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CRIMINAL LAW AND PROCEDURE

OVERVIEW

I. FOURTH AMENDMENT

A. *Search and Seizure*

1. Standing

In *United States v. Smith,*[1] the Tenth Circuit refrained from determining its position on an issue that had been specifically reserved by the United States Supreme Court in *Brown v. United States,*[2] *i.e.*, whether the holding in *Simmons v. United States*[3] precludes a case by case analysis, rendering the "automatic standing" rule of *Jones v. United States* unnecessary.[4] Appellant Smith, who had been convicted at a second trial of possession of

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[1] 527 F.2d 692 (10th Cir. 1975).

[2] 411 U.S. 223 (1973). In order to have standing under *Brown*, defendants must (1) be on the premises at the time of the contested search and seizure; (2) allege a proprietary or possessory interest in the premises; and (3) be charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. *Id.* at 229. As to the third criterion, the Supreme Court stated: "But it is not necessary for us now to determine whether our decision in *Simmons* . . . makes *Jones* 'automatic' standing unnecessary. We reserve that question for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.'" *Id.* at 228.

[3] 390 U.S. 377 (1968). The Supreme Court in *Simmons* held that concessions made by a defendant in order to establish standing to move to suppress cannot be used by the Government in its case-in-chief against him or her at trial. *Id.*

[4] 362 U.S. 257 (1960). In *Jones* the Supreme Court held that in the case of a defendant who had been convicted of possession of narcotics seized from the apartment of another person, (1) the defendant need not make a preliminary showing of an interest in the premises searched or the property seized and (2) because the defendant was lawfully in the other person's apartment, he had made out a sufficient interest in the premises to confer standing to contest the search. *Id.* at 263, 265. The Ninth Circuit, in United States v. Boston, 510 F.2d 35 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975), expressed the following view of "automatic standing":

> Automatic standing ordinarily comes into play where the search has not intruded upon the privacy of the defendant but where that which has been seized nevertheless can be used against him. In such cases if he is to have standing to object to the seizure as the product of an unreasonable search he must show that some recognizable interest of his has been offended by the seizure—a showing that prior to *Jones* was highly embarrassing.

510 F.2d at 37-38.

The Government in *Smith*, however, suggested "that under *Brown* there is no doubt about the continued validity of the automatic standing rule of *Jones.*" United States v. Smith, 527 F.2d at 695.

stolen United States Postal Service money orders,[5] sought on appeal to establish his standing to challenge an automobile search and subsequent seizure of the money orders. The record indicated that Smith, while in the process of moving from his apartment, threw a brown sack containing the money orders into the unoccupied vehicle of a person who was helping him move.[6] Smith's actions were observed by a police officer who subsequently searched the unoccupied vehicle and seized the brown sack.[7]

In its analysis, the court reiterated the criteria articulated in *Jones v. United States*[8] for standing to contest a search and seizure, stating: "*Jones* . . . suggests three alternatives which may be used to establish standing, (1) substantial proprietary or possessory interest in the thing seized, (2) a similar interest in the premises searched, and (3) legitimate presence on the premises searched."[9] After determining that only the first criterion was applicable,[10] the court concluded that the evidence "clearly establishes that as of the time of the seizure Smith had abandoned the money orders"[11] and, therefore, did not have a substantial proprietary or possessory interest in the thing seized at the time of the seizure.[12] In side-stepping the "automatic standing" issue left open in *Brown*,[13] the Tenth Circuit pointed out the similarity

[5] Appellant's first conviction was reversed and remanded with directions that an evidentiary hearing on the motion to suppress be held *prior* to retrial. *See* United States v. Smith, 495 F.2d 668 (10th Cir. 1974).

[6] 527 F.2d at 694-95.

[7] *Id.* at 695.

[8] 362 U.S. 257 (1960).

[9] 527 F.2d at 695.

[10] The record indicated that Smith was not in the unoccupied car when it was searched nor did he have a possessory or proprietary interest in the helper's vehicle since Palmasano, the helper, was a stranger to Smith. In addition, the court pointed out that even if Smith had permission to put some of his belongings into Palmasano's car, he did not do so. His belongings were placed in his own vehicle. Only the money orders were "thrown" into Palmasano's vehicle. *Id.*

[11] *Id.* at 695-96. In disposing of the money orders, Smith testified that he "just wanted them away from me." *Id.* at 695.

[12] *Id.* at 696.

[13] *See* notes 2 through 4 *supra* and accompanying text. Other circuit courts of appeal have confronted the problem and avoided it in a number of ways. *See* United States v. Lang, 527 F.2d 264 (4th Cir. 1975) (possession at time of search not essential element of crime charged); United States v. Boston, 510 F.2d 35 (9th Cir. 1974) (possession not essential element of possession of narcotics with intent to distribute); United States v. Dye, 508 F.2d 1226 (6th Cir. 1974) (even though defendants charged with possession as an essential element of the offense charged, the Sixth Circuit found no evidence of posses-

between *Brown* and its decision in *Smith:*

> [T]he Government's case against Smith does not depend upon Smith's possession of the stolen money orders at the time such were taken from [the helper's] automobile. As a matter of fact, the "possession" relied on by the Government in the instant case to support the conviction is necessarily "possession" occurring prior to Smith's abandonment of the money orders, because a finding of "abandonment" connotes a lack of possession.[14]

Thus, the court held that Smith was without standing because he had no proprietary or possessory interest in the money orders at the time they were seized by the police.[15]

2. Probable Cause for Warrantless Search

In *United States v. Rodriguez*[16] the issue addressed by the Tenth Circuit was whether border guards had probable cause to search the luggage of passengers on a commercially operated van-trailer combination passing over the border. Appellant Rodriguez, one of the paying passengers, was ordered from the van by

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sion at the time of the contested search and seizure); United States v. Capra, 501 F.2d 267 (2d Cir. 1974) (defendants not charged with physical possession at the time of the seizure); United States v. Colacurcio, 499 F.2d 1401 (9th Cir. 1974) (defendant in conspiracy prosecution not charged with possessory crime); United States v. Hearn, 496 F.2d 236 (6th Cir. 1974) (possession not an essential element of the conspiracy offense charged); United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974) (defendant never had actual or constructive possession of his customers' suitcases at the time of the seizure). *See also* United States v. Calhoun, 510 F.2d 861, 866-67 n.4 (7th Cir. 1975).

The Ninth Circuit, in *United States v. Boston,* framed the issue as follows:

> What is left after *Simmons* to outrage one's sense of fairness—when there is no intrusion upon a defendant's privacy and his claim of possessory right to that which has been seized no longer has its devastating effect—is the matter of "prosecutorial self-contradiction." The question is as to the degree and quality of governmental inconsistency that suffice to create that condition and, on balance, to trigger "automatic" standing. In such cases, as we read *Brown,* it is not the facts as developed at trial or the prosecutor's theory of guilt that controls. Rather, it is whether the defendant has been *charged* with possession—whether possession is an essential element of the crime for which he has been indicted.

510 F.2d at 38 (emphasis in original). *See* United States v. Miller, 500 F.2d 751 (5th Cir. 1974).

[14] 527 F.2d at 696.

[15] *Id.* It should be noted that this analysis tends to eviscerate the "automatic standing" rule since a defendant charged with a possessory offense may arguably be said always to have a "possessory interest" in the subject matter, regardless of whether he or she is in actual physical control. This would afford such a defendant the "automatic standing" to contest the seizure of the evidence alleged to be illegally possessed.

[16] 525 F.2d 1313 (10th Cir. 1975).

border agents[17] and directed to open his luggage which had been taken from the trailer hitched to the van.[18] He was subsequently convicted of unlawful possession of heroin with the intent to distribute.[19]

In determining that the discovery of marijuana in the trailer was insufficient in and of itself to establish probable cause to search the defendant's luggage, the Tenth Circuit concluded that the warrantless search in this instance violated the defendant's fourth amendment protection from unreasonable searches and seizures.[20] Although the Government contended that Rodriguez "voluntarily" opened his suitcase,[21] the court noted that the Government failed to sustain its burden in showing that consent had been freely and voluntarily given for the warrantless search.[22] The court also resolved that the search could not be upheld as a search incident to a lawful arrest.[23] Finally, placing particular reliance

[17] Passengers, including Rodriguez, were ordered from the van after a border guard located marijuana in the precise place where an informant had said it would be. *Id.* at 1315-16. Although there was a noted absence of prior dealings between the agent and this particular informant, the court "assumed" that the agent had probable cause to believe there was marijuana in the trailer since he had inquired of others who had had prior dealings with this informant, thereby satisfying himself that the informant was reliable. The court also made note of the fact that the border agent was not required to obtain a warrant before searching the trailer for marijuana due to the automobile exception to the search warrant requirement. *Id.* at 1316.

[18] *Id.* at 1315.

[19] Rodriguez was convicted under 21 U.S.C. § 841 (1970).

[20] 525 F.2d at 1316-17. Although Rodriguez' suitcase contained a large amount of heroin (25 pounds), the court stated that "[s]uch fact, however, does not validate a search that was invalid in its inception." *Id.* at 1315.

[21] The court noted that the border patrol agents were armed and in full uniform and that the passengers were ordered from the van and "told" to open their luggage. The mere fact that Rodriguez, who understood little English, did so, does not mean that he voluntarily consented to the search. *Id.* at 1315-16.

[22] "[T]his burden is not met by merely showing acquiescence to a claim of lawful authority." *Id.* at 1316 (citing Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Jones, 475 F.2d 723 (5th Cir. 1973)). *See also* United States v. Biswell, 442 F.2d 1189, 1191 (10th Cir. 1971).

[23] "The fact that marijuana was discovered in the trailer was not sufficient to justify the arrest of Rodriguez for possession of marijuana." 525 F.2d at 1316. *See* United States v. Castillo, 524 F.2d 286 (10th Cir. 1975). *Castillo* was the companion case to *Rodriguez*. As driver of the van, Castillo was arrested for possession with intent to distribute the marijuana found in the trailer. His conviction was subsequently overturned due to the fact that he merely drove the van/trailer without having loaded or ever looked into the trailer. Hence, the court determined he could not have been in possession.

The court in *Rodriguez* further noted that, even if the appellant had been subject to a lawful arrest, "the scope of any permissible search incident to such arrest would not have

on *United States v. Di Re,*[24] the court concluded that the right to search a vehicle for contraband does not carry with it a concomitant right to search the person of an occupant of such vehicle and, by extension, the occupant's suitcase.[25]

3. Airline Freight Inspections

The airline freight inspection[26] of a package shipped from San Francisco, California, to Oklahoma City, Oklahoma, presented the Tenth Circuit with a question as to the reasonableness of the search and seizure of the package's contents[27] and the corollary question of the protection afforded by the fourth amendment, if any, where there is a private as opposed to a governmental search.[28] In *United States v. Ford*[29] an airline agent in San Francisco opened a package addressed to the defendant in Oklahoma City where the apparent nervousness of the sender alerted the freight agent that the package might contain contraband or another substance ineligible for air freight.[30] After determining

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extended to his suitcase in the trailer" since the presence of a weapon or the possibility of destruction of the evidence by the arrestee and his proximity to his suitcase were not present as to Rodriguez. 525 F.2d at 1316-17. The court further hypothesized that, even if "Rodriguez' suitcase had merely been under his seat in the bus, instead of in the trailer, it could not be said that there was probable cause to search Rodriguez' suitcase." *Id.* at 1317 (citing United States v. Day, 455 F.2d 454 (3d Cir. 1972); United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971)).

[24] 332 U.S. 581 (1948).

[25] 525 F.2d at 1317. The Government relied on United States v. Medina-Flores, 477 F.2d 225 (10th Cir. 1973), for the lawfulness of the search in *Rodriguez.* The Tenth Circuit, however, distinguished the two cases on their facts, *i.e.,* whether the driver and occupants were total strangers, as in *Rodriguez,* or companions in crime, as in *Medina-Flores. See also* United States v. Masiello, 235 F.2d 279, 283 n.2 (2d Cir. 1956); United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955).

[26] The right of freight shippers to inspect all packages is established by tariffs filed by carriers with the Civil Aeronautics Board pursuant to 49 U.S.C. § 1373(a) (1970). *See* United States v. Ford, 525 F.2d 1308, 1309 (10th Cir. 1975) (citing ATP Tariff CAP No. 96, Rule 24). "The practical effect of [the tariff] is that the person shipping goods consents to the inspection of his goods by entering into the contract of shipment." United States v. DeBerry, 487 F.2d 448, 449 n.1 (2d Cir. 1973).

[27] The Tenth Circuit stated:

> [We must] consider the validity of the search, arrest, and seizure process in San Francisco and Oklahoma City. It seems to us that the events which occurred in California and Oklahoma were one episode and must be considered together for Fourth Amendment purposes. Illegality in either place would be fatal to the government's case.

United States v. Ford, 525 F.2d 1308, 1310 (10th Cir. 1975).

[28] *See* United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

[29] 525 F.2d 1308 (10th Cir. 1975).

[30] *Id.* at 1309.

that the substance in the package was heroin, local police officers called to the scene proceeded to mark, reseal, and place the package aboard the plane for Oklahoma City. Thereafter, enforcement officers in that city were informed of the situation.[31] Upon claiming the package, the defendant was immediately arrested.[32]

Reiterating the language of *United States v. Harding*,[33] the Tenth Circuit concluded that "the events which occurred in San Francisco did not amount to a government search; rather, it was a private inspection . . . not violative of the Fourth Amendment."[34] In addition, the court determined that the *seizure* in San

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[31] *Id.* at 1309-10.

[32] Ford was charged and convicted of unlawful possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1970). On appeal, the defendant-appellant invoked her fourth amendment protection as to the contents of the package. 525 F.2d at 1310.

[33] 475 F.2d 480 (10th Cir.), *vacated on other grounds*, 414 U.S. 964 (1973). The Tenth Circuit, in *Harding*, held that the inspection was authorized by tariff regulations and was thus a private search in the absence of "collusion with federal officers." 475 F.2d at 483. *See* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 41:25 (1967).

[34] 525 F.2d at 1312. All of the cases relied upon by the Tenth Circuit to support its position seem to have entailed the following general fact pattern: Airline officials become suspicious as to the contents of a package because of the demeanor of the sender or because of the contents marked on the package; the package is opened by the airline agents who determine that the package contains a suspicious narcotic substance or obscene materials; and law enforcement officers, either local or federal, are then called to verify the contents before the package is resealed. United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); United States v. Harding, 475 F.2d 480 (10th Cir. 1973).

The threshold question facing the Tenth Circuit, in determining whether information obtained as a result of an airline freight inspection is usable by the Federal Government at trial, is whether or not the Government participated in the initial search. Elkins v. United States, 364 U.S. 206 (1960). *See* United States v. Issod, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), wherein the test appeared to be whether the "initial opening of one of the trunks [was] by the freight agent." 508 F.2d at 994. The Court of Appeals for the District of Columbia has stated that the focus of inquiry should be on whether the airline search was "made on the carrier's own initiative for its own purposes." United States v. Pryba, 502 F.2d at 398. The Tenth Circuit noted, in *Ford*, that "[i]n our case, as in *Pryba* and apparently in *Issod*, the government agents were called in after completion of a privately motivated and authorized inspection by airline officials . . . ." 525 F.2d at 1312.

Other cases have held that "an inspection by a carrier is not a governmental search. United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972)." United States v. DeBerry, 487 F.2d 448, 450 (2d Cir. 1973). *See* United States v. Blanton, 479 F.2d 327 (5th Cir. 1973); United States v. Echols, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); United States v. Tripp, 468 F.2d 569 (9th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973); Clayton v. United States, 413 F.2d 297 (9th Cir. 1969), *cert. denied*, 399 U.S. 911 (1970). If the search is conducted in the presence of or at the behest of government law enforcement officers, then the evidence obtained may be inadmissible unless probable cause for the

Francisco was reasonable and necessary where based upon probable cause under exigent circumstances.[35] Following the analysis of the Second Circuit in *United States v. DeBerry*,[36] the Tenth Circuit reasoned that the Oklahoma City officers were merely *reasserting* dominion and control over the package and its contents as part of one continuous episode and that the constitutional rights of the appellant had not been violated thereby.[37]

B. *Arrest Without Probable Cause and Effect Upon Confession*

The Tenth Circuit was confronted with a case "at the crossroads of the Fourth and Fifth Amendments"[38] in *Stevens v. Wilson*.[39] Appellant Stevens sought appeal from a judgment of the federal district court which had denied habeas corpus relief from a conviction affirmed by the Colorado Supreme Court.[40] Appellant Stevens "alleged that her arrest was unlawful and that it tainted her subsequent confession since the confession was the product of the invalid arrest . . . ."[41] The Tenth Circuit noted

search is present. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). For other cases supporting this proposition see authorities cited in United States v. Pryba, 502 F.2d at 398 n.41. *See also* United States v. Newton, 510 F.2d 1149 (7th Cir. 1975).

[35] 525 F.2d at 1313. It appears that the Tenth Circuit went one step beyond *DeBerry* (no warrant required at the suitcase's destination) in that it required exigent circumstances where there was no search warrant at the package's place of dispatch, *i.e.*, San Francisco. The court pointed out that if the officers had detained the substance until a magistrate could issue a warrant to seize it: "The time delay required to obtain a warrant . . . might very well have warned the parties to the crime of the government's presence and prevented their apprehension. If the contraband had not been shipped immediately, the Oklahoma City addressee probably would have become suspicious and remained aloof." *Id.*

[36] 487 F.2d 448 (2d Cir. 1973).

[37] 525 F.2d at 1312-13. Under the *DeBerry* analysis, the seizure of the contraband by a Los Angeles officer was legal where the carrier, under a legal inspection, put the marijuana in the officer's plain view; the marijuana could then be seized upon sight without a warrant. The officer was deemed to have made the seizure by removing one of the bricks of marijuana, marking it, and marking its container with his initials. Thus, when police in New York removed the bag from the back seat of the defendants' car, they were not making an initial seizure, but were merely reasserting dominion and control first exercised by the government in Los Angeles over the suitcase. United States v. DeBerry, 487 F.2d at 451.

[38] Brown v. Illinois, 422 U.S. 590, 591 (1975).

[39] 534 F.2d 867 (10th Cir. 1976).

[40] People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973). The appellant was convicted in the state court of possession of marijuana, in violation of COLO. REV. STAT. § 48-5-2 (1963), and of introducing contraband into the Colorado State Penitentiary, in violation of COLO. REV. STAT. § 40-7-58(2) (Supp. 1967).

[41] 534 F.2d at 869.

the chain of events leading up to the challenged confession to be as follows: Stevens entered a restroom on the grounds of the Colorado State Penitentiary; the restroom was searched after her exit and marijuana was subsequently found; she and a companion followed an investigator, at his request, to a room in the maximum security area where they were arrested and given their rights under *Miranda v. Arizona*;[42] and she was detained in the room for interrogation during which time she made an inculpatory statement.[43]

The Tenth Circuit was in accord with the district court ruling that Stevens' arrest was not a mere detention or preliminary investigation within the framework of *Terry v. Ohio*.[44] However,

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[42] 384 U.S. 436 (1966).

[43] 534 F.2d at 869-70. The Tenth Circuit referred to the opinion of the Colorado Supreme Court for this summary of the essential facts.

[44] 392 U.S. 1 (1968). In accordance with its reasoning in Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971), the Colorado Supreme Court affirmed appellant's conviction on the ground that the alleged arrest was in the nature of a field investigation. In *Stone* such detention was justified by something less than probable cause. *Id. See* People v. Stevens, 183 Colo. at 404, 517 P.2d at 1339. Thus, the supreme court concluded that removal of petitioner from the prison lobby was a reasonable and sensible manner in which to investigate criminal activity, and that a one-half hour detention for the same was reasonable under the circumstances. *Id.* at 406-07, 517 P.2d at 1340. *See* Terry v. Ohio, 392 U.S. at 34-35 (White, J., concurring) (favors temporary detention on streets if pertinent questions are asked). *See also* People v. DeBour, 19 CRIM. L. REP. (BNA) 2289 (N.Y. Ct. App., June 15, 1976), wherein the court held that an officer with a lesser degree of suspicion than that necessary for a forcible stop under *Terry* may approach a private citizen on the street for the purpose of requesting information; however, the officer must have an *articulable* reason for doing so. It should also be noted that the Colorado Supreme Court in *Stevens* pointed out that the record before it would not support the extent of an intrusion which would be justified by probable cause to arrest. 183 Colo. at 406, 517 P.2d at 1340.

The federal district court disagreed with the Colorado Supreme Court's conclusion that the "arrest" was within *Terry*, ruling instead that there had been an arrest for the purpose of interrogating Stevens. Stevens v. Wilson, 534 F.2d at 870. The Tenth Circuit agreed that the appellant's arrest was not a detention or preliminary investigation due to the fact that "the appellant was confined within a room in the penitentiary; . . . she was confronted with the marijuana which had been discovered in the restroom following her visit; . . . she was questioned thoroughly and a confession was obtained." *Id.* Judge Barrett, in his concurring opinion, preferred to premise the finding that there had been an arrest on the fact that the defendant had been told she was under arrest. *Id.* at 873.

Note the hypothetical effect of Stone v. Powell, 428 U.S. 465 (1976), on Stevens' habeas corpus claim in *Stevens v. Wilson*. In *Stone* the United States Supreme Court held that, after a defendant has been afforded an opportunity for the full and fair litigation of fourth amendment claims by the state, he may not thereafter obtain federal habeas corpus relief on the ground that illegally seized evidence was introduced at his trial. 428 U.S. at 494. It would appear that *Stevens* presents just the type of case where the appellant should not be afforded habeas corpus relief since she raised the issue of no probable cause for the arrest at the state level. 183 Colo. at 403, 517 P.2d at 1338.

given the fact that there was an arrest, the court concluded that the federal district court had failed to consider whether there was probable cause to arrest based upon the seizure of the marijuana.[45] In remanding for findings on this issue, the Tenth Circuit determined that the presence or absence of probable cause was a crucial question in the case[46] and concluded "that the trial court erred in merely determining the voluntariness of the confession as a Fifth Amendment problem in failing to come to grips with the illegality of the arrest and its effect upon the validity and competency of the appellant's confession."[47]

The Tenth Circuit further instructed that if it was found that an arrest had been made without probable cause,[48] then the validity and competency of the confession would have to be considered in light of *Wong Sun v. United States*[49] and *Brown v. Illinois*.[50]

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[45] The court stated that an independent determination of whether probable cause existed for the arrest pursuant to the fourth amendment is "the crucial issue in a habeas corpus case" and "entirely permissible and . . . called for under 28 U.S.C. Section 2254." 534 F.2d at 870.

[46] *Id.* at 871. 28 U.S.C. § 2254 (1970) reads, in pertinent part, as follows:

> (d) [A] determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct, unless . . . that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced . . . and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

[47] 534 F.2d at 872. The federal district court had concluded that a violation of the appellant's fourth amendment rights was not a controlling consideration since voluntariness of the confession was the crucial issue of the case and, under standards set by the Tenth Circuit, the confession had been voluntary. *Id.* at 870 n.1.

[48] The court noted that "[c]onceivably the total evidence amounted to probable cause [to arrest]" but that "the issue would be at least a close question demanding careful scrutiny" by the trier of fact. *Id.* at 871. For additional cases dealing with the necessity of determining probable cause to arrest prior to determining the voluntariness of confessions, see United States v. Rose, 526 F.2d 745 (8th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976); Logan v. Capps, 525 F.2d 937 (5th Cir. 1976). *See also* United States v. Burnett, 526 F.2d 911 (5th Cir. 1976).

[49] 371 U.S. 471 (1963).

[50] 422 U.S. 590 (1975). The Tenth Circuit does not view *Brown* as extending or enlarging *Wong Sun* but merely views it as a recognition by Illinois of the *Wong Sun* doctrine. 534 F.2d at 872. *See* United States *ex rel.* Mungo v. LaVallee, 522 F.2d 211, 218 n.7 (2d Cir. 1975). For this reason, the Tenth Circuit found the state's argument that *Brown* was to be applied retroactively as nonmeritorious. 534 F.2d at 872 n.3. In its analysis, the Tenth Circuit noted certain criteria from *Brown* for determining whether a confession was the fruit of an illegal arrest, *e.g.*, whether *Miranda* warnings had been given; or the

On the other hand, if the federal district court concluded that the arrest was valid, then the criteria of *Miranda v. Arizona* would have to be examined to determine whether or not the confession had been voluntary.[51]

II. FIFTH AMENDMENT

A. *Grand Jury Setting*

1. Use of Privileges

In *Thompson v. United States*[52] witness Thompson, as secretary and representative of the Phillips Petroleum Co., asserted the attorney-client and work-product privileges as defenses to a 28 U.S.C. § 1826(a)[53] contempt citation for failure to produce certain corporate documents subpoenaed by a grand jury. At the request of the Government, and in response to appellant's motion to quash, the trial court examined the disputed documents[54] in camera. After conducting an ex parte hearing at which government counsel was present, the court held that the Government had met its burden in establishing a prima facie need for the documents.[55] On appeal, Thompson challenged the ex parte hearing, asserting that a determination as to whether the documents contained communications in contemplation or furtherance of illegal activities required an adversary hearing.[56]

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presence of intervening circumstances. *Id.* at 872. *See* Santos v. Bayley, 400 F. Supp. 784, 789 (D.C. Pa. 1975) (held that the confession was an intervening independent act of free will sufficient to purge the primary taint of the unlawful arrest). The court also reiterated that the burden of showing admissibility of a confession after an illegal arrest (that it was the product of an accused's free will) rests upon the State. 534 F.2d at 872. *See* United States v. Shavers, 524 F.2d 1094, 1096 (8th Cir. 1975).

[51] 534 F.2d at 871.

[52] 532 F.2d 734 (10th Cir. 1976).

[53] This subsection reads as follows:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses *without just cause* shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.

28 U.S.C. § 1826(a) (emphasis added).

[54] The Tenth Circuit also examined all of the disputed documents in camera and determined that 28 of them involved the claims of attorney-client privilege and 7 made the claim of work-product privilege. 532 F.2d at 736.

[55] *Id.* at 735.

[56] *Id.* at 736.

In rejecting this argument, the Tenth Circuit began with the proposition that Thompson's attorney-client privilege was governed by common law.[57] The court then noted that previous decisions interpreting the privilege had held that the privilege must give way when illegal activities on the part of the client are involved.[58] Recognizing that this determination of existing or intended criminal activity can be made during an ex parte hearing,[59] the court determined that the burden of demonstrating some relationship between the subpoenaed documents and the charges under investigation rests upon the Government.[60] The Tenth Circuit then concluded that the lower court did not abuse its discretion in conducting an ex parte hearing and that the Government had met its burden in showing prima facie need.[61]

As to Thompson's claimed work-product privilege, the court followed the *Hickman v. Taylor*[62] rule and the Tenth Circuit's decision in *Natta v. Hogan*.[63] In light of these decisions, the court was resolved to find that, in the absence of a claim by the appellant that the documents had been prepared for pending litigation, the Government had met its burden in showing "adequate reason" for the production of the documents.[64] The Tenth Circuit further stated that "[t]he question of the work-product privilege

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[57] *Id.* at 736-37. *See* FED. R. EVID. 501.

[58] Clark v. United States, 289 U.S. 1 (1932); United States v. Friedman, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *aff'd* 385 U.S. 293 (1966). *See* Sawyer v. Barczak, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956); United States v. Weinberg, 226 F.2d 161 (3rd Cir. 1955).

[59] On the basis of Alderman v. United States, 394 U.S. 165 (1969), Thompson argued that an adversary hearing was required. In its analysis, the Tenth Circuit distinguished those cases where an adversary hearing is required due to the witness' claimed defense of illegal electronic surveillance by the government and the instant case where there is a noted absence of such a defense. 532 F.2d at 737. *See* United States v. Vigil, 524 F.2d 209 (10th Cir. 1975), *cert. dismissed*, 425 U.S. 927 (1976). The court expressed the concern that to allow an adversary hearing on Thompson's claimed privilege would turn the hearing into a mini-trial on the merits and subvert the expeditious functioning of the grand jury. 532 F.2d at 737.

[60] 532 F.2d at 737.

[61] *Id.* at 738. *See* United States v. Friedman, 445 F.2d at 1086. *See also* Clark v. United States, 289 U.S. at 14.

[62] 329 U.S. 495 (1947). The rule states that the proponent seeking an attorney's documents must establish "adequate reasons" to justify production. *Id.* at 512.

[63] 392 F.2d 686, 693 (10th Cir. 1968) (discovery does not apply to documents prepared by an attorney in preparation for impending litigation).

[64] 532 F.2d at 738.

is one for ultimate determination at the trial. We will not give an anticipatory answer."[65]

In the case of *In re Vigil*,[66] witness Vigil contended that her marriage to a prospective defendant in a case under investigation by the grand jury constituted "just cause" under 28 U.S.C. § 1826(a)[67] for her refusal to testify before the grand jury.[68] Vigil was served with a subpoena on July 22, 1975, directing her to appear before the grand jury on August 19, 1975. On August 18, 1975, defense counsel filed various motions, memoranda, and affidavits, none of which sought to raise the marital relationship privilege as a defense.[69] On the following day a hearing was held on Vigil's motions to quash the subpoena. After the denial of each motion, she appeared before the grand jury and refused to testify.[70] She was subsequently granted "use" immunity under 18 U.S.C. § 6002[71] and was ordered by the trial court to testify.[72] On the afternoon of August 19th Vigil again refused to testify, for the first time mentioning her alleged marital relationship as one ground for her refusal.[73] Although the Government made a re-

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[65] *Id.*

[66] 524 F.2d 209 (10th Cir. 1975).

[67] See note 53 *supra* for the text of the subsection.

[68] 524 F.2d at 217.

[69] *Id.* The court's decision indicates that these motions raised such issues as grand jury selection, Vigil's right to have an attorney present in the grand jury room, and her right to compel disclosure of electronic surveillance. *Id.* at 212. See notes 82 through 99 and accompanying text *infra* for a discussion of the electronic surveillance defense to contempt proceedings.

[70] 524 F.2d at 212.

[71] An example of "use" immunity in this case would be to prohibit the use of any specific answer she gave before the grand jury from being used against her in a subsequent prosecution. However, it does not prohibit the use of evidence discovered from leads supplied by that testimony.

[72] 254 F.2d at 217. As an additional ground for appeal, the appellant claimed that the immunity granted was not broad enough. *Id.* at 219. Following the Supreme Court decision in Kastizar v. United States, 406 U.S. 441 (1972), the Tenth Circuit held that the trial court did not err in refusing to issue protective orders. *But see* Justice Douglas' dissent in *Kastizar:*

> When we allow the prosecution to offer only "use" immunity we allow it to grant far less than it has taken away. For while the precise testimony that is compelled may not be used, leads from that testimony may be pursued and used to convict the witness. My view is that the framers put it beyond the power of Congress to *compel* anyone to confess his crimes.

Id. at 466-67. For a recent criticism of "use" immunity and the grand jury system in general, see Goldenberg, *Congressional Reform of Grand Juries Expected,* Rocky Mountain News, November 15, 1976, at 3, col. 1, and at 14, col. 2.

[73] 524 F.2d at 217.

quest that Vigil be held in contempt after her second refusal to testify on August 19th, the trial court continued the matter until August 22, 1975, in order to give Vigil another opportunity to answer those questions for which she had been granted immunity.[74] Appellant appeared before the grand jury on August 22nd and again refused to answer questions, asserting as one ground the husband-wife privilege. Another hearing was held at which time the trial court adjudged Vigil "to be in civil contempt" and ordered her confinement until she complied with the orders of the court.[75]

The Tenth Circuit did not reach the merits of Vigil's claim of a marital privilege,[76] disposing of the issue on the ground that it was not timely raised.[77] In addition, the court determined that the appellant's affidavit[78] in support of the privilege was not timely filed with the trial court.[79] In view of this failure to comply with procedural requirements, the Tenth Circuit held that an

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[74] The court's opinion indicates that 14 written questions were submitted to Vigil at her first grand jury appearance. *Id.* at 212. It further indicates, without explanation as to the contents, that Vigil was granted use immunity as to three questions. *Id.* at 217. When the trial court continued the proceeding until August 22, 1975, it "broadened the immunity order to include additional questions." *Id.* Throughout the entire proceeding it appears that Vigil steadfastly refused to answer any question other than her name. *Id.* at 212 n.1.

[75] *Id.* at 217-18.

[76] The court gave some indication that it questioned whether the marital relationship had been alleged in good faith, citing Lutwak v. United States, 344 U.S. 604 (1953). Appellant Vigil relied on *In re* Snoonian, 502 F.2d 110 (1st Cir. 1974), to support her claimed marital privilege. The Tenth Circuit, however, distinguished *Snoonian* on its facts since the "husband-wife relationship was not in dispute and the court reached the merits of the claimed privilege." 524 F.2d at 218.

[77] As indicated, Vigil first raised the husband-wife privilege at her first appearance before the grand jury after pre-appearance hearings on her motions to quash the subpoena. *See* text accompanying note 73 *supra.* The Tenth Circuit spoke of "the rather tardy manner in which the marital relationship issue was sought to be injected into the proceeding." 524 F.2d at 218.

[78] The appellant's affidavit read as follows:

> I, VERONICA VIGIL being duly sworn, depose and say that I am the wife of Ray Otero. Ray and I began to live together in Boulder, Colorado in October, 1973. In December, 1973, we became man and wife by mutual consent in Boulder, Colorado. We continued to live together until April, 1975. I believe Ray Otero to be the target of the Grand Jury investigation.

Id.

[79] Appellant's August 22nd hearing occurred at 11:00 a.m., at which time her counsel sought to file an affidavit of "Veronica Vigil re her Marriage." This affidavit was not given to the trial judge before or during the contempt hearing but was apparently filed with the clerk of court at 2:54 p.m. on August 22, 1975. *Id.* at 217.

evidentiary hearing on the marital relationship was not required by the trial court.[80] Under these circumstances, the court concluded that Vigil's unsupported assertion of her marriage to a prospective defendant was not "just cause" for her refusal to testify before the grand jury.[81]

2. Illegal Electronic Surveillance

In support of her refusal to answer questions propounded by the Government before the grand jury, Veronica Vigil further alleged illegal electronic surveillance as a "just cause" under 28 U.S.C. § 1826(a).[82] She claimed that the Government's denial of such electronic surveillance was insufficient under 18 U.S.C. § 3504(a)(1) to sustain its position.[83] In affirming the lower court, the Tenth Circuit began its analysis with the United States Supreme Court's holding in *Gelbard v. United States.*[84] In *Gelbard* the Court held that if there has been prior illegal electronic surveillance and it can be shown that the interrogation of the witness before a grand jury would be based upon such illegal interception, then just cause not to answer exists under section 1826(a).[85] The Tenth Circuit then bifurcated its analysis, discussing issues

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[80] By analogy to an untimely claim of illegal electronic surveillance in *In re* Lewis, 501 F.2d 418 (9th Cir. 1974), *cert. denied,* 420 U.S. 913 (1975), the Tenth Circuit concluded that "the late filing of a bare claim of common-law marriage should not be permitted to impede the work of the Grand Jury." 524 F.2d at 218.

[81] 524 F.2d at 218.

[82] See note 53 *supra* for the text of the subsection.

[83] This section provides:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, *the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.*

18 U.S.C. § 3504(a)(1) (1970) (emphasis added).

[84] 408 U.S. 41 (1972).

[85] The evidentiary prohibition found in *Gelbard* is premised on the fact that 18 U.S.C. § 2515 prohibits the presentation to grand juries of the compelled testimony of a witness which was intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §§ 2510-2520 (1970). 408 U.S. at 47. In a subsequent case the Supreme Court narrowed the application of *Gelbard,* stating that the Court's conclusion rested exclusively on its interpretation of Title III, *i.e.,* that it was simply an effort by Congress to afford special safeguards against the unique problems posed by the misuse of wiretapping and electronic surveillance. United States v. Calandra, 414 U.S. 338 n.11 (1974).

which were not considered by the Supreme Court in *Gelbard*:[86] (1) The sufficiency of the witness' claim of illegal surveillance which will trigger an evidentiary hearing on the existence or absence of surveillance,[87] and (2) the sufficiency of the Government's denial of surveillance under section 3504(a)(1).[88]

As to the claim of electronic surveillance, counsel for Vigil filed one affidavit by the appellant personally[89] and two by her counsel.[90] The court concluded that the information contained in Vigil's affidavits were "grossly lacking" and, thus, insufficient to establish the existence of electronic surveillance.[91] The Tenth Circuit expressed the opinion that the affidavits did "no more than describe the ordinary experiences which are encountered by the telephone user from time to time in his daily life."[92]

Although the appellant's evidence of illegal surveillance was insubstantial, the court focused on the sufficiency of the Govern-

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[86] 524 F.2d at 213.

[87] The Supreme Court, in Alderman v. United States, 394 U.S. 165, 182 (1969), held that an adversary hearing was required in order to determine if evidence supporting defendant's convictions was the product of an illegal electronic surveillance.

See also United States v. Alter, 482 F.2d 1016 (9th Cir. 1973), where the court held that the witness' affidavits were sufficiently concrete and specific to make a prima facie showing of electronic surveillance which shifted the burden to the Government to affirm or deny under 18 U.S.C. § 3504(a)(1). *See also* United States v. Handler, 476 F.2d 709 (2d Cir. 1973), where the court interpreted the language of § 1826(a), "without just cause shown," to place on the witness the burden of coming forward with "just cause." *But see* notes 53-56 *supra* and accompanying text.

[88] *See* note 83 *supra.*

[89] From her analysis of the questions asked at her first appearance before the grand jury, appellant stated "her belief" that the questions were "directly or indirectly" based upon illegal electronic surveillance. 524 F.2d at 214.

[90] *Id.* The affidavits of appellant's counsel set forth general difficulties with Vigil's phone, *e.g.*, inability to get connections, substantial delay before the connection was made, problems in dialing, a "double beep," and a "hollow sound" when there was rapid dialing. *See In re* Freedman, 529 F.2d 543, 550 (3d Cir.), *cert. denied,* 425 U.S. 992 (1976).

[91] 524 F.2d at 214.

[92] *Id. See also In re* Freedman, 529 F.2d at 550; United States v. Alter, 482 F.2d at 1024-25; *In re* Horn, 458 F.2d 468, 471 (3d Cir. 1972).

As to the affidavits filed by appellant's counsel in *Vigil,* neither appellant nor the court squarely raised the issue of whether electronic surveillance of third parties conceivably could have been the basis for any of the questions propounded. *See* United States v. Fitch, 472 F.2d 548, 549 (9th Cir. 1973), where the Government did not specifically respond to the allegation that the attorney had been subjected to surveillance. *See also* United States v. See, 505 F.2d 845, 856 (9th Cir. 1974), *cert. denied,* 422 U.S. 1057 (1975); United States v. Vielguth, 502 F.2d 1257, 1259 (9th Cir. 1974); *In re* Marx, 451 F.2d 466, 468 (1st Cir. 1971).

ment's denial, *i.e.*, how far must the Government search for evidence of illegal surveillance[93] and what quality of evidence is necessary to support the denial?[94] The trial court heard testimony from the two law enforcement officers conducting the investigation of the case, both of whom testified that there was no electronic surveillance.[95] In addition, the trial court was advised by an Assistant United States Attorney that he had been assured by

[93] The First Circuit has stated that "[t]he dominate *[sic]* weight of authority has rejected a conclusory statement as an appropriate response [by the government]." *In re* Hodges, 524 F.2d 568, 570 nn.1-5 (1st Cir. 1975). *See In re* Lochiatto, 497 F.2d 803, 806 (1st Cir. 1974). *But see In re* Mintzer, 511 F.2d 471 (1st Cir. 1974), as interpreted by the First Circuit in *In re* Hodges, 524 F.2d at 570 n.6. Other courts have taken the approach that the Government's response may match the claim of surveillance, *e.g.*, a general denial in response to nonspecific allegations. *See In re* Freedman, 529 F.2d 543 (3d Cir. 1976); United States v. See, 505 F.2d 845 (9th Cir. 1974); United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974); Korman v. United States, 486 F.2d 926 (7th Cir. 1973). Still other circuit courts have required some search of the relevant government agencies which may be involved in the investigation, differing only in the number of agencies which should be checked. *In re* Millow, 529 F.2d 770, 774 (2d Cir. 1976); *In re* Buscaglia, 518 F.2d 77, 79 (2d Cir. 1975); United States v. Aloi, 511 F.2d 585, 602 (2d Cir. 1975); United States v. Stevens, 510 F.2d 1101, 1104 (5th Cir. 1975); United States v. D'Andrea, 495 F.2d 1170, 1173 n.10 (3d Cir. 1974); United States v. Smilow, 472 F.2d 1193, 1194 (2d Cir. 1973); Bufalino v. Immigration & Naturalization Serv., 473 F.2d 728, 734 (3d Cir. 1973); *In re* Womack, 466 F.2d 555, 556 (7th Cir. 1972); *In re* Horn, 458 F.2d 468, 469 n.3 (3d Cir. 1972); *In re* Grumbles, 453 F.2d 119, 120 n.4 (3d Cir. 1971). *See* Judge Okes' dissent in United States v. Grusse, 515 F.2d 157, 160 (2d Cir. 1975), where he would require the so-called eight agency search of the FBI; Secret Service; IRS; Bureau of Alcohol, Tobacco, and Firearms; Customs; DEA; and Postal Service.

[94] Some circuit courts have required that evidence of the search be in affidavit form submitted by those government agencies which have searched or by those government officials in charge of the investigation. *In re* Freedman, 529 F.2d at 549; *In re* Millow, 529 F.2d 770 (2d Cir. 1976); *In re* Buscaglia, 518 F.2d 77 (2d Cir. 1975); United States v. Grusse, 515 F.2d 157 (2d Cir. 1975) (Lumbard, J., concurring); *In re* Mintzer, 511 F.2d 471 (1st Cir. 1974); United States v. D'Andrea, 495 F.2d 1170 (3d Cir. 1974); Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973); Bufalino v. Immigration & Naturalization Serv., 473 F.2d 728 (3d Cir. 1973); United States v. Fitch, 472 F.2d 548 (9th Cir.), *cert. denied*, 412 U.S. 954 (1973) (Douglas, J., dissenting); United States v. Smilow, 472 F.2d 1193 (2d Cir. 1973); *In re* Horn, 458 F.2d 468, 470 (3d Cir. 1972). *See also In re* Grumbles, 453 F.2d at 120 n.4. Other courts have found letters of a search acceptable. United States v. Aloi, 511 F.2d 585 (2d Cir. 1975); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); United States v. D'Andrea, 495 F.2d 1170 (3d Cir. 1974); *In re* Womack, 466 F.2d 555 (7th Cir. 1972). And some courts have stressed the importance of oral testimony, under oath, as acceptable evidence of the search. *In re* Jurney, 410 F.2d 914 (5th Cir. 1973); United States v. Doe, 451 F.2d 466 (1st Cir. 1971). *See* note 95 *infra* and accompanying text. *But see* United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); *In re* Grumbles, 453 F.2d at 120 n.4. The First Circuit sidesteps what it considers to be the minimum standard for an adequate government response under § 3504 because "the necessary facts and circumstances are not presented [in the instant case]." *In re* Hodges, 524 F.2d at 570.

[95] *In re* Vigil, 524 F.2d at 215.

"every agency of the United States which had had anything to do with the case . . . that there had not been any electronic surveillance either by court order or otherwise to the best of their knowledge."[96] In holding that such denial by the Government satisfies the requirements of section 3504(a), the court expressed its preference for testimony in court as opposed to denial by affidavit.[97] The court further stated its preference for the balancing approach in determining the sufficiency of the Government's denial[98] and noted that its approach "is in harmony with that employed in the other cases."[99]

B. *Trial Setting*

In *United States v. Smith*[100] the appellant challenged his two convictions for criminal contempt which had arisen out of his refusal to testify in successive criminal trials. His argument was twofold: (1) That the proceedings granting him immunity were defective,[101] and (2) that the second contempt charge subjected

[96] *Id.* The Tenth Circuit stressed the fact that the Assistant United States Attorney "also has assured *this* court that there has been no electronic surveillance." *Id.* (emphasis in original).

[97] *Id.* at 216.

[98] *Id.* The court rejected Vigil's reliance on United States v. Alter, 482 F.2d 1016 (9th Cir. 1973), where the Ninth Circuit held the Government to greater specificity in what agencies were elected and what was the substance of their responses. *Id.* at 1027. Instead the Tenth Circuit stated that "[w]e consider a quest for certainty in this kind of inquiry futile and regard a balancing or weighing evaluation to be more helpful because each case presents individual demands." 524 F.2d at 216. Although the Tenth Circuit was not specific as to what was to be balanced or weighed, it would appear from the above that the court was referring to the facts presented by each particular case. Other courts have spoken of the balancing test in terms of weighing the right of the witness to be free from unwarranted surveillance against the right of the Government to operate grand juries in an effective manner. *See* United States v. Stevens, 510 F.2d 1101, 1106 (5th Cir. 1975); Beverly v. United States, 468 F.2d at 752 (5th Cir. 1972).

[99] 534 F.2d at 216-17, 220-22.

[100] 532 F.2d 158 (10th Cir. 1976).

[101] 18 U.S.C. § 6003 (1970) provides that:

> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under sub-section (a) . . . when in his judgment—
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Appellant argued that it was error for the First Assistant United States Attorney to sign the application for an immunity order under § 6003. He further argued that the trial

him to double jeopardy.[102]

Smith had been granted immunity under 18 U.S.C. § 6003[103] as the result of his claimed privilege against self-incrimination when he refused to testify at the first bank robbery trial.[104] A mistrial was subsequently granted when Smith persisted in his refusal to testify despite this grant of immunity. In addition, the prosecution commented upon Smith's prospective testimony in its opening statement.[105] At the second trial on the bank robbery, Smith again refused to testify when called as a witness. This resulted in the reinstatement of his grant of immunity. His persistence in refusing to testify gave rise to the charges of and subsequent convictions on the two counts of criminal contempt now challenged.[106]

The Tenth Circuit concluded that "there is no merit whatsoever to the contention that 18 U.S.C. Section 6003 was not complied with," since the United States Attorney may designate any assistant to carry out his or her functions under section 6003.[107] In addition, the court pointed out that the authorization under section 6003 covered both of Smith's refusals to testify, stating: "It is unreasonable to compel the Justice Department to apply for immunity with a related review of the record each time a problem of this kind comes up. To so hold would be to approve

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court erred in accepting the general application and order granting immunity for the first trial insofar as applying it to the second effort to obtain the appellant's testimony. 532 F.2d at 160. Following the authorization for immunity under § 6003, counsel was appointed for Smith when he claimed a lack of understanding of immunity. Although it is unclear whether this appointment of counsel occurred before or after the immunity hearing, the absence of counsel at the time immunity is granted is not a deprivation of any constitutional right. United States v. Handler, 476 F.2d 709 (2d Cir. 1973). In addition, the witness must demonstrate some prejudice caused by the absence of counsel at the immunity hearing. *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973).

[102] 532 F.2d at 160-61. Smith argued that he could be convicted of only one offense of criminal contempt, citing the fifth amendment guarantee against double jeopardy.

[103] See note 101 *supra* for the language of 18 U.S.C. § 6003. *See also* 18 U.S.C. § 6002 (1970) which provides as follows:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

[104] 532 F.2d at 159.

[105] *Id.*

[106] The trial court brought contempt proceedings under 18 U.S.C. § 401 (1970).

[107] 532 F.2d at 160. *See* note 101 *supra.*

legal maneuvering by an accused. This we refuse to do."[108] The court then determined that Smith's two convictions were not double jeopardy[109] since they were distinct and successive acts of contempt punishable as separate offenses.[110] The court also took note that Smith was not prejudiced due to the fact that he received identical concurrent sentences.[111] Expressing the courts' general disfavor for multiplying contempt penalties where a defendant has made his or her position clear,[112] the court concluded that the case did not evidence an attempt to multiply offenses since the Government had reason to believe that Smith would testify the second time and was therefore justified in calling him a second time.[113]

III. SIXTH AMENDMENT

The United States Supreme Court's decision in *Faretta v. California*[114] required extensive interpretation by the Tenth Circuit in the past year. In *Faretta* it was determined that a defendant in a state criminal trial has a constitutional right under the sixth amendment[115] to proceed without counsel when he or she voluntarily and intelligently elects to do so.[116] An analogous issue arose in *United States v. Hill*[117] and *United States v. Bennett*[118] as to whether a defendant charged with a federal crime has a

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[108] 532 F.2d at 160 (citing *In re* Weir, 520 F.2d 662 (9th Cir. 1975)).

[109] "Double jeopardy is a defense which, since it seeks to bar a second prosecution, is ordinarily raised prior to trial." 8 MOORE'S FEDERAL PRACTICE 8.07[1], at 8-51, -52 (2d ed. 1970).

[110] 532 F.2d at 160, and cases cited therein. *See also* Lufman v. United States, 500 F.2d 1293 (7th Cir. 1974).

[111] 532 F.2d at 160-61, and cases cited therein. *See* United States v. Abigando, 439 F.2d 827 (5th Cir. 1971).

[112] 532 F.2d at 161, and cases cited therein. *See* People v. Riela, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (Sup. Ct. 1960). *See also* 8 MOORE'S FEDERAL PRACTICE 8.07[1], at 8-51, -52 (2d ed. 1970). The First Circuit uses a "single subject" test to determine if the prosecution is attempting to multiply offenses. The court, however, noted problems with the test because it may be too open-ended, *i.e.*, there are infinite ways to categorize information in terms of time, place, incident, transaction, and people involved. *See* Baker v. Eisenstadt, 456 F.2d 382, 390 (1st Cir.), *cert. denied*, 409 U.S. 846 (1972).

[113] 532 F.2d at 161.

[114] 422 U.S. 806 (1975).

[115] The Supreme Court held: "Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is . . . necessarily implied by the structure of the Amendment." *Id.* at 819.

[116] *Id.* at 834-35.

[117] 526 F.2d 1019 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976).

[118] 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976).

statutory[119] and/or constitutional right[120] to represent him or herself with the assistance of counsel.[121]

In *United States v. Hill* the defendant moved by both written and oral motion to ask questions of jurors and witnesses at trial while at the same time taking advantage of the assistance of counsel.[122] The trial court denied both motions and the defendant-appellant appealed, claiming that his right to represent himself had been denied.[123]

Surveying the pre-*Faretta* decisions of other circuit courts of appeal,[124] the Tenth Circuit noted a trend indicating that a person could either represent himself or be represented by counsel. However, a person does not have a *right* to hybrid representation.[125]

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[119] 28 U.S.C. § 1654 (1970) (emphasis added) provides: "In all courts of the United States the parties may plead and conduct their own cases personally *or* by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[120] *See* note 115 *supra.*

[121] 526 F.2d at 1024; 539 F.2d at 49. The argument advanced in *Bennett* proposed that the right of self-representation under § 1654, the sixth amendment, and *Faretta* sustains a defendant's right to hybrid representation, *i.e.*, self-representation with the aid of counsel. *Id.*

[122] The court's opinion contains the following colloquy between the trial court and Hill:

> THE DEFENDANT: Well, at this point, I would ask if—again I could be allowed to assist in my defense.
> THE COURT: You mean ask questions of jurors and ask questions of witnesses?
> THE DEFENDANT: To a certain extent, yes.
> THE COURT: No. The Court is not going to grant you that request. I have already ruled on it.
> THE DEFENDANT: No. No, I didn't say that I wanted to dismiss them [his attorney]. I said that I wanted to represent myself and I want to have my attorneys assist me.

526 F.2d at 1024 n.3.

[123] *Id.* at 1024. The record indicates that prior to the noon recess, defendant addressed the court with reference to the absence of blacks on the jury. "[His] statements . . . deteriorated to the point that defendant was finally physically removed from the courtroom." *Id.* at 1023. After the noon recess, and out of hearing by the jury, defendant again addressed the court and requested permission to question jurors and witnesses. *Id.* It was appellant's position that the court should have inquired to determine the exact nature of his claim. *Id.* at 1024.

[124] 526 F.2d at 1024, and cases cited therein. *See also* United States v. Shea, 508 F.2d 82, 86 (5th Cir.), *cert. denied,* 423 U.S. 847 (1975); United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964); Manson v. Pitchess, 317 F. Supp. 816 (C.D. Cal. 1970). *But see* Wake v. Barker, 514 S.W.2d 692 (Ky. 1974).

[125] 526 F.2d at 1024.

The court then determined that *Faretta* did not alter the established rules concerning hybrid representation,[126] taking cognizance of the fact that the sixth amendment fails to address hybrid representation as a right of constitutional dimensions.[127] Concomitantly, the court suggested that there is not any statutory right of such representation since 28 U.S.C. § 1654 is written in the disjunctive.[128] After concluding that Hill's request was in fact for hybrid representation, the Tenth Circuit held there was no abuse of discretion in the denial of his motions.[129]

The defendant, in *United States v. Bennett*,[130] was convicted in a first trial[131] of one count of forcibly interfering with a prison hospital administrator in the performance of his duties.[132] During a hearing on a pretrial motion, Bennett requested that he be able to assist in his own defense by making the opening and closing statements to the jury and by cross-examining particular government witnesses.[133] The trial court ruled that Bennett could cross-

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[126] *Id.* The court cites to a post-*Faretta* decision, United States v. Swinton, 400 F. Supp. 805 (S.D.N.Y. 1975), wherein it was held that a criminal defendant has no sixth amendment right to act as her own counsel where she is also represented by an attorney. *See* United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); Stiner v. Oklahoma, 539 P.2d 750, 753 (Okla. Crim. App. 1975). *See also* United States v. Lang, 527 F.2d 1264, 1265 (4th Cir. 1975).

It can be argued that *Swinton* seems to require some showing on the part of a defendant seeking co-counsel status that his or her traditional representation is inadequate or inappropriate. The defendant's allegations that she should take "personal responsibility for the conduct of a trial whose outcome may seriously affect her life for many years"; that "citizens should participate in social institutions"; and that her cross-examination of former associates would be more effective than that of her attorney were apparently not sufficient. United States v. Swinton, 400 F. Supp. at 807. The court stated that the defendant was represented by "able counsel who have had ample experience and a thorough acquaintance with the matters in litigation." *Id.*

[127] 526 F.2d at 1025. *See* United States v. Swinton, 400 F. Supp. at 806.

[128] 526 F.2d at 1025. *See* note 119 *supra.*

[129] 526 F.2d at 1025. *See* United States v. Bennett, 539 F.2d at 49; United States v. Lang, 527 F.2d 1264, 1265 (4th Cir. 1975).

The court in *Swinton* gave some indication of the test to be used by trial judges in determining whether or not to allow a defendant to proceed pro se: a "balancing [of] considerations of individual freedom of choice against the need to ensure the orderly proceedings essential to a fair trial." 400 F. Supp. at 806.

[130] 539 F.2d 45 (10th Cir. 1976).

[131] For an understanding of the court's decision in *Bennett*, it is important to realize that Bennett had two separate trials.

[132] The defendant was convicted of violating 18 U.S.C. § 111 (1970).

[133] 539 F.2d at 49. The court noted that throughout the first trial Bennett was asserting *only* his right to represent himself with the assistance of counsel. *Id.*

examine certain witnesses but that he could not argue the evidence to the jury. In so limiting Bennett's personal participation, the trial court determined that matters of argument should be conducted by the defendant's court-appointed attorney.[134] Bennett appealed his conviction on the ground that he had a statutory and constitutional right to such hybrid representation. The Tenth Circuit rejected Bennett's claim of a right to appear as co-counsel,[135] primarily relying on its decision in *United States v. Hill.*[136] The court determined there was no abuse of discretion in denying such participation to Bennett and in limiting his personal activity to that of cross-examination of several witnesses.[137]

Prior to his second trial, Bennett again requested that he be allowed to make an opening and closing statement and be permitted to cross-examine certain witnesses. As in his first trial, the trial court informed him that he would be allowed to cross-examine witnesses but not to make arguments. Bennett moved to defend pro se.[138] After denying a second motion by the defendant to conduct his own defense,[139] the court appointed counsel on his

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[134] *Id. See* United States v. Dellinger, 472 F.2d 340, 407 (7th Cir.), *cert. denied,* 410 U.S. 970 (1973); Duke v. United States, 255 F.2d 721, 725-26 (9th Cir. 1958).

[135] *See* note 121 *supra.*

[136] *See* notes 124 through 128 *supra* and accompanying text.

[137] 539 F.2d at 49.

[138] *Id.* at 49-50.

[139] At a second pretrial hearing the following dialogue occurred:

> THE DEFENDANT: . . . I know I am not a qualified attorney to conduct a full trial, but there are certain aspects of the trial that I feel that I am competent to proceed with . . . . And because of this [denial of hybrid representation motion] I was placed in the position of conducting my complete trial, which I will do if the Court still denies me limited assistance of counsel.
>
> THE COURT: Mr. Bennett, you are just playing fox with the Court. I can't understand what you want . . . .
>
> . . . .
>
> THE COURT: What do you want [Shaw, Bennett's attorney] to do?
>
> THE DEFENDANT: Everything else that takes place in this trial.
>
> THE COURT: You mean you want him to conduct your trial except the part you want to do?
>
> THE DEFENDANT: That is right, Your Honor.
>
> . . . .
>
> THE COURT: . . . Mr. Shaw, the Court is going to direct that you conduct this trial . . . .
>
> THE DEFENDANT: I renews *[sic]* my Motion to be allowed to conduct my own defense.

Id., Appendix at 56-57.

behalf.[140] Thus, the Tenth Circuit was faced with yet another interpretation of *Faretta:* How soon in the criminal process must a defendant decide to proceed by counsel or pro se?[141]

In holding that the right to self-representation "is one which the defendant must clearly and unequivocally assert before trial,"[142] the court noted that such assertion on the defendant's part is necessary because the trial court must ascertain whether the accused has made an understanding waiver of his right to counsel.[143] The Tenth Circuit agreed with the trial court's conclusion—Bennett "forfeited his right to self-representation by his vacillating positions which continued until just six days before the case was set for trial."[144] Thus, there was no error in the trial court's denial of self-representation.[145]

United States v. Smith[146] and *United States v. Montgomery*[147] raised several interesting issues relating to the effect of *Faretta* upon pretrial plea bargaining. In *Smith*, the defendant was arrested on June 8, 1974,[148] and charged with a violation of the Dyer Act.[149] On both June 10 and 11, while still in custody, he requested an opportunity to speak with authorities, signing waivers on both days.[150] During the course of the interview[151]

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[140] 539 F.2d at 50.

[141] Justice Blackmun, in his dissent in *Faretta*, indicated some of the procedural questions left open by the majority's decision:

> If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to the assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se?* Must he be allowed to switch in midtrial?

Faretta v. California, 422 U.S. 806, 852 (1976) (Blackmun, J., dissenting). *See* Stiner v. State, 539 P.2d at 753, where the Oklahoma Court of Appeals directed attention to the majority's opinion in *Faretta*, 422 U.S. at 834-35 n.46, allowing standby counsel for the accused in certain circumstances.

[142] 539 F.2d at 50.

[143] *Id.* For a pre-*Faretta* treatment of this type of issue, see United States v. Shea, 508 F.2d 82, 84 (5th Cir. 1975).

[144] 539 F.2d at 51.

[145] *Id.*

[146] 525 F.2d 1017 (10th Cir. 1975).

[147] 529 F.2d 1404 (10th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976).

[148] 525 F.2d at 1017.

[149] 18 U.S.C. § 2312 (1970).

[150] 525 F.2d at 1018.

[151] The court's opinion is unclear as to whether the defendant made his inculpatory statements at both interviews or only at the June 11, 1974, interview. The court spoke only of "the conversation" as being in the nature of plea bargaining. *Id.* at 1019 n.1.

Smith made an inculpatory statement as to the Dyer Act violation. His principal reason for requesting the interview was to offer to plead guilty to all charges if he could be assured of being sent to a federal penal institution.[152] The Government introduced these statements made by Smith during his personal attempt at bargaining as part of its case-in-chief.[153] He was subsequently convicted and sentenced;[154] this appeal followed.

On appeal, the Tenth Circuit was confronted with the following issues: Whether it was error to admit, as part of the Government's case-in-chief, inculpatory statements made by the defendant during plea bargaining; and, considering the precedents indicating that plea discussions and agreements pursued by an attorney are privileged and inadmissible, of what importance is the fact that Smith was not represented by counsel when he engaged in these negotiations? Citing various authority[155] for the general proposition that plea discussions conducted by a lawyer have been recognized as privileged and inadmissible, the court addressed the policy reasons behind the protection of plea bargaining.[156] The court then concluded that, in light of the Supreme Court's decision in *Faretta*[157] and the given inadmissibility of attorney-conducted plea bargaining discussions,[158] there should be no distinction when a defendant, who is not represented by

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[152] *Id.* at 1018. In its analysis, the court concluded that Smith's purpose in requesting the two interviews was "to work out an arrangement, whereby he would serve federal time and thus avoid the state robbery charge." *Id.* at 1020.

The court indicated that the officer dealing with Smith knew that the purpose of both interviews was to allow him to bargain. This knowledge was underscored by the fact that the officer brought an FBI agent to the June 11th interview in connection with the bank robbery charge. *Id.*

[153] *Id.* at 1019. It was the Government's position in the case that the statements were confessions made after Smith was advised of his rights under *Miranda* and that he had chosen to waive them. *Id.* at 1019-20. The Tenth Circuit, however, was not persuaded that "[the signing of a *Miranda* waiver] effectively negates the legal consequence of the plea bargaining," since he was seeking an agreement and not making a confession. *Id.* at 1020.

[154] 525 F.2d at 1017.

[155] United States v. Ross, 493 F.2d 771 (5th Cir. 1974); United States *ex rel.* Burke v. Mancusi, 425 F.2d 1061 (2d Cir. 1970); State v. Byrd, 203 Kan. 45, 453 P.2d 22 (1969) (dictum). *See also* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PLEAS OF GUILTY § 3.4 (Approved Draft 1968); FED. R. EVID. 410; FED. R. CIV. P. 11(e)(6). 525 F.2d at 1020-21.

[156] 525 F.2d at 1020. To allow plea bargaining discussions to be admissible in evidence "would effectively thwart the effort." *Id.* at 1021.

[157] *Id. See* notes 114-28 *supra* and accompanying text.

[158] 525 F.2d at 1020.

counsel, is seeking to plea bargain on his own behalf.[159] Thus, in reversing and remanding, the Tenth Circuit held that it was error to receive into evidence inculpatory statements made during plea bargaining.[160]

United States v. Montgomery[161] presented a somewhat different issue than *Smith* in the area of plea bargaining. Defendant Montgomery, who had been charged with federal offenses under a two count indictment,[162] was represented at his omnibus hearing and arraignment by an assistant federal public defender.[163] Before entering his plea at the arraignment, Montgomery "stated in no uncertain terms that he wished to be represented by someone other than a public defender."[164] This request was denied and he "requested that he be allowed to represent himself."[165] This request was likewise denied. One month after his arraignment, another federal public defender filed a motion for a continuance, indicating in the motion that plea bargaining had been undertaken on Montgomery's behalf.[166] The defendant eventually entered a guilty plea to a lesser included offense[167] and was subsequently represented by a public defender at the sentencing.[168] On appeal, Montgomery alleged error in the trial court's refusal to allow him to represent himself, citing *Faretta*.[169]

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[159] *Id.* at 1021. "Such efforts [plea bargaining on his own behalf] are to be considered on the same bases as they would be considered if [the defendant] had a lawyer." *Id.* The court noted that *Smith* was considered as a case of first impression. *Id.* The writer has been unable to find any cases subsequent to *Smith* which utilize the same attorney privilege and *Faretta* analysis in an instance where defendant bargains on his own behalf.

[160] 525 F.2d at 1021-22.

[161] 529 F.2d 1404 (10th Cir.), *cert. denied*, 426 U.S. 908 (1976).

[162] Montgomery was charged with violations of 18 U.S.C. §§ 111 and 1792 (1970).

[163] 529 F.2d at 1405.

[164] *Id.*

[165] *Id.*

[166] Montgomery was arraigned on December 9, 1974, and the motion for continuance was filed on January 9, 1975. *Id.*

[167] The defendant entered a plea of guilty at a hearing conducted in accordance with FED. R. CRIM. P. 11. At a Rule 11 hearing the trial court must determine that the defendant understands the charges against him or her, that there has been no undue influence upon the defendant to plead, and that there is a factual basis for the guilty plea. 529 F.2d at 1405-06.

[168] 529 F.2d at 1406.

[169] As to Montgomery's *Faretta* argument, the court stated:

> Mr. Justice Stewart made clear [in *Faretta*] that in federal courts the right of self-representation has always been recognized and that indeed specific provision was made for it in the Judiciary Act of 1789, which is currently

Concluding that his plea was voluntary, the Tenth Circuit held that appellant Montgomery was "precluded from asserting that his right to represent himself was infringed."[170] The court deferred to those decisions of the United States Supreme Court which have consistently held that a voluntary plea of guilty blocks out any previous constitutional defects in the case[171] and precludes any efforts to set aside such a plea on constitutional grounds.[172] In affirming Montgomery's conviction, the court stated that "the voluntary plea of guilty by Montgomery is the independent intervening act which renders ineffectual the prior failure to allow appellant to represent himself at a trial."[173]

Where there was a twenty-seven-month delay between the time of indictment and trial, the Tenth Circuit applied a *Barker v. Wingo*[174] analysis to determine if the appellant in *United States v. Hay*[175] had been prejudiced by such a lengthy delay.[176] Hay, an

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codified in 28 U.S.C. Section 1654. Since, then, the federal law has always recognized the right, it follows that a violation of this guarantee could be claimed by the defendant regardless of whether *Faretta* carries retroactive force.

Id. See Stiner v. State, 539 P.2d 750, 753 (Okla. Crim. App. 1975).

[170] 529 F.2d at 1407. The Tenth Circuit determined that Montgomery's guilty plea was voluntary and that he waived his right of self-representation when he permitted a public defender to plea bargain for him. The court noted that Montgomery accepted the benefits of the bargain by pleading to a lesser included offense. *Id.*

[171] The court cites Tollett v. Henderson, 411 U.S. 258 (1973) (Marshall, J., dissenting). *But see* Justice Marshall's dissent in *Tollett:*

> [E]ven where counsel does not consider and present to his client the possibility of a challenge to the composition of the grand jury, the client is nonetheless held to have made an "intelligent" guilty plea.
>
> . . . .
>
> If plea bargaining is to be constitutionally acceptable, it must rest upon personal choices made by defendants informed about possible alternatives; at least, they should know what options are open to them [for an intelligent and knowing act within *Brady*].

Id. at 270, 273.

[172] The court cites Brady v. United States, 397 U.S. 742 (1970). The other two cases in the trilogy are McMann v. Richardson, 397 U.S. 759 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970).

[173] 529 F.2d at 1407.

[174] 407 U.S. 514 (1972). In deciding whether a defendant has been denied a speedy trial, the Supreme Court has suggested four factors to be considered: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

[175] 527 F.2d 990 (10th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

[176] The court's opinion indicated that the Government first learned of criminal activity involving Hay in January 1969. Following a lengthy investigation, the appellant was

engineer employed by a prime contractor in the construction of a public works system in Saigon, South Vietnam, was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371.[177]

Balancing the reasons for the delay against the prejudice to the appellant, the court first concluded that the relevant period for determining whether there had been a denial of a speedy trial was the period of time from the appellant's arrest to the time of his trial, *i.e.*, seventeen months.[178] The court then examined at great length the reasons advanced by the government "for two identifiable periods of delay":[179] (1) A deposition procedure in a foreign country[180] and (2) the unavailability of a witness.[181] Prefac-

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indicted by a grand jury on August 18, 1972. At the time of his indictment, however, Hay was in Mali, Africa. Mali finally revoked his visa, and he was arrested on May 18, 1973, when his plane landed in New York. He was subsequently convicted at his trial on October 13, 1974. *Id.* at 993-94.

The court noted the appellant's prejudice claim, "in addition to the anxiety and concern usually attendant to pending criminal charges, is that he was unable to pursue his occupation as an engineer because that required him to work overseas. The terms of his bond restricted him to Colorado and his passport had been lifted." *Id.* at 996. *See* United States v. Annerino, 495 F.2d 1159, 1163 (7th Cir. 1974).

[177] The court's decision indicated that Hay, as the supervisor of a sub-contractor's work (a French corporation, *Les Establissements Eiffel),* conspired with employees of *Eiffel* to exert efforts to obtain the highest possible allowance on *Eiffel*'s cost overrun claim to the government of South Vietnam. The United States, through the Agency for International Development, loaned South Vietnam monies for the construction project. 527 F.2d at 992-93.

[178] The court did not consider the time between appellant's indictment and trial because he was not available for prosecution. *Id.* at 993-94. *See* note 66 *supra.*

[179] 527 F.2d at 994.

[180] The court noted that it was necessary to depose bank officials in Switzerland in order to authenticate appellant's bank account in which he held the monies paid for his services in the conspiracy. The trial court found that the circumstances of the case justified the delay, and the Tenth Circuit agreed that the Swiss deposition procedure was "extraordinary and presented both legal and diplomatic problems." *Id.*

[181] The trial court, however, found that the witness' testimony at trial was not essential. *Id.* at 995. The Tenth Circuit disposed of this problem by opining that "[w]e do not believe . . . that a witness must be absolutely indispensable to justify reasonable delay." *Id. But see* Speedy Trial Act of 1974, 18 U.S.C. § 3161-3174 which, the court noted, might be more stringent due to § 3161(h)(3)(A) which allows for a delay caused by the unavailability of an "essential" witness. 527 F.2d at 995 n.8. Although the writer has been unable to find any recent case law interpreting this particular section of the Speedy Trial Act Judge MacKinnon of the Court of Appeals for the District of Columbia has written: "They [of which (h)(3)(A) is one] are perfectly reasonable interpretations of excusable delay in court proceedings and generally follow sound law in the United States." United States v. Brown, 520 F.2d 1106, 1139 (D.C. Cir. 1975) (MacKinnon, J., Statement of Reasons in Support of Sua Sponte Motion to consider the Case En Banc).

ing its analysis on language from *Barker v. Wingo, i.e.*, that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge,"[182] the court concluded that, given the reasons for the delay in a complex case such as this,[183] seventeen months was not long enough to be so prejudicial as to justify reversal.[184] The Tenth Circuit thus determined that the appellant was not denied a speedy trial.[185]

IV. TRIAL MATTERS

A. *Pretrial Motions to Suppress*

In *United States v. Kay*[186] and *United States v. Cassidy*,[187] the Tenth Circuit reversed trial court decisions granting motions to suppress evidence. In *Kay* there was a noted absence of any witnesses sworn or any evidence received at the "hearing" despite the fact that the defendant's fourth amendment issue was "largely factual and sharply contested."[188] Recognizing that "the statements and argument of counsel are not a substitute for a proper evidentiary hearing," the Tenth Circuit concluded that the suppression of the evidence and dismissal of the action was improper at that time.[189]

In *Cassidy* the trial court found that the defendant had not voluntarily waived his *Miranda* rights[190] since he had been under considerable "pressure" at the time.[191] Finding this to be "pure speculation" unsupported by the evidence,[192] the Tenth Circuit

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[182] 407 U.S. at 531.

[183] *See* notes 180 and 181 *supra* and accompanying text.

[184] The court concluded that the 17-month delay did not prejudice Hay in the preparation of his defense. 527 F.2d at 996.

[185] *Id.* at 997.

[186] No. 76-1299 (10th Cir., June 23, 1976) (Not for Routine Publication).

[187] No. 76-1137 (10th Cir., Mar. 30, 1976) (Not for Routine Publication).

[188] No. 76-1299 at 2.

[189] *Id. See* United States v. Smith, 495 F.2d 668 (10th Cir. 1974).

[190] No. 76-1137 at 3. There was evidence introduced at trial that the defendant was fully apprised of his *Miranda* rights and that he understood these rights. However, he chose to give a statement to the agent. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[191] The Tenth Circuit noted that the trial judge had taken into consideration, among other things, evidence introduced in a companion case in reaching his determination that the statement was involuntary. No. 76-1137 at 3.

[192] In holding that the trial court's findings in this matter were totally without merit, the Tenth Circuit stated: "The observation by the trial court that Cassidy had been under 'pressure' during the time he was holding hostages and brandishing firearms in his escape efforts and therefore could not thereafter 'voluntarily' give a statement is pure speculation

reversed: "[C]laims of instability, employment difficulties, psychiatric treatment, fear of policemen and being tired and hungry will not serve to overcome confessions given after proper Miranda warnings with no evidence of force, threats or promises being used to obtain the confessions."[193]

B. *Prejudicial Joinder of Offenses*

In *United States v. Kinard*[194] the Tenth Circuit rejected the appellant's argument that he had suffered substantial prejudice due to the joinder into a single trial of six separate substantive charges and a conspiracy charge.[195] Referring to the principles laid down in *United States v. Burkhart,*[196] the court found determinative the fact that proof of the various offenses would have been admissible even if separate trials had been ordered.[197]

In *United States v. Day*[198] the defendant appealed denial of

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and insufficient to support the trial court's findings." *Id.* at 4. *See* United States v. Adams, 470 F.2d 249 (10th Cir. 1972), where the Tenth Circuit held that the determination of "whether a waiver is understandingly and voluntarily made may be established by the circumstances of the case." *Id.* at 251.

[193] No. 76-1137 at 4 (quoting United States v. Ritter, 456 F.2d 178, 179 (10th Cir. 1972)).

[194] No. 75-1066 (10th Cir., July 14, 1976) (Not for Routine Publication).

[195] Citing FED. R. CRIM. P. 8 and 13, the Tenth Circuit concluded that such joinder was procedurally proper. No. 75-1066 at 11.

[196] 458 F.2d 201 (10th Cir. 1972). Articulating the general rule applicable to receiving the evidence of other crimes, the Tenth Circuit, in *Burkhart,* held:

> Such evidence in the first instance is inadmissible. There are, however, several exceptions which allow such evidence to be received in special circumstances and for limited purposes. It may be received for the purpose of proving a common plan, scheme or design to commit the offense charged or for the purpose of proving motive, opportunity, intent, knowledge, identity or absence of mistake, inadvertence or accident.

Id. at 204. *See* DeVore v. United States, 368 F.2d 396 (9th Cir. 1966); Mills v. United States, 367 F.2d 366 (10th Cir. 1966); Woodland v. United States, 347 F.2d 956 (10th Cir. 1965); Weeks v. United States, 313 F.2d 688 (10th Cir. 1963); Berry v. United States, 271 F.2d 775 (5th Cir. 1959). *See also* United States v. Parker, 469 F.2d 884 (10th Cir. 1972); Moran v. United States, 404 F.2d 663 (10th Cir. 1968); Morgan v. United States, 355 F.2d 43 (10th Cir.), *cert. denied,* 384 U.S. 1025 (1966).

[197] The Tenth Circuit noted that the defendant not only neglected to request a severance of the charges, but a claim of prejudicial joinder was not asserted at the trial court level until the defendant made his motion for a new trial. Although it was recognized that a "[f]ailure to request severance by a pretrial motion generally constitutes a waiver," the Tenth Circuit refrained from deciding whether his objections should be heard as raised in his motion for a new trial. Instead, it chose to proceed on the grounds that it was a nonmeritorious claim of prejudice. No. 75-1066 at 12.

[198] 533 F.2d 524 (10th Cir. 1976).

his motion to require the Government to elect between a homicide charge and a charge of accessory after the fact.[199] The appellant argued that since he could not be convicted on both charges, there was a legal bar to trying him on both counts. In determining that this argument was fallacious, the Tenth Circuit noted that it could have based its holding on the grounds that it was a proper joinder in the absence of prejudice.[200] However, in view of the appellant's failure to make any pretrial motions with regard to prejudice and his subsequent acquittal on the homicide charge, the court determined that the proper grounds for affirmance of the accessory after the fact conviction was that "acquittal on one misjoined count cures a misjoinder."[201]

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[199] The Tenth Circuit acknowledged FED. R. CRIM. P. 14 as the proper remedy when a defendant is prejudiced by a joinder. The rule provides the trial court with machinery to require an election if, in its own sound discretion, it finds prejudice.

[200] The Tenth Circuit referred to the FED. R. CRIM. P. 8(a) which allows joinder if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." *See* United States v. Van Scoy, 482 F.2d 347 (10th Cir. 1973), where the Tenth Circuit held: "Although Van Scoy could not be convicted of both bank robbery and being an accessory after the fact, it is clear the offenses are based upon transactions constituting parts of a common scheme and thus fall within Rule 8(a) jurisdiction." *Id.* at 349.

[201] 533 F.2d at 526. The Tenth Circuit chose to base its holding upon the general principle stated in Gornick v. United States, 320 F.2d 325, 326 (10th Cir. 1963), where the court refused to find prejudice in the denial of a motion to grant a separate trial on each count when the appellant was found not guilty on one of the counts. *See* United States v. Perlstein, 120 F.2d 276 (3d Cir. 1941); Culjak v. United States, 53 F.2d 554 (9th Cir. 1931); Latses v. United States, 45 F.2d 949 (10th Cir. 1930); Weinhandler v. United States, 20 F.2d 359 (2d Cir. 1927); Morris v. United States, 12 F.2d 727 (9th Cir. 1926); Beaux-Arts Dresses v. United States, 9 F.2d 531 (2d Cir. 1925). *But see* Cross v. United States, 335 F.2d 987, 991 (D.C. Cir. 1964).

The Tenth Circuit noted, however, that the general rule is not applicable where there is a multiplicity of charges so as to "make it difficult for the jury to sort out the evidence pertaining separately to each charge, and the subsequent related problems with the instructions." 533 F.2d at 526-27. *See* Pointer v. United States, 151 U.S. 396 (1894).

In his appeal, the appellant in *Day* also made a "belated expression" of his desire to testify as to only one of the counts. The Tenth Circuit rejected this argument as being too late. However, it has been recognized that under some circumstances "[p]rejudice may develop when an accused wishes to testify on one but not the other of two joined offenses." Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964). For the applicable standard in such cases see Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), where the court held:

> [N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough informa-

C. *Jury Selection*

Although the problems encountered in empaneling the jury were "perhaps regrettable," the Tenth Circuit upheld the conviction in *United States v. Johnson.*[202] At the time jury selection was to commence, there was a noticeable absence of blacks in the group of prospective jurors.[203] After the jury array had been exhausted, the United States Marshal was directed to get prospective jurors off the streets within the vicinity of the courthouse. This was the manner in which the jury was finally selected. The Tenth Circuit cited defense counsel's failure to make a motion to challenge the array under 28 U.S.C. § 1867(d) as determinative.[204]

A similar challenge to strike the petit jury was made in *United States v. Bennett*[205] where there was only one black available on the jury panel. The appellant argued that an improper selection of prospective jurors had been made in violation of 28 U.S.C. § 1861,[206] because lists of actual voters were used in lieu of voter registration lists. The Tenth Circuit affirmed on the grounds articulated by the court in *Leggroan v. Smith*[207] where it

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> tion—regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other—to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.

Id. at 977.

[202] No. 74-1666 (10th Cir., Oct. 31, 1975) (Not for Routine Publication).

[203] Counsel for the defendant made a motion for a continuance (which was subsequently denied) but failed to make any motion challenging the array pursuant to 28 U.S.C. § 1867 (1970). *See* note 19 *infra.*

[204] The court noted that compliance with this section "is the exclusive means by which a person accused of a federal crime may challenge a jury array on the grounds that it was not selected in conformity with the provisions of the Jury Selection & Service Act of 1968." No. 74-1666 at 5. *See* 28 U.S.C. § 1867(e).

[205] 539 F.2d 45 (1976).

[206] 28 U.S.C. § 1861 (1970) requires "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."

[207] 498 F.2d 168 (10th Cir. 1974). In *Leggroan* the entire jury panel was challenged on the grounds that it was selected from tax assessment rolls thereby effectively "excluding nonproperty owners and prejudicially reducing the number of women, young people, poor people and members of minority races." *Id.* at 169. The Tenth Circuit concluded that "no rational basis exists for such a discriminatory exclusion and that the jury selection method used was constitutionally improper." *Id.* at 171. *See also* Carter v. Jury Comm'n, 396 U.S. 320 (1970) (reiterates the states' freedom in confining selection of prospective jurors to

was recognized that a mode of jury selection must be upheld when the proof offered failed to show "that a recognizable, identifiable class of persons, otherwise entitled to be jury members, has been purposefully and systematically excluded from jury service."[208]

In *United States v. Trujillo*[209] a sixth amendment challenge was raised against the jury composition where the defendant objected to six of the jurymen who had previously served in narcotics cases. The Tenth Circuit affirmed, stating that "service on prior juries in cases having similar issues does not of itself exclude a juror from serving."[210]

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those citizens meeting qualifications such as age, education, good intelligence, sound judgment, and fair character); United States v. King, 492 F.2d 895 (8th Cir. 1974) (the court summarily held that the Jury Service and Selection Act of 1968 was not violated by the use of voter registration lists); United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974) (court rejected complaint that a juror wheel, which was composed from the voter registration list exclusively, consequently resulted in an improper representation of the community as to race, economic status, or age); *Overview, Criminal Law and Procedure,* 52 DEN. L.J. 133, 148-49 (1975).

[208] 498 F.2d at 170. The Tenth Circuit, in *Bennett,* also noted that the statistics offered by the defendant did not show that the proportion of blacks to whites actually voting was any less than the proportion registered to vote in the counties from which the array was drawn. The defendant had based his proof on national figures. 539 F.2d at 55.

[209] No. 74-1834 (10th Cir., Sept. 17, 1975) (Not for Routine Publication). *See also* United States v. Jasper, 523 F.2d 395 (10th Cir. 1975) (court rejected the claim that jurors who had been *challenged* in a kindred case immediately preceding this one were ineligible to serve on this jury).

[210] No. 74-1834 at 9 (citing Casias v. United States, 315 F.2d 614 (10th Cir.), *cert. denied,* 374 U.S. 845 (1963)). *See* Virgin Islands v. Williams, 476 F.2d 771 (3d Cir. 1973), where the Third Circuit stated:

> [F]ederal courts have uniformly held that, absent some evidence of actual partiality, a juror is not disqualified merely because he previously sat in a similar case arising out of a separate and distinct set of circumstances even though the offenses charged in the cases are similar and some of the same prosecution witnesses testify in each case.

Id. at 773.

For courts upholding a jury panel despite the fact that some of the jurors had previously served in a similar case and/or heard testimony of the same prosecution witnesses, see United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); United States v. Salazar, 480 F.2d 144 (5th Cir. 1973); United States v. Estrada, 441 F.2d 873 (9th Cir. 1971); United States v. Haynes, 398 F.2d 980 (2d Cir.), *cert. denied,* 393 U.S. 1120 (1968); United States v. Cooper, 332 F.2d 790 (3d Cir. 1964); Casias v. United States, 315 F.2d 614 (10th Cir.), *cert. denied,* 374 U.S. 845 (1963); Calderon v. United States, 269 F.2d 416 (10th Cir. 1959); Harbold v. United States, 255 F.2d 202 (10th Cir. 1958); Cwach v. United States, 212 F.2d 520 (8th Cir. 1954); Belvin v. United States, 12 F.2d 548 (4th Cir. 1926); Haussener v. United States, 4 F.2d 884 (8th Cir. 1925); Wilkes v. United States, 291 F. 988 (6th Cir.), *cert. denied,* 263 U.S. 719 (1923). *But see* United States v. Stevens, 444 F.2d 630, 632 (6th Cir. 1971), where the Sixth Circuit held that "whenever avoidable,

The absence of procedural safeguards necessitated by pretrial and trial publicity provided the basis for appeals in *United States v. Hall*[211] and *United States v. Coppola.*[212] The Tenth Circuit rejected the appellant's contention in *Hall* that the trial judge's voir dire of prospective jurors was inadequate in light of the alleged prejudicial pretrial publicity. In determining that there was not an abuse of discretion by the trial court, the Tenth Circuit recognized that, although the trial judge's questions were not as numerous or detailed as those submitted by the appellant, they contained the import of his inquiry.[213]

The Tenth Circuit likewise rejected the argument that the trial court erred in refusing to allow counsel to ask the questions. In averring to Rule 24(a) of the Federal Rules of Criminal Procedure, the court held that *either* the court or counsel is permitted to conduct the voir dire.[214]

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jurors should not be called to serve in cases involving witnesses or parties who participated in cases in which they were previously impanelled."

[211] 536 F.2d 313 (10th Cir. 1976).

[212] 526 F.2d 764 (10th Cir. 1975).

[213] The appellant also alleged error by the trial judge due to his refusal to ask all of the questions offered by the appellant. 536 F.2d at 324. *See* Ham v. South Carolina, 409 U.S. 524, 527 (1973), where the Court held that a trial judge "was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." *See also* Brundage v. United States, 365 F.2d 616 (10th Cir. 1966).

[214] FED. R. CRIM. P. 24(a) provides:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

For the scope of review of a trial court's discretion under this rule see Brundage v. United States, 365 F.2d 616 (10th Cir. 1966), where the Tenth Circuit held that "[t]he court's discretion under this rule will not be disturbed, unless it appears from the record that its voir dire was inadequate to properly test the qualifications and competency of the prospective jurors to sit on trial of the case." *Id.* at 618. *See also* United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); Goosman v. A Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963); Alvarez v. United States, 282 F.2d 435 (9th Cir. 1960); United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds,* 365 U.S. 312 (1961); Butler v. United States, 191 F.2d 433 (4th Cir. 1951); Speak v. United States, 161 F.2d 562 (10th Cir. 1947).

The appellant also alleged error in the trial judge's failure to question each juror individually. While the Tenth Circuit recognized that it may have been better practice to conduct an individual voir dire of each prospective juror due to the publicity prior to the trial, the failure to do so was not error. The court distinguished Silverthorne v. United

In *Coppola* the appeal was based on the failure to admonish jurors at the end of each day's session to refrain from reading newspapers, watching television, or listening to radio accounts of the trial. Although the Tenth Circuit recognized that it is better practice to repeat this warning throughout the trial,[215] the court determined that there was no prejudice where the trial judge relied on his preliminary admonition which had been given generally to all of the prospective veniremen prior to empaneling of the jury.[216]

D. *Admissibility of Evidence*

The question of hearsay as to the testimony of a prosecution witness was confronted by the Tenth Circuit in *United States v. Coppola*.[217] The appellant was convicted of first degree murder and conspiracy to commit the murder of a fellow inmate, one Willard Hardaway.[218] The facts support the conclusion that Har-

States, 400 F.2d 627 (9th Cir. 1968), where the defendant's conviction was reversed and remanded when, in view of the voluminous and highly inflammatory publicity prior to the trial, the court failed to conduct individual questioning of the prospective jurors. The Ninth Circuit expressed its preference for the following rule: "Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors." 400 F.2d at 639 n.15 (citing AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.4(a) (Tent. Draft 1966) (selecting the jury—method of examination)). The Tenth Circuit distinguished *Silverthorne* due to the essentially factual newsreporting in *Hall* rather than opinions as to guilt. It was felt that this newsreporting was neither inflammatory nor prejudicial. 536 F.2d at 326. *See* United States v. Colabella, 448 F.2d 1299 (2d Cir. 1971) (following the Ninth Circuit's rule). *See also* Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961).

[215] 526 F.2d at 775-76. *See* Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961), where the court reversed the conviction because the trial court permitted the jury to separate overnight and for a long weekend without cautioning them prior to each separation against reading anything about the case:

> And in all criminal cases whenever jurors are permitted to separate, the court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the course of the trial.

272 F.2d at 507 (citing Brown v. United States, 99 F.2d 131, 132 (D.C. Cir. 1938)).

[216] The Tenth Circuit based its affirmance on the harmless error rule as articulated in Chapman v. California, 386 U.S. 18 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

[217] 526 F.2d 764 (10th Cir. 1975).

[218] *Id.* at 766.

daway was killed when he failed to deliver a requisite amount of heroin to the appellant, who had arranged for it to be delivered inside the walls of Leavenworth.[219]

The prosecution witness, Killian Joe Herman, worked as an orderly in the segregation area of Leavenworth. Herman testified that he was to deliver heroin to one Molina as compensation for killing Hardaway at defendant-appellant's behest. In this testimony he related to the court certain responsive comments made by the defendant-appellant to Herman in reaction to inculpating statements that had been made by Molina to Herman regarding Molina's payoff.[220] The import of these statements by the appellant directed Herman to assure Molina that due payment would be forthcoming and that he would keep Molina in heroin " 'as long as they was [*sic*] together and had the stuff available . . . .' "[221] Herman's testimony regarding the statements of Molina to which the defendant-appellant had responded was admitted into evidence despite considerable objection by the defense that such testimony was hearsay.[222]

The Tenth Circuit, in rejecting the appellant's challenge to admittance of this testimony, chose to view the hearsay statements as adoptions by the appellant wherein "it appear[ed] the accused understood and unambiguously assented to those statements."[223] In conclusion, the court held that Herman's recounting of Molina's statements and the defendant-appellant's comments in response to them were properly admitted under the party admissions exception to the hearsay rule.

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[219] *Id.* There had been evidence introduced at trial which indicated that the appellant was the major supplier of heroin at the penitentiary. *Id.* at 776.

[220] *Id.* at 768.

[221] *Id.* at 769.

[222] *Id.*

[223] *Id.* n.2. *See* Naples v. United States, 344 F.2d 508 (D.C. Cir. 1964); 4 WIGMORE, EVIDENCE §§ 1069, 1071-72 (Chadbourne rev., 1972). *See also* Maryland Cas. Co. v. Pearson, 194 F.2d 284 (2d Cir. 1952) (information given by the driver of the car regarding his employment by the insured was sufficiently acquiesced in by the insured when he failed to deny the statement made in his presence, rendering it an admission that the driver was insured's employee at the time of the accident).

For cases holding that a statement made in the presence of an accused, which statement necessarily calls for his denial if untrue, may be relevant as an adoptive admission, due to his failure to deny the statement, see Ishler v. Cook, 299 F.2d 507 (7th Cir. 1962); United States v. Arpan, 260 F.2d 649 (8th Cir. 1958); United States v. Alker, 255 F.2d 851 (3d Cir. 1958); Kelley v. United States, 236 F.2d 746 (D.C. Cir. 1956); Egan v. United States, 137 F.2d 369 (8th Cir. 1943).

In *United States v. Jones*[224] and *United States v. Swain*[225] the Tenth Circuit upheld the admission of tape recordings over the appellants' objections. In *Jones* the appellant was convicted on the basis of tape recordings made contemporaneously with his sale of cocaine and heroin to a government informant.[226] The tapes were challenged on the grounds that they were "inaudible, susceptible to misinterpretation and highly prejudicial."[227] The appellant also argued that it was error to permit the informant to corroborate his own testimony through use of these tapes.[228]

Noting that the admissibility of a tape recording is "within the sound discretion of the trial judge,"[229] the Tenth Circuit held that the discretion exercised here was without error where there was also substantial corroboration for the informant's testimony from the Drug Enforcement Administration agent who had made the tapes in question.[230] The court, in assuming that the two tapes were played in their entirety at trial, concluded that the record, taken as a whole, showed no prejudicial error in connection with the tapes.[231] However, despite the court's acquiesence in the trial

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[224] 540 F.2d 465 (10th Cir. 1976).

[225] No. 75-1387 (10th Cir., Dec. 16, 1975) (Not for Routine Publication).

[226] 540 F.2d at 467.

[227] *Id.* It should be noted that the Government admitted, prior to trial, that parts of the two tapes were incomprehensible, other parts were incomplete, and still others were totally inaccurate. Due to these problems, the Government assured that no use would be made of the transcripts at trial. *Id.* at 469.

[228] *Id.* The trial court permitted the informer to testify in the presence of the jury on the contents of the inaudible tapes, despite objections from the defense that this was extremely prejudicial and inflammatory. *Id.* The Tenth Circuit acknowledged the flagrant insufficiency of the recordings, noting that the court reporter was unable to decipher and record what portion of the tape was being played or whose voices were being heard. *Id.*

[229] *Id.* at 470. *See* United States v. Clements, 484 F.2d 928 (5th Cir. 1973), *cert. denied,* 415 U.S. 991 (1974); United States v. Hodges, 480 F.2d 229 (10th Cir. 1973); United States v. Carson, 464 F.2d 424 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); United States v. Skillman, 442 F.2d 542 (8th Cir.), *cert. denied,* 404 U.S. 833 (1971); United States v. Madda, 345 F.2d 400 (7th Cir. 1965); Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied,* 374 U.S. 829 (1963); Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), *cert. denied,* 368 U.S. 989 (1962); Monroe v. United States, 234 F.2d 49 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956).

[230] 540 F.2d at 470. The Tenth Circuit stated that "[u]nless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy, it may be admitted; this is especially so where a witness who heard the statements also testifies and the recording gives independent support to his testimony." *Id. See* Monroe v. United States, 234 F.2d 49 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956).

[231] 540 F.2d at 469.

court's action, the Tenth Circuit did provide the prosecution with a caveat:

> To avoid danger of reversal for an inadequate record and possible prejudice, some means should be used to identify clearly those portions of the tapes played at trial. These tapes, or transcribed portions of them, should be included in the record on appeal. In the trial court's discretion the use of tapes may be conditioned on advance preparation of an accurate transcript . . . .[232]

A similar issue arose in *United States v. Swain*[233] where the appellant based his challenge on the admission of a tape which had been recorded contemporaneously with the attempted rape for which he was now on trial. The appellant argued that portions of the tape were inaudible and the admittance thereof constituted prejudicial error.[234] Reiterating the importance of the trial judge's discretion in these matters, the Tenth Circuit affirmed the admissibility of the tape:

> It is well settled that a recording is admissible unless there are inaudible portions which are so substantial that the recording as a whole is not trustworthy . . . . Whether or not the inaudible portions are so substantial that the recording is not trustworthy has repeatedly been held to be a determination for the trial judge acting within his discretion.[235]

The Tenth Circuit noted that the trial court had conducted an in camera hearing wherein the tape had been reviewed in its entirety and the court had subsequently determined that the inaudible portions were not so substantial or untrustworthy so as to require the tape's exclusion.[236]

E. *Scope of Direct and Cross-Examination*

The scope of cross-examination by defense counsel was addressed by the Tenth Circuit in *United States v. Brooks*,[237] *United States v. Logan*,[238] and *United States v. Estell*.[239] In these cases

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[232] *Id.* n.3.

[233] No. 75-1387 (10th Cir., Dec. 16, 1975) (Not for Routine Publication).

[234] *Id.* at 5.

[235] *Id.*

[236] *Id.* at 6. *See* United States v. Clements, 484 F.2d 928, 930 (5th Cir. 1973); United States v. Carson, 464 F.2d 424, 437 (2d Cir. 1972); Gorin v. United States, 313 F.2d 641, 651-52 (1st Cir. 1963); Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961); Monroe v. United States, 234 F.2d 49, 55 (D.C. Cir. 1956).

[237] No. 75-1638 (10th Cir., Aug. 3, 1976) (Not for Routine Publication).

[238] No. 75-1693 (10th Cir., Aug. 3, 1976) (Not for Routine Publication).

[239] 539 F.2d 697 (10th Cir. 1976).

the defendants-appellants argued that it was error for a trial judge to restrict defense counsel's inquiry into the misdeeds of government witnesses.[240] In affirming the appellants' convictions, the Tenth Circuit emphasized that "[t]he scope of cross-examination is broad, but it is not unlimited."[241] Recognizing that this determination is within the "sound discretion" of the trial court,[242] the Tenth Circuit held that the trial court ruling would not be disturbed where "[t]he matters sought to be inquired into do not appear to be relevant or in anywise germane to the central issue in the case . . . ."[243]

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[240] The same government witness testified in all three cases. The unrelated criminal activity of the witness included the theft of government meat, forging checks, concealing weapons, and a possible homicide. In his cross-examination of the government witness, defense counsel sought to inquire into the witness' background in an attempt to bring out these past criminal acts as evidence of his "evil character." No. 75-1693 at 6-7.

[241] No. 75-1638 at 8. The Tenth Circuit agreed that such inquiry into the prosecution witness' alleged misdeeds were irrelevant in that they had no connection with the charges then pending against any of the defendants, namely, knowing possession of heroin with the intent to distribute the same. *Id.* at 9. *See* No. 75-1693 at 6-7; 539 F.2d at 700. In addition, the Tenth Circuit held that the trial court did not abuse its discretion in concluding that such inquiry was "not probative of truthfulness or untruthfulness." 539 F.2d at 700.

[242] No. 75-1693 at 6; No. 75-1638 at 8-9; 539 F.2d at 700. *See* United States v. Spivey, 508 F.2d 146 (10th Cir.), *cert. denied,* 421 U.S. 949 (1975); Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970); McManaman v. United States, 327 F.2d 21 (10th Cir. 1964); Darby v. United States, 283 F.2d 896 (10th Cir. 1960); Foster v. United States, 282 F.2d 222 (10th Cir. 1960).

[243] No. 75-1638 at 9. *See* No. 75-1693 at 6-7; 539 F.2d at 700. *See also* United States v. Jones, No. 75-1338 (10th Cir., Mar. 25, 1976) (Not for Routine Publication), where the Tenth Circuit reversed the trial court for refusing to admit testimony bearing upon the character for veracity of a prosecution witness. The Tenth Circuit adopted the language used in Atkinson v. Atchison, T. & S.F. Ry., 197 F.2d 244 (10th Cir. 1952), where it was held that "[t]he credibility of the witness is always relevant in the search for truth . . . ." *Id.* at 246. In *Atkinson* it was recognized that the trial court's duty is only to

> protect [the witness] from questions which go beyond the bounds of relevancy merely to harass, annoy or humiliate him . . . . Evidence challenging directly the truth of what the witness has said about *matters material to the issue on trial,* cannot be called collateral and immaterial to the issue of the credibility of the witness, and it is admissible for that purpose.

Id. (emphasis added; citations omitted). *See also* FED. R. EVID. 608(a); 3A WIGMORE, EVIDENCE §§ 981, 983 (Chadbourne rev. 1970).

It is curious why the Tenth Circuit did not affirm the trial courts' action in these three cases on the grounds articulated by the Fourth Circuit in United States v. Pennix, 313 F.2d 524 (4th Cir. 1963), where the court stated that "witnesses . . . may, for purposes of impeachment, be questioned as to *prior* convictions . . . . But it is clearly established that the cross-examiner may not go further and inquire of a defendant concerning only his prior arrest or indictment for a crime." *Id.* at 529 (emphasis added; citations omitted). The Tenth Circuit, in *Brooks,* noted that there was nothing in the record to indicate that

In *United States v. Larry*[244] direct examination of the defendant's expert witness was wrongfully restricted by the trial court where the defendant sought to rebut the trustworthiness of testimony given by an expert government witness. The government witness had testified to his conclusions concerning a chemical analysis that had been conducted to detect the existence of heroin. The Tenth Circuit, commenting upon the trial court's misconception of the answers called for by the questions, recognized that the questions did not call for the opinion of one expert as to the qualifications of another expert, but would only indicate disagreement as to the conclusions drawn by the other expert.[245] However, the Tenth Circuit concluded that this error did not require reversal.[246]

F. *Sufficiency of the Evidence*

In *United States v. Stricklin*[247] the appellants' appealed their respective convictions of possession of 2,250 pounds of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).[248] The defendants were apprehended while riding in a pickup behind a vehicle and trailer which contained 2,250 pounds of marijuana. Two bricks of marijuana were found in the pickup and these were "similar or identical in appearance" to those in the vehicle and trailer.[249] The defendants contended that this

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the government witness had ever been charged with murder, that there was evidence that he had been arrested on a concealed weapons charge, but no evidence on a conviction, and that he had *allegedly* stolen government meat and forged checks. No. 75-1638 at 8. The Fourth Circuit, in *Pennix*, recognized that the probative value of this type of evidence is "overwhelmingly outweighed by its inevitable tendency to inflame and prejudice the jury . . . ." 313 F.2d at 529. *See* United States v. Dow, 457 F.2d 246 (7th Cir. 1972); United States v. Mitchell, 427 F.2d 644 (3d Cir. 1970).

[244] 522 F.2d 264 (10th Cir. 1975).

[245] *Id.* at 266. The court distinguished United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970), wherein the Tenth Circuit held that it was improper to direct questions to one expert as to the qualifications of another expert.

[246] 522 F.2d at 266.

[247] 534 F.2d 1386 (10th Cir.), *cert. denied*, 429 U.S. 831 (1976).

[248] 21 U.S.C. § 841(a)(1) (1970) states, in part: "[I]t shall be unlawful for any person knowingly or intentionally—(1) to . . . possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." The defendants were also charged with and convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (1970).

[249] 534 F.2d at 1390. The search of the pickup was proper where nightime hunting tools were in plain view of the officer, giving him probable cause to believe that appellants were engaged in illegal hunting. *Id.*

evidence was insufficient to support their convictions for possession of the marijuana in the trailer.[250] Concluding that this circumstantial evidence certainly supported the inference that the two bricks of marijuana came from the trailer,[251] the Tenth Circuit characterized the situation as amounting to *constructive possession* where "the appellants were all engaged in some joint activity relative to the marijuana . . . ."[252]

Similarly, the sufficiency of the evidence connecting the appellant with the theft of a tractor and two trailers was the basis for appeal in *United States v. Wofford.*[253] The appellant argued that evidence tending to show that he had "possession" of the property subsequent to the theft was insufficient to prove that he actually was in possession or that he committed the offense as defined under 18 U.S.C. § 659.[254] The Tenth Circuit, acknowledg-

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[250] 534 F.2d at 1390. *See* Glasser v. United States, 315 U.S. 60, 80 (1942), where the Court held that although evidence should be viewed by circuit courts in a light most favorable to the Government, the conviction must be supported by "substantial evidence."

[251] *Id.*

[252] *Id. See* Amaya v. United States, 373 F.2d 197 (10th Cir. 1967), where the Tenth Circuit defined "possession," as the term is used in the federal narcotics laws, to include both actual and constructive possession:

> [T]hat constructive possession meant that although the narcotic may be in the physical possession of another, the defendant knowingly had the power of exercising control over it; that possession was not limited to manual touch or personal custody; that it was sufficient to constitute possession under the statute if the defendant had knowledge of the presence of the narcotic and control over it . . . .

Id. at 199. *See also* United States v. Jones, 308 F.2d 26 (2d Cir. 1962); United States v. Hernandez, 290 F.2d 86 (2d Cir. 1961); United States v. Cox, 277 F.2d 302 (2d Cir. 1960); United States v. Malfi, 264 F.2d 147 (3d Cir.), *cert. denied,* 361 U.S. 817 (1959).

In addition to the "constructive possession" rationale, the circuit courts have also used language rejecting a distinction between the weight to be accorded direct evidence of possession and that of circumstantial evidence of possession in supporting a conviction. *See* United States v. Pinna, 229 F.2d 216 (7th Cir. 1956), where it was contended by the appellant that direct proof of possession is essential in order to give rise to the presumption of importation. In denying the validity of this argument, the Seventh Circuit held: "We know of no reason . . . why possession proven by circumstantial evidence should be treated any differently from possession proven by direct evidence." *Id.* at 218. *See also* United States v. Peterson, 488 F.2d 645 (5th Cir.), *cert. denied,* 419 U.S. 828 (1974); Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969); Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962); Eason v. United States, 281 F.2d 818 (9th Cir. 1960); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955); United States v. Pisano, 193 F.2d 355 (7th Cir. 1951).

[253] No. 75-1185 (10th Cir., Nov. 25, 1975) (Not for Routine Publication).

[254] 18 U.S.C. § 659 (1970) defines the offense, in part, as follows: "Whoever . . . steals, or unlawfully takes, carries away . . . with intent to convert to his own use any goods or

ing that the evidence received had established the defendant's "dominion over" the stolen property,[255] affirmed the conviction on the following grounds:

> Proof beyond a reasonable doubt that the defendant had possession of property recently stolen gives rise to the inference that the accused knew the property was stolen and also to the inference that the defendant participated in the theft of the property. There is no requirement that the possession need be exclusive in the accused . . . . [P]ossession can exist on a joint basis with another actor.[256]

G. *Trial Judge Conduct*

The conduct of the trial judges was at issue in *United States v. Sporcich*[257] and *United States v. Hill.*[258] In *Sporcich* the appel-

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chattels . . . which constitute an interstate . . . shipment of . . . property; . . . Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both . . . ."

[255] There was testimony placing the defendant-appellant as one of three men attempting to drive the equipment onto the witness' rural property. In addition, the witness testified that the defendant-appellant remained behind to watch the truck while the others went to seek assistance in moving the vehicles. No. 75-1185 at 3.

[256] *Id.* at 4. The Tenth Circuit cited Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969) in support of this proposition. It should be noted that the trial court in *Sewell* was careful to instruct the jury that they should acquit if possession was at all consistent with innocence. In *Wofford* the Tenth Circuit stressed the instruction that possession had to be established beyond a reasonable doubt in order for the inference of theft to be drawn. No. 75-1185 at 5. *See* Rugendorg v. United States, 376 U.S. 528 (1964), where Mr. Justice Clark stated:

> In *Wilson v. United States,* 162 U.S. 613, Chief Justice Fuller held for a unanimous Court that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by circumstances or accounted for in some way consistent with innocence."

Id. at 536-37. *See* United States v. Lang, No. 75-1263 (10th Cir., Nov. 21, 1975) (Not for Routine Publication); United States v. Prujansky, 415 F.2d 1045 (6th Cir. 1969); United States v. Riso, 405 F.2d 134 (7th Cir. 1968); Avon v. United States, 382 F.2d 965 (8th Cir. 1967); Minor v. United States, 375 F.2d 170 (8th Cir.), *cert. denied,* 389 U.S. 882 (1967); Gregory v. United States, 364 F.2d 210 (10th Cir.), *cert. denied,* 385 U.S. 962 (1966); United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960); Torres v. United States, 270 F.2d 252 (9th Cir. 1959), *cert. denied,* 362 U.S. 921 (1960); Pearson v. United States, 192 F.2d 681 (6th Cir. 1951).

A strong dissent in *Wofford* suggests that the Tenth Circuit allowed an impermissible "inference upon an inference" to be made in this case when it held the proof sufficient to sustain the conviction. The dissent points out that the witness' testimony placing the defendant in the truck and later assisting in moving the equipment off of the highway and onto the witness' property, etc. was too "meager" an association with the stolen property to make this inference applicable. No. 75-1185 at 8-10 (Hill, J., dissenting).

[257] No. 74-1569 (10th Cir., Dec. 5, 1975) (Not for Routine Publication).

[258] 526 F.2d 1019 (10th Cir. 1975).

lant argued that she was denied a fair trial due to the deprecatory remark by the trial judge as to the ethics of her counsel.[259] Recognizing that an allegedly prejudicial comment must be reviewed on a case-by-case basis,[260] the Tenth Circuit concluded that this comment was indeed unfortunate, but it was "not so prejudicial as to deny [the appellant] a fair trial."[261]

In *Hill* the appellant's claim of prejudice was based upon the judge's order to have him removed from the courtroom due to his endless "harangue" and the judge's subsequent smile during the removal.[262] In light of the neutralizing instruction given to the

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[259] In the presence of the jury, the court stated to defense counsel: "Mr. Wallace, there are adequate remedies for that. This is not the time to try them out. *Ethical counsel* would know better than to do it in a trial such as this. Now, if that's what you have in mind, quit it." No. 74-1569 at 8 (emphasis in original).

[260] *See* United States v. Roell, 487 F.2d 395 (8th Cir. 1973). In *Roell* the judge made comments where counsel was a bit "overzealous" in questioning a witness. The Eighth Circuit stated that "this court is required to view these comments from the perspective of the proceedings as a whole." *Id.* at 403.

[261] No. 74-1569 at 8. *See* United States v. Polizzi, 500 F.2d 856, 892 (9th Cir. 1974) (citing Smith v. United States, 305 F.2d 197 (9th Cir.), *cert. denied,* 371 U.S. 890 (1962)). In *Smith* the Ninth Circuit stated:

> [F]ew, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial.

305 F.2d at 205. *See also* United States v. Weiss, 491 F.2d 460 (2d Cir. 1974) (while judge's comments were improper, they did not approach the level of harshness or contempt for the defense); United States v. Mackay, 491 F.2d 616 (10th Cir. 1973), *cert. denied,* 416 U.S. 972 (1974) (trial court may "reprimand or rebuff" counsel if necessary to maintain control); United States v. Boatner, 478 F.2d 737 (2d Cir. 1973) (where court's comments did not suggest guilt, comments were directed at counsel only, remainder of court's rulings were evenhanded between both sides, and strong curative instructions were made in an attempt to erase prejudice to the defendant, the Second Circuit concluded that a new trial was not necessary); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973) (conviction was reversed where the cumulative effect of the court's remarks deprecating defense counsel was to prejudice the jury against the defense case); Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970) (rebuffing counsel as to several points and objections did not interfere with a fair trial); United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969) (admonishing of counsel in regard to examination of exhibits did not deny defendant a fair trial); Cooper v. United States, 403 F.2d 71 (10th Cir. 1968) (where it was not reversible error for the court to refer to counsel's arguments as ridiculous).

[262] After asking the defendant several times if he was finished with his outrageous conduct, which included personal attacks on the court, the judge had him removed from the courtroom by marshals. The judge admitted that he had difficulty in restraining himself from smiling because of the magnitude of appellant's conduct.

jury immediately following the defendant's removal,[263] the Tenth Circuit concluded that the trial judge's conduct did not prevent the appellant from receiving a fair trial.[264] The court noted that these actions did not approach the conduct condemned by the Second Circuit in *United States v. Nazarro,*[265] where the trial judge had participated in the trial to such an extent that a "partisan purpose" on his part could be inferred.[266]

H. *Closing Arguments*

The prosecutor in *United States v. Bishop*[267] remarked, in his summation to the jury, that "the evidence in this case is uncontradicted [as to the the defendant's passing of counterfeit bills]."[268] The defendant filed a motion to dismiss, arguing that this statement could be interpreted as a comment on his failure to testify.[269] In affirming the denial of the defendant's motion, the Tenth Circuit adopted the test articulated in *Knowles v. United States:*[270] "Whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."[271] In applying the *Knowles* test, the Tenth Circuit emphasized the fact that there were witnesses other than the defendant,

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[263] The court stated to the jury, in part: "This is not evidence. Ignore what he has said. He is highly emotional this morning . . . . It is not proper and you will not allow yourselves to be influenced by his conduct or by what he says." 526 F.2d at 1025.

[264] The Tenth Circuit, acknowledging that the trial judge should not have smirked, chose to recognize that the "appellant was entitled to a fair trial but not a perfect one." *Id.* (citing Lutwak v. United States, 344 U.S. 604, 619 (1953)). In *Lutwak* the Court supported this proposition by citing Rule 52(a) of the Federal Rules of Criminal Procedure: "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Id.* at 619-20, 620 n.4.

[265] 472 F.2d 302 (2d Cir. 1973).

[266] In *Nazarro* the judge participated extensively in examining witnesses. It was noted that he continuously rehabilitated prosecution witnesses and designed questions to inject doubt as to the credibility of defense witnesses. He also frequently interrupted the testimony of defense witnesses. The Second Circuit concluded that the only remedy for the prejudice suffered here was to reverse and remand for a new trial. The court stated, "even if a judge's interjections are not motivated by a partisan purpose, 'he must not . . . permit even the appearance of such an interference.'" *Id.* at 310 (citing United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960)).

[267] 534 F.2d 214 (10th Cir. 1976).

[268] *Id.* at 219.

[269] *Id. See* Griffin v. California, 380 U.S. 609 (1965).

[270] 224 F.2d 168 (10th Cir. 1955).

[271] 534 F.2d at 220 (citing Knowles v. United States, 224 F.2d at 170).

Bishop, who could have been called to testify as to her lack of knowledge and intent. Under these circumstances, the court concluded that it was not error for the prosecutor to comment "that the evidence against the defendant [was] uncontradicted, especially where the facts in issue could have been controverted by persons other than the defendant."[272]

In *United States v. Adcox*[273] the Tenth Circuit reacted with strong disapproval to the prosecutor's closing argument wherein he made an emotional appeal to the jury that the people of the town in which the crime was committed were watching them (the jury) to see if they were going to condone it or condemn it.[274] The Tenth Circuit interpreted this argument as placing the task of enforcing the law on the jury which had the effect of implying that what they did in this case would determine whether there would be law or lawlessness.[275] In spite of its recognition that the prosecutor's closing argument was invalid, the Tenth Circuit affirmed the conviction in view of the overwhelming evidence of the defendant's guilt.[276]

I. *Jury Instructions*

1. Accomplice Testimony

The failure to give a cautionary instruction on accomplice testimony was held to be reversible error in *United States v. Holland*,[277] where the only evidence against the defendant was the testimony of accomplices. The Tenth Circuit found this to be

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[272] 534 F.2d at 219. *See* United States v. Williams, 479 F.2d 1138 (4th Cir. 1973); United States v. Follette, 418 F.2d at 1266 (2d Cir. 1969). *See also* Desmond v. United States, 345 F.2d 225 (1st Cir. 1965), where the First Circuit held that a comment concerning the "lack of contradiction" is improper "[u]nless it is apparent *on the record* that there was someone other than himself whom the defendant could have called." *Id.* at 227 (emphasis added).

[273] No. 75-1400 (10th Cir., Apr. 7, 1976) (Not for Routine Publication).

[274] *Id.* at 8.

[275] *Id.*

[276] *Id.* at 9. In support of its holding, the *Adcox* court cited United States v. Worth, 505 F.2d 1206 (10th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), and United States v. Gilbert, 447 F.2d 883 (10th Cir. 1971), wherein the Tenth Circuit affirmed both convictions, despite its avid disapproval of the prosecutor's closing statements. The court noted that "there was no infringement of appellant's substantial rights within the meaning of Rule 52 FED. R. CRIM. P." in view of the overwhelming evidence of guilt. No. 75-1400 at 9. *See Overview, Criminal Law and Procedure*, 53 DEN. L.J. 109, 120-21 (1976).

[277] No. 75-1556 (10th Cir., Apr. 8, 1976) (Not for Routine Publication).

plain error "affecting substantial rights" and a reversal was required despite the fact that the defendant failed to request such an instruction.[278]

Faced with a similar situation, the Tenth Circuit upheld the jury instructions on accomplice testimony in *United States v. Carpenter.*[279] The court emphasized that the trial court had gone even further than had previously been required by *Butler v. United States,*[280] since the trial court instructed the jury: "You should never convict a defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond a reasonable doubt."[281]

2. Defendant's Theory of Defense

A refusal by the trial court to instruct the jury as to the defendant's theory of defense was the basis for challenge in *United States v. Swinton*[282] and *United States v. Robison.*[283] In *Swinton* the defendant contended that he was merely a "procuring agent" and was not "engaged in the business of dealing in firearms." The Tenth Circuit held that this request to have a "procuring agent" instruction submitted to the jury was nonmeritorious in view of the fact that the defendant had chosen not to testify and had also neglected to present any evidence that he was acting only as such an agent.[284]

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[278] *Id.* at 2. The rule of law regarding an instruction on accomplice testimony was articulated in Butler v. United States, 408 F.2d 1103 (10th Cir. 1969), where the Tenth Circuit held: "[I]n federal courts the testimony of an accomplice need not be corroborated, but the court must instruct the jury as to the manner in which such testimony should be considered." *Id.* at 1105. *See* United States v. Webb, 466 F.2d 190 (10th Cir. 1972); United States v. Owens, 460 F.2d 268 (10th Cir. 1972); United States v. Birmingham, 447 F.2d 1313 (10th Cir. 1971); United States v. Lujan, 444 F.2d 103 (10th Cir. 1971); United States v. Reid, 437 F.2d 94 (9th Cir. 1971).

[279] 535 F.2d 1218 (10th Cir. 1976).

[280] 408 F.2d 1103 (10th Cir. 1969). The instruction given by the Tenth Circuit in *Butler* was as follows: "The mere fact that a witness is an accomplice does not mean that he is an incompetent witness or that he can't tell the truth, but it does mean that testimony is to be weighed with great care and received with caution." *Id.* at 1105.

[281] 535 F.2d at 1219 n.2. *See* Cross v. United States, 392 F.2d 360, 363 (8th Cir. 1968).

[282] 521 F.2d 1255 (10th Cir. 1975).

[283] No. 75-1494 (10th Cir., Mar. 31, 1976) (Not for Routine Publication).

[284] 521 F.2d at 1260. "While a defendant is entitled to instructions on any theory of defense finding support *in the evidence presented* and the law . . . , a trial court is not required to instruct on a defendant's theory of the case when such an instruction has no foundation in evidence." *Id.* (citations omitted).

A similar conclusion was reached in *Robison* where, indicted for refusing and resisting arrest, the defendant based the theory of defense on his apprehension as to the identity of the officers who stopped him. Although the defendant testified as to this, the Tenth Circuit held that there was no evidence to "reasonably support" such a theory.[285]

J. *Post-trial Matters*

1. Sentencing

In *United States v. Murdaugh*[286] the trial court rejected the defendant's "Motion for Jail Time" on the basis that it lacked jurisdiction to consider the matter. The defendant appealed, seeking credit for time spent in state custody on a related charge. His motion was based on 18 U.S.C. § 3568, which states: "The Attorney General shall give any such person [convicted of an offense] credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed."[287] Acknowledging that giving credit is an

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[285] The Tenth Circuit's rationale for affirming the refusal to give the defendant's instruction was based upon a series of events leading up to the willful injury of government property. These included an officer in uniform showing an I.D. card to the defendant; the officer's use of a radio; ample time for the defendant to observe the officer; and a lack of hesitance on the part of the defendant in walking back to the patrol car with the officer. The only evidence that supported the defendant's theory of defense was his own testimony as to his subjective state of mind. The Tenth Circuit held that this was not enough, citing United States v. Swallow, 511 F.2d 514 (10th Cir. 1975); United States v. Hagen, 470 F.2d 110 (10th Cir. 1972), *cert. denied*, 412 U.S. 905 (1973); and Beck v. United States, 305 F.2d 595 (10th Cir. 1962). *But see* Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951) where the court held:

> [I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.

Id. at 617. *See* United States v. Indian Trailer Corp., 226 F.2d 595, 598 (7th Cir. 1955). *See also* United States v. Garcia, 452 F.2d 419 (5th Cir. 1971), where the court recognized that the phrase "any foundation in the evidence" did not necessarily mean

> that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense . . . . We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense.

Id. at 423.

[286] No. 75-1636 (10th Cir., Apr. 6, 1976) (Not for Routine Publication).

[287] 18 U.S.C. § 3568 (1970).

administrative function,[288] the Tenth Circuit held that judicial review was nonetheless appropriate "to insure compliance with that section in order to protect a prisoner's statutory right to credit."[289] Although the federal courts have varied the jurisdictional bases utilized for entertaining such motions,[290] the Tenth Circuit has recognized the proper avenue for relief as 28 U.S.C. § 2255.[291] Noting that the defendant's motion was properly filed with the district court, the Tenth Circuit held that it was error to dismiss the motion for a lack of jurisdiction.

The issue on appeal in *United States v. Marines*[292] was whether the sentencing court gave improper consideration to a felony charge, which had been dismissed as part of a plea bargain, in imposing sentence for a misdemeanor charge based upon the

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[288] In rationalizing the computation of sentencing as an administrative function, the D.C. Circuit, in United States v. Lewis, 447 F.2d 1262 (D.C. Cir. 1971), stated that "[t]he mandate and operative scheme implicit in the statute provides that the available credit shall be applied *after* whatever sentence is imposed and not *before* sentence. Thus, the court must first impose sentence before any 'credit' may be realized." *Id.* at 1265. *See* Soyka v. Alldredge, 481 F.2d 303 (3d Cir. 1973); Bostick v. United States, 409 F.2d 5 (5th Cir.), *cert. denied*, 396 U.S. 890 (1969); Lee v. United States, 400 F.2d 185 (9th Cir. 1968).

Due to the administrative character of the "Motion for Jail Time," most circuits have held that the district court may refuse to entertain the motion where the appellant has failed to exhaust administrative remedies. *See* Pace v. Clark, 453 F.2d 411 (5th Cir. 1972); United States v. Morgan, 425 F.2d 1388 (5th Cir. 1970); Smoake v. Willingham, 359 F.2d 386 (10th Cir. 1966).

[289] No. 75-1636 at 3. *See* United States v. Morgan, 425 F.2d 1388 (5th Cir. 1970).

[290] The Tenth Circuit recognized that federal courts have treated motions seeking credit for time spent in state custody as falling under 28 U.S.C. § 2241 (1970) (addresses the power of a federal court to grant a writ of habeas corpus); 28 U.S.C. § 2255 (1970); 28 U.S.C. § 1361 (1970) (addresses the jurisdiction of federal district courts to entertain actions "to compel an officer of the United States to perform his duty"); and FED. R. CRIM. P. 35 (a motion for reduction of sentence must be made within 120 days after the sentence has been imposed). No. 75-1636 at 3. For an example of court discretion exercised in treating these motions, see Lee v. United States, 400 F.2d 185 (9th Cir. 1968), where the Ninth Circuit held that justice required it to treat the appellant's "Motion for Jail Time" as a petition for habeas corpus under 28 U.S.C. § 2255 in lieu of his actual petition under FED. R. CRIM. P. 35 where the motion was made five years after the sentence had been imposed.

[291] No. 75-1636 at 3. 28 U.S.C. § 2255 states, in part: "A prisoner in custody under sentence of a court established by Act of Congress claiming . . . that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to . . . correct the sentence." *See* Davis v. Willingham, 415 F.2d 344 (10th Cir. 1969). For other circuits that have recognized 28 U.S.C. § 2255 as a proper avenue for relief, see Holt v. United States, 422 F.2d 822 (7th Cir. 1970); Sobell v. United States, 407 F.2d 180 (2d Cir. 1969); Lee v. United States, 400 F.2d 185 (9th Cir. 1968); Bryans v. Blackwell, 387 F.2d 764 (5th Cir. 1967).

[292] 535 F.2d 552 (10th Cir. 1976).

same set of facts. In concluding that the appellant's claim was nonmeritorious, the Tenth Circuit recalled its consideration of a similar issue in *United States v. Majors*:[293]

> [T]he dismissed indictment and the charge contained in it are within the kind of information which a court may properly consider in passing sentence. The plea bargain and the indictment dismissal resulting from it did not and, indeed, could not, deprive the judge of the right and probably the duty of giving consideration to it.[294]

2. Prisoner's Rights

In *Robinson v. McCune*[295] the appellant, while serving two concurrent five-year felony sentences at a federal penitentiary, was sentenced to two one-year misdemeanor sentences to run concurrently with each other, but consecutively "to any sentence now serving."[296] The issue arose as to whether the defendant should have been transferred, at his request, to a lesser custody institution for the service of his misdemeanor sentences following the completion of his service of the felony sentences.[297] Prison authorities chose to aggregate the defendant's sentences whereby he was to serve one sentence for all purposes, including place of confinement.[298] The fact that one sentence was for a felony and the other for a misdemeanor was disregarded.

The Tenth Circuit noted that 18 U.S.C. § 4161 requires aggregation of sentences for purposes of sentence computation.[299] However, the court also acknowledged that 18 U.S.C. § 4083 had been amended in 1959 to permit incarceration at a penitentiary *only if* the offense was punishable by a sentence in excess of one year.[300] In reversing the trial court with respect to the issue of

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[293] 490 F.2d 1321 (10th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975). *See Overview, Criminal Law and Procedure*, 52 DEN. L.J. 133, 159-61 (1975).

[294] 535 F.2d at 554.

[295] 536 F.2d 1340 (10th Cir. 1976).

[296] *Id.* at 1341.

[297] The appellant claimed that he was being unlawfully confined in the penitentiary, in violation of 18 U.S.C. § 4083 (1970), to serve sentences imposed for misdemeanor convictions. This provision provides, in part: "A sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant."

[298] 536 F.2d at 1341.

[299] 18 U.S.C. § 4161 (1970) provides, in part: "When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the [good time allowance] shall be computed."

[300] 536 F.2d at 1342.

place of confinement, the Tenth Circuit concluded that "the practice of aggregating consecutive misdemeanor sentences with prior unexpired felony sentences for purposes of determining place of confinement is not only unauthorized under § 4161, but also does substantial violence to the clear legislative intent expressed in § 4083."[301] In accordance with this interpretation, the court held that Robinson could not be "compelled to serve the misdemeanor sentences at a penitentiary, in the absence of his consent."[302]

In *United States v. Williams*[303] the limits imposed on a federal prisoner's right to privacy were challenged where the defendant filed a motion to suppress evidence that was seized as the result of a rectal search that had been performed prior to releasing the defendant to a Deputy Marshal.[304] The Tenth Circuit confirmed the trial court's overruling of the defendant's motion, noting that the authority for the search was based upon 18 U.S.C. §§ 4041 and 4042 which grant authority to the Director of the Bureau of Prisons to promulgate policies and procedures for the treatment of inmates.[305] In defining the court's scope of review in these matters, the Tenth Circuit stated that "judicial review will be granted only upon a showing that prison officials have exercised their discretionary powers in such a manner as to constitute

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[301] *Id. See also* Brede v. Powers, 263 U.S. 4 (1923); *In re* Bonner, 151 U.S. 242 (1894).

[302] 536 F.2d at 1392. *See* Dorssart v. Blackwell, 277 F. Supp. 399 (N.D. Ga. 1967); United States v. Lomas, 60 F. Supp. 198 (S.D.N.Y. 1945).

[303] No. 75-1401 (10th Cir., Apr. 23, 1976) (Not for Routine Publication).

[304] The defendant was to be placed in the custody of a deputy United States marshal for the purpose of transporting the defendant to a trial wherein he was to appear as a witness. Prior to the defendant's release, permission was granted by the warden to conduct the challenged rectal search wherein a plastic container, containing a piece of hacksaw blade, an emery cord, two screwdrivers, and a small piece of metal, was discovered.

[305] The Tenth Circuit recognized that pursuant to these statutory provisions, "prison authorities at the various institutions are authorized to formulate policies and procedures necessary to meet the particular needs of the respective institutions." No. 75-1401 at 5. The following policy statement was issued by the Warden of Leavenworth in March 1974:

> Every inmate will be searched thoroughly with a magnetometer to detect any contraband hidden in body cavities. A more thorough rectal examination will normally only be necessary in those cases when a positive reading is received from the magnetometer search, or when a Deputy U.S. Marshal or the Chief Correctional Supervisor or his designee determines the inmate is a serious escape risk or is extremely dangerous.

Id. There was evidence that the correctional supervisor at Leavenworth considered the defendant to be a serious escape risk. *Id.*

clear abuse or caprice."[306] The appellant failed to make such a showing.

V. STATUTORY INTERPRETATION

A. *28 U.S.C. § 515(a)*

Three separate cases, *United States v. Katz*,[307] *United States v. Ratley*,[308] and *United States v. Pauldino*,[309] presented the issue of whether, because of the method of their appointments, special attorneys appointed under section 515(a)[310] possessed proper authorization to appear before grand juries. Appellant Ratley contended that "the letters commissioning the attorneys were improper in that they did not 'specifically direct'[311] the attorneys' activities and were not issued by the United States Attorney General himself."[312] Recognizing that recent decisions of other circuits[313] had specifically rejected these arguments, the Tenth Circuit held

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[306] *Id.* *See* Rivera v. Toft, 477 F.2d 534 (10th Cir. 1973); Daugherty v. Harris, 476 F.2d 292 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973); Black v. Warden, United States Penitentiary, 467 F.2d 202 (10th Cir. 1972); Evans v. Moseley, 455 F.2d 1084 (10th Cir.), *cert. denied*, 409 U.S. 889 (1972); Perez v. Turner, 462 F.2d 1056 (10th Cir.), *cert. denied*, 410 U.S. 944 (1972).

[307] 535 F.2d 593 (10th Cir. 1976).

[308] No. 75-1403 (10th Cir., Apr. 1, 1976) (Not for Routine Publication).

[309] No. 75-1336 (10th Cir., Mar. 17, 1976) (Not for Routine Publication).

[310] Section 515(a) provides that:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any legal proceeding, civil or criminal, including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

[311] No. 75-1403 at 3. *See In re* Persico, 522 F.2d 41 (2d Cir. 1975) (broad authority to Strike Force attorney under commission signed by Assistant Attorney General). The Second Circuit states: "The 'specifically directed' phrase of § 515(a) should not be so niggardly construed as to interfere with the federal government's ability to efficiently administer its criminal laws." 522 F.2d at 64.

[312] No. 75-1403 at 3.

[313] DiGirlomo v. United States, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975); Infelice v. United States, 528 F.2d 204 (7th Cir. 1975); *In re* Persico, 522 F.2d 41 (2d Cir. 1975). *See* United States v. Agrusa, 520 F.2d 370 (8th Cir. 1975), wherein the court held that under § 515(a) the Attorney General could delegate his authority to subordinate officers of the Department of Justice. In United States v. Wrigley, 520 F.2d 362 (8th Cir. 1975), the Eighth Circuit rejected the position of the Second Circuit in *Persico* "that the power of the Attorney General to authorize special attorneys to appear before grand juries is limited to situations where there is a special reason to limit the role of the local district attorney and where that reason has been made explicit by the Attorney General." 520 F.2d at 368 n.11 (citing *Persico*, 522 F.2d at 60).

that the special attorneys in each case[314] had proper authority to appear before the grand juries.[315]

B. *18 U.S.C. § 1952*

In *United States v. Villano*[316] appellants Villano and Smaldone appealed their convictions under section 1952[317] on the ground that the evidence adduced at trial was of a local gambling business patronized sporadically by one nonresident[318] and, thus, under the reasoning of *Rewis v. United States*,[319] their activities did not constitute a federal offense.[320] In upholding the convictions, the Tenth Circuit determined that the evidence supported the convictions based upon (1) an interpretation of the statute,[321]

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[314] No. 75-1336 at 4; No. 75-1403 at 3; 535 F.2d at 595-96.

[315] *See* note 314 *supra*.

[316] 529 F.2d 1046 (10th Cir.), *cert. denied*, 426 U.S. 953 (1976).

[317] 529 F.2d at 1052. The Travel Act provisions in question provide that:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
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> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . .

18 U.S.C. § 1952.

[318] The appellants' employees, Colgan and Amato, over the telephone in Denver, Colorado, accepted bets for appellants' illegal gambling operation. The evidence of interstate telephone calls came from one Ferris, a resident of Valentine, Nebraska, who testified that he placed bets by calling three Denver telephone numbers and by using a code number. Ferris' testimony was corroborated by telephone company records. United States v. Villano, 529 F.2d at 1050-51.

[319] 401 U.S. 808 (1971). The Tenth Circuit gave the following summary of the *Rewis* case:

> In *Rewis* there was a lottery or numbers operation in Florida near the Georgia line. Two defendants were Florida residents and there was no proof that they crossed state lines in connection with operation of their lottery. Two other defendants were Georgia residents who traveled to the Florida location to place bets.

529 F.2d at 1052.

[320] 529 F.2d at 1052.

[321] The court stated:

> From the terms of the statute itself we feel that the evidence supports the convictions. There was proof to sustain an inference that the defendants caused or aided and abetted the use by Colgan and Amato of interstate telephone facilities in furnishing line information, accepting bets and arranging payoffs with Ferris.

Id.

(2) an examination of its legislative history,[322] and (3) an analysis of the *Rewis* opinion.[323] The court stated that a plausible argument for reversal might have been made on the basis of *United States v. Altobello*[324] and *United States v. McCormick*,[325] but held the two cases inapplicable here because of the repeated use of an interstate facility by the nonresident witness which produced a substantial volume of gambling on his part.[326]

C. *28 U.S.C. § 2042*

United States v. 17,400 Dollars in Currency[327] presented the Tenth Circuit with a unique claim to monies given to a "cooperating individual,"[328] Nocenti, by his principals and used to set up an illegal narcotics transaction.[329] After his principals were arrested and subsequently convicted, Nocenti filed a claim for the money which he had turned over to the Bureau of Narcotics and Dangerous Drugs.[330]

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[322] *Id.* The Tenth Circuit cited the reasoning and conclusion of the Supreme Court in *Rewis* for the proposition that, based on its legislative history, the Travel Act was aimed at organized crime and persons residing in one state while operating illegal gambling in another state. The Act does not apply to illegal activity solely because that activity is patronized by out-of-state customers. *Id.* (citing United States v. Rewis, 401 U.S. at 811-12). *See* note 319 *supra*. The court further summarized the Act's legislative history to the effect that Congress intended "use [of] any facility" to apply to interstate telephone calls. United States v. Villano, 533 F.2d at 1052-53 n.6.

[323] The Tenth Circuit distinguished *Rewis*, noting that the Supreme Court's decision focused on the interstate activity of *others*. 529 F.2d at 1053. In *Villano* it was "the *defendants* [who] situated their agents where they carried on transactions using telephones, receiving local and interstate calls." *Id.* (emphasis in original). *See also* United States v. Eisner, 533 F.2d 987, 992 n.6 (6th Cir. 1976).

[324] 442 F.2d 310 (7th Cir. 1971) (incidental involvement of interstate facilities).

[325] 442 F.2d 316 (7th Cir. 1971). *But see* United States v. Eisner, 533 F.2d at 992; United States v. LaFaivre, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975); United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970); United States v. Wechsler, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

[326] United States v. Villano, 529 F.2d at 1053-54. The Fourth Circuit, for purposes of satisfying the jurisdictional requirements of the Act, examines whether there has been *any* use of an interstate facility in furtherance of one of the illegal activities defined in the Act. *See* United States v. LaFaivre, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975); United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970); and United States v. Wechsler, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

[327] 524 F.2d 1105 (10th Cir. 1975). The case is an offshoot of the criminal prosecution reported in United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

[328] 524 F.2d at 1105. The court's decision indicates that Nocenti was operating with the full cooperation of the Bureau of Narcotics and Dangerous Drugs. *Id.* at 1105-06.

[329] *Id.*

[330] *Id.* at 1106.

The majority of the court held that the money must be surrendered to Nocenti because of the agency relationships involved: Nocenti, as agent of two principals who were involved in a serious crime, was no longer required to account for the money,[331] and Nocenti, as an informer, was not an agent of the United States.[332]

In his dissenting opinion, Judge Doyle argued that, throughout the transaction, which was for the purpose of arresting and convicting Nocenti's two "principals," Smaldone and Merkowitz,[333] Nocenti was really acting on behalf of the United States Government, not on behalf of Smaldone and Merkowitz or on his own behalf.[334] Thus, in concluding that Nocenti was acting as a government agent and that, therefore, "the government has a better right [to the money] than Nocenti,"[335] Judge Doyle indicated that 28 U.S.C. § 2042[336] should govern how the money is treated: Nocenti should have been required to prove independent good title; were he not able to do so, the money would be inherited by the United States Treasury.[337] Judge Doyle further stated:

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[331] *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 412(2)(b) (1958)).

[332] The majority found no case "where the government has formally or informally asserted that an informer was a lawful agent of the United States or has accepted responsibility for the actions of an informer as his principal." 524 F.2d at 1106. It argued, by analogy, that the Government has consistently refused to accept responsibility for the actions of informers in entrapment cases. *Id. See* United States v. Spivey, 508 F.2d 146 (10th Cir.), *cert. denied,* 421 U.S. 949 (1975). *But see* 524 F.2d at 1107 (Doyle, J., dissenting) (wherein it is argued that the entrapment cases recognize an agency, imputing the acts of the informant to the Government).

[333] 524 F.2d at 1107. According to Judge Doyle, the evidence indicated that Nocenti journeyed to Peru with the money for one purpose—to bring back some cocaine that could be used to arrest and convict Smaldone and Merkowitz. *Id.*

[334] *Id.*

[335] *Id.* at 1108.

[336] This section provides:

> No money deposited shall be withdrawn except by order of court.
>
> In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

28 U.S.C. § 2042 (1970).

[337] It is Judge Doyle's position that Nocenti, as a government informer, should have been compensated in accordance with the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1970), "which [under 21 U.S.C. § 886(a)]

"The really objectionable aspect to me is that the court is lending its aid to one who has no legal right to the award but, more important, the court is going to the assistance of a wrongdoer—a converter."[338]

D. *18 U.S.C. § 2518*

The appellant in *United States v. Russo*[339] alleged error in the trial court's failure to suppress wiretap evidence[340] arguing that, under 18 U.S.C. § 2518,[341] the wiretap orders and applications therefor were deficient.[342] In an opinion written by Judge McWilliams, the Tenth Circuit held that, based on an analysis of the wiretap applications[343] and *United States v. Kahn*,[344] the evidence was sufficient to warrant a finding of probable cause which would

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authorizes the Attorney General to pay an informer such sum or sums of money as he may deem appropriate." 524 F.2d at 1109.

[338] 524 F.2d at 1109.

[339] 527 F.2d 1051 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976). Defendant Russo was convicted of conspiring to carry on prostitution and bribery in Kansas [violation of KAN. STAT. ANN. § 21-3512, -3513, and -3901 (1970)] through the use of interstate facilities in violation of 18 U.S.C. § 1952 (1970). *Id.* at 1053.

[340] Russo's telephone conversations with a co-conspirator, Lowman, were intercepted by wiretaps placed on the telephones at the two massage parlors operated by Lowman. *Id.* at 1054. The court's opinion indicated that there were five tapes of Russo's calls to the target telephone which were introduced into evidence at his trial. *Id.* at 1057-58.

[341] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (1970).

[342] The application for a wiretap and the order authorizing the same must include "the identity of the person, *if known*, committing the offense and whose communications are to be intercepted . . . ." 18 U.S.C. § 2518(1)(b)(IV) (1970) (emphasis added). It was Russo's position on appeal that, since he was not so identified, the wiretaps should have been suppressed. 527 F.2d at 1054.

[343] The first application for the wiretap named Lowman and "others as yet unknown." 527 F.2d at 1054. Russo's name was mentioned in the FBI agent's affidavit in support of the application.

The first application for extension of the wiretap did not include the appellant's name although Russo's name was again mentioned in the affidavit supporting the application for the second extension. The court's decision indicates that phone calls from one "Tony" (later identified as Russo) were intercepted after the first order was granted and between the first and second extensions. *Id.* at 1054-55.

[344] 415 U.S. 143 (1974). The Tenth Circuit in *Russo* stated:

> The rule that we glean from *Kahn* is that if the Government "knows," i.e., has "probable cause" to believe, that a particular person is committing an offense for which the wiretap is sought, and also "knows" that such individual is likely to use the target telephone in furtherance of such criminal activity, then, and only then, need the application and order for a wiretap identify such person by name.

527 F.2d at 1056.

have necessitated the identification of appellant Russo in the wiretap applications and order.[345] In addition, the court concluded that the introduction of the wiretap evidence as to Russo was harmless error.[346]

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DENYING A CRIMINAL DEFENDANT THE OPPORTUNITY TO CALL A WITNESS WHO WILL INVOKE HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

INTRODUCTION

During the most recent survey period the Tenth Circuit decided two cases[1] which involved the attempt by criminal defendants to raise inferences favorable to their cases by calling witnesses who would assert the fifth amendment privilege against self-incrimination.[2] The defendants in each case were prosecuted on charges related to the illegal distribution of drugs and in their defense sought to call as witnesses individuals who had been present at the alleged drug sales. In each case, the Tenth Circuit

[345] 527 F.2d at 1056. The court based its finding of no probable cause on a peculiar factual aspect of the case, *i.e.*, that Russo's name, although mentioned in the application affidavits, was brought into the matter purely by double hearsay (an informant told the FBI that Lowman had told him (informant) that Russo was a conduit for his (Lowman's) protection money to the police). *Id.* at 1054. The court determined that this hearsay was insufficient to warrant a finding of probable cause. *Id. Compare* United States v. Donovan, 429 U.S. 413 (1977); United States v. Moore, 513 F.2d 485 (D.C. Cir. 1975); and United States v. Bernstein, 509 F.2d 996 (4th Cir.), *cert. denied*, 421 U.S. 962 (1975).

[346] 527 F.2d at 1057-58. Even though conversations by Russo were intercepted *before* the first and second wiretap extension applications and orders, the Tenth Circuit also determined that their content was innocuous, *e.g.*, that the conversations did not give any evidence of prostitution, bribery, or interstate travel. *Id.* at 1057.

[1] United States v. Eitel, No. 75-1537 (10th Cir., Jan. 30, 1976) (Not for Routine Publication), *cert. denied*, 475 U.S. 979 (1976); United States v. Martin, 526 F.2d 485 (10th Cir. 1975).

[2] The fifth amendment to the United States Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

affirmed the refusal of the district court to allow defense counsel to cause the witnesses to invoke their fifth amendment privilege in the presence of the jury.

Two constitutional issues were raised by the defendants on appeal. Both defendants argued that the nature of a witness' fifth amendment right required that the witness be compelled to invoke his privilege on the stand in the presence of the jury.[3] In addition, one of the defendants argued that the action of the trial court denied him his sixth amendment right to compulsory process for obtaining witnesses in his favor.[4] The Tenth Circuit did not directly address either constitutional issue. Instead, it decided both cases on the basis of an evidentiary rationale used by other circuits in factually analogous situations.[5]

This paper will discuss the fifth and sixth amendment issues which the Tenth Circuit did not confront, and evaluate the soundness of the evidentiary rationale used by the Tenth Circuit in deciding the cases.

I. FACTS

A. *United States v. Martin*

Maurice Duke Martin was tried and convicted of two separate counts of distributing heroin.[6] The Government's primary witness was an undercover agent for the Drug Enforcement Administration (DEA) who testified that he purchased heroin from Martin on two different occasions.[7] The only other person present at the alleged sales was an informant who had originally introduced the DEA agent to Martin.[8] At the defendant's first trial the informant was subpoenaed by the defendant; the informant took the stand in front of the jury but refused to testify on the grounds

[3] Brief for Appellant at 8-10, United States v. Martin, 526 F.2d 485 (10th Cir. 1975); Brief for Appellant at 11-13, United States v. Eitel, No. 75-1537 (10th Cir., Jan. 30, 1976) (Not for Routine Publication).

[4] United States v. Eitel, No. 75-1537 at 7.

[5] *See* text accompanying notes 57-74 *infra*.

[6] Martin was charged under 21 U.S.C. § 841(a)(1) (1970).

[7] A second DEA agent testified that he had observed the other agent make contact with Martin on both occasions, but that he did not see the sale take place. 526 F.2d at 486. Therefore, the jury based its decision almost entirely on the testimony of the one agent.

[8] *Id.*

that under the fifth amendment he could not be compelled to incriminate himself.[9] The trial ended with a hung jury.[10]

At his second trial Martin again caused a subpoena to be served on the informant. The informant appeared at the trial, but informed defense counsel that he would again refuse to testify. Martin's attorney nevertheless attempted to put the informant on the stand.[11] The trial court refused to allow the witness to be called, and later gave a neutralizing instruction admonishing the jury to draw no inferences from the fact that the informant had not appeared as a witness.[12]

On appeal Martin argued that the trial court committed reversible error in refusing to allow him to call the informant.[13] He maintained that a witness, in contrast to a defendant, had no constitutional right not to take the stand.[14] Martin argued that a witness' testimonial privilege against self-incrimination could not be triggered until a question was put to the witness after he had been sworn and placed before the jury.[15]

B. *United States v. Eitel*

Jeffrey Eitel was indicted and convicted of distributing and of aiding and abetting the distribution of methamphetamine.[16]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] The trial court gave the following instruction:

> There has been testimony in this case about an informant named Samuel Hudson. As a result of a hearing held outside the presence of the jury, the Court has determined that Mr. Hudson is not available to be called as a witness by either side in this case.
>
> The jury may not draw any inference from the fact that Samuel Hudson did not appear as a witness in this case.

Id.

[13] *Id.* at 487.

[14] Brief for Appellant at 8-10, United States v. Martin, 526 F.2d 485 (10th Cir. 1975).

[15] *Id.*

[16] Eitel was charged under 21 U.S.C. § 841(a)(1) (1970) and 18 U.S.C. § 2 (1970). At Eitel's trial a DEA agent testified that he went to a certain Denver residence to negotiate a purchase of methamphetamine. Eitel arrived a short time later and produced a sample. The agent then demanded to see the entire quantity of methamphetamine before making the purchase. At this point Eitel and Marcel Targa, who had been present throughout the transaction, left the room. According to the agent, they returned accompanied by Owen Plyler, were shown the purchase money, and again departed. Eitel, Targa, and Plyler soon returned and, according to the agent's testimony, Targa gave the agent several packets containing what was later identified as methamphetamine. No. 75-1537 at 3-4.

Eitel attempted to call Owen Plyler, who was present at the alleged sale, as a witness.[17] Out of the presence of the jury, the court questioned Plyler concerning his intent to invoke his fifth amendment privilege and allowed Eitel's counsel to ask Plyler specific questions. Plyler asserted his testimonial privilege to each question.[18] After determining that Plyler had a legitimate right to invoke the privilege and being assured that he would stand on his privilege, the court refused to allow Plyler to be examined in the jury's presence.[19]

On appeal Eitel, like Martin, argued that a witness' privilege against self-incrimination involves a limited option of refusal to testify and not a prohibition against all inquiry. He asserted as error the trial court's refusal to allow Plyler to be called as a witness.[20] In addition, Eitel argued that the trial court's refusal denied him his sixth amendment right to compulsory process for obtaining witnesses in his favor.[21]

II. HOLDING

A. *United States v. Martin*

The Tenth Circuit summarily dismissed the issue raised by Martin concerning the boundaries of a witness' fifth amendment privilege against self-incrimination. The court limited its substantive discussion to distinguishing *United States v. Namet*[22] and *United States v. Coppola*[23] from *Martin*. Both *Namet* and *Coppola* were relied upon by the defense as supportive of the proposition that a person can invoke the fifth amendment privilege only in the presence of the jury after being called as a witness and being placed under oath.[24] In addition, the court relied on

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[17] On cross-examination the undercover agent admitted that he had stated in the complaint affidavit filed three months after the alleged transaction that it was Owen Plyler, and not Eitel, who produced the original sample of methamphetamine. *Id.* at 3.

[18] *Id.* at 4.

[19] Charges arising out of the incident were still pending against Plyler but would be dismissed if Plyler satisfactorily completed a treatment program he was then undergoing. *Id.* at 4 n.1.

[20] Brief for Appellant at 11-13, No. 75-1537 (10th Cir., Jan. 30, 1976) (Not for Routine Publication).

[21] No. 75-1537 at 7.

[22] 373 U.S. 179 (1963).

[23] 479 F.2d 1153 (10th Cir. 1973).

[24] *Namet* and *Coppola* involved attempts by prosecutors to raise inferences adverse to a defendant by calling witnesses who then invoked their fifth amendment right in front

decisions from other circuits sustaining a trial court's refusal to allow a defense witness to be called in similar circumstances.[25]

The Tenth Circuit disposed of *Namet* by distinguishing it factually.[26] Without discussing the explicit language in *Coppola* that lent support to Martin's argument,[27] the court observed that both *Coppola* and *Namet* really stood for the evidentiary proposition that the prosecution should not be allowed to ask questions certain to produce a claim of privilege and with it an atmosphere of guilt.[28] The court reasoned that both *Coppola* and *Namet* actually stood for the proposition that a defendant should not be allowed to use the same tactic to produce an atmosphere of innocence.

B. *United States v. Eitel*

In the *Eitel* decision, the court did not attempt to define the scope of a witness' fifth amendment right nor did the court discuss the issue raised by Eitel concerning his sixth amendment right to compulsory process for obtaining witnesses in his favor.[29]

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of the jury. In *Namet,* the United States Supreme Court rejected the defendant's claim that reversible error occurred when a prosecutor was allowed to call witnesses who then invoked their testimonial privilege. The Court stated several reasons for its holding: First, the prosecutor honestly believed the witnesses did not have a legitimate right to claim the privilege and therefore no prosecutorial misconduct was involved; second, the witnesses gave considerable nonprivileged testimony that corroborated the Government's case; finally, the few claims of privilege did not add critical weight to the Government's case but at most constituted cumulative support for inferences already well established by the nonprivileged portion of the testimony of the witnesses. 373 U.S. at 186-89.

In *Coppola,* the Tenth Circuit read *Namet* as supportive of the proposition "that the privilege is not a prohibition against inquiry and cannot be effectively raised before the question is asked and is applicable only to particular questions." 479 F.2d at 1160. Nevertheless, the court in *Coppola* found that reversible error had occurred, holding that the conduct of the Government fell within that part of the *Namet* opinion prohibiting the conscious efforts by a prosecutor to raise inferences adverse to the defendant from a witness' claiming the self-incrimination privilege.

[25] United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied,* 401 U.S. 995 (1971).

[26] After briefly reiterating the facts and holding of *Namet,* the court stated: "In thus holding the Court observed that no constitutional issues were involved, only a claim of 'evidentiary trial error.' This observation is equally applicable to the present case. *Namet,* then, is clearly distinguishable on the facts." 526 F.2d at 487.

[27] *See* note 24 *supra.*

[28] 526 F.2d at 487.

[29] The only reference in the opinion indicating the court had given any consideration to Eitel's sixth amendment claim occurred in a footnote. Therein the Tenth Circuit indi-

Instead, the court again relied on authorities in other circuits that had confronted similar factual situations.[30] Specifically, the court adopted the evidentiary rationale stated by the majority opinion in *Bowles v. United States*:[31]

> It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense. The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness' invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness "takes the Fifth." In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.[32]

III. ANALYSIS

A. *The Boundaries of a Witness' Fifth Amendment Privilege*

There is considerable authority for the proposition relied on by both Martin and Eitel that a witness' fifth amendment privilege, unlike that of a defendant, does not give a witness the right to refuse to be called to the stand.[33] According to this notion, the privilege of the witness, as opposed to that of a defendant, is merely an option of refusal and not a prohibition against all in-

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cated that it had examined the dissenting opinions in Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971), and United States v. Beye, 445 F.2d 1037 (9th Cir. 1971), but found the majority opinions more convincing. No. 75-1537 at 7 n.2. For a discussion of the majority and dissenting opinion in those two cases, see text accompanying notes 57-65 and 75-79 *infra*.

[30] United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); United States v. Beye, 445 F.2d 1037 (9th Cir. 1971); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971). In addition to the cases cited in *Martin*, the court in *Eitel* relied on United States v. Beye, 445 F.2d 1037 (9th Cir. 1971).

[31] 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971).

[32] 439 F.2d at 541 (citations omitted). Significantly, the Tenth Circuit did not articulate a rule absolutely proscribing a trial court from ever allowing a witness to be called by the defense in this kind of situation. However, while leaving the ultimate decision to the sound discretion of the trial court, the Tenth Circuit gave no indication of the factors a lower court should consider in making its decision.

[33] *See* C. MCCORMICK, LAW OF EVIDENCE § 136 (1972); 8 J. WIGMORE, EVIDENCE § 2268 (McNaughton rev. ed. 1961); and authorities cited in note 34 *infra*.

quiry. Thus, the privilege requires that questions normally be put to a witness on the stand while he is under oath.[34]

The reason for requiring that witnesses actually submit to questioning before asserting the fifth amendment privilege against self-incrimination arises from the nature of the privilege itself. The privilege is available only if a particular response falls within the narrow scope of the privilege's protection.[35] Because the judge, and not the witness, is the ultimate arbiter of this question, a decision on the propriety of allowing the witness to assert the privilege cannot be made until the question has been put to the witness and he has stated the basis for his refusal to answer.[36]

If one accepts this rationale, it does not necessarily follow that a witness should be required to assert his privilege before the jury. If the purpose of requiring the witness to take the stand is to insure that the privilege is not improperly used, that goal can be accomplished in an in camera hearing out of the jury's presence. This is precisely the procedure suggested by several courts that have faced the problem in situations similar to that found in *Martin* and *Eitel*.[37] It is also the procedure followed by the trial

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[34] The cases articulating this rule tend to fall into three factually distinct categories. First, there is a group of cases involving criminal trials where the rule is stated as dictum. *See, e.g.*, Garner v. United States, 501 F.2d 228 (9th Cir. 1972), *aff'd*, 424 U.S. 648 (1976); United States v. Shuford, 454 F.2d 772 (4th Cir. 1971); People v. Hannon, 50 Misc. 2d 297, 270 N.Y.S.2d 327 (1962). Second, there are cases involving witnesses called before a grand jury or other investigative body with subpoena powers. *See, e.g.*, Hutcheson v. United States, 369 U.S. 599 (1962); United States v. Cefalu, 338 F.2d 582 (7th Cir. 1964). Finally, there are cases in which a prosecutor has called a witness and the witness has stood on his fifth amendment privilege before the jury. United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973); United States v. Terry, 362 F.2d 914 (6th Cir. 1966); United States v. Harmon, 339 F.2d 354 (6th Cir. 1964), *cert. denied*, 380 U.S. 944 (1965); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); Commonwealth v. Donatelli, 202 Pa. Super. 565, 198 A.2d 338 (1964). The precedential value of the last two groups of cases is weakened by the factual differences between these situations and the situations found in *Eitel* and *Martin*. Moreover, when analyzed in terms of the rule's rationale, discussed in the text accompanying notes 35-39 *infra*, the unqualified statement of the rule found in these cases becomes highly suspect.

[35] C. McCORMICK, LAW OF EVIDENCE § 136 (1972).

[36] *Id.* In addition to making certain that the witness has a legitimate right to invoke the privilege, requiring the witness to take the stand and plead his fifth amendment privilege while under oath after specific questions have been put to him arguably serves the additional purpose of testing the witness' resolve to stand on the privilege.

[37] United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); United States v. Beye,

court in *Eitel,* and implicitly approved by the Tenth Circuit.[38]

Absent an in camera hearing similar to the one held by the trial court in *Eitel,*[39] where the witness' privilege is actually put to the test, the rule and its rationale should control. The trial court in *Martin* arguably erred to the extent that it failed to conduct a hearing of this sort.

B. *A Defendant's Sixth Amendment Right to Compulsory Process*

The sixth amendment guarantees to every criminal defendant the right to compulsory process to obtain witnesses to testify at his trial.[40] This right was made applicable to state criminal proceedings through the fourteenth amendment in *Washington v. Texas.*[41]

The United States Supreme Court has recognized that "few rights are more fundamental than that of an accused to present witnesses in his own behalf."[42] However, the right is not absolute. In *Chambers v. Mississippi*[43] the Court made it explicitly clear that "in exercising this right the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[44] More recently, in *United States v. Nobles,*[45] the Court

445 F.2d 1037 (9th Cir. 1971); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied,* 401 U.S. 995 (1971).

[38] No. 75-1537 at 9.

[39] *See* text accompanying notes 17-19 *supra.*

[40] The sixth amendment to the United States Constitution states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

[41] 388 U.S. 14 (1967). For further discussion of this case, see notes 66-68 *infra.*

[42] Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (citations omitted).

[43] 410 U.S. 284 (1973). In *Chambers* the defendant sought to introduce the testimony of three persons to whom another, McDonald, had confessed to having committed the murder for which Chambers was being tried. The trial court excluded the evidence as hearsay. The Supreme Court reversed and noted that, in this situation, the hearsay bore the assurances of trustworthiness and also fell within the traditional exception for declarations against interest. The Court then went on to say: "That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

[44] *Id.*

[45] 422 U.S. 225 (1975). In *Nobles* the defendant attempted to impeach the credibility of a government witness by using statements obtained from the witness by a defense investigator. When defense counsel indicated he did not intend to produce the investiga-

reaffirmed this qualifying language, noting that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system . . . ."[46] Implicit in the holdings of these cases is the recognition that the Supreme Court has accorded to the rules of evidence and also to discretionary evidentiary rulings a constitutional dimension capable of overriding an express constitutional guarantee.

Only two circuit court decisions have directly addressed the sixth amendment issue raised by *Eitel* in a factually analogous context.[47] Neither case was cited by the Tenth Circuit. In *Myers v. Frye*[48] the Seventh Circuit rejected the defendant's claim that he should be allowed to have a witness invoke the fifth amendment before the jury. The court held that "[t]he Sixth Amendment does not operate to prevent a state from adopting any limitations on defense evidence in criminal trials, but only prevents the adoption of broad arbitrary limitations."[49] The court saw the refusal to allow the defendant to call the witness as neither broad nor arbitrary.[50] In *United States v. Roberts*[51] the Ninth Circuit said that the sixth amendment right "must be considered in light of its purpose, namely, to produce testimony."[52] Since the witness' refusal to testify would not be testimonial in the literal sense of that word, calling a witness who would refuse to testify did not fulfill that purpose.[53]

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tor's complete report, the trial court ruled that the investigator could not testify concerning his interviews with the witness. The court of appeals reversed the trial court, holding that the disclosure condition was improper. The Supreme Court then reversed the court of appeals. In the decision, the Court rejected the defendant's sixth amendment claim, and held that the evidentiary ruling was within the trial court's discretion in order to assure that the jury would hear the full testimony from the investigator rather than only a truncated portion favorable to the defendant. *Id.* at 240-41.

[46] *Id.* at 241.

[47] United States v. Roberts, 503 F.2d 598 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); Myers v. Frye, 401 F.2d 18 (7th Cir. 1968). For other courts that have spoken to the scope of the right in other contexts, see Wisconsin *ex rel.* Monsoor v. Gagnon, 497 F.2d 1126 (7th Cir. 1974); United States v. De Stefano, 476 F.2d 324 (7th Cir. 1973). Several other circuit courts have implicitly rejected Eitel's sixth amendment argument. *See* note 30 *supra*.

[48] 401 F.2d 18 (7th Cir. 1968).

[49] *Id.* at 21.

[50] *Id.*

[51] 503 F.2d 598 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

[52] 503 F.2d at 600.

[53] *Id.*

Other circuits that have faced the kind of situation presented by *Eitel* and *Martin* have side-stepped the sixth amendment issue entirely.[54] Rather than confront the difficult constitutional question posed by this kind of situation, they have relied on a purely evidentiary rationale, refusing to acknowledge that the rationale itself had constitutional dimensions.[55]

C. *The Evidentiary Rationale*

The reasoning adopted by the Tenth Circuit in *Martin* and *Eitel* accurately reflects the approach to this problem taken by the courts generally. The focus is not on the defendant's sixth amendment right, nor on the extent of a witness' fifth amendment privilege; rather, the primary concern is with the evidentiary ramifications of allowing inferences to be drawn by a jury from the assertion by a witness of his fifth amendment privilege against self-incrimination.

This evidentiary rationale was succinctly stated in that portion of the majority opinion in *Bowles v. United States*[56] quoted by the Tenth Circuit in *Eitel*.[57] This evidentiary concern seems to involve three elements: the "constitutional notion" that guilt should not be inferred from the exercise of the fifth amendment privilege; the inability to subject the evidence to cross-examination;[58] and the potential danger of a jury giving undue probative significance to a witness' pleading the fifth amendment.

The first element, the "constitutional notion" referred to by the majority in *Bowles*, really has no application to a witness, as opposed to a defendant, asserting the fifth amendment privilege.[59] Since the witness is not on trial, his constitutional right to remain silent is not endangered by requiring him to take the stand or by allowing the jury to draw inferences from his silence.[60]

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[54] *See* note 30 *supra*.

[55] *See* note 26 *supra*.

[56] 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971).

[57] *See* text accompanying note 31 *supra*.

[58] For an excellent analysis of the majority opinion in *Bowles*, see Comment, *An Extension of the Fifth Amendment Right Against Self-Incrimination*, 52 B.U.L. REV. 149 (1972).

[59] *Id.*

[60] *Id.* at 157.

Similarly, the inability to subject this kind of evidence to direct cross-examination should not be accorded undue weight.[61] In the first place, the prosecutor will be able to appeal to the jurors' natural skepticism of any attempt on the part of the accused to place the blame on another.[62] He will also be able to impeach the silent witness by raising inferences concerning the possibility of undue influence or ulterior motives.[63] In addition, in the context of a criminal proceeding it does not necessarily follow that the Government's right to cross-examine should be deemed paramount to the defendant's right to compulsory process.[64] Where the two rights cannot be accommodated in the context of a criminal trial involving a defendant clothed with the traditional protections of an accused, the balance arguably falls in favor of permitting the defendant to raise the inference for whatever value it might possess.[65]

The third element, which involves a combined concern with the unreliability of the inferences and potential prejudice to the prosecutor, would seem to be the crux of the rationale. Since the courts have allowed this evidentiary concern to effectively override the defendant's sixth amendment right to present witnesses in his own behalf, a careful analysis of this aspect of the rationale is necessary.

In *Washington v. Texas*,[66] the Supreme Court held that if a defense witness' testimony is relevant and material, it should be admitted.[67] Unless the evidence can be excluded for some legiti-

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[61] Bowles v. United States, 439 F.2d 536, 545 n.13 (D.C. Cir. 1970) (Bazelon, C.J., dissenting), *cert. denied*, 401 U.S. 995 (1971).

[62] 439 F.2d at 545 n.13.

[63] *Id.*

[64] United States v. Beye, 445 F.2d 1037, 1043-44 n.7 (9th Cir. 1971) (Ely, J., dissenting).

[65] C. McCORMICK, LAW OF EVIDENCE § 121 at 256 n.77 (1972).

[66] 388 U.S. 14 (1967).

[67] *Washington* involved the attempt of a defendant to call as a witness another individual who had already been convicted of the same crime. Texas statutes proscribed this practice. TEX. REV. CODE ANN. art. 82 (1925) (repealed 1967); TEX. CRIM. PRO. CODE ANN. art. 711 (1925) (repealed 1965). The Court formulated the issue of the case to be "whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court." 388 U.S. at 19. After noting that the right to offer the testimony of witnesses is the right to present a defense and is therefore a fundamental element of due process of law, Chief Justice Warren, writing for a unanimous Court, stated:

mate reason, refusing to admit relevant and material evidence violates a criminal defendant's sixth amendment right to compulsory process.[68]

In order for evidence to be considered relevant and material for the purposes of admissibility it does not have be be completely free from alternative interpretations; it is only necessary that the evidence tend to increase the likelihood of the defendant's guilt or innocence.[69] The inferences to be drawn from a witness' pleading the fifth amendment clearly meet this test.[70] Consequently, if a court refuses to allow an accused to call a witness solely because it believes the inferences to be drawn by the jury from that evidence are unreliable or ambiguous, in the sense that more than one logical inference follows from the invocation of the privilege, the court would be disallowing relevant and material testimony in violation of the defendant's sixth amendment right.

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed.

Id. at 23 (footnote omitted).

The Court also stated in a footnote that: "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . ." *Id.* at 23 n.21. At least one court has interpreted this to mean that if the defendant's sixth amendment right directly conflicts with a witness' fifth amendment right, the former must give way to the latter. In other words, a witness cannot be forced to incriminate himself because his testimony would be relevant and material to the defendant's defense. Holloway v. Wolff, 351 F. Supp. 1033 (D. Neb. 1972), *rev'd on other grounds*, 482 F.2d 110 (8th Cir. 1973).

[68] *See* notes 43-45 and 67 *supra*.

[69] C. MCCORMICK, LAW OF EVIDENCE § 185 (1972); 8 J. WIGMORE, EVIDENCE § 38 (McNaughton rev. ed. 1940). *See* Williamson v. United States, 207 U.S. 425 (1908), where the Court stated:

> The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.

Id. at 451 (citing Holmes v. Goldsmith, 147 U.S. 150, 164 (1892)).

[70] The probative value of such inferences has generally been conceded. *See* United States v. Maloney, 262 F.2d 535 (2d Cir. 1959); Comment, *Exercise of the Privilege Against Self-Incrimination by Witnesses and Codefendants: The Effect Upon the Accused*, 33 U. CHI. L. REV. 151, 159 (1965).

The issue of relevancy and materiality was effectively conceded by the *Bowles* majority in their formulation of the problem. The primary concern of the majority was not that the inferences were lacking in probative value, but that the jury might accord these very logical inferences undue weight.[71] Thus, the court's real concern was with the potential prejudicial effect to the prosecutorial function in allowing the evidence. This concern with prejudice, as distinguished from unreliability, arguably saves the rationale from the constitutional dilemma posed by *Washington.*[72] If the potential for prejudice is significant, this danger protects a court that excludes the evidence from the charge of arbitrariness condemned in *Washington.*[73] However, even if the court disallows the evidence on this basis, it is according greater weight to the possibility of prejudice to the prosecutor than to the defendant's constitutional right to present relevant and material evidence in his defense. This result can only be justified if the danger of prejudice is very great, and a court should indulge in a very careful consideration of the comparative constitutional values involved.

The courts have not dealt with the difficult tension that exists between an evidentiary concern with potential prejudice to the prosecutor and the defendant's constitutional right to present evidence in his defense. Instead, the *Bowles* court and its progeny have approached and resolved the problem by analogizing to precedents dealing with a fundamentally different situation—prosecutorial attempts to raise inferences adverse to a defendant by having a government witness stand on his fifth amendment rights in the presence of the jury.[74]

D. *The Prosecutorial Precedents*

A fundamental weakness in the majority's analysis in *Bowles,* as adopted by the Tenth Circuit in *Martin* and *Eitel,* is the reliance upon precedents involving prosecutorial attempts to

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[71] *See* text accompanying note 32 *supra.*

[72] *See* note 67 *supra.*

[73] *See* note 67 *supra.*

[74] Namet v. United States, 373 U.S. 179 (1963); United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973); Fletcher v. United States, 332 F.2d 724 (2nd Cir. 1964); Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950). *See* also Comment, *supra* note 58, at 154-69.

use this kind of evidence.[75] Chief Justice Bazelon rightly pointed out in his dissent in *Bowles* that the reasoning of these cases did not necessarily apply to a situation in which it is the defense, and not the prosecutor, that is attempting to raise the inferences.[76] In this situation the defendant is merely attempting to use the other's refusal to testify as corroboration for other evidence presented in his defense.[77] When the prosecutor uses this tactic it is equivalent to an outright denial of the defendant's fifth amendment right to remain silent because it is equivalent to using the defendant's own silence as an element of proof beyond a reasonable doubt.[78] By contrast, when an accused suggests by inference that another person is culpable, no equivalent right residing in the prosecutor is impinged, unless the threat of prejudice is deemed sufficiently great to trigger the due process protections discussed earlier.[79]

The two situations are simply not analogous. But rather than abandon the analogy with all its inappropriate analytical baggage, the courts have steadfastly refused to engage the difficult constitutional and evidentiary questions that lurk beneath its simple symmetry.

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[75] *See* note 74 *supra*.

[76] 439 F.2d 536 (D.C. Cir. 1970) (Bazelon, C.J., dissenting), *cert. denied*, 401 U.S. 995 (1971). Judge Bazelon stated: "The position of a defendant asserting his Sixth Amendment right to bring witnesses before the jury is not analogous to that of a prosecutor attempting to insinuate that a defendant is guilty because his confederates refuse to answer incriminating questions." 439 F.2d at 545 n.11.

[77] *Id.*

[78] *Id.*

[79] *See* text accompanying notes 72-73 *supra*. In People v. Dikeman, 555 P.2d 519 (Colo. 1976), the Colorado Supreme Court faced essentially the same situation that the Tenth Circuit confronted in *Martin* and *Eitel*. The defendant sought to call a witness who had originally been charged with first degree assault arising out of the same shooting that led to the defendant's indictment. However, prior to the trial, the charges against the witness were dismissed for lack of probable cause. The defendant maintained that it was the witness who had in fact committed the assault.

Knowing that the witness would stand on his fifth amendment right, and over the objection of the prosecutor, the trial court permitted the defendant to call the witness and cause him to invoke his testimonial privilege before the jury. The jury subsequently acquitted the defendant.

The Colorado Supreme Court reversed the trial court. Following the established approach, the court analogized to precedents involving a prosecutor's attempt to use this kind of evidence. According to the court, consistency required that the defendant and prosecutor be treated alike. Without articulating it in these precise terms, the underlying rationale seemed to involve the recognition of something akin to a right of due process residing in the prosecutor.

Conclusion

The Tenth Circuit's decisions in *Martin* and *Eitel* are most susceptible to criticism for their failure squarely to confront the fifth and sixth amendment issues raised by these appellants. By relying on decisions that had in turn relied on and analogized to precedents involving a prosecutor's attempt to raise inferences adverse to a defendant, the court compounded its error.

A defendant's attempt to raise inferences in his own favor by calling a witness he knows will stand on his fifth amendment privilege does involve an evidentiary problem. Accordingly, it was not entirely inappropriate for the court to focus on this evidentiary concern. However, the question of the probative and prejudicial value of inferences to be drawn by a jury from a witness' assertion of the fifth amendment privilege has unique constitutional dimensions which do not come into play when a prosecutor uses the same tactic.

To the extent that this kind of evidence is offered by a defendant for the purposes of showing the existence of possibilities other than the defendant's guilt, it is relevant and material to the defense. Absent a compelling right of constitutional dimensions residing in the prosecutor that would justify the exclusion of this admittedly probative evidence, the defendant's sixth amendment right should control, and the evidence should be allowed. In order to exclude the evidence the court must, at the very minimum, find that the potential prejudice to the prosecutorial function outweighs the defendant's constitutional right to use the evidence in his defense. This difficult constitutional balancing poses a critical issue that the Tenth Circuit completely failed to address.

Viewed in this light, the court's result in *Martin* and *Eitel* becomes questionable. Allowing the speculative danger of prejudice to the prosecutor to take precedence over a defendant's constitutional right arguably recasts the traditional balance of advantage in a criminal proceeding. Giving the benefit of any doubt to the prosecutor arguably tips the scales of justice in a manner historically considered abhorrent to our system of criminal justice.

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