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CRIMINAL LAW AND PROCEDURE

OVERVIEW

I. FOURTH AMENDMENT: SEARCH AND SEIZURE

In *Wing v. Anderson*[1] the Tenth Circuit applied the criteria for standing to contest a search and seizure which the Supreme Court had announced in *Brown v. United States*.[2] Wing, convicted of armed robbery, challenged the search of a vehicle belonging to a friend. The search was conducted while he was hiding in some weeds several blocks away. The court pointed out that Wing was not present at the search, that he had no possessory interest in the vehicle, and that he was not charged with an offense which included, as an essential element, possession of the items seized (a traffic ticket issued to him, sunglasses with his fingerprints on them, and fingerprints lifted from the vehicle's interior).

It is undisputed that probable cause must exist prior to a search or seizure of an automobile. Less clear is the question on what basis a vehicle may be *stopped* and its driver questioned, however briefly. The Tenth Circuit grappled with this question in two cases, muddling the issue in the first but clarifying it in the second. The two cases are *United States v. McDevitt*[3] and *United States v. Jenkins*.[4]

McDevitt was stopped by a New Mexico policeman who wanted to see if the U-Haul truck McDevitt was driving carried goods for hire. McDevitt's papers were in order, but the policeman requested McDevitt to come to the police car. The policeman radioed headquarters and, upon learning that McDevitt was a Navy deserter, arrested him. Some time later the truck was towed to headquarters and 800-900 pounds of marijuana was found in it.[5]

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[1] No. 74-1056 (10th Cir., July 28, 1975) (Not for Routine Publication).

[2] 411 U.S. 223 (1973). There is no standing where the defendants: (1) Were not on the premises at the time of the contested search and seizure; (2) alleged no proprietary or possessory interest in the premises; and (3) were not charged with an offense that 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.

[3] 508 F.2d 8 (10th Cir. 1974).

[4] No. 74-1567 (10th Cir., Aug. 14, 1975).

[5] The record before the court was not clear about all the circumstances occurring between the arrival of the truck at headquarters and the discovery of the marijuana. There

The court first reiterated the requirements necessary to justify the stop of an automobile:

> In order for an officer to *stop and search* a vehicle there must exist some basis for suspicion, at least, that the driver has violated the law . . . .
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> . . . .
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> Similarly, an automobile may be *stopped for inspection* without probable cause, but the act of stopping may not be arbitrary. Thus, our court has said that "even an investigatory detention must be based on reasonable ground, if not probable cause."[6]

A few paragraphs later the court cited several of its earlier cases,[7] including *United States v. Lepinski*,[8] which held that a routine stop to check driver's license and registration was reasonable and proper.[9] Then instead of focusing upon the lack of probable cause[10] to detain McDevitt *after* his papers were found to be in

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was no warrant for the search, but there might have been a voluntary admission by McDevitt or a valid inventory search. The cause was remanded for further proceedings or a new trial. 508 F.2d at 12-13.

[6] 508 F.2d at 10-11 (emphasis added). One of the several cases cited for the statement on stop and search was Terry v. Ohio, 392 U.S. 1 (1968). For the latter proposition regarding stopping for inspection, the court cited United States v. Fallon, 457 F.2d 15, 18 (10th Cir. 1972). *Fallon* involved a stop for a vehicle registration and driver's license check. New Mexico law requires all operators of motor vehicles to show registration and license upon demand of an officer. N.M. STAT. ANN. §§ 64-3-11, 64-13-49 (1953). The *Fallon* court did, it is true, express some doubt about the statutes. The sentence quoted from *Fallon* in *McDevitt* reads in full:

> The fact that the occupants appeared to have been "hippies" in and of itself did not justify even a preliminary investigation, and *it is doubtful whether the statute contemplates purely arbitrary stops*, for even an investigatory detention must be based on reasonable ground, if not probable cause.

457 F.2d at 18 (emphasis added). But in the preceding paragraph, the court made it clear that the validity of the statutes was not in question: "*We need not determine* whether an arbitrary arrest pursuant to this statute would be justified . . ." since there were articulable facts making the stop and limited questioning reasonable. *Id.* (emphasis added).

[7] United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973); United States v. McCormick, 468 F.2d 68 (10th Cir.), *cert. denied*, 410 U.S. 927 (1972); United States v. Fallon, 457 F.2d 15 (10th Cir. 1972); United States v. Sheppard, 455 F.2d 1081 (10th Cir. 1972); United States v. Granado, 453 F.2d 769 (10th Cir. 1972); United States v. Suldana, 453 F.2d 352 (10th Cir. 1972); United States v. Sanchez, 450 F.2d 525 (10th Cir. 1971); United States v. Self, 410 F.2d 984 (10th Cir. 1969).

[8] 460 F.2d 234 (10th Cir. 1972).

[9] The same New Mexico statutes as in *Fallon* were involved. *See* note 6 *supra*.

[10] If there was no probable cause to detain McDevitt after his papers were found to be in order, then the subsequent arrest for desertion and any inventory search of the vehicle would be fatally tainted by the illegality of that detention. On the "fruit of the poisonous tree" doctrine, see Wong Sun v. United States, 371 U.S. 471 (1963). This analysis would have obviated the need to discuss the validity of the original stop and would

order, the court discussed the validity of the original stop itself and in the process strained to distinguish *Lepinski*:

> In *Lepinski* and the other cited cases the original stopping of the vehicle and the temporary detention were not invalid. The present case, however, stretches the *Terry* doctrine to the breaking point. The *Terry* concept cannot apply to an arbitrary stopping of a vehicle for the purpose of possible discovery of a law violation.[11]

Yet, why is a "routine" stop for a check of license and registration made, except for a possible discovery of a violation, *viz.*, driving without proper license or registration?[12] Perhaps the invalidity of the stop in *McDevitt* is due to the lack of express delegation of power to New Mexico policemen to stop and inspect vehicles which are capable of carrying goods for hire; the power of officers to stop vehicles for the purpose of license and registration checks is clear. But if this is the real difference, the court should have said so.

The defendant in *United States v. Jenkins*[13] sought a reversal of his conviction for interstate transportation of a stolen vehicle, asking the court to apply *McDevitt* to his case. Jenkins was stopped by a New Mexico patrolman for a "routine registration check." When he produced an expired driver's license and no registration for his vehicle, the policeman asked Jenkins to follow him to the station. On the way the officer learned from headquarters that Jenkins' vehicle had been stolen in California. At the station Jenkins was placed under arrest.

The sole issue in *Jenkins* was the validity of the original stop.

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restrict the further proceedings upon remand to the question of a spontaneous and voluntary admission by McDevitt of marijuana possession.

A somewhat similar case last year involved a valid stop for routine, restricted purposes. United States v. Newman, 490 F.2d 993 (10th Cir. 1974), discussed in *Tenth Circuit Survey*, 52 DENVER L.J. 185 (1975). When a search following the stop was conducted without probable cause, the Tenth Circuit held the search was illegal and reversed the conviction.

[11] 508 F.2d at 12.

[12] To hold that license and registration checks must be based at least on reasonable suspicion would take the teeth out of the laws: "A contrary holding would render unenforceable the [California] statute requiring that automobile drivers be licensed." Lipton v. United States, 348 F.2d 591, 593 (9th Cir. 1965). *See also* United States v. Turner, 442 F.2d 1146, 1148 (8th Cir. 1971); Myricks v. United States, 370 F.2d 901, 904 (5th Cir.), *cert. denied*, 386 U.S. 1015 (1967): "[T]he stopping for road checks is reasonable and therefore acceptable" if not a "ruse."

[13] No. 74-1567 (10th Cir., Aug. 14, 1975).

Jenkins' counsel relied heavily on *United States v. Fallon*[14] and *McDevitt* and asked that *Lepinski* be reexamined. Instead, the court reaffirmed *Lepinski* and, while not overruling *McDevitt*, read the language of *McDevitt* "in context" and found it inapposite to *Jenkins*.[15]

The court also pointed approvingly to a footnote in *United States v. Brignoni-Ponce*,[16] a Supreme Court case decided be-

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[14] 457 F.2d 15 (10th Cir. 1972). *See* note 6 *supra*.

[15] No. 74-1567 at 5-6. The court distinguished *McDevitt* from *Lepinski* and *Jenkins* partly on what the routine check disclosed. In *McDevitt* the papers were found to be in order, but in *Lepinski* and *Jenkins* the checks revealed immediately that the papers were not in order. While this is a factual distinction, it is also an impermissible legal distinction. The result of an action does not determine whether the action was legal at its inception. The Tenth Circuit itself made that point in relation to searches in Harris v. United States, 151 F.2d 837 (10th Cir. 1945), *aff'd*, 331 U.S. 145 (1947). The reasoning in *Harris* is valid as well here: "[A] search in violation of the constitution is not made lawful by what it brings to light . . . ." *Id.* at 841, *citing* Byars v. United States, 273 U.S. 28, 29 (1927).

[16] 422 U.S. 873 (1975). It was decided on the same day as the other "border patrol" cases, Bowen v. United States, 422 U.S. 916 (1975), and United States v. Ortiz, 422 U.S. 891 (1975). These three cases and United States v. Peltier, 422 U.S. 531 (1975), dealt with issues left unresolved by the landmark border search case, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Both *Peltier* and *Bowen* held that *Almeida-Sanchez* was not retroactive. *Brignoni-Ponce* held that officers on roving patrols near the border, but not at the border or its "functional equivalent," must base a *stop* of a vehicle on "articulable facts" and then must restrict their questions to citizenship and immigration status and suspicious circumstances. Anything more requires consent or probable cause. *Ortiz* dealt with searches at fixed traffic checkpoints and held that, consistent with *Brignoni-Ponce*, searches not at the border must be based on consent or probable cause. Justice Rehnquist, concurring in *Ortiz*, said on the matter of stops:

> [T]he Court's opinion is confined to full searches, and does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship. Such stops involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal entry. I do not regard such stops as unreasonable under the Fourth Amendment, whether or not accompanied by "reasonable suspicion" that a particular vehicle is involved in immigration violations . . . .

422 U.S. at 898-99. On the other hand, Justice White, in an opinion in which Justice Blackmun also concurred, expressed doubt about Justice Rehnquist's views:

> The Court purports to leave the question open, but it seems to me, my Brother REHNQUIST notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion.

Id. at 914-15.

tween *McDevitt* and *Jenkins*. On state and local police powers, the Court said in *Brignoni-Ponce*:

> Our decision in this case takes into account the special function of the Border Patrol . . . . Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.[17]

The Tenth Circuit seized on this language to buttress its reasoning in *Lepinski*. Thus the Tenth Circuit in *Jenkins* returned to the clear holding of *Lepinski*, that state and local police agencies may stop vehicles on a purely random, arbitrary basis, without probable cause or even reasonable suspicion, to check license and registration papers.[18]

The Tenth Circuit had a border patrol case of its own prior to the three Supreme Court cases decided June 30, 1975.[19] In *United States v. Martinez*[20] a border patrolman in New Mexico was alerted by radio to watch for a car suspected of carrying illegal aliens. The officer stopped the car, questioned the occupants briefly about their citizenship, and then lifted a blanket covering the space between the seats where illegal aliens could be hidden. The officer found only suitcases and clothing. Suddenly Martinez drove off and soon thereafter threw a bag out the window. The officer found marijuana in the bag and later caught and arrested Martinez. The court held that the officer had the authority to stop and make a limited investigation, and that Martinez' flight and attempt to get rid of the marijuana were voluntary acts which gave rise to probable cause.

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[17] 422 U.S. at 833 n.8.

[18] Justice Rehnquist indicated one possible legal basis for justifying arbitrary traffic checks in his concurrence in *Brignoni-Ponce*:

> [J]ust as travelers entering the country may be stopped and searched without probable cause . . . a strong case may be made for those charged with the enforcement of laws *conditioning the right* of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use.

422 U.S. at 887 (emphasis added).

[19] *See* note 16 and accompanying text *supra*.

[20] 507 F.2d 58 (10th Cir. 1974).

The timeliness of information contained in an affidavit for a search warrant was the issue in *United States v. Rahn*.[21] Rahn, a former Alcohol, Tobacco and Firearms Bureau investigator, had been convicted of theft of government property—weapons seized by the Bureau, which Rahn and his supervisor certified they had destroyed. The supervisor was interrogated in July of 1973 and said that in 1971 he and Rahn had agreed to take several of the seized weapons. One of Rahn's fellow officers, not involved in the scheme, remembered seeing Rahn in the fall of 1971 with a shotgun which resembled one supposedly destroyed. Further investigation disclosed that Rahn had not sold his weapons locally as had his supervisor. Accordingly, the warrant to search Rahn's residence was issued in July of 1973 and the weapons were found. Rahn attacked the issuance because the information was over 18 months old[22] and there was no probable cause to believe that he still had the weapons at home. The court recounted the facts at great length and found the magistrate was given sufficient probable cause to believe the weapons were at Rahn's residence. The court expressed its policy in such cases as follows:

> [W]e have given deference to the issuing magistrate's determination and have remembered that even doubtful cases are to be resolved largely by the preference to be given warrants.[23]

II. FIFTH AMENDMENT

A. *Sufficiency of Indictment*

The fifth amendment requires that a person charged with a major crime be indicted by a grand jury. *United States v. Curtis*[24] dealt with the sufficiency of an indictment. The indictment alleged that Curtis had violated 18 U.S.C. § 134, the mail fraud statute. The indictment was phrased almost entirely in the general language of the statute. The court held that the wording was conclusory and did not give "any fair indication of the nature or character of the scheme or artifice relied upon . . . ."[25] As the

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[21] 511 F.2d 290 (10th Cir.), *cert. denied*, 96 S. Ct. 41 (1975).

[22] On the issue of timeliness the court relied on Sgro v. United States, 287 U.S. 206 (1932), and two of its own cases: United States v. Holliday, 474 F.2d 320 (10th Cir. 1973); United States v. Johnson, 461 F.2d 285 (10th Cir. 1972).

[23] 511 F.2d at 294.

[24] 506 F.2d 985 (10th Cir. 1974).

[25] *Id.* at 992. On the sufficiency and specificity needed in an indictment see Russell v. United States, 369 U.S. 749 (1962).

defendant was without sufficient knowledge of the specific offenses charged, the court reversed the judgment and directed dismissal of the indictment.[26]

B. *Double Jeopardy*

In *United States v. Leeds*[27] the defendant, an Indian convicted of robbery in Indian country, alleged that his arrest for disorderly conduct by a tribal policeman, where this charge arose out of the same set of occurrences as did the robbery, placed him twice in jeopardy. The Tenth Circuit held that the arrest by the tribal policeman, who was not a federal officer, was "manifestly tribal in character"[28] and that the tribal and federal charges were therefore sufficiently different from one another so as not to constitute double jeopardy.[29]

In *United States v. Worth*[30] the defendant sold an informer an illegal weapon, dynamite, and cocaine. The United States brought charges against Worth for sale of the weapon and explosives, but Kansas charged him with the cocaine sale. Worth alleged that since the sales of dynamite and cocaine were contemporaneous, he was being tried twice for the same act. The court, however, held the sales to be two acts, not one; therefore, each sovereign could try one act without running afoul of the fifth amendment.[31]

C. *Self-incrimination*

A frequent ground for appeal is that an accused who wants

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[26] The court added that no trial court instruction could have overcome the fatal insufficiency of the indictment. 506 F.2d at 992. Form 3 in the Appendix of Forms of the Federal Rules of Criminal Procedure was mentioned favorably as providing a proper model for an indictment. *Id.* at 987.

[27] 505 F.2d 161 (10th Cir. 1974).

[28] *Id.* at 163 n.2. The court distinguished *Leeds* from United States v. Keeble, 459 F.2d 757 (8th Cir. 1972), *rev'd on other grounds*, 412 U.S. 205 (1973). In *Keeble* the officer was both a federal officer and a tribal officer.

[29] The court also held that just as Federal Rule of Criminal Procedure 5(a), which requires federal suspects to be brought quickly before a magistrate, does not apply to federal suspects already in state custody, neither does rule 5(a) apply to federal suspects already in tribal custody. 505 F.2d at 163.

[30] 505 F.2d 1206 (10th Cir. 1974).

[31] *Id.* at 1210. The fifth amendment is applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969). *See also* Waller v. Florida, 397 U.S. 387 (1970); Ashe v. Swenson, 397 U.S. 436 (1970). Justice Brennan, concurring in *Ashe*, expressed his preference for the "same transaction" test. *Id.* at 448. On the multiple-acts, single-transaction issue in the Tenth Circuit, see Robinson v. United States, 366 F.2d 575, 579 (10th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

to testify as to only one of several matters at trial is forced into a dilemma: Either he remains completely silent, or he testifies and opens all the other matters to cross-examination.

In the case just discussed, *United States v. Worth*,[32] Worth's defense to the federal charge of illegal sale of explosives was entrapment. If he testified on the entrapment issue, he would have to admit the sale of explosives. This admission of a sale at a certain time and place could be used against him in the later state trial for sale of cocaine at the same time and place. The Tenth Circuit held that the choice was his to make, but that it was not impermissible to force him to choose.[33] Further, the court said that it was not essential for Worth to take the stand in order to rely on the entrapment defense.[34]

A similar dilemma confronted the defendant in *United States v. Philipps*.[35] Philipps was charged with a violation of 18 U.S.C. § 2114, assault with intent to rob a mail carrier. Because he placed the mail carrier's life in jeopardy, he was given 25 years, the stiffer penalty provided for in section 2114. First, Philipps said that section 2114 actually creates two separate offenses. The court held that the stiffer penalty for jeopardizing a mail carrier's life (or wounding him) was not a separate offense, but only an aggravating circumstance.[36] Second, Philipps claimed that he could not take the stand to testify concerning the aggravating circumstance without subjecting himself to cross-examination on the basic robbery offense; *i.e.*, that he could not testify concerning punishment without being forced to testify concerning guilt. The court held that the choice was not constitutionally impermissible.[37]

The validity of a confession made by an American citizen

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[32] 505 F.2d 1206 (10th Cir. 1974).

[33] *Id.* at 1209-10.

[34] *Id.* at 1209. This is consistent with an earlier holding this past year. On the entire issue of entrapment see United States v. Hawke, 505 F.2d 817 (10th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975). *Hawke* expanded upon an earlier Tenth Circuit analysis of the thorny entrapment defense, Martinez v. United States, 373 F.2d 810 (10th Cir. 1967).

[35] 522 F.2d 606 (10th Cir. 1975).

[36] *Id.* at 610.

[37] *Id.* at 611. The court relied upon Kirk v. United States, 457 F.2d 400 (6th Cir.), *cert. denied*, 409 U.S. 987 (1972), which relied upon Crampton v. Ohio, 402 U.S. 183 (1971). (*Crampton* was vacated by the Supreme Court, 408 U.S. 941 (1972), but only insofar as the death penalty was concerned, because of Furman v. Georgia, 408 U.S. 238 (1972).)

while in custody in a foreign country was questioned in two cases, *United States v. Mundt*[38] and *Cranford v. Rodriguez*.[39] The court joined several other circuits[40] by holding the confessions valid where the trial courts had found the confessions to be voluntary.

In *Mundt*, although an American narcotics agent had been involved in the investigation which culminated in Mundt's arrest in Peru, the confession was made to a Peruvian officer. The Peruvian officer did not give Mundt the warnings required by *Miranda v. Arizona*.[41] The court agreed with the trial court that since the Peruvian was not an agent of the American officer, there was insufficient reason to exclude the confession.[42]

In *Cranford* the confession was made to a New Mexico officer across the border in Juarez, Mexico. Cranford had been given *Miranda* rights and a waiver form; the standard language had been altered by crossing out the reference to appointment of an attorney and inserting instead a reference to the accused's right to talk to an American consular officer. The alteration was made because Mexico law does not give a right to counsel at that stage of the criminal process. The court found "a good faith effort to comply with the *Miranda* doctrine"[43] under the circumstances.

The test for admissibility in both *Mundt* and *Cranford* was one of voluntariness; American participation did not in itself taint the confessions fatally, even though the *Miranda* warnings were not given as they would have been in the United States. The issue of voluntariness was submitted to a full hearing at the trial level in both cases. Cranford, whose original trial was in state court, was denied an evidentiary hearing on his habeas corpus action in federal court. The Tenth Circuit upheld the district court's reviewing only the state court's transcript.[44]

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[38] 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975).

[39] 512 F.2d 860 (10th Cir. 1975).

[40] *See, e.g.*, United States v. Welch, 455 F.2d 211 (2d Cir. 1972) (confession made in the Bahamas); United States v. Chavarria, 443 F.2d 904 (9th Cir. 1971) (Mexico); United States v. Dopf, 434 F.2d 205 (5th Cir. 1970) (Mexico); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971) (Canada).

[41] 384 U.S. 436 (1966).

[42] 508 F.2d at 906-07.

[43] 512 F.2d at 863. While the Tenth Circuit assumed that the *Miranda* doctrine still applies outside the United States, the Second Circuit in United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), said that it did not. Still, both courts found the admission of the incriminating statements valid.

[44] The Tenth Circuit noted that the trial court has the discretion to hold a new

Voluntariness was also the issue in *United States v. Crocker*.[45] Crocker had confessed both orally and in writing to passing counterfeit money, and had done so after *twice* waiving in writing her right to have an attorney. She claimed that the burden of proof was placed on her during the suppression hearing, rather than on the government as *Miranda* mandates.[46] The court held that while the burden is on the government to prove that the *Miranda* rights were waived voluntarily, knowingly, and intelligently, there is also a burden on the accused:

> Logic dictates that a pre-trial Motion to Suppress filed by an accused does in fact cast the burden upon the movant to present facts necessary to sustain his position.[47]

III. TRIAL MATTERS

A. *Jury Selection*

Randomness of jury selection was at issue in *United States v. Davis*.[48] When it came time to pick the 12th juror, only two veniremen remained of the original courtroom pool. Davis claimed that picking either one would not be "random." This sophistic argument was quickly rejected by the Tenth Circuit, which held that the "essence of randomness . . . is not number, but the absence of any arbitrary attempt to exclude a class of persons from the jury."[49] The court stated the policy succinctly:

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hearing, but is only compelled to grant one if "the constitutional issues had not been fully tried in state court or [if] there existed relevant evidence which was not presented." 512 F.2d at 862. The court pointed to 28 U.S.C. § 2254(d) (1970) and two well-known Supreme Court cases: Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[45] 510 F.2d 1129 (10th Cir. 1975).

[46] 384 U.S. at 475.

[47] 510 F.2d at 1135, *citing* Wilson v. United States, 218 F.2d 754 (10th Cir. 1955). The measure for establishing voluntariness is preponderance of the evidence, not beyond a reasonable doubt. Lego v. Twomey, 404 U.S. 477, 489 (1972).

Crocker also discussed whether the guidelines for determining voluntariness had to be those in *Miranda*, or could also be those in 18 U.S.C. § 3501 (1970), passed after *Miranda* in order to ameliorate the harm Congress thought *Miranda* had caused. 510 F.2d at 1136-38. The court indicated that, although the Supreme Court had not passed expressly on the constitutionality of section 3501, it interpreted several recent Supreme Court decisions to uphold impliedly section 3501. *Id.* In any event, the Tenth Circuit also found the suppression hearing met the *Miranda* guidelines. Even if the section 3501 discussion is technically dictum, the Tenth Circuit position is clear: A confession meeting the section 3501 guidelines on voluntariness can be validly admitted.

[48] 518 F.2d 81 (10th Cir. 1975). Randomness is required in federal juries by 28 U.S.C. §§ 1861-74 (1970).

[49] 518 F.2d at 82, *citing* Sitarski v. New York, 358 F. Supp. 817, 820 (W.D.N.Y. 1973). The *Sitarski* court cited Hoyt v. Florida, 368 U.S. 57 (1961). *Hoyt* said that an unreasona-

"The selection of each of the jurors is guaranteed 'random' so long as formation of the pool is nondiscriminatory."[50]

B. *Trial Court Discretion*

United States v. Stoker[51] dealt with the number of subpoenas available to an indigent defendant.[52] Stoker applied for 16 subpoenas, in accordance with Federal Rule of Criminal Procedure 17(b),[53] on the last day of the Government's case. The trial court granted him only four. The Tenth Circuit limited its review of the issue to the question of possible abuse of discretion by the trial court and found none.[54]

Another issue of discretion arose in *United States v. Connor*.[55] Connor was charged with interstate transportation of a firearm after having been convicted of a felony. Of his several prior felony convictions, the Government chose to prove a rape conviction because it was recent and from the state where the federal trial was being held. Connor offered to stipulate that he had been previously convicted of a felony. The trial court allowed proof of the rape conviction. The Tenth Circuit held that this was a matter of discretion for the trial judge.[56]

Sequestration of a rowdy defendant was the issue in *United*

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ble exclusion of a particular group from jury service was improper, but also upheld a Florida scheme which placed women on jury lists only if they so requested. That part of *Hoyt* approving the exclusion or automatic exemption of women from jury service was overruled in Taylor v. Louisiana, 419 U.S. 522 (1975). *Taylor* is not retroactive. Daniel v. Louisiana, 420 U.S. 31 (1975).

[50] 518 F.2d at 82.

[51] 522 F.2d 576 (10th Cir. 1975).

[52] The right to compulsory process is guaranteed by the sixth amendment.

[53] The rule requires "a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense."

[54] The court cited several of its recent cases on trial court discretion. 522 F.2d at 578. Abuse of the trial court's discretion has been the standard of review for over 80 years. Crumpton v. United States, 138 U.S. 361 (1891).

[55] No. 74-1385 (10th Cir., July 9, 1975) (Not for Routine Publication).

[56] The court repeated the general rule that a party is not required to stipulate and may insist upon proving its facts. However, it emphatically denied that the Government had an "*absolute right* to refuse *any offer* by a defendant to stipulate to facts in a criminal proceeding." *Id.* at 3. The court said that the trial judge, in his discretion, could *direct* the Government to stipulate. *Id.* at 2.

The court also provided a practical pointer. The proper way to prove a conviction is to introduce a certified copy of the conviction and have an official of the prison identify in court the defendant as the one named in the conviction. *Id.* at 3. *See* United States v. McCray, 468 F.2d 446, 449 (10th Cir. 1972).

States v. Munn.[57] Munn was ordered sequestered, during jury selection, in the marshal's office where he could still hear the proceedings. He was also given an opportunity to confer with his counsel from time to time.

The trial judge kept Munn out until jury selection was over and three minor witnesses had been called. Munn was gone only about 1¼ hours. He contended that the Supreme Court's authoritative statements on in-court discipline in *Illinois v. Allen*[58] required his return to the courtroom immediately upon his giving his promise to behave. The Court said in *Allen*:

> Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.[59]

The Tenth Circuit did not read the "as soon as" language to require absolutely the return of the defendant to the courtroom at the earliest possible time. Rather, the judge must be allowed to exercise some discretion in deciding whether the defendant's promise to behave is sincere.[60]

C. *Closing Arguments*

Government prosecutors came under considerable fire for prejudicial statements in their closing arguments. In *United States v. Ludwig*[61] the prosecutor vouched for the credibility of his police witnesses. The court held that this was clear and prejudicial error, and reversed and remanded the case.[62]

The prosecutor in *United States v. Worth*[63] referred to a drug sale for which the defendant would soon be on trial in state court

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[57] 507 F.2d 563 (10th Cir. 1974), *cert. denied*, 421 U.S. 968 (1975).

[58] 397 U.S. 337 (1970).

[59] *Id.* at 343.

[60] 507 F.2d at 568. In *Allen*, a few paragraphs after the language quoted in the text, the Supreme Court said the following about discretion:

> We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

397 U.S. at 343.

[61] 508 F.2d 140 (10th Cir. 1974).

[62] *Id.* at 143. For a forceful statement of Tenth Circuit policy on vouching for the credibility of witnesses, see United States v. Martinez, 487 F.2d 973, 977 (10th Cir. 1973). *See also* 3 WHARTON'S CRIMINAL PROCEDURE § 525 (12th ed. 1975).

[63] 505 F.2d 1206 (10th Cir. 1974). For a discussion of the double jeopardy and entrapment issues in *Worth*, see notes 30-34 and accompanying text *supra*.

and added about the drug itself: "And he transferred a vial of cocaine, a hard narcotic. And I can't say enough bad about cocaine and I can't say enough bad about people who would sell it."[64] The Tenth Circuit condemned the language, but also provided a lesson for defense counsel: Since there was no timely objection to the inflammatory remarks, there was no reversal.[65]

In *United States v. Latimer*[66] the prosecutor literally testified in his closing argument that the reason the Government did not introduce the film of a bank robbery was that the camera malfunctioned. There had been testimony that the camera had been activated, but nothing more. Defense counsel properly argued the inference that the film did not identify the accused. The prosecutor should have shown the film so that the jurors could have seen the camera had malfunctioned, or simply allowed the inference to stand. But, by going outside the record and expressing his personal knowledge and beliefs, he overstepped the boundaries of proper argument. Since there had been timely objection, the case was reversed and remanded.[67]

D. *Principal and Accessory*

The Tenth Circuit had the opportunity to discuss an element of criminal law in *United States v. Tokoph*.[68] Tokoph was accused of aiding and abetting one Weil in misapplying bank funds by receiving illegal loans. Tokoph contended that since Weil, the principal, had not been *convicted* of the substantive offense, he

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[64] 505 F.2d at 1211.

[65] *Id.* This lesson has been taught by the Tenth Circuit before. United States v. Gilbert, 447 F.2d 883, 886 (10th Cir. 1971); McManaman v. United States, 327 F.2d 21, 24 (10th Cir.), *cert. denied*, 377 U.S. 945 (1964). Where there is no timely objection, the only chance for a reversal lies in a finding of "plain error." Van Nattan v. United States, 357 F.2d 161, 163 (10th Cir. 1966). *Accord*, Isaacs v. United States, 301 F.2d 706, 736 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962); Paschen v. United States, 70 F.2d 491, 502 (7th Cir. 1934).

[66] 511 F.2d 498 (10th Cir. 1975).

[67] *Id.* at 503. *See also* United States v. Peak, 498 F.2d 1337, 1338-39 (6th Cir. 1974); Reichert v. United States, 359 F.2d 278, 281-82 (D.C. Cir. 1966); 6 J. WIGMORE, EVIDENCE §§ 1806, 1807 (3d ed. 1940).

Latimer drew a rare dissent, this one by Judge Hill, who was of the opinion that under the circumstances the error was trivial; that defense counsel knew why the camera malfunctioned and took unfair advantage by arguing an inference he knew was logical but factually untrue; and that Latimer had had a fair trial, although not a "perfect" one. 511 F.2d at 503-04.

[68] 514 F.2d 597 (10th Cir. 1975).

(Tokoph) could not be convicted as an accessory. The Tenth Circuit correctly pointed out the distinction between proving the principal's *guilt* and convicting him.[69] Although Weil had not yet been tried, there was sufficient evidence to show that he had committed the offense and that Tokoph had aided and abetted him.

IV. JURY INSTRUCTIONS

A. *Mental Competence*

The issue in *United States v. Munz*[70] was the standard for a jury's judging the defendant's mental competence. The trial judge had repeatedly said that the difference between mental competence and incompetence was whether the defendant was acting voluntarily or was driven by an "insane delusion." The Tenth Circuit rejected this "insane delusion" language and expressed a strong preference for the language used in one of its earlier cases, *United States v. Wion*.[71]

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[69] The defendant relied heavily on United States v. Stevison, 471 F.2d 143 (7th Cir. 1972), *cert. denied*, 411 U.S. 950 (1973). The Seventh Circuit said: "The presupposition that an aider and abettor may be convicted . . . absent *conviction* of the principal is invalid." *Id.* at 147-48 (emphasis added). The court then cited Giragosian v. United States, 349 F.2d 166 (1st Cir. 1965), and United States v. Caplan, 123 F. Supp. 862 (W.D. Pa. 1954), in support of its holding. However, a reading of the two cases discloses that the Seventh Circuit erred in its interpretation of and reliance upon those cases.

Giragosian held:

> In order to convict Giragosian of aiding and abetting it was necessary for the Government to prove that [the principal] himself was *guilty* of the primary offense . . . .

349 F.2d at 167 (emphasis added), *citing* Coffin v. United States, 162 U.S. 664 (1896). The Tenth Circuit correctly noted the distinction between *guilt* of the principal (*Giragosian*) and *conviction* of the principal (*Stevison*).

Caplan furnishes no support for *Stevison* either. In fact, the proof requirement is even less in *Caplan* than in *Giragosian* and *Tokoph*: "The proof must establish that the *offense* was committed by *someone* and that defendant aided and abetted in its commission." 123 F. Supp. at 865 (emphasis added). Proving an offense has been committed is much easier than proving that a particular person, the principal, committed the offense.

The Seventh Circuit would have been right several centuries ago:

> At common law an accessary cannot be tried without his consent before the *conviction* or outlawry of the principal except where tried together with him; the rule, however, has been changed by statute in many jurisdictions.

22 C.J.S. *Criminal Law* § 104 (1961) (emphasis added).

The current general rule, which is that applied by the Tenth Circuit, is stated as follows: "Ordinarily, the *guilt* of the principal must be proved in order to convict an accessary." *Id.* § 105 (emphasis added).

[70] 504 F.2d 1203 (10th Cir. 1974).

[71] 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964).

Wion adopted the A.L.I. standard on criminal responsibility, which provided that the test of mental competence was whether the accused lacked a "substantial capacity" to appreciate the wrongfulness of his act.[72] The test used by the trial judge was essentially whether the accused had *no* capacity to appreciate the wrongfulness of his act. Because of the emphasis by the trial judge on "insane delusions" and the possibility of seriously misleading the jury due to the way some expert testimony was phrased, the court found substantial prejudice to the defendant's rights and reversed and remanded.[73]

B. *Reasonable Doubt*

Within the last 2 years the Tenth Circuit has made clear its preference for a particular definition of "reasonable doubt."[74] The question arose most recently in *United States v. Leaphart.*[75] Once again the circuit court approved the definition of "reasonable doubt" as "the kind of doubt that would make a reasonable person *hesitate to act.*"[76] And once again the court expressed its displeasure with an instruction couched in positive rather than negative terms. The criticized instruction read:

> Proof beyond a reasonable doubt is established if the evidence is such as a reasonably prudent man would be *willing to rely and act upon* in the most important of his own affairs.[77]

The "hesitate to act" language received the most authoritative approval from the Supreme Court in *Holland v. United States.*[78] The Tenth Circuit has since followed *Holland* in *United States v. Smaldone*[79] and *United States v. Pepe.*[80] Although it has not reversed a case using the "willing to act" instruction, because

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[72] ALI MODEL PENAL CODE § 4.0 (1962 Proposed Final Draft). For a short discussion of the A.L.I. and other tests, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 38 (1972). Almost all of the federal courts of appeals have accepted the A.L.I. test. *Id.* § 38, at 294 n.78.

[73] 504 F.2d at 1208-09.

[74] United States v. Pepe, 501 F.2d 1142 (10th Cir. 1974); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). See discussion of *Smaldone* and *Pepe* in *Tenth Circuit Survey*, 52 DENVER L.J. 158-59 (1975).

[75] 513 F.2d 747 (10th Cir. 1975).

[76] *Id.* at 750 n.1 (emphasis added).

[77] *Id.* at 749 (emphasis added). This was part of the instruction used at Leaphart's trial.

[78] 348 U.S. 121, 140 (1954), *aff'g* 209 F.2d 516 (10th Cir. 1954).

[79] 485 F.2d 1333 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

[80] 501 F.2d 1142 (10th Cir. 1974).

it is not seriously misleading to the jury, it is clear that the Tenth Circuit expects a change in the trial courts:

> The time has unquestionably arrived after *Holland*, *Smaldone*, and *Pepe* for the trial courts to change this instruction and to couch it in the terms prescribed by the Supreme Court of the United States.[81]

V. POST-TRIAL MATTERS

A. *Sentencing*

The doctrine of merger was applied in *United States v. Munn*,[82] where the defendant had been sentenced for both larceny and robbery, each arising from the same episode. The Government agreed that the larceny was merged into the robbery, and the court vacated the sentence on the larceny conviction.[83]

The court in *Mayfield v. United States*[84] joined several other circuits[85] in holding that the imposition of a statutorily mandated special 2-year parole term is an imposition of a sentence; therefore, the defendant is required to be present.[86]

Consistent with two decisions last year,[87] the Tenth Circuit has held in *Garcia v. United States*[88] that there is no need to inform a defendant who pleads guilty that there is a possibility of consecutive sentences, where the defendant actually knew of that possibility. No special language about consecutive sentences is absolutely required.

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[81] 513 F.2d at 750.

[82] 507 F.2d 563 (10th Cir. 1974), *cert. denied*, 421 U.S. 968 (1975). For a discussion of sequestration in *Munn*, see text accompanying notes 57-60 *supra*.

[83] *Id.* at 569. *See also* Benton v. Maryland, 395 U.S. 784, 796-98 (1969); Prince v. United States, 352 U.S. 322, 329 (1957); United States v. Leyba, 504 F.2d 441 (10th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1970).

[84] 504 F.2d 888 (10th Cir. 1974).

[85] The court in *Mayfield* cited the following cases in support of its holding: Thompson v. United States, 495 F.2d 1304, 1306-07 (1st Cir. 1974); Tanner v. United States, 493 F.2d 1350, 1351 (5th Cir. 1974); Caille v. United States, 487 F.2d 614, 616 (5th Cir. 1973); United States v. McCray, 468 F.2d 446, 450-51 (10th Cir. 1972).

[86] FED. R. CRIM. P. 43. The one exception to the requirement of presence is when there is a reduction in sentence. FED. R. CRIM. P. 35.

[87] Wall v. United States, 500 F.2d 38 (10th Cir.), *cert. denied*, 419 U.S. 1025 (1975); Williams v. United States, 500 F.2d 42 (10th Cir. 1974). For a discussion of consecutive sentences and these cases, see *Tenth Circuit Survey*, 52 DENVER L.J. 139-41 (1975).

[88] No. 74-1428 (10th Cir., Dec. 10, 1974) (Not for Routine Publication).

B. *Time to Appeal—Extensions*

Federal Rule of Appellate Procedure 4(b) requires that defendants wishing to appeal in criminal cases must file a notice of appeal within 10 days after entry of judgment. Upon a showing of excusable neglect, that period can be extended 30 days. In *United States v. Connor*[89] the notice of appeal arrived in the mail after the initial 10-day period, but within the additional 30-day period which could have been granted. The trial judge held there was no excusable neglect, even though the notice was mailed within the initial 10-day period and took 5 days to be delivered in Cheyenne, the same city where it was mailed. The Tenth Circuit held that the trial judge abused his discretion. The question then became whether the trial court could enter an order after the 30-day period had expired, even though the notice arrived during the 30-day period. The Tenth Circuit held that the trial court had that power.[90]

C. *Expunction of Arrest Record*

United States v. Linn[91] faced squarely the issue whether the fact of an acquittal by itself is enough to mandate expunction of the defendant's arrest record. The court held that while courts do have the power to expunge after acquittal, mere acquittal alone is not sufficient to warrant an expunction.[92] However, when extreme circumstances warrant, expunction is proper and available.[93]

D. *Prisoners' Rights*

Following is a brief discussion of several cases brought by

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[89] No. 74-1651 (10th Cir., May 12, 1975) (Not for Routine Publication).

[90] *Accord*, C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952, 954-55 (2d Cir. 1968). The court also cited Johnson v. United States, 405 F.2d 1072, 1074 (D.C. Cir. 1968); Reed v. Michigan, 398 F.2d 800, 801 (6th Cir. 1968); Evans v. Jones, 366 F.2d 772, 773 (4th Cir. 1966).

[91] 513 F.2d 925 (10th Cir.), *cert. denied*, 96 S. Ct. 63 (1975).

[92] *Accord*, United States v. Seasholtz, 376 F. Supp. 1288 (N.D. Okla. 1974); United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973); United States v. Rosen, 343 F. Supp. 804 (S.D.N.Y. 1972).

[93] *See, e.g.*, United States v. McLeod, 385 F.2d 734, 749-50 (5th Cir. 1967); United States v. Kalish, 271 F. Supp. 968, 970 (D.P.R. 1967). *Linn* noted that some of the cases

> call for a "balancing" of the equities between the Government's need to maintain extensive records in order to aid in general law enforcement and the individual's right of privacy.

513 F.2d at 927.

prisoners incarcerated in federal and state institutions. In the wake of a recent Supreme Court case, *Wolff v. McDonnell*,[94] which clarified what due process rights prisoners do and do not have in prison disciplinary actions, inmates in the six-state area encompassed by the Tenth Circuit challenged many existing prison disciplinary procedures. In *Shimabaku v. Britton*[95] it was held that in a disciplinary proceeding a prisoner who was charged with an infraction which might also be a crime was entitled to "use immunity" in any subsequent criminal action; there was thus no constitutional dilemma involving self-incrimination if he were forced to testify at the hearing.[96] Several other cases,[97] based on due process rights protected in *Wolff*, failed because the Supreme Court specifically stated that its decision was not retroactive.[98]

In two cases prisoners had alleged that conditions within the prison were so poor as to constitute cruel and unusual punishment in violation of the eighth amendment. In *Gregory v. Wyse*[99] the court found that solitary confinement per se was not cruel and unusual punishment, even with a hard bed, cramped quarters, continuous light, and other restrictions. The second case, *Poindexter v. Woodson*,[100] limited the remedies available to victims of cruel and unusual punishment: No money damages were allowed where there was no showing of malice.[101]

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[94] 418 U.S. 539 (1974).

[95] 503 F.2d 38 (10th Cir. 1974).

[96] *Id.* at 44-45.

[97] Gregory v. Wyse, 512 F.2d 378, 381 (10th Cir. 1975), and five unpublished Tenth Circuit opinions: Collingwood v. Meacham, No. 73-1749 (July 17, 1975); Foor v. Carlson, No. 73-1804 (Dec. 10, 1974); Johnson v. Britton, No. 73-1672 (Dec. 9, 1974); Haas v. Attorney General, No. 74-1130 (Oct. 30, 1974); Black v. Warden, No. 73-1586 (Oct. 30, 1974).

[98] 418 U.S. at 573-74.

[99] 512 F.2d 378 (10th Cir. 1975).

[100] 510 F.2d 464 (10th Cir. 1975).

[101] The cruel and unusual punishment was inflicted upon several alleged prison rioters and included lengthy stays in "strip cells." Since these cells had been used in the past, the court felt it unfair to hold current prison officials liable for what had just been determined to be a constitutional violation. Thus, the officials were granted qualified immunity; on this topic see Scheuer v. Rhodes, 416 U.S. 232 (1974).

Dissents in the Tenth Circuit are quite rare, but this case drew one from Judge Doyle. He felt that the officials had not acted in good faith and that the violation was one which shocked the conscience, and that, therefore, immunity should not be extended. 510 F.2d at 467.

Mail censorship was the issue in two unpublished opinions: *Kennedy v. State Department of Corrections*[102] and *Berry v. Anderson.*[103] The court in *Kennedy* remanded to the Wyoming district court for a determination as to whether a Wyoming rule prohibiting inmates from writing articles for publication furthered any substantial governmental interest. The district court in *Berry* enjoined Oklahoma officials from refusing to mail Berry's letters, but denied him monetary damages. The Tenth Circuit affirmed, as no injury had been shown.[104]

There were several cases involving sentencing, probation, and parole. The cases and their holdings, briefly stated, follow:

United States v. Giles:[105] The Tenth Circuit will not review a sentence if it is within statutory limits.

United States v. Johnson:[106] Federal Rule of Criminal Procedure 35 cannot be used to attack the validity of a conviction; rule 35 can only be used to reduce or correct a sentence.

United States v. Reynolds:[107] The trial court was held to have abused its discretion when it extended the length of probation without informing the probationers of their alleged violations and without making specific findings.

Patrick v. Britton:[108] A probationer is entitled to a *local* revocation hearing, in order to secure witnesses and present a proper defense.

Sanchez-Hernandez v. Daggett:[109] There is no set rule in the Tenth Circuit requiring a meaningful parole hearing to be held no later than one-third of the way through a sentence.

Mower v. Britton:[110] The Tenth Circuit joined the Seventh Circuit[111] in applying the Administrative Procedure Act[112] to pa-

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[102] No. 74-1564 (10th Cir., Mar. 27, 1975) (Not for Routine Publication).

[103] No. 74-1491 (10th Cir., July 16, 1975) (Not for Routine Publication).

[104] On the issue of mail censorship and prisons, see Procunier v. Martinez, 416 U.S. 396 (1974). Censorship is only one of many issues in a long, well-documented case involving the Oklahoma State Penitentiary. Battle v. Anderson, 376 F. Supp. 402, 424-25 (E.D. Okla. 1974).

[105] No. 74-1527 (10th Cir., Mar. 14, 1975) (Not for Routine Publication).

[106] No. 75-1013 (10th Cir., July 8, 1975) (Not for Routine Publication).

[107] No. 74-1753 (10th Cir., July 30, 1975) (Not for Routine Publication).

[108] No. 74-1874 (10th Cir., May 2, 1975) (Not for Routine Publication).

[109] No. 75-1120 (10th Cir., May 15, 1975) (Not for Routine Publication).

[110] 504 F.2d 396 (10th Cir. 1974).

[111] King v. United States, 492 F.2d 1337 (7th Cir. 1974).

[112] 5 U.S.C. §§ 551-59 (1970).

role hearings conducted by the United States Board of Parole. This decision was expressly made non-retroactive.

Habeas corpus naturally was at issue in several cases, discussed briefly below:

Sanders v. Conine:[113] Habeas corpus is the proper remedy for a prisoner challenging the validity of his extradition.

Jenkins v. Atkins:[114] That a state court did not deal with one crucial issue in a case does not require repetitious exhaustion of state remedies if the issue was tendered to the state court.[115]

United States v. Hereford:[116] If an indigent prisoner is only contemplating a federal habeas corpus[117] or other action but has not yet filed, he is not entitled to a free transcript.[118]

Finally, the Tenth Circuit has held in *Henderson v. Secretary of Corrections*[119] that a prisoner for whom corrective shoes were prescribed but not furnished does not have a right of action for damages:

> We cannot say that the inadequacy of appellant's normal shoes or the omission to provide the corrective shoes gives rise to a constitutional deprivation sustaining a [42 U.S.C.] § 1983 claim nor that appellant could elaborate this set of facts to support a claim which would entitle him to relief.[120]

VI. STATUTORY INTERPRETATION

A. *21 U.S.C. § 802(15)*

This section defines marijuana as *Cannabis sativa L.* In two cases, *United States v. Ludwig*[121] and *United States v. Spann*,[122]

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[113] 506 F.2d 530 (10th Cir. 1974).

[114] 515 F.2d 1078 (10th Cir. 1975).

[115] The court mentioned two Supreme Court cases involving exhaustion of administrative remedies: Roberts v. LaVallee, 389 U.S. 40 (1967); Brown v. Allen, 344 U.S. 443 (1953).

[116] No. 75-1116 (10th Cir., May 14, 1975) (Not for Routine Publication).

[117] 28 U.S.C. § 2255 (1970).

[118] *Contra*, MacCollom v. United States, 511 F.2d 1116 (9th Cir. 1974). The Ninth Circuit made one practical point in its decision to grant transcripts to indigents prior to their filing section 2255 actions: It often costs less to furnish the transcript than to go into court and fight the prisoner's motion for a free transcript. *Id.* at 1123. For cases in accord with the Tenth Circuit, see *id.* at 1118.

[119] 518 F.2d 694 (10th Cir. 1975).

[120] *Id.* at 695. On the issue of medical care for prisoners, the court has previously said: "The prisoner's right is to medical care—not to the type or scope of medical care which he personally desires." *Id.*, *quoting* Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968).

[121] 508 F.2d 140 (10th Cir. 1974).

[122] 515 F.2d 579 (10th Cir. 1975).

the defendants claimed that marijuana consists of three distinct species—*Cannabis sativa L.*, *Cannabis indica*, and *Cannabis ruderalis*. The Government proved only that "marijuana" was found in both cases. Defendants argued that the Government's case, therefore, had to fail, since there was no proof that the marijuana seized was of the one type outlawed. The Tenth Circuit rejected the argument, as have most courts confronted with it.[123] As far as the Tenth Circuit is concerned, marijuana is marijuana is marijuana.

B. *18 U.S.C. § 660*

This statute reads in pertinent part as follows:

> Whoever . . . being an employee of [a corporation engaged in commerce as a] common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, any of the moneys . . . arising or accruing from . . . such commerce . . . shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

In *United States v. Tye*[124] the court held that a person who drove a truck wholly within the state of Kansas, where the truck carried C.O.D. packages from outside Kansas, was within the class of persons Congress intended to cover. A recent district court case, on the other hand, held that where a vehicle was only driven *intra*state, the fact that it carried goods moving *inter*state did not bring any misapplication of funds within section 660.[125]

It is unclear whether the expansive Tenth Circuit interpretation or the narrow district court interpretation is correct; the statute is unfortunately ambiguous enough to support both interpretations.

C. *18 U.S.C. § 844(f)*

This section, in pertinent part, provides:

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[123] The cases are collected in United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975); those in accord with *Ludwig* and *Spann* are *id.* at 204 n.12, and those not in accord are *id.* at 203 n.11. *Walton* itself is in accord; its reasoning is grounded on the interpretation that, since all species of marijuana contain the active ingredient tetrahydrocannabinol (THC), Congress meant to outlaw all species.

[124] 519 F.2d 586 (10th Cir. 1975).

[125] United States v. Reca, 355 F. Supp. 334 (D.P.R. 1973). *Accord*, Shaver v. United States, 174 F.2d 618 (9th Cir. 1949). *But cf.* United States v. Kimball, 441 F.2d 505 (10th Cir. 1971).

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both . . . .

The defendant in *United States v. Apodaca*[126] was convicted under this statute for dynamiting a Fremont County, Wyoming, sheriff's car. The sheriff's department received federal financial assistance in the following manner: The Federal Law Enforcement Assistance Administration provided funds to the state Governor's Planning Committee on Criminal Administration, which in turn passed on funds to Fremont County, which finally passed on funds to the sheriff's department. The court held that the intermediary agencies were mere conduits of federal funds and not distributors of state funds. Since the dynamited car belonged to the sheriff's department and the department was an organization receiving federal funds, there was federal jurisdiction. That the funds did not buy the property destroyed by the explosive was no impediment; *any* property owned by the organization is covered.[127]

Richard F. Currey

SEARCHES FOR DOCUMENTARY EVIDENCE AND THE FIFTH AMENDMENT
Shaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975)

BY WILLIAM A. BIANCO*

I. THE PROBLEM

At approximately 8:00 a.m. on Friday, October 22, 1971, six

[126] 522 F.2d 568 (10th Cir. 1975).

[127] This extremely broad view of federal jurisdiction under section 844(f) first appeared in a district court case several months before *Apodaca*. United States v. Brown, 384 F. Supp. 1151 (E.D. Mich. 1974). The defendant was convicted of blowing up a planned parenthood clinic which received Federal Health, Education, and Welfare funds through the Southeast Michigan Family Project, a non-profit Michigan corporation. *Brown* quoted from the legislative history of section 844 and concluded that Congress intended that a broad meaning be given the term "Federal financial assistance." *Id.* at 1154.

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or eight agents of the Internal Revenue Service arrived at the office of Dr. Wendell Shaffer, a Colorado Springs dentist in practice by himself. The agents served a search warrant on the doctor and began a 7-hour examination of his office, including file cabinets, desk drawers, and closets. The warrant authorized a search for

> certain property, namely fiscal records relating to the income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources from January 1, 1966 to December 31, 1970, including, but not limited to, dental patient cards, appointment books, cash receipt books, cash disbursement books, expense records, business ledgers, log books, bank ledger sheets and statements, deposit tickets, cancelled checks, purchase invoices, copies of receipts covering payment of fees, copies of invoices and bills . . . , an approximately 5½" by 7",—paper pad—allegedly, known as a "cheat book" . . . .[1]

The agents emerged with some 18 cartons of records, which were seized pursuant to the warrant.

Subsequent to the seizure, Dr. Shaffer and his wife filed an action seeking the return of their property, the suppression of any evidence, as well as injunctive relief and damages.[2] The trial court rejected the Shaffers' claim that their fourth and fifth amendment rights had been violated, and granted summary judgment for the Government, holding that the search and seizure was proper and that the Shaffers were not entitled to damages.

On appeal to the Tenth Circuit, the Shaffers contended that:

> (1) the seizure of the private papers of a dentist practising as a sole practitioner violated his privilege against self-incrimination; and (2) the search and seizure was unreasonable under the Fourth Amendment.[3]

In an opinion by Judge Barrett, the Tenth Circuit held that the warrant was properly issued and limited in scope to certain described business records.[4] The court disposed of the Shaffers' fifth amendment argument with the terse remark:

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[1] Shaffer v. Wilson, 523 F.2d 175, 180 (10th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3249 (U.S. Oct. 21, 1975) (No. 75-601).

[2] The action was filed pursuant to rule 41(e) Fed. R. Crim. P. and 28 U.S.C.A. § 1331. 523 F.2d at 177.

[3] *Id.*

[4] *Id.* at 179-80. The court also noted that the warrant was predicated upon the supporting affidavits of three of the doctor's former employees to whom he had allegedly

> There is no violation of one's Fifth Amendment privilege against self-incrimination by reason of the proper execution of a valid search and seizure.[5]

In making this statement the court implicitly rejected the thesis of an "intimate relation" between the fourth and fifth amendments to the United States Constitution, a doctrine that was born nearly a century ago in *Boyd v. United States,*[6] and often cited since.

The court did not focus on historical or, for the most part, policy arguments in its analysis of this question, but looked primarily to the presence of "compulsion" in the production of the Shaffers' documents. Though the "compulsion" test may be no more than a shorthand method of considering whether fifth amendment problems are raised, it is not the most useful or decisive analytical approach.

Judge Seth, in a lengthy and vigorous dissent, argued that the search was unreasonable and in violation of the fourth amendment. He further asserted that the warrant permitting the seizure of personal records compelled the Shaffers to become witnesses against themselves in violation of the fifth amendment.[7] Judge Seth, like the Shaffers, relied heavily on *Hill v. Philpott,*[8] in which the Seventh Circuit held a search by the IRS for documents to be in violation of the fifth amendment.[9] Judge Seth's

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bragged about his cheating on income tax returns. The former employees identified with specificity at least some of the documents sought. *Id.*

The opinion of the court may arguably be construed to mean that the court would find only warrantless searches unreasonable under the fourth amendment: "The Fourth Amendment prohibits only an unreasonable search undertaken without a warrant." *Id.* at 179. It is doubtful, however, that the court intended by this remark to approve without more *all* searches made pursuant to warrants. *Cf.* In re Berry, 521 F.2d 179 (10th Cir.), *cert. denied,* 96 S. Ct. 276 (1975), where the court considered the requirements under the fourth amendment for a reasonable subpoena duces tecum. Further, the court noted in *Shaffer:* "We readily agree that a general search warrant does not afford 'carte blanche' to seize *all* records, personal and business." *Id.* at 177.

[5] 523 F.2d at 179.

[6] 116 U.S. 616, 633 (1886).

[7] 523 F.2d at 184.

[8] 445 F.2d 144 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[9] The Seventh Circuit, in *Hill,* was faced with a fact situation almost identical to that in *Shaffer.* The Seventh Circuit did not reach the fourth amendment question but found that the compulsory search for documentary evidence of tax evasion was indistinguishable, in legal and practical effect, from a subpoena to produce the same documents. Such a subpoena, the Seventh Circuit noted, would have been expressly prohibited by *Boyd* as a violation of the privilege against self-incrimination. 445 F.2d at 149. *Cf.* Vonder-

position appears to be that the fourth and fifth amendments are intertwined and that the very examination of certain documents in the course of an otherwise valid search results in a violation of both the fourth and fifth amendments. He reached this conclusion in part by finding "compulsion" an implicit part of any search pursuant to warrant. Judge Seth plainly reveals his distress at the extent and nature of the IRS search in *Shaffer*. His opinion is an emotional reminder—or warning—that we ought not forget the principles upon which this nation was founded. That reminder should not go unheeded. Nor should it obscure an analytical review of what those fundamentals were in the beginning, or how they may have developed and been interpreted in 200 years. The dissenting opinion is not without support, as *Boyd* and *Hill* demonstrate, but the arguments raised simply do not justify an interpretation of the fifth amendment as protecting most, if not all, documents from government scrutiny.

Because space here is limited and because questions of fact must necessarily be involved, the fourth amendment question of the reasonableness of the search of the Shaffer office and the breadth of the warrant will not be discussed here. Rather, the more troublesome (and more interesting) question of the relationship of the fourth and fifth amendments, and any resulting extension of the privilege against self-incrimination to documents, will be explored. That exploration will include a look at the *Boyd* case and the validity of the "intimate relationship" doctrine; a consideration of the policies behind the fifth amendment and how those policies relate to documentary evidence; and, finally, a review of the Supreme Court's approach to self-incrimination and the relationship of that approach to documentary evidence.

II. *Boyd* AND THE "INTIMATE RELATION" DOCTRINE[10]

Boyd involved a suit by the Government to confiscate plate glass allegedly imported in violation of the customs laws. To establish the Government's case, Boyd was ordered to produce an

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Ahe v. Howland, 508 F.2d 364 (9th Cir. 1974) (similar facts; search held unreasonable on fourth amendment grounds only); United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) (worksheets of gambler seized; held, no violation of fifth amendment); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969) (Friendly, J.) (seizure of letter as evidence of defendant's participation in narcotics conspiracy; held, no violation of the fifth amendment).

[10] Boyd v. United States, 116 U.S. 616, 633 (1886).

invoice related to the importation of the glass. The order was issued under a statute which specifically provided that subpoenas could issue to develop the evidence necessary for prosecutions pursuant to the customs laws.[11] Were production refused, the Government's allegations would be taken as confessed.[12] An earlier statute had permitted the seizure of documents pursuant to warrant rather than their production by subpoena.[13]

The Supreme Court, in an opinion by Mr. Justice Bradley, roundly condemned the order for production as a violation of both the fourth and fifth amendments.[14] The Court asserted that compelled testimony and compelled examinations of private papers were improper in light of the history of the fourth and fifth amendments, which were intended to prevent invasions by the government "of the sanctity of a man's home and the privacies of life."[15] It was in this sense that the Court noted "the Fourth and Fifth Amendments run almost into each other."[16]

Although the question of a search of private papers *pursuant to a warrant* was not before the Court, the majority's position on that related question was clear:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.[17]

Justice Bradley relied heavily on Lord Camden's decision in

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[11] Act To Amend The Customs Revenue Laws And To Repeal Moieties of 1874, ch. 391, 18 Stat. 186.

[12] *Id.* ch. 391, § 5, 18 Stat. 187. For an excellent discussion of the *Boyd* case, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 49-61 (1966).

[13] Act of March 2, 1867, ch. 188, § 2, 14 Stat. 547.

[14] The Court said:

> [W]e are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.

116 U.S. at 634-35.

[15] *Id.* at 630.

[16] *Id.*

[17] *Id.* at 635.

the landmark English case, *Entick v. Carrington.*[18] The *Entick* case and the circumstances out of which it arose do, indeed, lie at the heart of the American and English privileges against unreasonable search. It may not, however, mean all that the Court in *Boyd* asserted.

John Entick, whose house had been searched and private papers examined on the authority of a general warrant issued by the Secretary of State in an attempt to discover libelous matter, brought suit for damages against those who had conducted the search. Lord Camden, considering the validity of the general search warrant which had been used as a possible justification for what would otherwise have been a trespass, held the warrant to be unauthorized and condemned general searches for evidence of the type permitted by the warrant:

> In the criminal law, such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.[19]

The dictum of Lord Camden in *Entick* was ultimately incorporated into the dictum of Justice Bradley in *Boyd.* The *Boyd* thesis that unreasonable searches often compelled self-incrimination and that compulsory self-incrimination "throws light on" the meaning of unreasonable search[20] was purportedly derived directly from the quoted language in *Entick.* But a link between the fourth and fifth amendments and the resulting invalidity of document searches was neither a necessary nor logical conclusion from *Entick.* It has been suggested that Lord Camden sought only to argue that innocent and guilty alike would be harmed by unreasonable searches, just as they would be harmed

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[18] 19 Howell St. Tr. 1029 (1765).

[19] 19 Howell St. Tr. at 1073, *as quoted by Justice Bradley,* 116 U.S. at 629.

[20] 116 U.S. at 633.

by compulsory self-incrimination. It was a comparison of like policy considerations, and no more.[21]

Nor did the Court in *Boyd* recognize that Lord Camden's ire was aroused by the unlawful issuance and general character of the warrant and not from any compulsory incrimination. One commentator has aptly noted:

> Justice Bradley's reliance on Lord Camden's words in the Entick case to justify a doctrine of interrelationship between the two amendments was not well placed, for the Entick opinion proves nothing of the sort. In order to determine the existence of a trespass, it was necessary for Lord Camden to establish the illegality of the warrant authorizing the seizure of Entick's papers. Lord Camden found that since the general warrant had received no recognition in common law and Parliament had not authorized it, legal authority for its issuance did not exist. The thrust of his opinion was directed to the *generality* of the warrant, the fact that its issuance was grounded in mere suspicion and not based on probable cause. It was in this connection that Lord Camden stressed the self-incrimination analogy. Compulsory self-incrimination was not permitted by law because it would hurt "the innocent as well as the guilty. . . . [S]earch for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty . . . . *[I]f suspicion at large should be a ground of search . . . whose house would be safe?*"[22]

Significantly, the paragraph in *Entick* containing the last quoted sentence was omitted by Justice Bradley. The sentence clarifies the analogy and places in doubt the underpinning of the purported relationship between the two amendments.[23]

However this conflict may be resolved, the *Entick* case need not and should not be read as broadly as Justice Bradley's dictum in *Boyd* would suggest. Mr. Justice Miller, in a separate opinion, concurred in by Mr. Chief Justice Waite, reached the same result without having to interrelate the fourth and fifth amendments. Justice Miller noted that the order, either to produce a document or to have charges of a criminal nature taken as confessed, was clearly prohibited by the fifth amendment, although it involved neither a search nor a seizure.[24] Limited in this way, *Boyd* has no

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[21] 8 J. WIGMORE, EVIDENCE § 2264, at 382 n.4 (McNaughton rev. 1961).

[22] J. LANDYNSKI, *supra* note 12, at 59.

[23] *Id.* Perhaps the Court indulged in writing " 'law office history,' which is merely a function of ex parte advocacy." L. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 265 (1972).

[24] 116 U.S. at 639-40.

effect on document searches pursuant to a warrant, although it continues to play an important role where documents are called for by subpoena. The reason for the distinction has been expressed as follows:

> For though the documents or chattels thus sought [by subpoena] be not oral in form, and though they be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still there is a testimonial disclosure implicit in their production. It is the witnesses' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort—authenticating or vouching for pre-existing chattels—are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection.[25]

Although Judge Seth criticized as artificial this distinction, relied upon by the majority in *Shaffer,* it does have meaning in light of the interests which the fifth amendment was intended to protect as will be shown below. Moreover, an interpretation of the fifth amendment which ignores its historical limitation to testimonial evidence[26] can, like the dictum in *Boyd,* serve to improperly mingle two amendments which are basically different in origin and character and can result in considerable confusion about both.[27]

History cannot alone determine the content of the privilege against self-incrimination. Most constitutional provisions have grown or evolved to some degree since the 18th century.[28] The legal concepts which may have been at the core of *Entick* or *Boyd* must be reconsidered in light of policies today believed to be fostered by the fourth and fifth amendments.[29]

III. The Policy Considerations Supporting the Privilege

The court in *Shaffer* said very little about the policy consid-

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[25] 8 J. Wigmore, *supra* note 21, at 379-80.

[26] *Id.* at 379.

[27] J. Landynski, *supra* note 12, at 59.

[28] *See* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. Cin. L. Rev. 671, 679 (1968).

[29] *See* Warden v. Hayden, 387 U.S. 294 (1967).

erations supporting its decision. It noted that, if the Shaffers' arguments were carried to a logical extreme, searches for all types of evidence—even instrumentalities of crime—would be curtailed and the ability of society to bring criminals to justice would be hampered.[30] Although this argument is vulnerable to the suggestion that the fifth amendment was, indeed, intended to make it somewhat more difficult to convict offenders,[31] it serves to raise the question of whether documents should be treated for purposes of the fifth amendment privilege as fundamentally different from other non-oral evidence.

Exhaustive analyses of the privilege and the policies behind it have already been undertaken by Judge Friendly[32] and by Professor McNaughton,[33] and cannot be improved upon here. Nevertheless, even a cursory review of these policies will serve to demonstrate that most of them, whether articulated by the Supreme Court or by commentators, are no more applicable to a search for documents pursuant to warrant than they would be to other chattels sought in the same manner.[34]

A comprehensive list of the policies supporting the privilege was presented for the Supreme Court by Mr. Justice Goldberg in *Murphy v. Waterfront Commission*:[35]

> The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' " It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisatorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual

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[30] 523 F.2d at 179.

[31] Hill v. Philpott, 445 F.2d 144, 149-50 (7th Cir. 1971).

[32] Friendly, *supra* note 28.

[33] J. WIGMORE, *supra* note 21, § 2251.

[34] Judge Friendly has suggested that the privilege be entirely abolished with regard to chattels, including documents, sought either by subpoena or other legal process. Friendly, *supra* note 28, at 701-03 (1968). His analysis of the relevant policy considerations would apply with even greater force where production is required by search warrant alone.

[35] 378 U.S. 52 (1964).

> to shoulder the entire load" . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[36]

Almost all of the enumerated policies apply solely to a testimonial privilege rather than a privilege from the production of preexisting documents. Some of the stated policies could conceivably apply to documents and are briefly treated here for that reason.

First, the relationship of government and individual would certainly be affected by an application of the privilege to documents. Although it is impossible to determine when a fair "state-individual balance" has been achieved, it is arguable that the fourth amendment requirements which all valid search warrants must meet, whether documents or other chattels are sought, are sufficient to preserve that proper balance. Fairness to the individual is no more compromised by a search for papers than by a search for a gun, so long as the state observes the proper procedural prerequisites.

The "protection to the innocent" argument could also plausibly apply to searches for documents, as *Boyd* and *Entick* suggest. This "policy," however, has largely been repudiated by the Supreme Court itself.[37]

More difficult to deal with is the "privacy" or "private enclave" theory which Mr. Justice Douglas recently developed at length in his dissent in *Couch v. United States.*[38] There can be little question that a search of a person's documents and records, however undertaken, is a compromise of his privacy. But freedom from all compromises of privacy is not necessarily a fundamental right. The imposition of controls on a valid search and, perhaps, a limitation upon the type of documents subject to search may properly define the limits of such a right, if it exists in this context. The Supreme Court has suggested that there *may* be an area or a category of documents or chattels so private that the govern-

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[36] 378 U.S. at 55 (citations omitted).

[37] Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966). *See also* Friendly, *supra* note 27, at 686-87; McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 207-08.

[38] 409 U.S. 322, 338 (1973) (dissenting opinion).

ment may make no inquiry into them.[39] Since the Court has not defined an area of absolute privilege it may be useful to consider what documents, if not all documents, merit the application of such a doctrine. The clearest case for the application of an absolute privilege would be that of documents which embody ideas, the expression of which is protected by the first amendment. If these documents deserve protection, it is because of their content. They arguably deserve no less protection than the oral expression of the same thoughts. In this sense they are very different from other chattels—whether communicative or non-communicative in character. Financial records, business records, and documents employed in the commission of crimes do not merit the same constitutional favor.[40]

In terms of values to be protected by the fifth amendment, the latter documents are really not different from items of real evidence, which sometimes may also be of a very "personal" nature but which, nevertheless, are not exempt from search or seizure. Even if the state cannot inquire about certain documents, it is arguable that the fifth amendment is not the proper source of protection for the non-incriminating ideas expressed. A disinterested magistrate should, in accordance with the fourth amendment, stand between the government and the individual whose documents are to be examined. The government's ability to compromise the privacy of any documents should be tested at that point.

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[39] The Court in Warden v. Hayden, 387 U.S. 294 (1967), noted that:

> This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

Id. at 303.

[40] *See* Friendly, *supra* note 28, at 687-90; 8 J. WIGMORE, *supra* note 21, at 318. Judge Fairchild, dissenting in Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), outlined some of the considerations which should be applied here:

> Assuming, however, that there is a class of papers so intimately confidential and so much a part of the personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. They appear to have been maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claim.

Id. at 150.

Of course, neither the magistrate nor even the government officials who are applying for a warrant may have any inkling that documents enjoying the protection of the first amendment are to be examined, and so, as Judge Seth argued in *Shaffer,* it is the search itself which will offend privacy, and not the seizure of some incriminating papers. However true this may be, it is important to recall that not all searches, but only *unreasonable* searches, are prohibited by the Constitution.[41] Further, the Constitution specifically foresaw that reasonable searches would be made of "papers and effects."[42] Some documents which express ideas may also, for totally unrelated reasons, (*e.g.,* because they bear a significant date or because of handwriting appearing on them), incriminate the author or owner. Such papers could be protected if the Supreme Court chooses to deliniate an absolute area of privacy. Short of such a decision, there is arguably no reason why such papers cannot be used in ways which would not in any way compromise first amendment freedoms.

The Tenth Circuit in *Shaffer* appropriately looked to the fourth amendment as the bulwark against invasion of privacy by the government. The behavior by the IRS which Judge Seth believed to be so offensive can be sufficiently tested by the fourth amendment alone. The right of privacy is unquestionably violated by the invasion of a home upon mere suspicion, the indiscriminate ransacking of belongings, and seizure of property. The fifth amendment need not be called upon to curb such outrageous behavior. Each amendment has its separate role to play in protecting the individual. They "are complimentary to, though not dependent upon, each other."[43]

IV. Documents as Protected "Communications"

Both the majority and the dissent in *Shaffer* approached the case as if the fifth amendment issue were primarily whether the Shaffers were subject to "compulsion" by the Government to incriminate themselves. The majority held that there was no compulsion because the IRS agents searched for the documents

[41] Boyd v. United States, 116 U.S. 616, 641 (1886) (concurring opinion); *See,* J. Landynski, *supra* note 12, at 60. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court approved "searches" involving even oral communications, if proper safeguards are employed.

[42] U.S. Const. amend. IV.

[43] L. Levy, Origins of the Fifth Amendment 394 (1968).

themselves, and the dissent properly indicated that search warrants too are rather compelling process.[44] Supreme Court decisions since *Boyd v. United States*[45] have defined the issue more sharply and offer a solution which does not depend on that troubling but not terribly helpful word "compulsion."

In *Warden v. Hayden*[46] the Supreme Court rejected the "mere evidence" rule which had prohibited searches for evidence, as opposed to instrumentalities of crime, fruits, or contraband. Prior to *Hayden*, only the latter could be properly sought and seized. The Court in *Hayden* based its departure from the old rule[47] and its decision to admit the evidence seized (articles of clothing) upon the determination that the evidence was not " 'testimonial' or 'communicative' in nature, and [its] introduction therefore did not compel respondent to become a witness against himself in violation of the fifth amendment."[48] The emphasis was on the nature of the evidence and not on the compulsory nature of the process by which it was produced.

The Court in *Hayden* alluded to a distinction perhaps first raised by Mr. Justice Holmes in *Holt v. United States.*[49] The defendant in *Holt* was compelled to put on a blouse in order to determine whether it belonged to him. He objected on fifth amendment grounds. Justice Holmes rated his contention as "an extravagant extension of the Fifth Amendment,"[50] because, although the resulting evidence was incriminating, no "communication" was extorted from the accused.[51]

Schmerber v. California[52] again raised the same distinction.

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[44] Judge Ely dissenting in VonderAhe v. Howland, 508 F.2d 364, 373 (9th Cir. 1974), noted that a person to whom a search warrant is directed refuses "production" at his peril:

> One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be broken down, he would be placed under arrest, and the desired material would be seized. How the imminence of such force can be considered as anything other than compulsion escapes us.

[45] 116 U.S. 616 (1886).

[46] 387 U.S. 294 (1967).

[47] The "mere evidence" rule was established in Gouled v. United States, 255 U.S. 298 (1921).

[48] 387 U.S. at 302-03.

[49] 218 U.S. 245 (1910).

[50] *Id.* at 252.

[51] *Id.* at 253.

[52] 384 U.S. 757 (1966).

There, a police officer compelled a driver of an automobile to submit to the extraction from his body of a blood sample. The sample was then analyzed for alcohol content and used as evidence against the driver. Despite the obvious compulsion of the defendant to assist the state in prosecuting him, the Court held that the removal of the blood did not violate the privilege against self-incrimination because "the privilege is a bar against compelling 'communications' or 'testimony,' but [the] compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."[53]

Assuming the propriety of the *Holt-Hayden-Schmerber* distinction as an analytical tool, how are letters, papers, and other documents to be treated if sought by search warrant? Some argue that documents sought in a search are the very type of communication which the Supreme Court had in mind in *Schmerber* and similar cases, because documents are "communicative" in nature.[54] This analysis is fallacious. The term "communication" can also be a catchword and, as such, no more helpful than the word "compulsion." It is not the nature of *items* seized which is critical, but the nature of the *acts* required of the individual. Blood samples, if analyzed, convey meaning; but the individual from whom they are taken is not required to act in a way which in itself conveys his own knowledge to the government, which may then use it against him. Thus, if the state were to serve a defendant with a subpoena to produce a weapon used in a particular crime, the accused could invoke the privilege against self-incrimination because his production of the weapon, as the one identified in the subpoena, would amount to an admission of guilt. The subpoena would require a communicative act rather than an item which in itself could constitute a communication. On the other hand, a lawful search of the person of a robbery suspect which reveals a note saying "This is a Stickup" cannot reasonably be said to

[53] *Id.* at 764. Similar distinctions were drawn in Gilbert v. California, 388 U.S. 263 (1967) (suspect required to give handwriting exemplars which were admitted in evidence at trial); United States v. Wade, 388 U.S. 218 (1967) (accused required to appear in a lineup). In the latter case the Court noted:

> It is a compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any *knowledge* he might have.

388 U.S. at 222 (emphasis added).

[54] *See, e.g.*, Comment, *Use of the Summons, Intervention and Constitutional Rights*, 2 HOFSTRA L. REV. 135, 176 (1974).

violate the fifth amendment. The individual should be in no better position where the object found happens to be a writing than he would be if a weapon were found.

Professor Zechariah Chafee, some fifty years ago, succinctly defined the governing principle:

> The privilege is violated when a man is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure.[55]

There is a real difference, in a fifth amendment sense, between a subpoena and a search warrant. The subpoena requires an act which communicates, *i.e.*, which divulges knowledge. The search warrant requires an act too—but not one which reveals knowledge or conveys information.

CONCLUSION

The court in *Shaffer* appears, then, to have reached the proper result. Preexisting documents, despite some argument to the contrary, were probably not protected from disclosure by the early privilege against self-incrimination. Nor is their protection required by the policies behind the privilege. They are logically no different from other chattels sought by a proper warrant.

The confusion about the status of documentary evidence perhaps results from the long asserted but somewhat cloudy "intimate retationship" between the fourth and fifth amendments. To say that these amendments are not interrelated robs neither one of any meaning or effect. It only serves to clarify discussion of the rights which flow from each. The *Boyd* case—and the fifth amendment itself—have acquired an almost mystical significance with time which makes it difficult to eliminate emotion from any discussion of them. To some extent this is praiseworthy. The fifth amendment is a symbol of certain national aspirations.[56] Nevertheless, its scope should not be broadened without carefully questioning how the result coincides with those aspirations. Finally, it would be foolish to lose sight of the position that the fourth amendment occupies in protecting the individual wholly apart from any function of the fifth. The requirement that the state measure up to definite standards and limitations before it

[55] Chafee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 673, 697-98 (1922).
[56] E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

may presume to compromise the person and property of the individual is the appropriate safeguard against overzealous or oppressive public officials.

JUVENILE LAW: JUVENILE DELINQUENCY AND YOUTH CORRECTIONS

During the 1974-75 term the Tenth Circuit made notable rulings in five criminal cases involving juveniles.

United States v. Watts[1] presented the question whether a juvenile's right to due process was violated by the failure of the police to give adequate notice of the charges against him to his parents. Watts, a minor aged 17, was charged by information with juvenile delinquency-manslaughter, arising from the stabbing death of his brother. On appeal, Watts contended that his due process rights were violated when his parents were not given adequate notice. The court found that notice to a juvenile's parents is not a due process right, but rather a procedural safeguard. Therefore, failure to give notice to parents is not such a denial of substantive due process as to require reversal.[2]

In re Gault,[3] cited by the appellant, set the standard for the type of notice required by due process for juvenile delinquency proceedings. The Supreme Court in *Gault* said that due process requires that a hearing in which a youth's freedom and his parents' right to custody are at stake cannot be held without giving the parents timely notice.[4] *Gault* required that the child and his parents be notified in writing of the charges and allegations at the earliest practicable time and sufficiently in advance to permit adequate preparation for the hearing.[5] In *Gault* the notice to the juvenile's mother was found to be inadequate where she was informed orally, on the day the juvenile was taken into custody, that there would be a hearing the next day.

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[1] 513 F.2d 5 (10th Cir. 1975).
[2] *Id.* at 8.
[3] 387 U.S. 1 (1967).
[4] *Id.* at 33-34.
[5] *Id.*

The Tenth Circuit found[6] the rights enumerated in *Gault* to be based on constitutional protections and, thus, equally applicable to a proceeding under the Federal Juvenile Delinquency Act[7] such as that in *Watts*. Section 5033 of that Act states:

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights . . . and shall immediately notify . . . the juvenile's parents, guardian, or custodian of such custody.

The court's concern in *Watts* was whether violation of the *Gault* standard per se constituted such a deprivation of the juvenile's right to due process as to require reversal. The court read *Gault* loosely as requiring only "fair treatment"[8] and concluded that Watts was not denied such fair treatment.[9] Notice to a juvenile's parents, the court said, is for a purpose similar to that of insuring that the juvenile has the assistance of counsel and can prepare an adequate defense.[10] It was found that, *in fact*, Watts had not been denied due process. Even though his parents were not notified by the authorities, he was represented by competent counsel, and his mother and stepfather were available to assist him.

Finding that the failure to notify Watts' parents was not willful and that the Government's case was not enhanced by the failure to notify them,[11] the court decided that reversal was not necessary. It reasoned that only a prophylactic safeguard, and not a basic due process right, was violated.[12]

The court thus treated the question as whether Watts was *in fact* denied fair treatment, rather than whether a due process requirement of notice to parents was violated. It gave little substantive effect to the language in section 5033 of the Juvenile

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[6] 513 F.2d at 6.

[7] 18 U.S.C.A. §§ 5031-42 (Supp. 1975).

[8] In support of its loose reading of *In re Gault*, the court quoted the Supreme Court's statement in *Gault* that the due process standards established there were to be "intelligently and not ruthlessly administered." 387 U.S. at 21. The circuit court also cited Goss v. Lopez, 419 U.S. 565, 578 (1975), in which the Supreme Court quoted Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961): "[D]ue process negates any concept of inflexible procedures universally applicable to every imaginable situation." 513 F.2d at 7-8.

[9] 513 F.2d at 9.

[10] *Id.* at 7, *citing* Holloway v. Wainwright, 451 F.2d 149 (5th Cir. 1971); Kempler v. Maryland, 428 F.2d 169 (4th Cir. 1970).

[11] *Id.* at 9.

[12] *Id.* at 7, *citing* Michigan v. Tucker, 417 U.S. 433 (1974).

Delinquency Act, which says notice *shall* be given to the juvenile's parents.

The Tenth Circuit expressed its agreement with a federal district court in Florida,[13] which read *Gault* as establishing that juveniles should be treated as adults in regard to certain constitutional rights. However, the emphasis behind the Juvenile Delinquency Act has been to proceed against juveniles as *juveniles* and to avoid prosecution as criminals;[14] the Tenth Circuit has noted this particular purpose in at least two previous cases,[15] one of which was handed down earlier this year. The specific procedural standards set out in *Gault* and the congressional mandate regarding notice in the Juvenile Delinquency Act[16] likewise emphasize special treatment of juveniles, and not the general "fair treatment" standard which the court has applied in *Watts*.

The provisions of the Federal Juvenile Delinquency Act, as amended in September 1974,[17] were made available to a juvenile indicted before the effective date of the Act in *United States v. Mechem*.[18] The United States sought a writ of mandamus and prohibition directing Judge Mechem to vacate his order that the prosecution substitute an information for its indictment against the 14-year-old respondent Chavez in connection with charges of rape and murder. The Tenth Circuit agreed with the trial judge that the amendments to the Juvenile Delinquency Act, which require that a juvenile under age 16 who is not surrendered to state authorities be proceeded against under the juvenile statute,[19] should be applied to the subject juvenile who had been arraigned 1 month before the effective date of the amendments.

The Federal Juvenile Delinquency Act effective at the time Chavez had been arraigned[20] excluded Chavez from treatment because of the serious nature of the charges against him.[21] The

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[13] Walker v. Florida, 328 F. Supp. 620 (S.D. Fla. 1971), *aff'd*, 466 F.2d 485 (5th Cir. 1972).

[14] *See, e.g.*, Fagerstrom v. United States, 311 F.2d 717, 720 (8th Cir. 1963).

[15] United States v. Mechem, 509 F.2d 1193 (10th Cir. 1975); Cotton v. United States, 355 F.2d 480, 481 (10th Cir. 1966).

[16] 18 U.S.C.A. § 5033 (Supp. 1975).

[17] *Id.* §§ 5031-42.

[18] 509 F.2d 1193 (10th Cir. 1975).

[19] 18 U.S.C.A. §§ 5031-42 (Supp. 1975).

[20] Ch. 645, §§ 5031-37, 62 Stat. 857 (1948), *as amended*, 18 U.S.C.A. §§ 5031-42 (Supp. 1975).

[21] The Federal Juvenile Delinquency Act defined "juvenile" as a person under 18 and

trial court held, however, that the policy behind the 1974 amendments was to control proceedings against juveniles and that the amendments evidenced an intent to remove juveniles from the ordinary criminal process. Contrary to its reasoning in *Watts*,[22] the circuit court agreed,[23] implicitly recognizing that the purpose of the Juvenile Delinquency Act is to avoid prosecution of juveniles as criminals.[24] The court was persuaded that Congress did not intend the ordinary criminal process to continue, through the saving statute,[25] to apply to juveniles not yet tried. The court's ruling was based on policy considerations; although the Juvenile Delinquency Act also deals with substantive offenses, its policy and procedural features are much more important.

In *Roddy v. United States*[26] the Tenth Circuit upheld an adult sentence imposed on a 22-year-old found guilty of robbery, even though the sentence was to be served consecutively with a sentence previously imposed under the Youth Corrections Act.[27] The defendant Roddy was given an indeterminate sentence under the Youth Act[28] by an Arizona court, which found affirmatively that treatment under the Youth Corrections Act would be beneficial.[29] Subsequently, Roddy was convicted of an earlier robbery

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"juvenile delinquency" as a violation of a law, by a juvenile, not punishable by death or life imprisonment. Ch. 645, § 5031, 62 Stat. 857 (1948), *as amended*, 18 U.S.C.A. § 5031 (Supp. 1975).

[22] 513 F.2d 5 (10th Cir. 1975). *See* text accompanying notes 13-17 *supra*.

[23] 509 F.2d at 1195.

[24] *Accord*, Cotton v. United States, 355 F.2d 480, 481 (10th Cir. 1966); Fagerstrom v. United States, 311 F.2d 717, 720 (8th Cir. 1963).

[25] 1 U.S.C. § 109 (1970), which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

[26] 509 F.2d 1145 (10th Cir. 1975).

[27] 18 U.S.C. §§ 5005-26 (1970).

[28] *Id.* § 5010(b). This section provides that in the case of a youth offender whose offense is punishable by imprisonment, the court may instead sentence the youth to the custody of the Attorney General for treatment and supervision under the Act, until it is determined by the Youth Correction Division of the Board of Parole that the youth should be discharged.

[29] 18 U.S.C. § 4209 (1970), titled "Young Adult Offenders," provides that where a defendant is age 22-26 at the time of conviction, a court may look at the defendant's prior record, social background, mental and physical health, and other pertinent factors, and it may sentence the young offender under the Federal Youth Corrections Act if the court reasonably believes that the defendant will benefit from such treatment.

in New Mexico, and received an adult sentence of 5 years to run consecutively to the Arizona youth sentence. A concurrent sentence was rejected by the New Mexico court because it found that peoples' lives were endangered by the robbery.

Defendant argued that the consecutive sentence imposed in New Mexico frustrated the rehabilitative purpose behind the Youth Act sentence given by the Arizona court. While acknowledging that the conjunction of the youth sentence and consecutive adult sentence has a "deleterious effect on the rehabilitative design of the Act,"[30] the Tenth Circuit concluded, citing *Nast v. United States*,[31] that a youth sentence for one offense did not bar a sentence under a different act for another prior or subsequent offense. The court quoted the following language from *Nast:* "[T]he problem raised by appellant is for such legislative consideration as it might enlist, rather than one to be solved as appellant presses upon this court."[32]

Dorszynski v. United States[33] was relied on to support the court's interpretation of the Youth Act as enlarging, not restricting the sentencing options of courts, and, thus, keeping sentencing within the judge's discretion. The court stated that eligibility for sentencing under the Act does not confer a right to be sentenced under it; a judge may decide not to apply the Act.[34] Also, as in this case, there is discretion to apply the Act to a defendant not otherwise eligible, if it is decided he will benefit from treatment under the Act. Finally, the court noted, the Youth Act does not provide that a sentence under the Act shall be preemptive.[35]

The court reviewed its prior holding in *Price v. United States*[36] in which it was determined that an indeterminate sentence imposed under the Youth Act for one of three counts could not be increased by imposition of consecutive sentences on the other two counts in the indictment. In *Price* it was pointed out that cumulative or consecutive sentences would not fit the reha-

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[30] 509 F.2d at 1147.
[31] 415 F.2d 338 (10th Cir. 1969).
[32] *Id.* at 340.
[33] 418 U.S. 424, 437 (1974).
[34] 509 F.2d at 1147.
[35] *Id.*
[36] 384 F.2d 650 (10th Cir. 1967).

bilitative purpose of the indeterminate sentences imposed under the Youth Act.[37]

The Tenth Circuit decided, however, that *Nast* rather than *Price* should be controlling where, as in this case, the sentences are not in statutory or constitutional conflict and the second offense arises under a different statute. The court failed to note, however, its own finding in *Nast* that there was a rehabilitative purpose behind the adult sentence imposed in that case as the sentencing judge had provided for parole within a year.[38] In the present case judicial discretion was emphasized rather than the rehabilitative purpose behind the Federal Youth Corrections Act.[39]

In *Jackson v. United States*[40] the Tenth Circuit decided that the Supreme Court ruling in *Dorszynski v. United States*[41] need not be given retroactive effect. That ruling required that an express finding be made on the record that a youth will not benefit from treatment under the Federal Youth Corrections Act[42] before sentencing him as an adult.[43]

Jackson was sentenced to 18 years for bank robbery; he contended on appeal that an express finding of "no benefit" was not made. The court decided that the purpose of the new rule in *Dorszynski* was to show clearly that the sentencing judge was

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[37] *Id.* at 652. The court said that the "elasticity" in the Youth Act was conducive to rehabilitation. Section 5017(c) sets outer limits on the length of time a youth may be kept under supervision, while section 5010(b) provides for release before those times when the Correction Division determines.

[38] 415 F.2d at 340.

[39] *See* H.R. REP. No. 2979, 81st Cong., 2d Sess. 1 (1950):

> The proposed legislation is designed to make available for the discretionary use of the Federal judges a system for the sentencing and treatment of [youth offenders] that will promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens
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> . . . .

See also Rogers v. United States, 326 F.2d 56 (10th Cir. 1963), in which the court reviews at length the rehabilitative purpose of the Federal Youth Corrections Act in support of its conclusion that confinement under the Act is for corrective and preventive guidance and rehabilitation and is not for punishment.

[40] 510 F.2d 1335 (10th Cir. 1975).

[41] 418 U.S. 424 (1974).

[42] 18 U.S.C. §§ 5005-26 (1970).

[43] The express finding requirement in *Dorszynski* could be satisfied by any expression that clearly showed that the sentencing judge considered the alternatives of sentencing under the Federal Youth Corrections Act and decided that the youth offender would not derive benefit from such treatment.

aware of the sentencing options.[44] The Tenth Circuit found that in this case the district court was fully aware of the Youth Act and of Jackson's eligibility under the Act at the time of sentencing. Therefore, the purpose of the *Dorszynski* rule was achieved despite the absence of an express finding of no benefit.

The court, using the criteria for retroactivity set out in *Michigan v. Payne*,[45] found that reliance on the procedural standard in effect before *Dorszynski* and the effect of retroactivity on the administration of justice both dictated against retroactive application of the new rule.[46] The court said that many courts had relied justifiably on the prior procedural standard, and retroactivity would needlessly subject to question a substantial number of properly imposed sentences.[47]

In *Suggs v. Daggett*[48] the Tenth Circuit decided that the 6-year maximum custody period established under the Federal Youth Corrections Act[49] requires that the youth must have been in actual or constructive custody during the 6 years. In so doing,

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[44] The Supreme Court in *Dorszynski* said, "Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it . . . no appellate review is warranted." 418 U.S. at 443.

[45] 412 U.S. 47 (1973). The criteria used to determine whether a newly announced rule is to be given retrospective application are: (1) The purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice.

[46] The court cited Holliday v. United States, 394 U.S. 831 (1969), in which strict adherence to rule 11 of the Federal Rules of Criminal Procedure was not required retroactively. *Holliday* looked at the large number of convictions obtained through justified reliance on the old standard and the disruptive effect their reversal would have. *See also* Stovall v. Denno, 388 U.S. 293, 298 (1967), which held that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process . . . must . . . be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice."

[47] 510 F.2d at 1337. *See also* Owens v. United States, 383 F. Supp. 780 (D. Pa. 1974), in which *Dorszynski* was held not to be retroactive. The court in *Owens* found the *Dorszynski* requirement to be prophylactic, not a substantive right, and decided that retroactivity would seriously affect sentences imposed in several circuits where it had been held, before *Dorszynski*, that a "no benefit" finding could be implied from the record. *Id.* at 785. It would be impossible, the court noted, for judges to go back and offer affirmative reasons for all the sentences meted out before *Dorszynski*.

[48] 522 F.2d 396 (10th Cir. 1975).

[49] 18 U.S.C. §§ 5005-26 (1970). Section 5017(c) of the Act provides:

> A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

the court restated its previous holding that a sentence of imprisonment is served by confinement in fact or by unrevoked parole.[50]

Petitioner Suggs instituted a habeas corpus proceeding, alleging his entitlement to release from custody under the Youth Act on the ground that section 5017(c) of the Act makes release at the end of 6 years mandatory. In fact, he was in an escape status for 82 days during the 6-year period, and the 82 days were not counted in computing the release date.

In reliance on *Rogers v. United States*,[51] the district court held that the 6-year period was mandatory, and, once the period has expired, the youth must be released.[52] The Tenth Circuit reversed, holding that both section 5017(c) and the language in *Rogers* which emphasized a 6-year maximum custody period[53] assumed actual or constructive custody or parole:

> To rule that escape time counts would be to disregard the object and spirit of the Youth Corrections Act which contemplates commitment for treatment looking to rehabilitation.[54]

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[50] Postelwait v. Willingham, 365 F.2d 759 (10th Cir. 1966); Weathers v. Willingham, 356 F.2d 421 (10th Cir. 1966).

[51] 326 F.2d 56 (10th Cir. 1963). *Rogers* concerned a due process challenge to the 6-year maximum period where the period of confinement under the Youth Corrections Act was potentially longer than the maximum sentence provided for in the statute under which the offender was charged. The court rejected the due process argument, saying that the Youth Corrections Act allowed for an offender to be released earlier than the maximum, depending on the youth's response to corrective treatment. If the period of confinement, up to 6 years, did turn out to be greater than the maximum sentence under the statute violated, it was not for punishment, but for rehabilitation. *See also* 18 U.S.C. § 5006(g) (1970), which defines treatment under the Act as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders."

[52] 522 F.2d at 396-97.

[53] 326 F.2d at 57.

[54] 522 F.2d at 397.