] The court concluded: "[D]ue process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified."[165]

C. *Privilege Against Self Incrimination*

In *United States v. DiGiacomo*,[166] the Tenth Circuit discussed the necessity for and adequacy of *Miranda* warnings delivered during an interrogation. Four secret service agents detained the defendant in the parking lot of a restaurant. They separated the defendant from his companion and advised him that they wished to talk to him about his alleged passing of counterfeit money. Prior to any actual questioning, the agents advised the defendant that he had a right to remain silent, that whatever he said could be used against him, and that he had a right to have an attorney with him during questioning. There was disputed testimony regarding the advisement of his right to have an attorney appointed should he be unable to afford one. During the

[163] 575 F.2d 819 (10th Cir. 1978).

[164] *Id.* at 821.

[165] *Id. See* Henderson v. Morgan, 426 U.S. 637 (1976); Smith v. O'Grady, 312 U.S. 329, 334 (1941); DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

[166] 579 F.2d 1211 (10th Cir. 1978).

course of the questioning the agents referred to the possibility of immediate arrest and the defendant made certain inculpatory statements. The following morning the defendant went to the secret service office for further questioning, but while there he refused to sign a waiver form. In urging reversal of the order suppressing the defendant's statement, the government argued that the *Miranda* warnings were unnecessary, or, alternatively, sufficient.

In *Oregon v. Mathiason,*[167] the Supreme Court interpreted the requirement that *Miranda* warnings be given whenever the defendant is "deprived of his freedom of action in any significant way."[168] Distinguishing the *Mathiason* situation[169] from the *DiGiacomo* facts, the Tenth Circuit held that the agents' separation of the defendant from his companion and their implied threats of arrest and general suspicions were sufficiently equivalent to an arrest to require the giving of *Miranda* warnings.[170] The court further held that the omission of the advisement of the right to appointed counsel rendered the warnings fatally deficient.[171] Since the warnings were deficient, the defendant's inculpatory statements made in the parking lot were not voluntary.[172] With regard to the statements made in the secret service office, the court ruled that the defendant's refusal to sign a waiver and his reluctance to respond to subsequent questions prohibited the finding of a valid waiver.[173] Therefore, the trial court's suppression of the defendant's statements was proper.

Dissenting Judge Barrett took issue with the majority's interpretation of the applicability of *Mathiason.* He reasoned that a coercive environment does not in itself mandate *Miranda* warnings, and that the agents' "requests" for cooperation in the parking lot did not deprive the defendant of his freedom in any significant way.[174] He also indicated that the trial court erred in ruling that there was any uncertainty surrounding the alleged omission

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[167] 429 U.S. 492 (1977).

[168] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[169] Mathiason came voluntarily to the police station and his freedom to depart was not restricted. *See* Oregon v. Mathiason, 429 U.S. at 495.

[170] 579 F.2d at 1214.

[171] *Id.*

[172] *Id.* at 1215.

[173] *Id.*

[174] *Id.* at 1217 (Barrett, J., dissenting).

from the warnings of the right to appointed counsel.[175] He concluded his dissent with a lengthy advocation of the Omnibus Crime Control and Safe Streets Act of 1968, especially section 3501.[176]

The issue of voluntariness arose again in *United States v. Bambulas.*[177] Defendant claimed that prosecutorial coercion allegedly occurring during a plea bargain stripped his guilty plea of the requisite voluntariness.[178]

In ruling that defendant's contention was without merit, the Tenth Circuit emphasized that the defendant's prior denial of any coercion with respect to his guilty plea should be regarded as conclusive absent a contrary showing of coercion.[179] In so holding, the court also tendered its support for a properly conducted plea bargaining arrangement.[180]

In *United States v. Blakney,*[181] defendant was convicted of transporting a counterfeit check in interstate commerce. Handwriting exemplars were ordered, not to support this charge, but to support certain of defendant's prior, uncharged offenses. The defendant refused to comply with the order, and his refusal became the subject of subsequent commentary. The defendant attempted to justify his refusal by arguing that under these circumstances the order violated his privilege against self-incrimination.

In rejecting defendant's argument, the Tenth Circuit first enunciated the general rule that handwriting exemplars are identifying rather than testimonial evidence, thus lying outside the scope of the privilege.[182] The court then refused to recognize any reason for not applying the general rule where, as here, the exem-

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[175] *Id.*

[176] This section favors an evaluation of the voluntariness of the incriminating statements rather than a mechanical application of the *Miranda* formula. *See* 18 U.S.C. § 3501 (1976).

[177] 571 F.2d 525 (10th Cir. 1978).

[178] The defendant also alleged that the involuntariness of his plea was further substantiated by the denial of his right to a speedy trial. In response, the court stated that pre-indictment delay does not constitute a due process violation absent actual prejudice and an intention to gain a tactical advantage over the accused. 571 F.2d at 527. *See* text accompanying notes 156-62 *supra.*

[179] 571 F.2d at 526.

[180] *Id.* The court noted that the Supreme Court has recognized the potential benefits of the plea bargaining system in Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[181] 581 F.2d 1389 (10th Cir. 1978).

[182] *Id.* at 1390. This rule was enunciated in Gilbert v. California, 388 U.S. 263, 266-67 (1967).

plars were ordered to substantiate uncharged crimes.[183] The court further held that since the exemplars were unprotected, no prejudice could attach to the comments illuminating the defendant's refusal to comply with the order.[184] The court thus distinguished the commentary in this case from that made upon a defendant's exercise of clearly established privileges.[185]

In *United States v. Nolan,*[186] the defendant had been convicted in 1966 of conspiracy to use and actual use of interstate facilities to carry on an unlawful gambling business, and had first appealed his conviction in 1970. During the trial, several persons referred to defendant's possession of a Federal Wagering Tax Stamp. Counsel for defendant made no objection to these references. On his second appeal the defendant requested an order vacating his sentence on the grounds that the trial references violated his privilege against self-incrimination, and that the law of waiver had changed during the years intervening between his first and second appeal. The defendant had registered his initial appellate claim in the light of two United States Supreme Court cases[187] holding that the assertion of the privilege against self-incrimination would provide a complete defense to the failure to comply with statutory requirements to file for or to pay wagering taxes.[188] On his second appeal, defendant urged that the retroactive application of these holdings should inure to his benefit.

The Tenth Circuit disagreed. First, the court confirmed its previous observation that defendant's counsel, while fully aware of the pending *Marchetti* and *Grosso* decisions, had failed to object to the tax stamp references. Such failure amounted to a knowledgeable waiver of the privilege.[189] Secondly, the court refused to endorse retroactive application of the *Marchetti* and *Grosso* holdings because appellant's conduct was not immune

[183] 581 F.2d at 1390. In support of this position the court referred to United States v. Mara, 410 U.S. 19 (1973), in which the Supreme Court allowed the grand jury to see exemplars linking the prospective defendant with the crime under investigation.

[184] 581 F.2d at 1390.

[185] *Id.* at 1391.

[186] 571 F.2d 528 (10th Cir. 1978).

[187] Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

[188] Grosso v. United States, 390 U.S. at 64-72 (1968); Marchetti v. United States, 390 U.S. at 60-61 (1968).

[189] 571 F.2d at 531.

from punishment under those holdings.[190] Therefore, the trial references forming the basis of the defendant's second appellate claim did not constitute a violation of his privilege against self-incrimination.

III. SIXTH AMENDMENT

A. *Right to Counsel*

Six Tenth Circuit cases in the past term involved issues concerning a defendant's sixth amendment right to counsel. The decisions can be grouped into four distinct aspects of that right: (1) the right to counsel generally; (2) the right to appointed counsel; (3) the right to counsel of defendant's own choosing; and (4) the right to effective assistance of counsel.

1. Right to counsel generally

In *Robinson v. Benson,*[191] defendant appealed from a district court order denying habeas corpus relief. While awaiting parole on conviction of interstate transportation of stolen securities, defendant was arrested on charges of attempting to pass a bad check. At a hearing before the jail's disciplinary committee, and again at his parole rescission hearing,[192] defendant was informed that he had no right to counsel, but could be represented by a staff member of the institution. On appeal, defendant raised the question of what due process rights, including the right to counsel, must be afforded in parole rescission hearings.[193]

The Tenth Circuit rejected defendant's contention that he had an absolute right to counsel in parole rescission hearings. The court noted that in parole *revocation* hearings appointment of counsel is discretionary,[194] and then ruled that in the *rescission*

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[190] *Id.* at 532.

[191] 570 F.2d 920 (10th Cir. 1978).

[192] On August 1, 1976, defendant Robinson was informed by the disciplinary committee that probable cause had been found for rescission of his parole. The final rescission hearing was held on December 14, 1976, even though the bad check charge had been dismissed on October 13. Robinson's parole grant was rescinded at the December 14 hearing. *Id.* at 922.

[193] *Id.* The Fifth Circuit had considered what due process rights must be afforded a defendant in parole rescission hearings in two cases, but neither case specifically addressed the right to counsel. MacIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975); Sexton v. Wise, 494 F.2d 1176 (5th Cir. 1974).

[194] 18 U.S.C. § 3006A(g) (1976) provides that in parole revocation proceedings, a defendant may be furnished representation of counsel where the interests of justice so

context there was likewise no right to counsel, at least where defendant had agreed to be represented by a staff member.[195]

The court did not decide whether the constitution requires *any* representation at all. Here, Robinson was represented by a staff member—nothing more was required.

2. Right to appointed counsel

The case of *United States v. DiGiacomo*[196] is one of the relatively rare Tenth Circuit cases in which the government appealed an adverse ruling of the trial court.[197] Defendant was indicted for possessing and passing counterfeit money with intent to defraud.[198] The trial court granted defendant's motion to suppress a counterfeit bill seized from defendant and statements made by defendant to government agents.[199]

The testimony at the suppression hearing conflicted as to what *Miranda*[200] rights had been given to defendant by any of the four government agents who stopped defendant in a restaurant parking lot. The trial court ruled that the government had failed to establish that defendant was properly advised of his right to *appointed* counsel and of his right to terminate questioning at any time.[201]

The Tenth Circuit agreed, ruling that "the right to appointed counsel is a significant right which cannot be excluded from the advisement."[202] The court further ruled that, although proper warnings were given the next morning, no waiver would be pre-

require and defendant is financially unable to afford such representation. *See also* Gagnon v. Scarpelli, 411 U.S. 778, 783-91 (1973).

[195] 570 F.2d at 923.

[196] 579 F.2d 1211 (10th Cir. 1978).

[197] 18 U.S.C. § 3731 (1976) allows a government appeal to the court of appeals from any decision of the district court suppressing or excluding evidence, if the United States attorney certifies that the appeal is not taken for purpose of delay and that the evidence is material.

[198] 18 U.S.C. § 472 (1976).

[199] For a discussion of the fifth amendment aspects of *DiGiacomo, see* text accompanying notes 166-76 *supra*.

[200] Miranda v. Arizona, 384 U.S. 436, 472-73 (1966), specifically required that an indigent defendant be advised that if he cannot afford an attorney, one will be appointed for him: "Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has funds to obtain one." *Id.* at 473.

[201] 579 F.2d at 1214.

[202] *Id.*

sumed. Once defendant refused to sign the waiver form, proof of waiver of his rights could be shown "only by the strongest evidence."[203] Therefore, exclusion of the evidence was proper.

Dissenting Judge Barrett, relying on the Supreme Court's decision in *Oregon v. Mathiason*,[204] concluded that the parking lot questioning was not custodial and did not require *Miranda* warnings at all.[205] Even assuming the necessity of such warnings, Judge Barrett stated, all *Miranda* warnings had been given with the "possible exception" of defendant's right to appointed counsel.[206]

The dissent seems to imply that the right to appointed counsel may be excluded from the advisement without affecting its validity. The Supreme Court's ruling in *Miranda*, however, that the advisement must include the "express explanation" of an indigent's right to appointed counsel,[207] is directly contrary to the dissenting position.

3. Right to counsel of defendant's own choosing

In two cases during the last term, defendants questioned the trial court's denial of their right to counsel of their own choosing. In one case, the preferred attorney was sick, and in the other case, the attorney had been disbarred by another state.

In *United States v. McCoy*,[208] defendant was charged along with seven other defendants with conspiring to import marijuana into the United States from Mexico.[209] Defendant entered a nolo contendere plea and was sentenced. On appeal, defendant alleged that the nolo plea was taken in violation of her right to be represented by counsel of her own choosing.

Defendant was represented by two attorneys, one from Chi-

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[203] *Id.* at 1215.

[204] 429 U.S. 492 (1977). In *Mathiason*, the Supreme Court held that defendant's voluntary appearance at the police station obviated the necessity of *Miranda* warnings, and that the half-hour interrogation was proper without warnings because defendant's freedom to depart was not restricted in any way. *Id.* at 495.

[205] Judge Barrett noted that the government agents did not *require* defendant to remain in the parking lot, but only *requested* that he remain until other agents could ask some questions. 579 F.2d at 1217 (Barrett, J., dissenting).

[206] *Id.*

[207] Miranda v. Arizona, 384 U.S. 436, 473 (1966).

[208] 573 F.2d 14 (10th Cir.), *cert. denied*, 98 S. Ct. 3073 (1978).

[209] 21 U.S.C. § 952(a) (1976); 21 U.S.C. § 960(a)(1) (1976).

cago and the other a local attorney from Albuquerque. On the night before defendant was to enter her plea, her Chicago counsel became too ill to attend court, and the Albuquerque attorney expressed a reluctance to proceed.[210] The trial court indicated its desire to proceed, and defendant and her attorney agreed to do so.

The Tenth Circuit, after carefully reviewing the trial court's questioning of defendant as to the voluntariness of her nolo plea, ruled that defendant had not been denied counsel of her own choosing. The record showed that, at the time of sentencing several weeks after defendant entered her plea, neither defendant nor her counsel, an associate of her Chicago counsel, "gave any indication that they did not want to persist in the nolo contendere plea."[211] Nor was any dissatisfaction expressed after sentence was imposed. Thus, despite the fact that the plea was entered without her Chicago attorney, defendant persisted in that plea, and had adequate representation at all pertinent times.[212]

Defendant in *United States v. Grismore*[213] alleged denial of his sixth amendment right to counsel because the trial court had denied his request that Jerome Daly, a disbarred Minnesota lawyer,[214] be permitted to represent him. When the trial court ap-

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[210] 573 F.2d at 16. The Albuquerque attorney's reluctance was based on the possibility of a conflict of interest. One of McCoy's codefendants was also his client, and that codefendant might have been called as a witness against McCoy. *Id.* The court rejected any claim of a possible conflict because the record indicated that McCoy did not intend to proceed to trial. *Id.* at 17.

[211] *Id.*

[212] *Id.* The court looked to the "totality of [the] circumstances that prevailed during all the pre-trial and trial proceedings." *Id.* (quoting McHenry v. United States, 420 F.2d 927 (10th Cir. 1970)).

[213] 564 F.2d 929 (10th Cir. 1977), *cert. denied*, 98 S. Ct. 1586 (1978). The court noted that the real thrust of defendant's appeal was not a sixth amendment claim, but rather "a tirade against the Federal Reserve System, the Internal Revenue Service, the federal judiciary, and lawyers." 564 F.2d at 930. The court also noted that defendant's attacks were based on religious and political views, and ruled that the claims merited no discussion. *Id.*

[214] *See* In Re Daly, 291 Minn. 488, 189 N.W.2d 176 (1971). Daly was disbarred for intentionally disregarding a court order prohibiting him and a justice of the peace from further proceedings in a declaratory judgment action which the Minnesota Supreme Court had ruled was beyond the jurisdiction of the justice of the peace.

Grismore apparently sought Daly's assistance in representing him because Daly sought to attack the constitutionality of the monetary system of the United States—the same attack Grismore raised before the Tenth Circuit. *See* note 213 *supra*. The Minnesota court rejected Daly's position, and entered judgment of disbarment.

pointed local Utah counsel instead of the disbarred attorney, defendant chose to represent himself against charges of uttering and dealing in counterfeit obligations of the United States.[215]

The Tenth Circuit rejected defendant's sixth amendment claim, noting that "the appointed lawyer was available throughout the trial to assist the defendant but his services were neither requested nor used."[216] Citing its earlier decision involving the same defendant and the same issue,[217] the court ruled that defendant was not deprived of any sixth amendment right to counsel.

4. Right to effective assistance of counsel

The Tenth Circuit ruled in two cases decided during the last year that one who claims a deprivation of adequate assistance of counsel faces a heavy burden of proof. In both of last term's cases, the court held that defendant had failed to meet that burden.

In *United States v. Nelson,*[218] the defendant appealed from his conviction for possession wih intent to distribute heroin.[219] Defendant's first trial ended in a mistrial when the prosecution elicited a prejudicial statement from the agent who had arrested defendant to the effect that defendant was a "major trafficker" of drugs.[220] The second trial commenced the following day, and resulted in defendant's conviction. On appeal, defendant urged that his attorney's failure to file a motion to dismiss the indictment on double jeopardy grounds[221] was the "most glaring exam-

[215] 18 U.S.C. §§ 472, 473 (1976).

[216] 564 F.2d at 931.

[217] United States v. Grismore, 546 F.2d 845 (10th Cir. 1976). In this earlier opinion, the court ruled that a disbarred lawyer was the equivalent of a lay person and that the sixth amendment right to counsel did not include a lay person. The court then concluded: "Even in those instances where it has been held to be permissible for a lay person to represent a criminal defendant, it is within the discretion of the trial judge to disallow such representation." *Id.* at 847.

[218] 582 F.2d 1246 (10th Cir. 1978).

[219] 18 U.S.C. § 2 (1976); 21 U.S.C. § 841(a)(1) (1976).

[220] 582 F.2d at 1248. Defense counsel cross-examined federal officers extensively about the involvement of Carl Arico, an intermediary between defendant and federal agents who had not been indicted. The prosecutor responded by asking why charges had not been brought against Arico, to which the agents responded that their main goal was to prosecute the "major traffickers." *Id.*

[221] On appeal, defendant alleged two arguments in support of his claim that the second trial violated the double jeopardy clause: 1) the mistrial was declared by the court *sua sponte,* and without manifest necessity; and 2) the mistrial resulted from judicial or prosecutorial overreaching. *Id.* The Tenth Circuit rejected both arguments. Defendant, not the court, had moved for mistrial, and, although the prosecutor had erred in eliciting

ple" of ineffective assistance.

Having ruled that the prosecutor's error in eliciting the statement was not made in bad faith,[222] the Tenth Circuit ruled that the failure to file such a motion did not deprive defendant of his right to effective representation. Nor did any other retrospective criticism of counsel merit reversal:

> One who claims such a deprivation faces a heavy burden. Adequacy of legal representation is measured neither by hindsight nor success. . . . The standard of adequacy of counsel in this circuit is that a defendant will be considered to have had adequate counsel unless counsel's representation at trial was of such a substandard level as to render the trial a mockery of justice and a sham.[223]

The court concluded that defendant might criticize some of the tactics employed at trial, but such criticism was not sufficient to meet his heavy burden of proof.

In *United States v. Seely*,[224] the Tenth Circuit held that trial counsel's death during a recess in the midst of trial did not support defendant's claim that he was denied effective assistance of counsel. The court noted that defendant's attorney died of a heart attack on Thursday afternoon, and that the trial had been continued until the following Monday when an associate of the deceased counsel took over.[225] The record reflected both that no further continuance was requested and that the substitute counsel was familiar with much of what had already transpired. The court concluded that defendant's mere allegation that the conviction may have resulted from substituted counsel's inexperience was insufficient to meet his burden of showing ineffective assistance.[226]

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the statement, defendant failed to demonstrate that the prosecutor acted in bad faith. *Id.* at 1248-49.

[222] *See* note 221 *supra*.

[223] 582 F.2d at 1250 (citations omitted).

[224] 570 F.2d 322 (10th Cir. 1978).

[225] Defendant's argument hinged on whether "inexperienced" counsel could be properly substituted for "seasoned" counsel, without prejudice to defendant. Although the court did not address the issue directly, it did adopt the "inexperienced" versus "seasoned" language, and then ruled that defendant was not prejudiced by the substitution. *Id.* at 323-24.

[226] *Id. See* Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970) *cert. denied*, 401 U.S. 1010 (1971).

B. *Right to Confront and Cross-examine Witnesses*

In *United States v. Lamb*,[227] four codefendants were convicted of numerous charges, including armed robbery, kidnapping, and transportation of stolen vehicles across state lines. Among the arguments raised on appeal,[228] three codefendants urged that the fourth defendant's assertion of his fifth amendment privilege on cross-examination[229] denied them their right to confront him as a witness against them.

The Tenth Circuit rejected defendants' claim, ruling that the record reflected that neither the Government's questions nor the one defendant's responses implicated the other three in any manner. Nor did any of the three defendants request the opportunity to cross-examine: "Thus, where coappellants had the opportunity to cross-examine [the fourth defendant] if they desired to do so, there appears to be no denial of the Sixth Amendment right of confrontation."[230]

In *Robinson v. Benson*,[231] the Tenth Circuit ruled that the opportunity to call and cross-examine witnesses is not absolutely essential in a parole rescission hearing. The court noted that the right to call witnesses is conditional in the context of a prison disciplinary proceeding,[232] and that the opportunity to cross-examine witnesses was not absolutely required in parole revocation matters.[233] Thus, confrontation in the context of a parole rescission was not an essential constitutional right.[234]

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[227] 575 F.2d 1310 (10th Cir. 1978).

[228] Various defendants argued violation of their fifth amendment privilege against self incrimination, the admissibility of prior convictions, and the admissibility of prior criminal activity. One interesting, if not noteworthy, ground for appeal was that one of the defendants had been ordered to shave his beard because he had been clean-shaven at the time of the robbery. On appeal, that defendant claimed that the order was violative of his fifth amendment privilege against self incrimination. The court disagreed, ruling that such an order required defendant only to give non-testimonial evidence. *Id.* at 1316.

[229] Defendant Clary had elected to testify in his own defense, and then exercised the privilege on cross-examination. *Id.* at 1314.

[230] *Id. See* United States v. Troutman, 458 F.2d 217 (10th Cir. 1972). The court in *Lamb* refused to speculate on what might have happened if the other defendants had chosen to cross-examine the fourth defendant. 575 F.2d at 1314.

[231] 570 F.2d 920 (10th Cir. 1978). For other aspects of this case, *see* text accompanying notes 191-95 *supra*.

[232] 570 F.2d at 922 (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

[233] 570 F.2d at 922 (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

[234] 570 F.2d at 923. It should be noted that this decision is based more on the due process clause than on the confrontation clause. Both of the Supreme Court decisions

C. *Right to Speedy Trial*

In *United States v. Grismore,*[235] defendant asserted violation of both the Speedy Trial Act[236] and his sixth amendment right to a speedy trial. Defendant was originally indicted on June 17, 1975, and arraigned on July 15, 1975. Trial did not begin until March 11, 1976,[237] and defendant appealed his conviction because of the delay.

First, the Tenth Circuit addressed defendant's alleged violation of two sections of the Speedy Trial Act. The court ruled that one provision, section 3161,[238] was not applicable to indictments handed down before July 1, 1976. Moreover, Utah's interim plan adopted pursuant to section 3164[239] was also inapplicable because defendant was tried within the 180 day time period following the effective date of the rule.[240]

Second, the court addressed defendant's allegation that he was denied his constitutional right to speedy trial. The court reviewed the four pertinent factors announced by the Supreme Court in *Barker v. Wingo:*[241] "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[242] The court noted that the nine month delay between indictment and trial was caused in large part by the diffi-

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relied upon by the Tenth Circuit in *Robinson* (*see* text accompanying notes 232 and 233 *supra*) address the applicability of the due process clause to analogous factual situations. *Robinson* is nonetheless included here because defendant asserted his right to confront and cross-examine adverse witnesses at his parole rescission hearing.

[235] 564 F.2d 929 (10th Cir. 1977), *cert. denied,* 98 S. Ct. 1586 (1978). For other aspects of this case, *see* text accompanying notes 213-17 *supra.*

[236] 18 U.S.C. § 3161-3174 (1976). Subsection (c) of section 3161 provides generally that the arraignment of a defendant must be held within 10 days of the indictment or information, and that trial must commence within 60 days thereafter.

[237] The case was assigned to Judge Anderson who recused himself. The case was reassigned to Judge Powell who died. The third judge, Judge Ritter, recused himself, and the case returned to Judge Anderson. On January 29, 1976—seven months after indictment—the case was assigned to Judge Brimmer. Trial commenced two months later. 564 F.2d at 932.

[238] *See* note 236 *supra.*

[239] 18 U.S.C. § 3164 (1976) provides that each district shall place into operation an interim plan—until the effective date of § 3161, *i.e.*, July 1, 1976—"to assure priority in trial or other disposition" of cases. The Utah plan discussed in *Grismore* became effective September 29, 1975, and defendant was tried approximately five months later. 564 F.2d at 932.

[240] *See* note 239 *supra.*

[241] 407 U.S. 514 (1972).

[242] *Id.* at 530, *quoted in* United States v. Grismore, 564 F.2d at 932.

culty in obtaining a judge.[243] The record, however, reflected no request by the defendant for trial, nor any prejudice caused by the delay. Under such circumstances, the court ruled, defendant had a fair trial and was not deprived of his right to a speedy trial under the sixth amendment.[244]

IV. TRIAL MATTERS

A. *Pretrial Matters*

1. Transcript of Preliminary Hearing

United States v. Vandivere[245] was a case of first impression discussing the sufficiency of furnishing an indigent defendant with a tape recording of the preliminary hearing in lieu of a written transcript. The court cited the Supreme Court's decision in *Britt v. North Carolina*[246] as establishing two controlling guidelines for determining whether an indigent defendant must be provided a transcript: " '(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.' "[247]

The district court judge ruled that the defendant should be given access to a full tape recording of the preliminary examination, and the appellate court accepted his determination that a transcript "or its equivalent"[248] would be of value to defendant in the preparation of his case.

The opinion centered primarily on whether a tape recording of a preliminary hearing is an alternative device "equivalent" to a transcript. The court noted that the presumption should be that indigent defendants in criminal cases are entitled to transcripts of any preliminary examination.[249] This presumption appears to be based on the language in *United States v. Jonas*—although an informal alternative substantially equivalent to a transcript is available under *Britt*, in the "overwhelming majority of cases . . . tape recordings or judicial notes will [not] suffice."[250] Rule

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[243] *See* note 237 *supra*.

[244] 564 F.2d at 932.

[245] 579 F.2d 1240 (10th Cir. 1978).

[246] 404 U.S. 226 (1971).

[247] 404 U.S. at 227, *quoted in* United States v. Vandivere, 579 F.2d at 1242.

[248] 579 F.2d at 1242.

[249] *Id.* at 1243.

[250] 540 F.2d 566 (7th Cir. 1976); FED. R. CRIM. P. 5.1.

5.1 adopted in the aftermath of *Britt*, provides the method for securing tape recordings and written transcripts of preliminary hearings. The purpose of the rule is to eliminate the delay and expense of written transcripts where listening to a tape recording would be sufficient.

Given the authority to evaluate the expediency of a tape recording as an alternative, the Tenth Circuit seemed to focus on the complexity of the proceeding as the determinative factor of the tape's sufficiency. The court in *Vandivere* stressed the simplicity and brevity of the trial, and that the government agent's testimony did not vary between the hearing and the trial. The facts in *Jonas* were distinguished: there had been two trials separated by two and one half months, and different attorneys had represented the defendant at each trial.[251]

While brevity and simplicity may be desirable ends, the result of the *Vandivere* analysis may contribute to a premature determination of simplicity that could foreclose or diminish the defendant's ability to develop and prepare a legitimately complex defense. Certainly both *Jonas* and *Vandivere* caution that the presumption that a defendant is entitled to a written transcript should not be lightly discarded.

2. Stipulation

United States v. Haro[252] illustrates the potential danger of stipulation in a criminal case, since the government is thereby relieved of the burden of proving that element of the crime. Haro was convicted of possessing unregistered grenades.[253] At the conclusion of the government's case-in-chief, the parties stipulated that the grenades were devices as described in the indictment and subject to the applicable statute. Haro entered into the stipulation unaware that the grenades had been prepared by the government witness as exemplar devices in an unrelated trial. On appeal defendant argued that the stipulation was the only evidence establishing the destructive character of the grenades,[254] and that

[251] 579 F.2d at 1242.

[252] 573 F.2d 661 (10th Cir.) *cert. denied*, 99 S. Ct. 156 (1978).

[253] 26 U.S.C.A. §§ 5845, 5861 (1954).

[254] The essence of defendant's motion for dismissal was that the government had failed to show that the weapons were characteristically destructive within the meaning of the statute, thereby alerting him of the need for registration. 573 F.2d at 663.

counsel would not have entered into the stipulation had he known that the grenades were exemplar devices.[255]

The Tenth Circuit ruled that nondisclosure by the government witness did not give rise to reversible error and that Haro could not be afforded relief from his stipulation.[256] Furthermore, the court noted that even if the witness' nondisclosure *had* amounted to prosecutorial misconduct, Haro would not be afforded relief because he failed to establish that knowledge of these facts would have led to a different result on retrial.[257]

The court's opinion suggests that the criminal defendant risks a crucial concession when he enters into any stipulation, and that even when the stipulation is a product of government misconduct the defendant will have the onerous burden of showing precisely how his case has been damaged as a result of the stipulation.

3. Motion to Supress—Chain of Custody

In *Edwards v. Oklahoma*[258] the Tenth Circuit voted to reverse a defendant's conviction. The reversal was predicated on an inadequately explained break in the chain of custody as a result of destruction of the evidence by its custodian. Defendant Edwards was arrested for drunk driving. He was given the standard breathalyzer test, and the ampoule was subsequently destroyed by the operator pursuant to the rules and regulations of the Board of Chemical Tests.[259]

Although the Tenth Circuit expressly refused to pass on the constitutionality of non-malicious destruction of breathalyzer ampoules, it ruled that the summary treatment of the issue by the state court denied defendant the right to a "full hearing."[260] The case was remanded for an evidentiary hearing with instructions that: (1) specific inquiry should be made into the particular breathalyzer test given Edwards; (2) the pertinent statute permitting immediate destruction should be submitted as evidence

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[255] *Id.* at 665.

[256] The court noted that one grenade had been detonated almost immediatly following Haro's sale to the agent and that it was a high quality destructive device, and that the three exemplar grenades were identical in all pertinent respects. *Id.*

[257] *Id.* (citing United States v. Grismore, 546 F.2d 844 (10th Cir. 1976)).

[258] 577 F.2d 1119 (10th Cir. 1978).

[259] OKLA. STAT. tit. 47, §§ 751-759.

[260] 577 F.2d at 1121.

accompanied by a detailed explanation of the ampoule itself; and (3) most significantly, the government should offer an explanation of the need for such destruction.

4. *Petite* Policy[261]

In *United States v. Thompson*[262] and *United States v. Fritz*[263] the Tenth Circuit addressed the Justice Department's so-called "*Petite* Policy." As stated in the United States Attorney's Manual, it is departmental policy that after a state prosecution there should be no federal trial for the act or acts unless there are compelling federal interests, in which case prior approval from the Attorney General is to be obtained as a prerequisite to prosecution.[264] Both cases held that: (1) the *Petite* policy is merely an internal, self-regulatory departmental policy that creates no enforceable right in the defendant to avoid federal prosecution following a state conviction for the same acts; and (2) the United States Attorney's failure to obtain prior approval from the Attorney General had no effect on the validity of the prosecutions.

B. *Admissibility of Evidence*

1. Foundation

In this age of rapid technological advance, products which a few years ago would have been considered novel in design have become commonplace and the accuracy of such products is generally recognized. Given the orientation it was not surprising that the Tenth Circuit in *United States v. Foster*[265] took judicial notice

[261] The *Petite* policy is a product of the tension created in a dual sovereign system between the right to avoid double jeopardy and the ability of both state and federal courts to prosecute a defendant for the same act. Under the policy, federal prosecution is disfavored once the state has acted. But the existence of the doctrine does not expand a defendant's rights. The *Petite* line of cases is interpreted to mean that promulgation of the policy by the Department of Justice confers no rights on the defendant, and that a defendant may not invoke the *Petite* policy to avoid federal prosecution unless the government agrees. The doctrine takes its name from a factually inapposite situation, however. *Petite* involved two *federal* prosecutions in different circuits. Nevertheless, the Supreme Court granted the Attorney General's motion to vacate the second federal judgment, indicating that policy dictated by fairness disfavors *multiple* prosecutions. However, the essence of the doctrine is the federal policy of avoiding dual prosecutions by the federal government when the state has already acted. Petite v. United States, 361 U.S. 529 (1960).

[262] 579 F.2d 1184 (10th Cir. 1978).

[263] 580 F.2d 370 (10th Cir. 1978).

[264] *Id.* at 374.

[265] 580 F.2d 388 (1978).

of the reliability and general acceptance of telephone company equipment used to discover an unlawful device depriving it of revenue.[266] The majority ruled that the nature and extent of the foundation which must be laid for introduction of tapes produced by electronic equipment is largely discretionary, and that the trial court's admission of the evidence was clearly within its authority. The court then went beyond the trial court in taking judicial notice of the accuracy of the phone company's detection equipment.[267]

In *United States v. Shields*[268] the Tenth Circuit addressed the admissibility of expert testimony on signature comparison when none of the documents used for comparison were identified at trial, admitted in evidence, or found by the trial court to contain the genuine signature of the defendant. The court held the expert's testimony admissible under rule 703[269] of the Federal Rules of Evidence which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data used need not be admissible in evidence.*[270]

Moreover, the court noted that the defendant never challenged the genuineness of the inadmissible document. He had merely objected to the expert's testimony on the ground that the samples were not originals.[271]

The court's application of rule 703 placed this defendant in a dilemma. To challenge the authenticity of the comparative documents he would have had to offer them into evidence,

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[266] *Id.* at 390. Defendant was using a multi-frequency signal generator "blue box" to circumvent charges on long-distance phone calls. Alerted by the frequency and duration of toll-free calls placed by defendant, the phone company had an employee monitor defendant's phone with a detection device described as "Hekimian equipment." No attempt was made to qualify the employee as an expert in the use of Hekimian equipment, but the evidence was undisputed that the device used at trial functioned properly and produced results identical to those produced by the equipment used on defendant's phone. *Id.* at 389.

[267] *Id.* at 390.

[268] 573 F.2d 18 (10th Cir. 1978).

[269] FED. R. EVID. 703.

[270] 573 F.2d at 21 (emphasis in court's opinion).

[271] *See* FED. R. EVID. 1002, the so-called Best Evidence Rule.

thereby waiving his right to have such prejudicial evidence declared inadmissible. Yet, by failing to challenge the documents, the expert's testimony stood uncontradicted in the instant case.

2. Rule 404

In *United States v. Carleo*[272] the Tenth Circuit applied rule 404(b)[273] of the Federal Rules of Evidence in upholding the trial court's admission of evidence of uncharged crimes and acts as proof of motive or intent. Defendant Carleo was a bar owner being investigated for gambling and bookmaking activities. One of his employees, Hull, discovered the operation and had been told to keep quiet and leave town. Hull became a government informer, and Carleo was convicted of conspiracy to obstruct a criminal investigation[274] and obstruction of justice.[275] Both statutes require proof of defendant's specific intent to obstruct. To satisfy this element the prosecution offered evidence that defendant had beaten another suspected informer in Hull's presence as an "example" and had tried to intimidate Hull by references to a well-known informer who had been shot the year before.[276]

The court ruled the government's evidence admissible under rule 404(b).[277] More significantly, it commended the manner in which the trial court had handled the offer of proof and introduction of the evidence:

> [T]he trial court here acted with the sensitivity and caution that considerations of other crimes evidence requires [sic]. The court called a recess in order carefully to consider the nature and purpose of the proffered evidence outside the presence of the jury before it was introduced. Moreover, the jury was instructed immediately prior to the introduction of the testimony that it was "being received for the very limited purpose of shedding what light it may, if any, on the motive and intent of the defendant in the [jury's] consideration of the charges made against him in this case." Record, vol. 3, at 41. The court also cautioned the prosecution not to go into the details of Dickinson's beating, and the government did not

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[272] 576 F.2d 846 (10th Cir. 1978).

[273] FED. R. EVID. 404(b) provides in pertinent part that: "Evidence of other crimes, wrongs, or acts . . . may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[274] 18 U.S.C. § 1510 (1976).

[275] 18 U.S.C. § 1503 (1976).

[276] 576 F.2d at 849.

[277] *See* note 273 *supra*.

> attempt to go beyond the scope of the inquiry delineated by the court.[278]

United States v. Westbo,[279] concerned the introduction into evidence of a separate, uncharged crime by way of cross-examination. The evidence had been excluded from the government's case-in-chief during an *in camera* conference. Westbo was convicted of wire fraud;[280] the fraud itself involved defendant's breach of his fiduciary duty as broker for the Bankers Union Life Insurance Company (BULIC). For financial reasons BULIC needed to sell a block of mortgages within a short time. At the last minute, Westbo's negotiations with the expected buyer fell through so he agreed to purchase the mortgages himself for $2.4 million. He then sold the mortgages to another for $2.7 million.[281]

During the course of the trial a BULIC committment letter, allegedly forged by defendant, was discovered. The government sought to introduce the letter under rule 404(b)[282] to show that defendant had consistently taken advantage of the hectic situation at BULIC in the months prior to the mortgage fraud. Because the court would not permit introduction of the letter as substantive evidence, the government displayed the document and cross-examined two witnesses about it without actually introducing it into evidence.

The Tenth Circuit reversed defendant's conviction, ruling that the trial court had abused its discretion in not declaring a mistrial when the jury was exposed to this evidence. That conclusion had two distinct aspects.[283]

First, in spite of the fact that the trial judge had excluded that evidence, the government's manner of presentation elicited the inference that defendant had forged the letter, although there was absolutly no attempt to prove the forgery:

> In effect, then, the forbidden evidence was put before the jury by unavoidable inferences drawn from answers given by these prosecution witnesses. Compounding these prejucidial inferences was the fact that defendant was then in the dilemma of having evidence of

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[278] 576 F.2d at 849-50.
[279] 576 F.2d 285 (10th Cir. 1978).
[280] 18 U.S.C. § 1343 (1976).
[281] 576 F.2d at 288.
[282] *See* note 273 *supra*.
[283] 576 F.2d at 292.

> other crimes effectively before the jury but being unable to negate these inferences without waiving his objection to this inadmissible evidence.[284]

Second, the Tenth Circuit sought to interpret the trial court's intent in excluding the letter as substantive evidence. The court concluded that the evidence had been properly excluded under rule 403[285] which provides for exclusion of any evidence in which the probative value is substantially outweighed by the danger of unfair prejudice. The trial court's ruling was intended to prohibit *any* reference to the letter; the government's "egregious conduct" violated the clear intent of the court's ruling and denied Westbo an opportunity to defend.

3. Rule 801(d)(2)

United States v. Blumenthal[286] illustrates the broad scope of Federal Rule of Evidence 801(d)(2).[287] Blumenthal was originally charged with distribution and conspiracy to distribute cocaine. The trial court dropped the conspiracy charge and defendant was convicted of distribution.[288] As part of the premise for its holding that there was sufficient independent proof of the existence of the conspiracy to make the hearsay statements of the co-conspirators admissible, the court noted in dictum that rule 801(d)(2)(E) recognizes statements of co-conspirators as an exception to the prohibition against hearsay even when no conspiracy is charged.[289] As applied in *Blumenthal,* the dismissal of the conspiracy charge against defendant had no effect on the admissibility of extrajudicial statements by co-conspirators.

Admission of inculpatory statements by a co-conspirator was

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[284] *Id.*

[285] FED. R. EVID. 403.

[286] 575 F.2d 1306 (10th Cir. 1978).

[287] FED. R. EVID. 801(d)(2) provides:

> A statement is not hearsay if the statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

[288] 21 U.S.C. § 841(a)(1) (1976).

[289] 575 F.2d at 1310. *See* note 287 *supra* for text of FED. R. EVID. 801(d)(2)(E).

a basis for appeal in *United States v. Davis.*[290] In *Davis,* defendant's co-conspirator was acquitted by the jury. Defendant argued that the acquittal rendered her inculpatory statement retroactively inadmissible. The court ruled that defendant's reliance on the Ninth Circuit case of *United States v. Ratcliffe*[291] was misplaced because a co-conspirator's statements are retroactively inadmissible only if the declarant is acquitted as a matter of law, and that the distinction between court and jury acquittal rests on the requirements that admission of any co-conspirator's statement requires an independent prima facie showing of declarant's involvement in a conspiracy. When a declarant is acquitted as a matter of law there is no such independent proof of the existence of the conspiracy; therefore, the statements become inadmissible.

The intriguing aspect of *Davis* is the court's suggestion that a timely request from defendant that the jury be instructed not to consider the hearsay statement as evidence against Davis if they found his co-conspirator not guilty *might* have been effective.[292] *Davis* makes it apparent such an instruction would not ordinarily come from the court *sua sponte;* the defense attorney should request such an instruction whenever appropriate.

C. *Interpretation of Federal Rules*

1. FED. R. CRIM. P. 12.1

In *United States v. Fitts*[293] the Tenth Circuit refused to find an abuse of discretion in the exclusion of defendant's alibi witnesses under rule 12.1 of the Federal Rules of Criminal Procedure,[294] despite the fact that failure to comply with the government's demand for a list of alibi witnesses under 12.1(a)[295] was the

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[290] 578 F.2d 277 (10th Cir. 1978).

[291] 550 F.2d 431 (9th Cir. 1976). In *Ratcliffe,* the Ninth Circuit ruled that where evidence is insufficient for submission to the jury and the court acquits an alleged co-conspirator, prior out-of-court statements of the acquitted become inadmissible and a new trial is required. *Id.* at 433.

[292] 578 F.2d at 281.

[293] 576 F.2d 837 (10th Cir. 1978).

[294] FED. R. CRIM. P. 12.1(d) provides in part: "Upon the failure of either party to comply with requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party."

[295] FED. R. CRIM. P. 12.1(a) provides in part:

> Upon written demand of the attorney for the government . . . the defendant shall serve . . . a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state specific place or places at which the

result of defense counsel's inexperience. Although the court indicated that the 12.1(d) sanction probably should not have been imposed under these rather extreme circumstances, such procedural elimination of Fitts' defense did not render the trial a "mockery of justice."[296]

2. FED. R. CRIM. P. 20

In interpreting rule 20 of the Federal Rules of Criminal Procedure, the Tenth Circuit, in *United States v. Herbst*[297] adopted the *Singer* rule[298] that the defendant may waive the right to be tried in a particular district court, but may not compel transfer of the case to another district.[299]

Herbst was indicted in Kansas and in Wisconsin. The district of Kansas moved to join all charges for a single Wisconsin disposition pursuant to rule 20,[300] but the proceeding was dropped when the Wisconsin court refused the transfer. After he was convicted in Wisconsin, defendant was tried in Kansas, convicted of interstate transportation of forged securities,[301] and given a sentence running consecutively with the Wisconsin term. He argued that he had pled guilty in Wisconsin with the understanding that all outstanding charges against him were to be combined, and that Wisconsin's refusal to include the Kansas indictment and the subsequent abandonment of the proceeding by Kansas without notice were violative of his due process rights.

The court held that absent a bargain in which the transferor court had agreed to carry out a rule 20 transfer, the gravamen of the rule was mutual consent by the district attorneys. Such a

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defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

[296] 576 F.2d at 839.

[297] 565 F.2d 638 (10th Cir. 1978).

[298] Singer v. United States, 380 U.S. 24 (1965), *cited in* United States v. Herbst, 565 F.2d at 642.

[299] 565 F.2d at 642.

[300] FED. R. CRIM. P. 20(a) provides in part:

A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district . . . .

[301] 18 U.S.C. § 2314 (1976).

transfer was a matter of discretion rather than right, and failure to notify the defendant of initiation or subsequent abandonment of such proceeding was "not significant."[302]

3. FED. R. CRIM. P. 29

United States v. Lopez[303] included an interesting discussion of the defendant's dilemma when his rule 29(b) motion for acquittal has been denied.[304] If the defendant presents evidence following the denial, his objection and ability to appeal the denial are automatically waived and he assumes the risk that his evidence will supply the missing elements of the prosecution's case.

In *Lopez,* the Tenth Circuit noted recent criticisms of the waiver rule[305] and the opinion seems to suggest a willingness to modify the rule. However, the court found the *Lopez* situation factually inapposite and refused to confront the rule 29 question.

D. *Statutory Interpretation*

1. 18 U.S.C. § 1955

In *United States v. Quarry*[306] the court interpreted 18 U.S.C. § 1955, a federal gambling statute which requires participation by at least five persons. At the close of the evidence the trial judge gave an "all or nothing instruction" that all five defendants must be found guilty to sustain any single guilty verdict. Because the jury returned guilty verdicts against only four of the five defendants, the judge acquitted all five. The government appealed the judge's action,[307] maintaining that the trial judge had improperly interpreted the five or more requirement of section 1955 and that the section required only a showing that "five or more persons conducted, financed, managed, supervised, directed or own all or part of such business."[308]

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[302] 565 F.2d at 643.

[303] 576 F.2d 840 (10th Cir. 1978).

[304] Under rule 29, defendant automatically waives his objection to a denial of his motion for acquittal if he thereafter presents testimony himself, although he may move again at the close of all evidence. FED. R. CRIM. P. 29.

[305] *See, e.g.*, United States v. Perez, 526 F.2d 859, 864 (5th Cir.), *cert. denied*, 429 U.S. 846 (1976); United States v. Polizzi, 500 F.2d 856, 903 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

[306] 576 F.2d 830 (10th Cir. 1978).

[307] *Cf.* United States v. Calloway, 562 F.2d 615 (10th Cir. 1977) (discussing the government's authority to appeal from the trial judge's error of law).

[308] 18 U.S.C. § 1955(b)(1) (1976).

The Tenth Circuit, agreeing with the government, ruled that the trial judge's interpretation was inconsistent with both the statute and the weight of authority.[309] The court reinstated the jury's verdict of guilty as to the four defendants, ruling that although the trial judge's instructions had been erroneous, the jury had been provided with a copy of section 1955 and had correctly interpreted it.

2. Jencks Act

In *United States v. Heath*[310] the Tenth Circuit held that the government had violated the Jencks Act,[311] which requires that the prosecution disclose statements of a government witness to the defense.[312] On appeal the government asserted a good faith defense based on the statutory language which compels production only of statements "in possession" of the United States,[313] and contended that the witheld statements were in state rather than federal hands.[314]

The Tenth Circuit refused to permit the government to adopt this hypertechnical interpretation of "in possession," ruling that *any* government witness' testimony is property subject to the Act, even when the statement is made only to state officials.[315]

Conceding that the government had indeed violated the Jencks Act by failing to produce the statement, the court noted that the trial court had found no bad faith on the part of the prosecutor,[316] and that the statements were eventually disclosed

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[309] 576 F.2d at 833. *See* United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

[310] 580 F.2d 1011 (10th Cir. 1978). The *Heath* case involved six defendants convicted of a conspiracy to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1), 952 (1976). The case was originally brought as a fourteen count indictment against twenty individuals alleged to be members of a grand conspiracy. The case is an indicator of the potency of the conspiracy charge and, according to the dissent, of the ability of the government to wield the "sweeping net" of conspiracy to its advantage.

[311] 18 U.S.C. § 3500 (1976) is entitled "Demands for production of statements and reports of witnesses."

[312] 18 U.S.C. § 3500(b) provides in part: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . which relates to the subject matter as to which the witness has testified."

[313] 18 U.S.C. § 3500(a).

[314] 580 F.2d at 1018.

[315] *Id.*

[316] The dissent's analysis of the pattern of prosecutorial misconduct came to the opposite conclusion; the pattern of requests, denials, and assurances transferred any government "inadvertance" into deliberate or at least negligent supression. *Id.* at 1030.

with full opportunity for defendants to conduct a second cross-examination. Even more significantly, the defense had not made a motion to strike the testimony, nor did it affirmativly demonstrate prejudice as a result of the violation. The court concluded that no mistrial was required; defendant's conviction was upheld.

Judge McKay dissented, stating that the Act required the court to strike the government witness' testimony[317] and to reverse unless it was "perfectly clear" that the defense was not prejudiced by the violation. Even when the government ultimately produced the statements, the statute placed the burden on the prosecution to make a clear showing that defendant was not prejudiced by the violation.[318]

E. *Post-trial Matters*

1. Sentencing

The 1977-78 Tenth Circuit cases pertaining to sentencing reaffirm the well-established rule that such matters are within the sound discretion of the trial court. *Watson v. United States*[319] involved the resentencing procedure under 28 U.S.C. § 2255 when a prior sentence has been declared invalid because invalid convictions were considered in assessing the sentence. Defendant Watson was convicted of armed robbery and sentenced to a fifteen year term. He initiated a section 2255 attack, contending that the trial judge had considered a prior invalid conviction in setting the term. The trial judge ruled that the first sentence was invalid, but resentenced defendant to an identical term. On appeal, defendant argued that he should have been resentenced by a new judge, relying on a Ninth Circuit decision,[320] which required fresh

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[317] 18 U.S.C. § 3500(d) (1976): "If the United States elects not to comply . . . the court *shall* strike from the record the testimony of the witness . . . ." (Emphasis supplied).

[318] 580 F.2d at 1029 (McKay, J., dissenting) (quoting United States v. Missler, 414 F.2d 1293, 1303-04 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970)).

> The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement witheld, violation of the Act is excused only in extraordinary circumstances.

[319] 575 F.2d 808 (10th Cir. 1978).

[320] Farrow v. United States, No. 74-2429 (9th Cir., filed Sept. 24, 1976) (case reopened

resentencing conducted by a new judge without consideration of invalid prior convictions.

The Tenth Circuit rejected defendant's argument, holding that the new sentence, even if identical, will be upheld if it appears from the record that the judge did not consider the prior invalid conviction.[321]

2. Guilty Pleas

The appeal in *United States v. Thomas*[322] centered on what the court termed a "misunderstanding" in a plea bargaining situation. Thomas was charged with possessing the contents of a parcel stolen from the United States mails.[323] Defendant pled guilty on the basis of a promise that the judge would not impose the sentence until all charges were accumulated. He was sentenced by a different judge however, and two days after sentencing, defendant was indicted on numerous other charges.[324] Thomas moved to dismiss the newly returned indictment on the ground that the government had reneged on representations previously made which defendant had relied on to his detriment.

The Tenth Circuit reversed the trial court's dismissal, and remanded the case for trial. In its view, the trial judge's bargain in no way constituted an agreement by the government that further indictments would not be returned. Rather, the "promise" was construed simply as an agreement that defendant would not be sentenced until all existing indictments had been returned.[325] Moreover, the court of appeals indicated that the subsequent indictments were not filed in bad faith. Therefore, the court suggested two alternatives to be pursued on remand: (1) that defendant be allowed to withdraw his guilty plea to the original charge; or (2) that defendant's sentence be vacated without a withdrawal of the guilty plea and the new indictments be processed before imposing a sentence.[326]

Apr. 14, 1977 to be considered by the court *en banc*).

[321] 575 F.2d at 810. *Accord*, United States v. Radowitz, 507 F.2d 109 (3rd Cir. 1974); United States v. Gaither, 503 F.2d 452 (5th Cir. 1974).

[322] 580 F.2d 1036 (10th Cir. 1978).

[323] 18 U.S.C. § 1708 (1970).

[324] The new indictment included violation of 18 U.S.C. §§ 2, 495, 1708, 2314, and 371. 580 F.2d at 1037.

[325] 580 F.2d at 1038.

[326] *Id.*

Barker v. United States[327] also involved plea bargaining, specifically a defendant's right to withdraw his plea of guilty prior to sentencing. Barker was convicted of receipt by a previously convicted felon of a firearm transported in interstate commerce.[328] While awaiting trial his apartment was searched and several incriminating items—a sawed-off shotgun and some marijuana—were seized. After a full hearing pursuant to rule 11(e) of the Federal Rules of Criminal Procedure, Barker pled guilty, and the government agreed not to oppose defendant's release bond until sentencing and not to attempt to make use of any evidence found in the apartment. Further, Barker was found to be mentally competent and represented by adequate counsel during the entire proceeding, and his guilty plea was deemed free and voluntary.[329] One week before sentencing however, Barker attempted to withdraw his guilty plea, contending that he had been coerced into the bargain. The trial court ruled that the coercion argument was without merit.[330]

On appeal Barker distinguished between pleas withdrawn before and after sentencing, urging that the proper test *before* sentencing was "fairness and justice."[331] Defendant argued that the trial court improperly employed the more stringent post-sentencing standard.[332]

The Tenth Circuit ruled that the trial court's use of the words "mandate" and "require"[333] did not indicate application of the improper standard. Such terms only expressed the court's recognition that withdrawal of a guilty plea is not an absolute right, but rather one resting solidly in the discretion of the trial court.[334]

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[327] 579 F.2d 1219 (10th Cir. 1978).

[328] 18 U.S.C. § 922(h) (1976).

[329] The pleas were held to be in full compliance with FED. R. CRIM. P. 11(d). 579 F.2d at 1224.

[330] *Id.* at 1222.

[331] *Id.* at 1223.

[332] The more stringent test after sentencing, withdrawal of a guilty plea only in cases of manifest injustice, is found in FED. R. CRIM. P. 32(d).

[333] Barker based his argument on the language in the trial court's memorandum denying his withdrawal motion: "We are not convinced that he would have presented legal ground sufficient to *mandate* allowance of his motion for withdrawal . . . . There is no situation here which would *require* us to allow withdrawal of the guilty plea." (Emphasis in opinion). 579 F.2d at 1223.

[334] 579 F.2d at 1223.

Therefore, the trial court's refusal to allow defendant to withdraw his guilty plea was not error.

Kay Graves Thomas
Karen A. Perez
David W. Miller
Amy T. Loper