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CRIMINAL LAW AND PROCEDURE

OVERVIEW

This section of the Tenth Circuit Survey is a compilation of the major cases decided last term in the area of criminal law and procedure. This is only a sampling of all Tenth Circuit criminal cases, and the treatment given to them is intended only as an overview, not as an exhaustive analysis.

The Tenth Circuit decisions in this area were for the most part straightforward applications of established precedent. None of the cases presents any significant development or change, although the factual situations are sometimes thought-provoking and rather extreme.

The section is divided into seven categories: Fourth Amendment; Fifth Amendment; Sixth Amendment; Trial Matters; Jury Instructions; Post-trial Proceedings, and Statutory Interpretation.

I. FOURTH AMENDMENT: SEARCH AND SEIZURE

A. *Consent*

In *United States v. Abbott*,[1] the Tenth Circuit ruled that a wife's participation in a search of her husband's automobile in conjunction with police officers did not amount to specific consent to a second search conducted by the same officers at a later time in her absence. Additionally, the court sounded a note of caution as to the validity of a citizen's consent to a warrantless search which is obtained while the individual consenting is clearly within the "shadow of authoritative control."[2]

Appellant John Abbott was in custody when his wife attempted to obtain the release of his automobile from police authorities.[3] She was informed that such a release was not possible without presentation of the automobile's registration certificate. A search of the passenger compartment by Mrs. Abbott with the

[1] 546 F.2d 883 (10th Cir. 1977).

[2] *Id.* at 885.

[3] Appellant had been stopped by the Oklahoma Highway Patrol for a routine registration check. The serial number and description on the registration produced by the appellant did not correspond to the automobile he was driving. Additionally, officers discovered a .45 caliber automatic under the seat of the automobile. Thereafter, appellant was arrested for possession of the weapon and illegal registration of the automobile. *Id.* at 884.

assistance of a police officer proved unsuccessful in locating the registration. Mrs. Abbott then suggested that the title might be in a box locked in the trunk of the automobile. Not possessing the trunk keys, she departed saying she would attempt to locate the key and return.

Subsequently, police officers obtained the trunk key from appellant's coat pocket in his jail cell, opened the trunk, found several registration titles and a .30 caliber carbine which was the subject of appellant's prosecution. The government justified its warrantless search of the trunk solely upon the claim that Mrs. Abbott had given consent to the search.[4] Appellant's motion to suppress was denied, and he was tried, convicted, and sentenced to imprisonment.

Upon appeal, the Tenth Circuit reversed the conviction with instructions to sustain appellant's motion to suppress.[5] The reversal was justified on two grounds. First, the court stated that there was no evidence that Mrs. Abbott ever expressly consented to a search of the trunk. At most, she had only implicitly consented to a search in her presence and with her assistance.

Second, the court warned that even if actual consent had been obtained, the burden would be heavy upon the state to show that it had been made freely and voluntarily and was not a product of the authoritative atmosphere in which she had been placed.[6] The court emphasized that the atmosphere in which con-

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[4] The court pointed out that the prosecution made no claim that the subject warrantless search was justified by any exigency of time or circumstances nor was it excused within the bounds of Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile at police station held proper where same search at place of arrest would have been impractical) or South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search following standard police procedures not a violation of the fourth amendment's prohibition of unreasonable search and seizures). 546 F.2d at 884.

[5] The government must meet a three-part test to justify a warrantless search based upon consent. The requirements were paraphrased as set out below:

> (1) There must be clear and positive testimony that consent was "unequivocal and specific" and "freely and intelligently" given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Id. at 885 (paraphrasing the test enunciated in Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962).

[6] Factors given as creating the authoritative atmosphere were the incarceration of Mrs. Abbott's husband, the impoundment of the auto, the number of police officers in

sent is given will always be a factor when the court is considering whether or not one has waived a fundamental right.[7]

In *United States v. Sor-Lokken,*[8] a "quitclaim"[9] deed to retain real and personal property was ruled to be a sufficient property interest to allow a third party to consent to a warrantless search. The court ruled that such an instrument, regardless of the exact nature of the property interest conveyed, bestowed upon the grantee the right to enjoy access to the residence and its contents, thus meeting the test of common authority set forth in *United States v. Matlock.*[10]

The deed was issued to a neighbor, Rhodes, by Sor-Lokken while he was in the process of spiriting his children away from visitation by his former wife. Mrs. Lokken, in an effort to locate her children and former husband, informed police officials of the location of several unregistered firearms within the abandoned house of her former husband. As a result of this information, police officers made two separate warrantless searches of the Sor-Lokken home. The validity of the second search, made pursuant to the neighbor's consent, became the issue on appeal.[11]

The defendant challenged the authority of Rhodes to consent to such police activity.[12] The court found that the neighbor's con-

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the area, and the unlikelihood of Mrs. Abbot believing she could search the car in privacy. 546 F.2d at 885.

[7] *Id.*

[8] 557 F.2d 755 (10th Cir. 1977).

[9] Defendant requested that his neighbor and personal friend take care of his property while he was in absence. The neighbor, Mr. Rhodes, was given a key to the house and a handwritten notarized note reading: "I Scott Sor-Lokken do hereby Quit Claim all my household goods, cars, real and personal property to Dan Rhodes of Liberty, Utah. They are his items as of this writing to disperse, keep as he desires 710 (1910 hours) 14 October 1975. Scott Sor-Lokken." *Id.* at 756.

[10] 415 U.S. 164 (1974). *Mattlock* allowed a third party to consent to a warrantless search if he possessed either "common authority" over the inspected premises or property or some other "sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171.

The court also analogized the situation presented in *Sor-Lokken* to two other consent search cases. In Frazier v. Cupp, 394 U.S. 731 (1969), the defendant shared the use of his duffle bag with another and was said to have "assumed the risk" that his companion "would allow someone else to look inside." *Id.* at 740; and United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962). A gratuitous bailee in possession of a borrowed car was held capable of giving consent, binding against the owner, to have the trunk searched. *Id.*

[11] The first search, made solely at the request of the former wife, had been found clearly illegal by the trial court. *Id.* at 756-57.

[12] A second issue addressed by the court was whether the first search made without

sent was voluntarily made prior to the officer's search and that he had sufficient authority over the property as a result of the "quitclaim deed" to give consent to the search. Thus, the search and subsequent seizure of the unregistered firearms were held valid under the fourth amendment.[13]

B. *Validity of Search Warrant*

In *United States v. Millar*,[14] the Tenth Circuit ruled that in a state search with minimal or no federal involvement, a search warrant need only conform to federal constitutional requirements to render evidence seized admissible in federal prosecutions. The defendant had argued that the state officials' failure to have the search warrant issued by a magistrate of a court of record as was required by the Federal Rules of Criminal Procedure[15] was a fatal defect to the use of the evidence discovered against him in a federal action.[16]

The court, however, ruled that the search was purely a state search with no federal implications. Millar was stopped by a state highway patrolman for a routine registration check. The odor of marijuana and the presence of several marijuana seeds on the floorboard resulted in the local police magistrate issuing a war-

consent from Rhodes so irreparably tainted the second search as to make the evidence thus procured inadmissible. This issue was resolved in favor of the government on the basis of the independent source doctrine as outlined in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). However, the court went beyond this ruling to point out that "[e]ven if it were demonstrated that the officers' afternoon search was a necessary prerequisite to the evening search, the carbine would still be unsusceptible to exclusion. . .[C]onsent to search satisfies Fourth Amendment requirements apart from the presence or absence of probable cause to conduct a search. The consent obtained in this case purged the disputed search of any possible taint." 557 F.2d at 758 (citations omitted).

[13] *Id.* at 757-58.

[14] 543 F.2d 1280 (10th Cir. 1976).

[15] FED. R. CRIM. P. 41(a). *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate of *a judge of a state court of record* within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government (emphasis added).

[16] Millar was charged with the possession of marijuana with an intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1970). 543 F.2d at 1282.

In his motion to suppress the defendant raised three arguments: (1) The initial stopping of his vehicle was arbitrary and merely a pretext for a general search; (2) the affidavit presented to the New Mexico magistrate was insufficient; and (3) the warrant was issued by a magistrate for the State of New Mexico, who was not a judge of a court of record, and hence there was noncompliance with Federal Rules of Criminal Procedure 41(a). *Id.* The court dismissed the first two contentions and only the third argument will be discussed in this overview.

rant. The warrant was executed by a state patrolman. No federal official played any role either in the obtaining of the search warrant or in the search that followed.[17] The search itself did not violate any fourth amendment constitutional requirements. Under these circumstances, the Court of Appeals stressed that the mere fact that the court issuing the warrant was not a court of record did not render the evidence obtained in the search inadmissible.[18]

While admitting that the element of time is crucial to probable cause and the issuance of a search warrant, the Tenth Circuit in *United States v. Brinklow*[19] nevertheless upheld the validity of a search warrant based upon an observation made eleven months previously.[20] Defendant was charged with four federal violations,[21] all of which arose out of his alleged bombing of a Port of Entry building in Colorado Springs. Authorities, acting on information received from Brinklow's accomplice in the bombing, executed a search warrant upon defendant's mobile home. Seized in the search were a citizens band radio (used to detonate the bombing device electronically), a police radio scanner (used to avoid police detection), and a notebook delineating dates and mileage figures of trips taken in the mobile home.

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[17] The court pointed out that the complete state nature of the search distinguished it from the situation presented to the Fifth Circuit in Navarro v. United States, 400 F.2d 315 (1968). In *Navarro*, the search in question was deemed to be a federal search because federal agents had participated in the search and thus the requirements of Federal Rules of Criminal Procedure 41(a) were deemed applicable. 543 F.2d at 1284.

[18] The court was careful to point out that its holding in *Millar* did not "do violence" to the rule set forth by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960). *Elkins* held that evidence obtained in a purely state search, which if conducted by federal officers would have violated the defendant's fourth amendment rights, is inadmissible over defendant's timely objections in a subsequent federal criminal proceeding. *Id.* at 223. In *Millar* there was no violation of the defendant's *constitutional* fourth amendment rights; it was merely an issue of compliance with federal procedural rules in a purely state search. 543 F.2d at 1284.

[19] 560 F.2d 1003 (10th Cir. 1977).

[20] In so doing, the Tenth Circuit expanded the holding of their 1972 decision in United States v. Johnson, 461 F.2d 285 (10th Cir. 1972). In *Johnson* the court held that the element of time must be examined in conjunction with the nature of the unlawful activity, and, where the affidavit recites a more isolated event, the existence of probable cause dwindles with the passage of time; however, where the affidavit recites facts indicating activity of a protracted and continuous nature, the passage of time becomes less significant. *Id.* at 287.

[21] Brinklow was indicted on four separate counts including: (1) interstate transportation of explosives; (2) destruction of a building used in interstate commerce; (3) transportation of stolen explosive material; and (4) illegal possession of a firearm. 560 F.2d at 1004.

Significant in the holding was the fact that the objects sought in the search were of the type "which could reasonably be expected to be kept . . . for extended periods of time."[22] The court emphasized that:

> [p]robable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance. The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical considerations of every day life. The test is one of common sense.[23]

Thus, due to the semipermanent nature of the property being sought, the court in *Brinklow* held that eleven months was not so long a period of time as to evaporate the probable cause inherent in the coconspirator's tardy revelation.

II. FIFTH AMENDMENT

A. *Double Jeopardy*

In *Goode v. McCune*[24] the Tenth Circuit in dictum[25] dismissed any suggestion that the double jeopardy clause barred state and federal convictions arising out of the same act. The court addressed this issue in an appeal of a denial of habeas corpus where the defendant sought to credit part of a Texas bank robbery sentence to a subsequent federal term.

The Tenth Circuit set out two reasons why the double jeopardy clause did not bar parallel state and federal trials. First, the federal bank robbery charge differed in proof from the state charge; the federal charge required a showing that the bank had

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[22] *Id.* at 1006. All of the items seized from the vehicle had been seen there within the last year; all were designed for long term use; none were inculpatory per se; nor were any of them of the type which were likely to be disposed of for any other readily apparent reason.

[23] *Id.* at 1005-06 (citations omitted). Among the cases cited as authority for the test utilized were United States v. Rahn, 511 F.2d 290 (10th Cir. 1975), and United States v. Johnson, 461 F.2d 285 (10th Cir. 1972). In *Rahn* the Tenth Circuit upheld a search warrant based upon observations of alleged unlawful activity made more than a year and a half before the application for a search warrant.

[24] 543 F.2d 751 (10th Cir. 1976).

[25] *Id.* at 752. The court apparently was not obliged to address the issue. This conclusion is supported by the court's pronouncement that the only issue of the case was "whether Goode [was] entitled to credit on his federal sentence for the period of time he remained in state custody."

some federal connection.[26] Second, there were two separate sovereignties, Texas and the federal government, each having a right to exact a penalty for violation of its laws.[27] Thus, the double jeopardy clause did not protect the defendant because he was tried by separate sovereignties on different charges.

Using this dual-sovereignty rationale, the court denied the defendant any entitlement to credit three years of his Texas sentence to his subsequent federal term.[28] The court reasoned that the defendant owed each sovereignty a debt, and since the Texas sentence was attributable only to the state charges, the federal government was not obliged to credit the state sentence.[29]

Although the Tenth Circuit's rationale in *Goode* is in conformity with the majority view,[30] it is not without criticism. In double jeopardy issues, the dual-sovereignty approach is particularly suspect when the gravamen of the state charge is comparable to the federal charge.[31] This criticism assumes that state and federal interests in justice are sufficiently parallel, vitiating any need to exact separate penalties for the same act.[32]

In *United States v. Gunter*[33] the Tenth Circuit held that the double jeopardy clause was inapplicable where the defendants were tried a third time after the juries in the first two trials were

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[26] The federal connection was proved by showing that the bank was insured by the FDIC. *Id.* at 753.

[27] *Id.*

[28] There was conflict in the affidavits as to whether Texas had credited Goode's state confinement from the period after his arrest to his conviction a year later. *Id.*

[29] *Id.*

[30] *See* United States v. Abbate, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

[31] If the state and federal statutes are similar in purpose, then the double jeopardy clause could be construed to cut off a subsequent trial for the same act by a different sovereignty. *Contra,* Bartkus v. Illinois, 359 U.S. 121, 138 (1959) (the Court stated that it was a problem that could be resolved by state statute).

[32] *Compare* Walker v. Florida 389 U.S. 387 (1970) (state and local prosecutions barred by the double jeopardy clause); Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting) (state and federal interests are sufficiently akin to bar parallel trials). *See generally* Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution,* 28 U. CHI. L. REV. 591 (1961); Pontikes, *Dual Sovereignty and Double Jeopardy,* 14 W. RES. L. REV. 700 (1963).

Normally, the federal government has not sought to prosecute where a state has prosecuted for substantially the same offense. In two cases this policy has resulted in dismissal of federal charges. *See* Petite v. United States, 361 U.S. 529 (1960); Orlando v. United States, 387 F.2d 348 (9th Cir. 1967).

[33] 546 F.2d 861 (10th Cir. 1976), *cert. denied,* 431 U.S. 920 (1977).

unable to reach verdicts.[34] Nine defendants were charged with the theft of an interstate shipment of auto tires.[35] At the conclusion of the third trial eight of the defendants had been convicted. Four appealed, raising the defense of double jeopardy.[36]

The Tenth Circuit found clear authority supporting the first retrial. Relying on *United States v. Perez*[37] and its progeny,[38] the court upheld the discretionary power of the trial judge to discharge the jury and permit a retrial because the circumstances were such that there was "a manifest necessity for the act [retrial] or the ends of public justice would otherwise be defeated."[39] Retrials in deadlocked jury situations have been equated with "manifest necessity" and "the ends of public justice" because of the vital interest in reaching final judgments.[40]

In considering whether a third trial fell within the purview of *Perez*, the court concluded that there were recognizable situations where the double jeopardy clause would create a bar.[41] However, the facts of this case still militated toward a retrial. Of particular significance to the court was the trial judge's proper exercise of discretion in granting the two mistrials.[42]

The court distinguished this case from two other circuit decisions where a third trial and a fourth trial were overturned because the trial judges had abused their discretion in granting the

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[34] The court also addressed the issues of third party consent to an otherwise unlawful search and seizure, amendments to an indictment, and other ancillary issues. *Id.* at 867-69.

[35] *Id.* at 864. Presumably much of the difficulty the juries had in arriving at a verdict resulted from the large number of defendants and the complex facts surrounding the theft.

[36] The Tenth Circuit ruled that the double jeopardy issue was appealable after the third trial because it represented the type of plain error which could be raised anew under FED. R. CRIM. P. 52(b). *Id.* at 864-65.

[37] 22 U.S. 579 (1824).

[38] *See* Illinois v. Somerville, 410 U.S. 458 (1973); Downun v. United States, 372 U.S. 734 (1963); Wade v. Hunter, 336 U.S. 684 (1949).

[39] 546 F.2d at 861, 866. The judge could have discharged the deadlocked jury and made a judgment of acquittal under FED. R. CRIM. P. 29(b) if he had found that the government's evidence was insufficient to support a conviction. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

[40] Illinois v. Somerville, 410 U.S. 548, 470-71 (1973).

[41] The court wrote that "[t]here may indeed be a breaking point, but we do not believe it was reached in the instant case." 546 F.2d at 866.

[42] In *Gunter* the Tenth Circuit did not find an abuse of discretion in the declaration of a mistrail after the second trial, even though the jury had deliberated only four and one half hours. *Id.* at 865.

mistrials.[43] The court also seemed to embrace a view that as the number of retrials increased, manifest necessity and the ends of public justice might weigh less heavily in favor of another attempt to reach a final verdict.[44]

In *United States v. Appawoo*[45] the Tenth Circuit faced a procedural dilemma wherein it was obliged to hear appeals of two judgments of acquittal despite a possible double jeopardy bar. At the trial court level, District Judge Ritter refused to rule on pretrial motions to dismiss the informations.[46] The judge's refusal to rule was in contravention of FED. R. CRIM. P. 12(b)(2).[47] However, once the juries had been impaneled, thereby initiating jeopardy,[48] and the prosecution had presented its cases,[49] the judge ruled on the motions and thereafter granted judgments of acquittal under FED. R. CRIM. P. 29(a).[50]

The judge's avowed purpose in delaying his rulings on the motions was to prevent appeals of pretrial motions[51] which nor-

[43] In Webb v. Court of Common Pleas, 516 F.2d 1034, 1040-41 (3d Cir. 1975), the court described the range of discretion in granting a mistrial as severely limited by recent holdings of the Supreme Court, reflecting the weight to be given to the double jeopardy clause. In Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967), the trial judge surpassed his discretionary bounds by arbitrarily granting a mistrial because of improper comments by the defense counsel.

[44] *Id.* at 866. The court wrote: "The rationale of *Perez* suggests to us the propriety of a third trial where the prior juries were unable to agree upon a verdict. This assumes, of course, that the concept of manifest 'necessity' and 'ends of public justice' referred to in *Perez* are met." *See also* Preston Blackledge, 332 F. Supp. 681 (E.D.N.C. 1971).

[45] 553 F.2d 1242 (10th Cir. 1977). This case was consolidated with United States v. Casey, 553 F.2d 1242 (10th Cir. 1977).

[46] The defendants raised the constitutionality of 18 U.S.C. § 1153, which concerned assaults as defined by state law in Indian Country. The defendants claimed that if they were not Indians they would have faced less stringent federal charges under 18 U.S.C. § 113, which provides a lesser penalty and is harder to prove than assault as defined under Utah law. *Id.* at 1243.

[47] This rule provides that defenses based on defects in the information "may be raised only by motion before trial."

[48] *See* Illinois v. Somerville, 410 U.S. 458 (1973).

[49] In *Appawoo* the government had rested. 553 F.2d at 1244. In *Casey* the prosecution had presented just one witness. *Id.* at 1245.

[50] *Id.* at 1244-46.

[51] At the conclusion of the trial in *Casey*, an attorney for the defendants in *Appawoo* (Appawoo was tried later) moved for a dismissal on the same grounds upon which the judge had just ruled in *Casey*. The judge responded:

> You are not representing your client very good. You are overlooking something a practical man ought to think about. The defendant in the preceding case was in jeopardy . . . . Now you are pushing your luck here. If I rule on this motion before you confront a jury and that constitutional question is

mally are appealable under 18 U.S.C. § 3731. The delays initiated jeopardy, thus creating a double jeopardy bar to subsequent appeals. The Tenth Circuit declared that the trial court's judgments of acquittal under 29(a) were not actually acquittals within that rule because hey were based on the constitutional *issue* in the pretrial motions;[52] rule 29 requires that acquittals be based only on the sufficiency of the *evidence* at trial. The court, citing *United States v. Martin Linen Supply Co.*,[53] determined that the trial judge had made no resolution as to the sufficiency of the evidence produced by the prosecution. Thus, the double jeopardy clause was not a bar to the appeal because the trial court's "judgments of acquittal" amounted to no more than rulings on the constitutional issue in the pretrial motions.[54]

In *United States v. Fay*,[55] the Tenth Circuit barred an appeal because the acquittal was in fact based on the evidence. The double jeopardy clause prevented appellate review because there was nothing to indicate that the trial was not bona fide.[56] At the trial court level, Judge Ritter refused to rule on a pretrial motion to suppress evidence.[57] However, after the prosecution began its presentation, the judge ruled on the motion, suppressing evidence vital to the government's case. Soon after, the judge granted a judgment of acquittal, as it was clear that the prosecution could not proceed.[58]

The Tenth Circuit distinguished this case from *Appawoo*

> litigated for the next ten years and goes up to the Supreme Court of the United States and in the meantime the Government amends, you have done your client a very great disservice, because there is no bar to him being prosecuted . . . . Now, that is poor legal representation from my point of view, and I am going to do what I can to protect him against his counsel, and we will just keep that right where it is and get a jury for you one of these days, and when we get the matter up before the jury we will get far enough down the way with the evidence to see what is involved and then we will entertain your motion.

Id. at 1245-46.

[52] *Id.* at 1244-45.

[53] 430 U.S. 564, 571 (1977).

[54] 553 F.2d at 1246. By declaring that its finding was a ruling on the pretrial motion, the Tenth Circuit skirted the issue as to whether the remands it ordered were retrials within the "manifest necessity" requirement of United States v. Perez, 22 U.S. 579 (1824).

[55] 553 F.2d 1247 (10th Cir. 1977).

[56] *Id.* at 1249.

[57] FED. R. CRIM. P. 29(b)(3) requires the motions to suppress evidence must be raised prior to trial.

[58] 553 F.2d at 1248.

because it concluded that the judgment of acquittal was based on the sufficiency of the evidence under rule 29(a).[59] A valid jeopardy was created, barring any subsequent appeal. Unlike the earlier case, the Tenth Circuit's refusal to allow the appeal precluded it from reviewing the constitutional issues in the motion to suppress.[60] The court denied review despite its own conclusions that the trial judge had "frustrated the proper trial" of the defendants and had "aborted a proper consideration of a challenge to a large segment of the proof."[61]

In granting the appeals in *Appawoo,* and barring review in *Fay,* the Tenth Circuit's primary consideration was whether the judgments of acquittal were in conformity with rule 29. If the acquittal was based on the insufficiency of evidence, as in *Fay,* the court looked upon the proceeding as a bona fide jeopardy with no appeal possible. If the acquittal was not related to the evidence, the court did not feel constrained by the double jeopardy clause because there was no bona fide acquittal.

The major difficulty in reconciling *Fay* with *Appawoo* is the Tenth Circuit's conclusion that the judgment of acquittal in *Fay* was based on the sufficiency of the evidence. It is arguable that since the motion to suppress evidence was not ruled on before trial and therefore was not reviewable,[62] the Tenth Circuit had no way to determine what evidence the trial judge could use constitutionally in judging the sufficiency of the evidence. Furthermore, since the ruling on the motion to suppress directly preceded the acquittal,[63] and the ruling was based on constitutional issues, it is arguable that these issues, and not the evidence presented, were the real basis for the acquittal. Under this hypothesis the judgment of acquittal was not based on the sufficiency of evidence under rule 29 and therefore was appealable.[64]

B. *Voluntariness of Confession*

Appellant in *United States v. Shoemaker*[65] contested his

[59] The Tenth Circuit relied on the trial judge's exclamations made after his ruling to suppress the evidence. *Id.*

[60] *See* text accompanying notes 51-52 *supra.*

[61] 553 F.2d at 1249.

[62] *See* text accompanying notes 59-60 *supra.*

[63] *See* text accompanying note 58 *supra.*

[64] *See* text accompanying notes 52-54 *supra.*

[65] 542 F.2d 561 (10th Cir. 1976), *cert. denied,* 429 U.S. 1004 (1976).

conviction of murder while attempting rape[66] on two grounds: one, that his confession was involuntary under the McNabb-Mallory rule[67] and rule 5(a) of the Federal Rules of Criminal Procedure;[68] and two, that the lower court erred in admitting into evidence photographs of the victim which had limited probative value and a highly inflammatory effect on the jury.

After being advised of his *Miranda* rights, defendant was questioned for six hours before being released. He was interviewed again three days later; after several hours of questioning, the defendant gave an oral confession. He was given a new *Miranda* instruction before each questioning session began.[69] On Saturday afternoon, the defendant dictated and signed a confession after a final advisement of rights, and was taken before the magistrate.[70]

The Tenth Circuit rejected defendant's interpretation of rule 5(a) to the effect that a defendant had to be brought before a magistrate within a "reasonable" time, six hours after arrest under *McNabb* and *Mallory*.[71] First, the court concluded that

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[66] 18 U.S.C. 1111 (1966).

[67] Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). In *Mallory*, the Supreme Court reaffirmed its prior policy set forth in *McNabb*, that a defendant must be taken before a magistrate with no undue delay. The rule is stated in no uncertain terms:

> The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

Mallory, 354 U.S. at 454.

[68] FED. R. CRIM. P. 5(a) provides in part: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . ."

[69] All of the questioning on Friday evening took place at defendant's place of employment, a carnival operating in a national park, where the victim had been found. 542 F.2d at 562-63. Defendant remained in park headquarters until his confession, at which time he was taken to the nearest federal jail. 542 F.2d at 562-63.

[70] *Id.* Some twenty-two hours elapsed between the time agents began the actual interview on Friday evening and the time defendant actually appeared before a magistrate on Saturday afternoon. For purposes of applying the McNabb-Mallory rule and rule 5(a), notes 47-48 *supra*, the court analyzes a 13-hour delay: Arrest took place shortly after defendant's oral confession around midnight and a written confession was signed sometime after 1 p.m. the following day.

[71] The origin of defendant's "six hour" rule is unclear. In *Mallory*, the delay between arrest and arraignment was at least seven hours. 354 U.S. at 450-51. The delay in *McNabb* was two or three days. 318 U.S. at 334-38. And delays of between 12 and 24 hours have

until the defendant confessed, "he was never restrained physically nor told that he was under arrest or otherwise not free to leave. Moreover, the evidence tended to show that [the] questioning sessions . . . singularly lacked acts of oppression or coercion . . . ."[72]

Second, the court ruled that noncompliance with the six-hour rule did not *ipso facto* render the confession inadmissible.[73] Rather, the time between arrest and arraignment was only one of several factors to be considered by the trial judge in determining admissibility, and it was not necessarily conclusive.[74] Additional factors weighed included the fact that some of the delay was attributable to the defendant who had refused to go before the magistrate without first seeing members of his family; the weekend day involved; the time of day of the arrest; the distance traveled; and the numerous *Miranda* warnings.[75] On balance, the court concluded, a thirteen-hour delay did not render the confession inadmissible.[76]

The court quickly dismissed the defendant's second contention, that the photographs of the victim were inadmissible. The court ruled that the admission of photographs is a function of the trial judge's discretion, and it found no abuse of that discretion.

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been upheld. *See, e.g.*, United States v. Collins, 462 F.2d 792 (2nd Cir. 1972), *cert. denied*, 409 U.S. 988 (1972) (delay of 21 hours); Evans v. United States, 325 F.2d 596 (8th Cir. 1963), *cert. denied*, 377 U.S. 968 (1964) (12-hour delay). *See also* FED. R. CRIM. P. 5(a), note 68 *supra*.

[72] 542 F.2d at 563.

[73] *Id.* (citing United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975); United States v. Davis, 456 F.2d 1192 (10th Cir. 1972)). In *Crocker*, the Tenth Circuit ruled that the statutory guidelines for determining voluntariness set forth in 18 U.S.C. 3501(a) (1969) had been correctly applied. 510 F.2d at 1138. The guidelines specify that the trial judge shall take into consideration all the circumstances surrounding the giving of the confession, including the time between arrest and arraignment, defendant's knowledge of the crime with which he is charged or of which he is suspected, and whether defendant knew of his rights. 18 U.S.C. § 3501(b).

[74] 542 F.2d at 563. *See* note 73 *supra*.

[75] 542 F.2d at 563.

[76] *Id.* The result reached is not inconclusive with *Mallory*:

> The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible to quick verification through third parties. But the delay must not be of a nature to give opportunity for the exaction of a confession.

354 U.S. at 449. *See also* note 71 *supra*.

III. SIXTH AMENDMENT

A. *Right to Counsel*

In two recent cases, the Tenth Circuit denied claims of ineffective assistance of counsel in violation of the sixth Amendment. In *Gillihan v. Rodriguez*,[77] the defendant, convicted on four counts of first-degree murder, attacked the adequacy of his court-appointed lawyers at both the trial level and on appeal from the New Mexico trial court conviction. The Tenth Circuit adhered to the majority position that relief on the ground of ineffective counsel will only be granted where the "trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court . . . or [was] without adequate opportunity for conference and preparation . . . ."[78]

The court held that counsel's failure to seek a change of venue despite massive publicity could not be challenged by the defendant where he never requested a change and was unaware of any publicity.[79]

Rodriguez also contended that his counsel had failed to require the prosecutor to disclose the existence of exculpatory evidence. The court found, however, that counsel did not become aware of this evidence until during the trial; the evidence was, nevertheless, immaterial where the appellant had admitted committing the act alleged but was maintaining innocence by reason of insanity.[80]

Counsel's failure to object to the prosecutor's reference to the defendant as a "mad dog" during closing arguments was justified, in the court's view, because there was no chance of obtaining a mistrial, the remark was consistent with a defense of insanity, and his lawyers used the expression to the defendant's benefit during their closing arguments.[81] The change of his plea from "not

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[77] 551 F.2d 1182 (10th Cir. 1977).

[78] Goforth v. United States, 314 F.2d 868 (10th Cir. 1963). *See also* United States v. Coppola, 486 F.2d 882, 887 (10th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); Johnson v. United States, 485 F.2d 240, 241-42 (10th Cir. 1973); Tapia v. Rodriguez, 446 F.2d 410, 416 (10th Cir. 1971); United States v. Davis, 436 F.2d 679, 681 (10th Cir. 1971).

[79] 551 F.2d at 1185-86.

[80] *Id.* at 1186.

[81] *Id.*

guilty" to "not guilty by reason of insanity" was found to have been made with the defendant's consent.[82]

In view of the fact that the defendant had told the trial judge he was satisfied with his lawyers, the Tenth Circuit, in line with its prior decisions, determined that the appellant's dissatisfaction with his counsel arose only after the imposition of sentence[83] and that "[n]either hindsight nor success is the measure for determining adequacy of legal representation . . . ."[84] The court also agreed with the district court that " 'counsel need not appeal every possible question of law at the risk of being found to be ineffective.' "[85] Thus, despite defense counsel's objection to the trial court's temporary insanity instruction, he need not have raised that issue on appeal.

In *United States v. Allen*,[86] the defendant alleged that he had not made his attorney aware of the seriousness of his mental condition because he had not realized its importance at that time. The Tenth Circuit concluded that evidence of the defendant's mental condition was readily available to counsel before trial and was not such "newly discovered evidence" as would warrant a new trial.[87]

Evidence of the defendant's mental illness was presented during direct examination by his counsel. The court stressed that a claim of lack of knowledge on the part of trial counsel, where there was an abundance of evidence before him, could not be transformed into an argument of ineffective assistance of counsel on appeal.[88] According to the Tenth Circuit, the trial counsel's statement, that he would have tried the case on an entirely different basis had he been aware of the existence of the defendant's

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[82] *Id.* at 1187.

[83] *Id.* at 1188. *See* Johnson v. United States, 485 F.2d 240, 242 (10th Cir. 1973).

[84] Tapia v. Rodriguez, 446 F.2d 410, 416 (10th Cir. 1971); *See also* Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971).

[85] 551 F.2d at 1189.

[86] 554 F.2d 398 (10th Cir. 1977).

[87] 554 F.2d at 403. "[N]ewly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved; it must be such as would probably produce an acquittal; and a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial." *Id. See also* United States v. Leyba, 504 F.2d 441, 442-43 (10th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

[88] 554 F.2d at 403. *See* United States v. DeCoster, 487 F.2d 1197, 1204-05 (D.C. Cir. 1973); United States v. Brown, 476 F.2d 933, 935 (D.C. Cir. 1973).

mental disorder, reflected nothing more than the natural expectation of unsuccessful counsel that improvement could be made the second time around.

Where counsel has the basic facts but simply does not present a defense on the basis of those facts, the court will not grant a new trial on the ground of inadequate counsel; to do so would be to put a "premium on neglect" and encourage withholding available information in order to present it as "newly discovered evidence" should the verdict be adverse.[89]

B. *Jury Composition*

United States v. Test [90] involved a challenge to the jury selection plan adopted by the District Court for the District of Colorado based on the Jury Selection and Service Act of 1968[91] and the fifth and sixth amendments to the United States Constitution. The defendants argued that Chicanos, blacks, and persons under forty years of age were underrepresented on the master jury wheel and that jurors drawn from that wheel were not "selected at random from a fair cross section of the community" as required by the Act and the Constitution.[92] They further alleged that the excuse, exemption, and disqualification categories adopted by the plan violated the Act.[93]

The Colorado jury selection plan utilizes voter registration lists as provided by the Act: these lists are the primary source of names for prospective jurors, but the Act also provides for supplementation, where necessary, if great disparities exist.[94]

The Tenth Circuit, along with the majority of lower federal courts, construed the statutory "fair cross section" standard as

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[89] 554 F.2d at 405. *Cf.* United States v. Vowteras, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1975).

[90] 550 F.2d 577 (10th Cir. 1976).

[91] 28 U.S.C. §§ 1861-1874 (1968).

[92] 28 U.S.C. § 1861 provides: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . . ."

[93] Under the plan, excuse, exemption, or disqualification was provided for persons residing in the judicial district for less than one year, persons convicted or under indictment for serious crimes, persons not literate in the English language, persons residing in certain divisions of the district, women with children under 10 years of age, sole proprietors, and persons without transportation. 550 F.2d at 593-95.

[94] 28 U.S.C. § 1863(b)(2).

substantially equivalent to the constitutional standard, previously developed,[95] providing for "reasonable representation." In order to show a violation of the Act, the defendants must show that Chicanos and blacks constitute a cognizable group,[96] that these groups are systematically or totally excluded from the jury selection process,[97] and, as a result, that the jury pools are not "reasonably representative" of the community.

In *Test*, the defendants demonstrated only a disparity between the proportion of Chicanos and blacks in the voting-age population and the proportion of Chicanos and blacks appearing on the voter registration lists. No court has required supplementation of voter registration lists merely because an identifiable group votes in a proportion lower than the rest of the population.[98] Nor has a challenge to a jury selection plan been successful where based solely on statistical evidence, as here.[99]

The Tenth Circuit relied on *Swain v. Alabama*[100] to hold that the jury roll need not mirror the community.[101] The court assumed without proof that Chicanos and blacks constitute a cog-

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[95] *See, e.g.*, United States v. Whiting, 538 F.2d 220, 222 (8th Cir. 1976); Anderson v. Casscles, 531 F.2d 682, 685 (2d Cir. 1976); United States v. Tijerina, 446 F.2d 675, 678-81 (10th Cir. 1971). The latest Supreme Court pronouncement on this issue is Taylor v. Louisiana, 419 U.S. 522 (1975), which is in accord with this construction.

[96] 550 F.2d 585. To establish cognizability, it is necessary to prove: "(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes of ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society. United States v. Test, 399 F. Supp. 683, 689 (D. Colo. 1975).

[97] 550 F.2d at 586. There are two lines of Supreme Court cases in which allegations of systematic exclusion have proven successful. The first is the "rule of exclusion" where there is proof that a cognizable group has been totally excluded or has received only token representation on juries. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Alexander v. Louisiana, 405 U.S. 625 (1972); Norris v. Alabama, 294 U.S. 587 (1935). The second line of cases deals with "substantial underrepresentation" or "systematic decimation," combined with obvious opportunities for discrimination. *See, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Whitus v. Georgia, 385 U.S. 545 (1967). Under both lines, an inference of discrimination is raised which must be rebutted by the government with something more than general averments of good faith, which are otherwise sufficient. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 227-28 (1965).

[98] *See, e.g.*, United States v. Freeman, 514 F.2d 171 (8th Cir. 1975); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973); United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973); United States v. Ross, 468 F.2d 1213 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

[99] 550 F.2d at 587.

[100] 380 U.S. 202 (1965).

[101] *Id.* at 208.

nizable group. In this case the defendants failed to show that Chicanos and blacks had been totally or systematically excluded from the selection process.

The court concluded that disparities of less than one person in the demographic composition of petit and grand juries and a difference of two persons on a jury panel of fifty are not substantial enough to warrant judicial intervention.[102] The court further noted that persons under forty years of age did not comprise a "cognizable" group as required to prove unconstitutionality or a violation of the Act.[103] The excuses, exemptions, and disqualifications alleged to be unconstitutional, were expressly permitted by statute,[104] and did not result in systematic exclusion or substantial underrepresentation.[105]

IV. TRIAL MATTERS

A. *Joinder or Severance*

In *United States v. Walton,*[106] the defendants were jointly tried and convicted of aiding and abetting interstate transportation of forged securities in violation of 18 U.S.C. §§ 2 and 2314. On appeal, the defendants alleged prejudicial error in the trial court's denial of their motions for severance.

The Tenth Circuit acknowledged that the disposition of a motion for severance is within the trial court's sound discretion.[107] A refusal to grant a motion for severance is error only upon abuse of discretion such that defendant is denied a fair trial.[108]

The court rejected defendants' various allegations of prejudice and determined that the denial of the motions for severance was proper.[109]

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[102] 550 F.2d at 590. In *Swain,* the Supreme Court approved of disparities ranging from 10-16 percent between voting-age population and names on the master jury rolls. 380 U.S. at 205, 208-09.

[103] 550 F.2d at 591.

[104] 28 U.S.C. §§ 1865(b)(1), (b)(5), (b)(2), 1863(b)(3).

[105] 550 F.2d at 595.

[106] 552 F.2d 1354 (10th Cir. 1977).

[107] United States v. Davis, 436 F.2d 679 (10th Cir. 1971); United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969). *See also* FED. R. CRIM. P. 14.

[108] United States v. Riebold, 557 F.2d 697 (10th Cir. 1977); United States v. Earley, 482 F.2d 53 (10th Cir.), *cert. denied,* 414 U.S. 1111 (1973); United States v. Mallory, 460 F.2d 243 (10th Cir.), *cert. denied,* 409 U.S. 870 (1972); United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969); Baker v. United States, 329 F.2d 786 (10th Cir.), *cert. denied,* 379 U.S. 853 (1964).

[109] Most of the different bases for the motions for severance were determined to be

B. *Affirmative Defenses*

In *United States v. Rosenfeld,*[110] the Tenth Circuit considered the affirmative defense of entrapment to a conviction of illegal distribution of cocaine. The defendant alleged that the persistent conduct and solicitations of a Federal Drug Administration agent, induced him to enter into the illegal transaction.

The agent contacted the defendant seeking to arrange a cocaine purchase. Upon defendant's refusal to do business with him, the agent called him approximately 18 to 20 times to get him to deal in drugs. The agent eventually induced the defendant to deal with him when the defendant's father became hospitalized without insurance coverage and the defendant's finances were low.

The Tenth Circuit held that the persistent calls of the agent did not constitute duress or entrapment.[111] The family troubles which finally led the defendant to deal with the agent did not "cause the defendant's act to be entrapement as a matter of law."[112]

The elements required for a finding of entrapment are set out in *Martinez v. United States,*[113] cited by the court in *Rosenfeld.* According to *Martinez,* entrapment does not become applicable until the commission of the crime charged is admitted by the accused,[114] and occurs when "the criminal design or conduct origi-

nonprejudicial. On appeal, however, one of the defendants claimed that the unexpected testimony of a co-defendant was highly prejudicial to the defendant's case. The court didn't affirm or deny the prejudicial nature of this action, but, in veiwing the totality of the circumstances, decided there was no abuse of the trial court's discretion. The court stated that if there was no cooperation among the several defense counsel (as evidenced here by the co-defendant's unexpectedly taking the stand) the defense cousel must so inform the court. In this case, the court was not advised of any lack of cooperation and could therefore presume cooperation between counsel. In addition, when the co-defendant took the stand, neither of the other defendants moved for an *in camera* hearing to preview the contents of the testimony, nor was a motion for severance made before or during the co-defendant's testimony, nor was any motion to strike or motion for mistrial made after the co-defendant's testimony. This inaction on the part of the defense counsel acted in effect as a waiver of a subsequent attack on the prejudicial character of the co-defendant's testimony. In support of this ruling, see Rhone v. United States, 365 F.2d 980 (D.C. Cir. 1966).

[110] 545 F.2d 98 (10th Cir. 1976).

[111] *Id.* at 101.

[112] *Id.*

[113] 373 F.2d 810 (10th Cir. 1967).

[114] *Id.* at 811.

nates in or is the product of the minds of the government officials and is implanted by them in the mind of an otherwise innocent person."[115] When the affirmative defense of entrapment is raised, the government has the burden of proving that entrapment did not occur.[116] However, the government has this burden only where the evidence of entrapment is undisputed. Where a question of fact as to the existence of entrapment is present, it is unnecessary for the government to proceed affirmatively.

The Tenth Circuit rejected the per se rule enunciated in *United States v. Bueno*,[117] that the government must come forward to contradict the defendant when the defense of entrapment is raised. Rather, where the existence of entrapment is disputed, the jury is entitled to reject uncontradicted portions of the defendant's testimony despite a total lack of countervailing evidence. *Rosenfeld* demonstrates the lengths to which the Tenth Circuit will go to deny that entrapment is present as a matter of law.

Another affirmative defense was rejected by the Tenth Circuit in *United States v. Evans*.[118] The court ruled that prison conditions, whatever they might have been, could not justify a prison riot or any other criminal conduct.[119] This holding is in accordance with prior Tenth Circuit decisions and with decisions of other circuit courts.[120]

In *United States v. Gano*,[121] the court confronted the issue of the admissibility of evidence pursuant to rule 404(b) of the Federal Rules of Evidence,[122] pertaining to crimes committed by the

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[115] *Id.* at 812. Some years later, in United States v. Gurule, 522 F.2d 20 (10th Cir. 1975), the Tenth Circuit stated that if a person is shown to be so, then there is no entrapment. The court in *Rosenfeld* relies on both *Martinez* and *Gurule*.

[116] United States v. Martinez, 373 F.2d at 812.

[117] 447 F.2d 903, 906 (5th Cir. 1971), *cert. denied*, 414 U.S. 873 (1973). In *Bueno*, the Fifth Circuit held that entrapment is established as a matter of law when a government informer furnishes the narcotics to the defendant for sale to a government agent.

[118] 542 F.2d 805 (10th Cir. 1976).

[119] *Id.* at 819.

[120] *See, e.g.*, Conte v. Cardwell, 475 F.2d 698, 701 (6th Cir. 1972), *cert. denied*, 414 U.S. 873 (1973); United States v. Haley, 417 F.2d 625 (4th Cir. 1969); Nelson v. United States, 208 F.2d 211 (10th Cir. 1953).

[121] 560 F.2d 990 (10th Cir. 1977).

[122] FED. R. EVID. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

defendant other than those charged in the indictment.

The defendant was convicted on three counts of having carnal knowledge of a female under the age of sixteen. The defendant, a social worker, was assigned to counsel the family of a patient. Pursuant to this assignment, he became sexually involved with the girl's mother and persuaded her to use marijuana and to put it into her daughter's food. Eventually, the defendant gave marijuana to the girl and induced her to have sexual intercourse with him.

The issue in the case was the admissibility of evidence concerning the defendant's sexual relations with the mother and his insistence that the family use marijuana to relax. The court concluded that the evidence was both relevant, material, and indispensable to a complete showing since the numerous incidents were so closely related.[123] The evidence was also admissible to prove motive, preparation, plan, and state of mind,[124] despite the fact that the commission of the act was undisputed in that the defendant relied on insanity.[125] Thus, evidence is admissible both to prove the offense charged and to show the complete picture of the crime, even if the defendant has admitted the acts charged. The Tenth Circuit held that the prejudicial effect of this evidence was outweighed by its probative value.

C. *Trial Court Discretion*

In *United States v. Munz,*[126] the defendant was convicted of robbing a federally insured bank and assaulting and jeopardizing the life of a teller by the use of a weapon in violation of 18 U.S.C. §§ 2113(a) and (d). On appeal, the defendant alleged prejudical error arising from hypothetical questioning of an expert witness by the trial judge.

The defendant's defense was lack of mental competency at the time of the offense. Extensive medical records were introduced into evidence by the defendant, clearly overcoming the presumption of sanity. To attempt to establish the defendant's

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opportunity, intent, preparation, plan, knowledge, indentity, or absence of mistake or accident.

[123] 560 F.2d at 993.

[124] *Id.*

[125] *Id.*

[126] 542 F.2d 1382 (10th Cir. 1976).

competency, the prosecution presented testimony of an expert witness. During the direct examination of this witness, the trial judge questioned the witness regarding a hypothetical situation which, although similar to that of defendant's, raised facts not present in the case.

The trial judge instructed the jury that his questioning related only to a hypothetical situation and should be disregarded in considering the defendant's case. The Tenth Circuit held these curative instructions to be sufficient to eliminate any prejudice resulting from the trial judge's participation.[127]

United States v. Pinkey[128] examined the proper participation of a trial judge in the conduct of a trial.

Defendant was convicted of using the United States mails to perpetrate a scheme to defraud and obtain money, in violation of 18 U.S.C.A. § 1341. While incarcerated in Colorado State Penitentiary, defendant wrote letters to recent widows, feigning a past friendship with their deceased husbands and asking that portions of cash loans made by the defendant to their husbands be repaid as soon as possible.

Defendant elected to proceed *pro se* at trial.[129] During the court's voir dire examination, the defendant, in the juror's presence, wrote suggested questions on a piece of paper and submitted them to the judge.

The trial judge, out of the presence of the jury, alerted the prosecutor to the existence of the handwritten voir dire questions and suggested that the prosecutor might wish to have his handwriting expert make a comparison of this sample of the defendant's writing.[130] On redirect examination, the expert witness

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[127] The defendant argued that the prejudice could not be cured by a subsequent instruction, citing United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973), and Horton v. United States, 317 F.2d 595 (D.C. Cir. 1963). These two cases are examplee of judges' conduct and comments deemed so prejudicial as to not be cured by jury instructions. However, the court felt that the prompt curative instructions given here did overcome any prejudice. *See* United States v. De Angelis, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974).

[128] 548 F.2d 305 (10th Cir. 1977).

[129] The court determined that the defendant had intelligently and voluntarily waived his sixth amendment right to counsel with full understanding of the risks involved. *Id.* at 311.

[130] In its case-in-chief the prosecution had introduced evidence through a handwriting expert's analysis linking the defendant to the above-mentioned letters already in evidence.

identified the writing as the defendant's and the judge admitted it into evidence.

On appeal the Tenth Circuit rejected defendant's contention that the judge's suggestion constituted plain error because it denied defendant a fair trial and compelled the defendant to testify in his own defense. The court held that the trial judge not only has the prerogative but an obligation to inject into the trial matters which are important to the search for truth; a judge's participation in trials is proper so long as he remains impartial and does not prejudice any party.[131] The court concluded that the trial judge's suggestion was within his discretion and that the defendant's rights were not prejudiced.[132]

D. *Evidence*

1. Suppression of Evidence

In *United States v. Picone,*[133] the Tenth Circuit had its first occasion to apply *United States v. Donovan,*[134] a Supreme Court case on suppression of wiretap evidence when some defendants were not named in the wiretap order.[135] As a result of information obtained through two judicially authorized wiretaps, defendants Picone and Simone had been charged with operating a racketeering enterprise.[136] The evidence as to Simone was suppressed because he had not been named in the initial wiretap order.[137] The

[131] United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971); McBride v. United States, 409 F.2d 1046 (10th Cir.), *cert. denied,* 396 U.S. 938 (1969); Massey v. United States, 358 F.2d 782 (10th Cir.), *cert. denied,* 385 U.S. 878 (1966); Ayash v. United States, 352 F.2d 1009 (10th Cir. 1965); Gardner v. United States, 283 F.2d 580 (10th Cir. 1960).

[132] In addition, the court noted that even if it had found prejudice due to the trial judge's participation, in light of the overwhelming evidence of the defendant's guilt, it would have been harmless. 548 F.2d at 310.

[133] 560 F.2d 998 (10th Cir. 1977).

[134] 429 U.S. 413 (1977).

[135] The Supreme Court ruled that failure to name a particular defendant in the application for a wiretap order was not fatal absent a showing that "the presence of that information as to additional targets would have precluded judicial authorization of the intercept." *Id.* at 436.

[136] 18 U.S.C. § 1952 (1970).

[137] The first wiretap order was obtained on October 5, 1973, and it authorized interception of wire communications at defendant Picone's place of business and at the residences of two defendants. Five persons were named, but defendants Simone and Goodfellow were not named. The second wiretap order, obtained in November 1973, authorized the same interception of wire communications; this order included Simone but not Goodfellow. 560 F.2d at 1000.

evidence against Picone was also suppressed because it was tainted by conversations with a third defendant, Goodfellow, who had not been named in either order.[138] The Government appealed from both suppression orders, but the Tenth Circuit withheld disposition until *Donovan* was decided by the Supreme Court.[139]

In *Donovan,* the Supreme Court ruled that under the wiretap statute:[140] (1) The Government must name all individuals whose conversations it has probable cause to believe will be intercepted;[141] and (2) the failure to identify certain people whose conversations are overheard does not warrant suppression so long as the additional information, i.e., the omitted names, would not have precluded judicial authorization.[142]

In *Picone,* the Tenth Circuit first ruled that the failure to name Simone in the initial wiretap order did not warrant suppression of the evidence. The court recited the statutory prerequisites for a lawful intercept order: probable cause to believe that (1) an individual is engaged in criminal activity; (2) particular communications concerning that offense will be obtained through the interception; (3) normal investigative techniques have failed or appear unlikely to succeed; and (4) the target facilities are being used in furtherance of the specified criminal activity.[143] Citing *Donovan,* the court ruled that suppression is not the required remedy for every failure to comply with statutory requirements:

> To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."[144]

The failure to name Simone did not warrant suppression because the presence of Simone's name or other information about him would not have precluded the court's authorization of the wire-

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[138] *Id.*

[139] United States v. Picone, 560 F.2d at 999 n.2.

[140] 18 U.S.C. §§ 2510-2520 (1970).

[141] 429 U.S. at 428.

[142] *Id.* at 436.

[143] 560 F.2d at 1001 (citing 18 U.S.C. § 2518(3) (1970)).

[144] 560 F.2d at 1001 (*quoting* United States v. Donovan, 429 U.S. at 433). *See also* United States v. Giordano, 416 U.S. 505, 527 (1974).

tap.[145] Moreover, no facts subsequently revealed would have caused the judge to deny the order.[146] Thus, the suppression order as to Simone was reversed.

In the second part of its opinion, the court addressed Picone's argument that the Government deliberately withheld defendant Goodfellow's name[147] from both intercept applications, thus tainting any conversations between himself and the unnamed Goodfellow.[148] The court rejected defendant's claim that the Government's failure to include Goodfellow was an improper attempt to withhold pertinent information from the lower court which authorized the intercept. Rather, the court ruled that two factors, the Government's representation that Goodfellow's name was withheld to protect confidential informants and the defendant's ample opportunity to raise this issue and question Government witnesses about any improprieties, demonstrated that the defendant's claim was without merit.[149] Conclusory allegations of wrongdoing without proof did not constitute a sufficient basis for suppression.[150] Therefore, the suppression order in favor of Picone was also reversed.

The Tenth Circuit rejected numerous grounds for appeal in affirming defendant's conviction in *United States v. Moore*.[151] Defendant was convicted of attempting to destroy the United

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[145] The court takes special note of the ample information provided by the F.B.I. affidavit to the judge prior to judicial authorization. The court also notes that the affidavit contained a substantial amount of information concerning Simone's involvement, even though he was not specifically named. 560 F.2d at 1001-1002.

[146] The court studied a supplemental F.B.I. affidavit, and found it persuasive in concluding that all of the available information concerning Simone's involvement would not have caused the authorizing judge to deny the intercept order. *Id.* at 1002 n.5.

[147] *See* note 5 *supra*.

[148] Defendant Picone argued that the Government's intentional failure to comply with the naming requirement of the wiretap statute made this case distinguishable from *Donovan*, 560 F.2d at 1002. Picone rested his argument on a footnote to the *Donovan* opinion:

> There is no suggestion in this case that the Government agents knowingly failed to identify respondents . . . for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case.

United States v. Donovan, 429 U.S. at 436 n.23.

[149] 560 F.2d at 1002.

[150] *Id. See also* United States v. De La Fuente, 548 F.2d 528, 533-34 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977); Wilson v. United States, 218 F.2d 754, 757 (10th Cir. 1955).

[151] 556 F.2d 479 (10th Cir. 1977).

States Federal Courthouse Building in Oklahoma City by means of a bomb device.[152] Among her grounds for appeal,[153] defendant contended that the evidence was insufficient to sustain a conviction, and that evidence which showed that a bomb similar to the one found in the courthouse had been discovered at the defendant's former residence should have been excluded.[154]

The Tenth Circuit ruled that, although no one saw the defendant enter the building, the facts and circumstances[155] permitted

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[152] 18 U.S.C. § 844(f) (1976).

[153] Defendant urged six grounds for appeal:

(1) The evidence was insufficient to sustain conviction. *See* text accompanying notes 5-8 *infra*.

(2) The indictment was nonspecific and unconstitutionally vague, or alternatively, defendant's request for a bill of particulars should have been granted. The court held that because the language of the indictment tracked the language of the statute, the indictment was sufficiently definite to apprise the defendant of the crime charged. United States v. Moore, 556 F.2d at 482-83. As to defendant's request for a bill of particulars, the denial of her request was within the sound discretion of the trial court and would not be disturbed on appeal. *Id.* at 483.

(3) The trial court erred in refusing to suppress evidence of a former conviction in California. Defendant's prior conviction had been expunged under a California statute, CAL. PENAL CODE 1203.4 (West 1977), but the court ruled that the evidence was still admissible for impeachment purposes. Citing United States v. Potts, 528 F.2d 883 (9th Cir. 1975), and Barbosa v. Wilson, 385 F.2d 319 (9th Cir. 1967), the court concluded that the evidence was admissible in a subsequent federal proceeding, the California expungement notwithstanding. United States v. Moore, 556 F.2d at 483-84.

(4) The trial court erred in not granting a mistrial when evidence of defendant's association with the Symbionese Liberation Army was inadvertently presented to the jury. The court noted that the evidence was given voluntarily through no fault of the Government and that the jury had been instructed to disregard the evidence. Under such circumstances, the brief reference did not taint the entire trial and it did not require reversal. United States v. Moore, 556 F.2d at 484-85.

(5) The trial court should have prohibited evidence of defendant's fingerprints found on a paper sack near the bomb and evidence of similar explosives found in defendant's former residence. *See* text accompanying notes 9-15 *infra*.

(6) The prosecuting attorney should have given defense counsel copies of all statements given by a Government witness to the F.B.I. prior to trial; the prosecution did not give defendant the requested copies until shortly before the witness testified. The court found no error because the defense counsel had the opportunity to study all the statements over an evening recess before proceeding with cross-examination. United States v. Moore, 556 F.2d at 485.

[154] Defendant had lived in a house owned by her mother and cared for by a great aunt. After defenant moved out, the new tenant discovered what appeared to be a homemade bomb and called police. The evidence at trial included testimony by a bomb expert about the similarity of this bomb and the courthouse bomb. *Id.* at 481.

[155] In addition to the bomb expert's testimony, *see* note 154 *supra*, the Government presented four other witnesses: a fingerprint expert testified that prints taken from the courthouse bomb matched those from the bomb taken from defendant's residence; a

the inference that defendant had planted the bomb there.[156] In the court's view, the inference was analogous to the well-established rule that a defendant's unexplained possession of recently stolen goods is sufficient to support the inference that the possessor is the thief.[157] The court concluded that the trial court did not err in refusing to direct a verdict of acquittal.[158]

Defendant also contended that *United States v. Burkhart*[159] prohibited the introduction of two specific pieces of government evidence: defendant's fingerprints on a paper sack in which, it could be inferred, the bomb was carried into the courthouse;[160] and evidence of a similar bomb and other explosive materials found at the defendant's former residence.[161] The court rejected the argument, ruling that *Burkhart* was distinguishable. In *Burkhart,* the Tenth Circuit had ruled that evidence of prior crimes was inadmissible absent a showing of continuity of the offenses or a connecting link between the case on trial and prior similar offenses.[162]

In *Moore,* however, the admissibility of the evidence of explosive materials in defendant's home was governed by rule 404(b) which provides that evidence of prior acts is "admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowl-

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chemical company employee testified concerning purchases of explosive materials by defendant; defendant's former co-worker testified about defendant's claimed ability to make bombs and her desire to bomb the federal building; and a policeman testified about the observance of explosive materials and devices in defendant's home on a prior occasion. *Id.* at 481-82.

[156] *Id.* at 482.

[157] Hall v. United States, 404 F.2d 1367 (10th Cir. 1968); Jenkins v. United States, 361 F.2d 615 (10th Cir. 1966).

[158] 556 F.2d at 482.

[159] 458 F.2d 201 (10th Cir. 1972) (admission of prior convictions to prove intent *held* reversible error absent continuity between the prior offense and the offense on trial).

[160] The paper sack and a matchbook had been found on the ground near the bomb. The sack contained one burned match, thus leaving the impression that the bomb had been lighted while still in the sack. 556 F.2d at 481.

[161] *See* note 154 *supra.*

[162] The language of the court is instructive:

> Continuity of the offenses or a connecting link between the case on trial and the tendered similar offenses is always essential and is to be considered regardless of whether the evidence is offered to prove a plan, scheme, design, motive, knowledge or intent . . . . *The lack of showing of a common plan, scheme, design or intent is of itself a fatal deficiency here.*

458 F.2d at 208 (emphasis added).

edge, identity, or absence of mistake or accident."[163] The trial court did not err in admitting the evidence because it bore directly on whether the defendant had planted the courthouse bomb.[164]

2. Exceptions to the Hearsay Rule

In *United States v. Wiley*[165] the Tenth Circuit considered application of the conspiracy exception to the hearsay rule.[166] The conspiracy exception was invoked during a jury trial in which the defendant was convicted of distributing heroin and cocaine. The narcotics transaction was completed at Denver's Stapleton International Airport; the defendant's accomplice, Solomon, delivered narcotics to an undercover government agent, handing them under a restroom stall partition.

At trial the undercover agent testified that he could see Solomon's face over the top of the partition and that Solomon nodded his head, indicating without words that he was carrying the narcotics with him in readiness for the exchange.[167] The defendant objected to this testimony, arguing that the undercover agent was restating the out-of-court assertion of another (Solomon's nod of affirmation) to prove the truth of the matter asserted therein (that indeed Solomon was delivering narcotics).

In reiterating the traditional rule, the court found that the agent's testimony as to Solomon's nod of the head was hearsay because the nod was intended to be assertive or communicative. But, the court ruled that the conspiracy exception to the hearsay rule was triggered under the facts of *Wiley*, permitting admission of the undercover agent's testimony.[168] However, in so ruling, the Tenth Circuit muddled the foundational requirements of the conspiracy exception; and, under the Federal Rules of Evidence, the

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[163] FED. R. EVID. 404(b).

[164] 556 F.2d at 485.

[165] No. 77-1073 (10th Cir., June 27, 1977) (Not for Routine Publication).

[166] "The hearsay rule prohibits use of a person's assertion, as equivalent to testimony of the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and his qualifications to make it. Grand Forks B. & D. Co. v. Iowa Hardware Mut. Ins. Co., 75 N.D. 618, 31 N.W. 2d 495 (1948). See 5 Wigmore on Evidence (3d ed.) §§ 1361, 1364."
Leake v. Hagert, 175 N.W.2d 675 (1970).

[167] No. 77-1073 at 4.

[168] *Id.* at 6.

court probably erred in labeling the testimony hearsay in the first place.

Federal Rule of Evidence 801 provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."[169] The requirements of this rule were met by the facts of *Wiley*: a statement by an unnamed co-conspirator made during the conspiracy was offered against the defendant. Therefore, under the rule, there was no hearsay to begin with. The need for an exception to the hearsay rule was obviated.

As to the foundational requirements of the conspiracy exception, the court properly noted that no conspiracy need have been charged in order to trigger the conspiracy hearsay exception.[170] The difficulty comes in determining how much independent evidence of conspiracy the Tenth Circuit required in this case. The court did not specify any quantum; it merely quoted an Eighth Circuit case to the effect that a "likelihood of illicit association" constitutes enough of a conspiracy to validate the hearsay exception.[171] Thereafter, the court stated in conclusive fashion, without supporting details, that "there is sufficient evidence of concerted action (conspiracy) by Solomon, the declarant in this case, and the appellant."[172]

In future appellate proceedings, it may be deceivingly easy to find a *likelihood* of *illicit association* that, under *Wiley*, will let in untrustworthy and damaging hearsay.

In *United States v. Plum*[173] the Tenth Circuit considered the business records exception[174] to the hearsay rule. The court ruled

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[169] The general heading of FED. R. EVID. 801(d) is "Statements which are not hearsay."

[170] The court reasoned that "the acts and declarations of one co-defendant are admissible against the other if the existence of a conspiracy is in fact shown by independent evidence . . . ." *Id.* at 6. This is consistent with previous decisions. United States v. Jones, 540 F.2d 465 (10th Cir. 1976); United States v. Lemon, 497 F.2d 854 (10th Cir. 1974); Lowther v. United States, 455 F.2d 657 (10th Cir. 1973). There is considerable support in other jurisdictions. United States v. Pasha, 332 F.2d 193 (7th Cir. 1964); Cossack v. United States, 82 F.2d 214 (9th Cir. 1936).

[171] United States v. Sanders, 463 F.2d 1086 (8th Cir. 1972).

[172] No. 77-1073 at 7.

[173] No. 75-1834 (10th Cir., July 11, 1977).

[174] The traditional rule is succinctly stated in Johnson v. Lutz, 253 N.Y. 124, 170 N.E.

inadmissible a loss-claim document filled out by the intended buyer of a shipment of silver bars that had been stolen. The loss-claim document had been offered at trial to show that the value of the silver shipment was in excess of the $5,000 minimum for conviction of the defendant under 18 U.S.C. § 2315.

The Tenth Circuit decided that the loss-claim document had not been completed in the *regular course* of the buyer's business and therefore lacked indicia of trustworthiness as a business record exception under Federal Rule of Evidence 803(6).[175] Nevertheless, the court ruled that admission of the document was harmless error because a second document, a purchase order, clearly established the value of the silver shipment at greater than $5,000. The purchase order properly fell within the hearsay exception, having been maintained in the regular course of business.[176]

In *Plum* the Tenth Circuit also emphasized the general admissibility, as *substantive* evidence, of prior recorded testimony taken at a preliminary hearing. Under traditional analysis, such prior testimony was inadmissible hearsay if introduced to prove the truth of the matters asserted therein.[177] The trial court in *Plum* reflected this traditional approach by apparently limiting the use of the preliminary hearing testimony for impeachment purposes only (not hearsay).[178]

In commenting on the trial court ruling, the Tenth Circuit noted that the Federal Rules of Evidence have enlarged on prior

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517 (1930); the modern counterpart is FED. R. EVID. 803(6), "Records of regularly conducted activity," which provides:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation . . . .

[175] *Id.*

[176] *Id.* at 11.

[177] Such hearsay might be admissible if it was "testimony of a witness given at a former trial of the same case on substantially the same issues, and where there was opportunity for cross-examination" and the witness was now unavailable (dead, insane, physically unable to testify, beyond the jurisdiction of the court, or whereabouts unknown despite diligent search). Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681, 697 (1941).

[178] No. 75-1834 at 14.

recorded testimony. Rule 801(d)(1) defines it as *not* hearsay at all, in contrast to the traditional rule. It is substantive evidence, admissible for all otherwise acceptable purposes.[179] Nevertheless, the court said that limiting the use of prior recorded testimony in *Plum* was not reversible error, for its only obvious value in the trial was for impeachment. And it clearly had been admitted for that purpose.[180]

3. Evidence of Prior Convictions

In *United States v. Nolan,*[181] the Tenth Circuit upheld the admissibility at trial of a prior foreign conviction as evidence of "intent, design, a continuing course of conduct, guilty knowledge, mental disposition, capacity, habit, plan, motive and identity"[182] in relation to the present charge of importing marijuana from India. The defendant previously had been convicted in Britain of importing hashish from India in a similar fashion.

The court sidestepped the defendant's primary contention that the British conviction was inadmissible because there was no evidence that the British authorities had met or exceeded American constitutional standards for protection of personal rights. The British conviction wasn't introduced to "support guilt or enhance punishment," the court noted;[183] it was introduced, not as a conviction *per se,* but as evidence tending to show activity that was relevant to the likelihood that the defendant imported marijuana from India in the present case.

V. Jury Instructions

In *United States v. Walker*[184] the Tenth Circuit held that the trial court erred in refusing to provide additional instructions

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[179] Fed. R. Evid. 801(d) provides, in part:

(d) Statements which are not hearsay. A statement is not hearsay if —

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

[180] No. 75-1834 at 15.

[181] No. 76-1177 (10th Cir., March 22, 1977).

[182] *Id.* at 4-5.

[183] *Id.*

[184] 557 F.2d 741 (10th Cir. 1977).

requested by a jury during its deliberations.[185] Jury confusion had resulted because an indictment was worded in the conjunctive while one of the two statutes the defendant was accused of violating was worded in the conjunctive and the other in the disjunctive.[186] Compounding the confusion was the fact that the jury was forced to rely upon memory for the judge's instruction.

The jury sent a note to the judge expressing bewilderment over the conjunctive/disjunctive situation. The Tenth Circuit, relying upon *Rogers v. United States,*[187] found the failure of the trial court to respond to the jury question in open court in the presence of opposing counsel to constitute sufficient "possible prejudice to the defendant"[188] to require reversal of conviction.

In *United States v. Corrigan,*[189] the Tenth Circuit considered the issue of the sufficiency of the trial court instruction concerning the burden of proof relating to the affirmative defense of self-defense. The court was largely persuaded by two cases from the Ninth Circuit[190] in holding that the trial court instructions were not sufficiently clear to avoid confusion among instructions concerning self-defense and other affirmative defenses and the burden of proof related thereto.[191]

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[185] In addition, the Tenth Circuit held that the trial court was correct in ordering a new trial because of harrassment of a witness.

[186] Walker had been indicted for "knowingly obtaining *and* exercising control over the personal property of another" (emphasis added), in violation of (1) the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13 (with this cause dependent upon the Colorado theft statute, COLO. REV. STAT. § 18-4-401 (1973)) and (2) the federal theft statute, 18 U.S.C. § 661. 557 F.2d at 742. The Colorado statute is worded in the disjunctive as "knowingly obtaining *or* exercising control over" the property of another (emphasis added), while the federal theft statute uses the conjunctive but different language of "takes and carries away with intent to purloin." During deliberations, only a copy of the indictment was available to the jurors.

[187] 422 U.S. 35, 39 (1975).

[188] 557 F.2d at 741, 745.

[189] 548 F.2d 879 (10th Cir. 1977).

Two special agents of the I.R.S. attempted to arrest the defendant at a meeting of the Wyoming Patriots. The defendant pulled a spray canister from his pocket and sprayed the contents — liquid red pepper — into the faces of the agents.

[190] The two Ninth Circuit cases were DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935), and Notaro v. United States, 363 F.2d 169 (9th Cir. 1966). 548 F.2d at 882.

[191] The court stated that the instruction should make clear that "[U]nless the government has established beyond a reasonable doubt that the defendant did not act in self-defense, the jury should find him not guilty." 548 F.2d at 883.

VI. POST-TRIAL PROCEEDINGS

A. *Sentencing and Plea Bargaining*

United States v. Fairfax[192] involved an appeal pursuant to rule 35 of the Federal Rules of Criminal Procedure[193] alleging the imposition of an illegal sentence. The *pro se* appeal of Fairfax claimed that he had changed his plea from not guilty to guilty of the charge of rape upon the representation by his attorney that his sentence would be less than the thirty-year sentence imposed by the trial court. The Tenth Circuit rejected the Rule 35 claim as a "conclusory assertion."[194] The court said that Fairfax might still collaterally attack the trial court sentence if the standards of specificity of allegation and other criteria enunciated in *Blackledge v. Allison*[195] could be met.

The issue in *United States v. Davis*[196] was whether guilty pleas should be vacated where the trial judge erroneously told the defendant he could be sentenced to a total of fifty years, and the actual sentence imposed by the court was forty-five years. Relying upon the prior Tenth Circuit case of *Murray v. United States,*[197] and finding persuasive the Fifth Circuit reasoning in *United States v. Blair,*[198] the court held that the misstatement of the maximum possible term did not entitle the defendant to relief where there was no claim that the misinformation had had any effect on the guilty pleas. The court did, however, remand the case for resentencing.

B. *Prisoner's/Parolee's Rights*

James v. Rodrigues[199] involved the validity of a proceeding

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[192] No. 77-1055 (10th Cir. July 28, 1977) (Not for Routine Publication).

[193] FED. R. CRIM. P. 35 provides in part: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."

[194] No. 77-1055 at 3, 4.

[195] 431 U.S. 63 (1977). The Supreme Court in *Blackledge* allowed collateral attack on the judgment of a state court through the filing of a writ of habeas corpus. The petition brought in *Blackledge* (1) presented specific factual allegations and (2) alleged that defendant's guilty plea was induced by an unkept promise. The Tenth Circuit noted that in the instant case, the misrepresentation of Fairfax's lawyer might not qualify as an "unkept promise" to fall within the *Blackledge* criterion. No. 77-1055 at 4.

[196] 544 F.2d 1056 (10th Cir. 1976).

[197] 419 F.2d 1076 (10th Cir. 1969) (court's misstatement of the possible maximum sentence held not error).

[198] 470 F.2d 331 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973).

[199] 533 F.2d 59 (10th Cir. 1977).

initiated by a New Mexico district attorney under the New Mexico Habitual Offender Act, NMSA 40A-29-5 and 40A-29-6, subsequent to the appellant's retrial and reconviction. Both the trial and appellate proceedings had resulted in sentences of one to five years. However, subsequent to the appeal and contrary to his action following the original proceeding, the district attorney filed an habitual criminal charge which culminated in the sentencing of appellant to life in prison.

Relying upon Supreme Court rulings in *North Carolina v. Pearce*[200] and *Blackledge v. Perry*,[201] the court held the filing of the habitual criminal charge to be "manipulative" and "tactical," constituting an interference with the right to appeal in violation of the due process clause of the fourteenth amendment. The court reasoned that an appellant with a one to five year sentence should not have to anticipate a possible sentence of life in prison. Justice McWilliams dissented upon the ground that the habitual criminal statute is mandatory in its terms.

C. *Appeals by the Government*

United States v. Barney[202] involved a situation where the trial court had ordered the Government upon three working days' notice to be ready to proceed to trial on twenty-three cases under pain of dismissal if the Government was not ready to proceed. When the Government asked for a continuance on some of the cases, the trial court proceeded to dismiss certain of the cases. The Tenth Circuit found the trial court conduct to be an abuse of discretion and "utterly unreasonable,"[203] and held that "the Government, as well as the defendant, is entitled to notice and a reasonable time within which to get its witnesses to the courthouse."[204]

VII. STATUTORY INTERPRETATION

21 U.S.C. § 841(a)(1) prohibits physicians from "distributing" and "dispensing" controlled substances except when acting

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[200] 395 U.S. 711 (1969).
[201] 417 U.S. 21 (1974).
[202] 550 F.2d 1251 (10th Cir. 1977).
[203] *Id.* at 1255.
[204] *Id.*

in the usual course of professional practice. *United States v. Fellman*[205] held that an indictment under section 841(a)(1), charging the defendant with "distributing" rather than "dispensing" such substances to undercover agents posing as patients, was not fatally defective. In so holding, the Tenth Circuit rejected the contrary position of the Fifth Circuit on the identical issue,[206] choosing instead to align itself with the reasoning of the First, Sixth, and Ninth Circuits.[207]

B. *18 U.S.C. § 2114*

18 U.S.C. § 2114 provides in part:

> Whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin . . . or rob any such person of mail matter, or of any money, or other property of the United States, shall . . . be imprisoned . . . .

The question presented in *United States v. Smith*[208] was whether an "assault with intent to rob" is adequately charged for purposes of section 2114 by an indictment alleging an "attempt to rob." The Tenth Circuit found the reasoning of the Fifth Circuit on this identical issue to be persuasive,[209] concluding that the indictment must fail since "statutes are to be construed so that each word is given effect."[210]

C. *18 U.S.C. § 1503*

18 U.S.C. § 1503 punishes by fine or imprisonment whoever "endeavors to influence, intimidate or impede any witness, in any court of the United States," or whoever injures any "witness in his person or property on account of his testifying or having testified to any matter therein." *United States v. White*[211] involved the issue of who is a "witness" for purposes of establishing an

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[205] 549 F.2d 181 (10th Cir. 1977).

[206] *See* United States v. Leigh, 487 F.2d 206 (5th Cir. 1973).

[207] Under similar fact situations, the First, Sixth, and Ninth Circuits have held that a physician may be properly charged with unlawful "distribution" of controlled substances. *See* United States v. Badia, 490 F.2d 296 (1st Cir. 1973); United States v. Ellzey, 527 F.2d 1306 (6th Cir. 1976); United States v. Rosenberg, 515 F.2d 190 (9th Cir. 1975), *cert. denied*, 423 U.S. 1031 (1976).

[208] 553 F.2d 1239 (10th Cir. 1977).

[209] *See* Aderhold v. Schlitz, 73 F.2d 381 (5th Cir. 1934).

[210] 553 F.2d at 1239-42.

[211] 557 F.2d 233 (10th Cir. 1977).

intent to obstruct justice within the purview of section 1503. White, who had already pleaded guilty to charges of counterfeiting, approached the car driven by Disney while Disney, a witness for the counterfeiting case, was inside the car. White proceeded to kick the door and yell profanities at Disney.

White argued at trial that since he had pleaded guilty prior to the assault of Disney, he knew that there would be no trial at the time of the assault, so that there was no prospect that Disney would ever be called as a "witness." White thus reasoned that he could not possess the requisite specific intent to intimidate or injure a "witness" in his person or property for purposes of section 1503. The Tenth Circuit rejected White's argument, reasoning that so long as a federal proceeding was pending, there existed a real chance that Disney would be called to testify.

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