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Criminal Law: Defendants' Rights

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CRIMINAL LAW: DEFENDANTS' RIGHTS

INTRODUCTION

The United States Constitution and various federal statutes prescribe the minimal protections that the government must give to criminal defendants. Although the concept of criminal defendants' rights implicates many aspects of criminal procedure, this Survey features cases decided by the Tenth Circuit from September 1995 to September 1996 addressing three specific areas. Part I examines the relationship between defendants and the judges presiding over their cases, and the extent to which a defendant may challenge the authority of a judge. Part II explores the rights of indigent defendants under the Fourteenth Amendment Equal Protection Clause of the United States Constitution, as related to presentence confinement credit resulting from an inability to post bail. Finally, Part III discusses the various claims made by defendants to invoke the protections of the Fifth Amendment of the United States Constitution for the purpose of suppressing self-incriminating statements.

I. POWER OF JUDGES OVER DEFENDANTS

A. *Background*

Criminal defendants have the right to challenge the authority of a trial judge as required by due process guarantees.[1] A defendant may move to recuse the judge based on the appearance of bias or prejudice pursuant to either 28 U.S.C. § 144 or § 455,[2] or the defendant may, pursuant to the Federal Magistrates Act,[3] challenge the authority of a magistrate to preside over certain proceedings.[4]

1. Magistrate Authority

The Federal Magistrates Act, enacted by Congress in 1968, created the system of United States Magistrates to replace the United States Commissioners.[5] Congress viewed the commissioner system as defective in part because its fee-for-service system restricted its effectiveness by limiting earnings and

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1. *See* Marla Eisland, Note, *The Federal Magistrates Act: Are Defendants' Rights Violated when Magistrates Preside over Jury Selection in Felony Cases?*, 56 FORDHAM L. REV. 783, 793-96 (1988).

2. For an analysis of the relationship between these recusal statutes, see Thomas McKevitt, Note, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817, 822-26 (1996).

3. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639 (1994)).

4. *See* 28 U.S.C. § 636 (describing the jurisdiction and powers granted to a magistrate).

5. *See id.* § 631. *See generally* Thomas R. Garcia, Note, *Federal Courts—In Re United States—Should Federal Magistrates Be Delegated the Authority to Approve Electronic Surveillance Applications?*, 18 W. NEW ENG. L. REV. 271 (1996) (discussing the history of the Federal Magistrates Act and cases interpreting magistrates' authority under the Act).

deterring highly qualified people from serving.[6] The Federal Magistrates Act delegated all the powers of the commissioners to the magistrates, and additionally, granted magistrates the power to determine certain pretrial matters and conduct preliminary hearings on post-trial motions.[7] In 1976, Congress amended the Act by expanding and clarifying the duties that magistrates could perform.[8] The amendment added a new clause that stated, "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States."[9] Extensive litigation followed in an attempt to define the precise scope of magistrate authority.

For example, in *United States v. Raddatz*,[10] the Supreme Court determined that a magistrate may conduct a hearing on a motion to suppress evidence in a felony trial without an automatic de novo review by the district court judge of the testimony presented.[11] The Court emphasized that the safeguards in the Act which allow the parties to object to the findings and recommendations by the magistrate, will also trigger de novo review by the district court judge.[12] Later, in *Gomez v. United States*,[13] the Court addressed the issue of whether a magistrate could conduct *voir dire* without the consent of the defendant.[14] Because the Act does not specify that a magistrate may conduct *voir dire*, the Court found that the defendant had a constitutional right to have a district judge preside.[15] Two years later, in *Peretz v. United States*,[16] the Court reconsidered the issue.[17] The two cases differ in that the defendant in *Peretz* expressly consented to the magistrate's authority and failed to raise an objection until after the conviction.[18] The Court narrowed the holding in *Gomez* to allow magistrates to conduct *voir dire* with the consent of the defendant.[19]

2. Recusal

The statutes governing recusal of a trial judge for personal bias or prejudice overlap substantively,[20] but differ procedurally.[21] Substantively, either a

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6. *See* Garcia, *supra* note 5, at 278.
7. 28 U.S.C. § 636.
8. *See* Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified as amended at 28 U.S.C. § 636(b)).
9. 28 U.S.C. § 636(b)(3).
10. 447 U.S. 667 (1980).
11. *Raddatz*, 447 U.S. at 673-84.
12. *Id.* at 680-81. For a constitutional analysis of *Raddatz*, *see* Eisland, *supra* note 1, at 788-96.
13. 490 U.S. 858 (1989).
14. *Gomez*, 490 U.S. at 861-62; *see also* Eisland, *supra* note 1 (discussing the constitutional issues involved when a magistrate presides over the jury selection in a felony case).
15. *Gomez*, 490 U.S. at 874-76.
16. 501 U.S. 923 (1991).
17. *Peretz*, 501 U.S. at 924-25.
18. *Id.*
19. *Id.* at 933.
20. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

§ 144 or § 455 motion challenges the impartiality of the presiding judge,[22] but procedurally, only a § 455 motion allows a sua sponte recusal.[23] Generally, the recusal motion is based on bias from an extrajudicial source, such as personal knowledge of the evidentiary facts or a personal relationship with a party or attorney in the case.[24] After filing a § 455 motion, the judge whose impartiality is questioned issues a decision. If the judge determines that the facts warrant recusal, another judge is assigned to the proceeding;[25] if the judge denies the motion, the decision is immediately reviewable by the appellate court to determine whether the trial judge abused his discretion.[26]

In *Liljeberg v. Health Services Acquisition Corp.*,[27] the Supreme Court established the proper inquiry to determine whether a judgment should be

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28 U.S.C. § 144 (1994). Section 455(b) states:

> He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(b). *See generally* Amy J. Shimek, *Professional Responsibility Survey: Recusal*, 73 DENV. U. L. REV. 903, 903-05 (1996) (discussing § 455 and Tenth Circuit decisions interpreting this provision).

21. *Compare* 28 U.S.C. § 144 (requiring a motion for recusal to be filed at least ten days before the beginning of the term during which the proceeding is to be heard) *with* 28 U.S.C. § 455 (providing no explicit time limitation on filing a motion). *See also* James Oleske, *Authority of the Trial Judge*, 84 GEO. L.J. 1179, 1179-85 (1996) (dicussing § 144 and § 455).

While § 455 provides no explicit time limitation, the Tenth Circuit has required this motion to be made in a timely manner. *See* Willner v. University of Kan., 848 F.2d 1020, 1022-23 (10th Cir. 1988); *see also* Shimek, *supra* note 20, at 913-15.

22. *See supra* note 20.

23. *See* 28 U.S.C. § 455(a) (stating that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned").

24. *See* 28 U.S.C. § 455(b); *see also* David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887, 908-11 (1996) (detailing the debate among federal courts of appeal regarding whether § 455(a) is subject to an extrajudicial source limitation).

25. *See* El Fenix de P.R. v. The M/Y Johanny, 36 F.3d 136, 141-42 (1st Cir. 1994) (holding that a judge may not reconsider her recusal order, but only transfer the case to another judge).

26. *See also* Oleske, *supra* note 21, at 1185.

27. 486 U.S. 847 (1988).

vacated based on the trial judge's failure to recuse himself when appropriate.[28] The reviewing court must consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[29] Recently, the Supreme Court rejected the doctrine that only extrajudicial sources can support a bias determination,[30] and conceded that recusal may be warranted by a display of judicial bias or prejudice within the courtroom.[31]

B. *Tenth Circuit Decisions*

1. *United States v. Ciapponi*[32]

a. *Facts*

Defendant George M. Ciapponi was arrested at a border checkpoint in New Mexico when authorities discovered ten kilograms of marijuana in the vehicle Ciapponi was driving.[33] Ciapponi's court-appointed attorney arranged a plea bargain with the government in which Ciapponi exchanged a guilty plea for a reduced sentence.[34] The district court judge assigned to the case designated a magistrate to hear and accept Ciapponi's plea.[35] At the hearing, Ciapponi waived his right to enter his guilty plea before a district judge, and proceeded to enter his plea before the magistrate.[36] However, at his sentencing hearing before the district judge, Ciapponi received a higher sentence due to his criminal history.[37] He appealed on the basis that the magistrate judge did not have the jurisdiction to accept his plea.[38]

b. *Decision*

The Tenth Circuit analyzed Ciapponi's challenge by examining the authority given to magistrate judges both statutorily by the Federal Magistrates Act and constitutionally by Article III.[39] The court noted that Congress amended the Magistrates Act in 1976 to expand the duties of magistrate judg-

28. *Liljeberg*, 486 U.S. at 862-64.
29. *Id.* at 864.
30. Liteky v. United States, 510 U.S. 540, 554 (1994); *see also* Blanck, *supra* note 24, at 910-23 (discussing the relationship between extrajudicial and intrajudicial source bias).
31. *Liteky*, 510 U.S. at 555-56 (acknowledging that although intrajudicial sources of bias are possible, the judge in question was not biased based simply on comments he made about the petitioner during a prior trial).
32. 77 F.3d 1247 (10th Cir.), *cert. denied*, 116 S. Ct. 1839 (1996).
33. *Ciapponi*, 77 F.3d at 1249.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* Ciapponi also contended that the court's use of his criminal history was erroneous because it should not have considered his two previous convictions "related" offenses. *Id.* at 1252-53. The Tenth Circuit found that the two convictions did not constitute a common scheme, and the district court made no error in counting them as separate offenses for sentencing purposes. *Id.*
39. *Id.* at 1249-52 (discussing 28 U.S.C. §§ 631-639 (1994) and Article III of the Constitution).

es as authorized by district court judges in response to the burdens of increasing caseloads.[40] Ciapponi argued that the magistrate's authority to accept his plea did not fall within the definition of delegable duties under the statute.[41] Additionally, the court reviewed the constitutionality of delegating duties to a magistrate when the defendant has the right to have a district court judge preside at "all critical stages of a felony trial."[42]

The Tenth Circuit relied upon the United States Supreme Court's *Peretz v. United States* decision in holding that a magistrate's expanded duties do not violate the statute or the Constitution when the defendant expressly consents to a magistrate's authority.[43] The court found it significant that Ciapponi did not object to the use of the magistrate, move to withdraw his plea, or request review of the plea proceeding by the district court.[44] The court also held that there is no requirement for the district court to review the plea proceedings conducted by a magistrate unless the defendant raises an objection or requests review.[45]

2. *Nichols v. Alley*[46]

a. *Facts*

On April 19, 1995, a bomb destroyed the Murrah Federal Building in Oklahoma City.[47] The massive explosion killed 169 people, and caused severe damage and injuries in the vicinity of the federal building.[48] Terry Nichols, and co-defendant Timothy McVeigh, were charged with the explosion in an eleven count indictment that included eight counts of first degree murder.[49] The first issue decided by the Tenth Circuit in the highly publicized "Oklahoma City Bombing Case" involved defendant Terry Nichols' writ of mandamus petition for the disqualification of all judges of the Western District of Oklahoma, including the assigned judge, Wayne Alley.[50] The explosion damaged Judge Alley's courtroom and offices, although Judge Alley sustained no injuries and was not personally acquainted with any of the deceased victims.[51] Both Nichols and McVeigh filed motions for recusal of Judge Alley, who denied the motions.[52] Nichols then filed a petition for a writ of mandamus with the Tenth Circuit for the purpose of disqualifying Judge Alley, as

40. *Id.* at 1250.
41. *Id.*
42. *Id.*
43. *Id.* at 1250-52 (discussing *Peretz v. United States*, 501 U.S. 923 (1991), which held a magistrate judge may preside over jury selection of a felony case with the defendant's consent).
44. *Id.* at 1251 (comparing Ciapponi's situation to that in *United States v. Williams*, 23 F.3d 629 (2d Cir. 1994), which held a magistrate may accept a defendant's plea with his consent even when the defendant challenged the magistrate's authority before the district judge and moved to withdraw his plea).
45. *Id.*
46. 71 F.3d 347 (10th Cir. 1995).
47. *Nichols*, 71 F.3d at 349.
48. *Id.*
49. *Id.* at 350.
50. *Id.*
51. *Id.* at 349-50.
52. *Id.* at 350.

well as all judges in the Western District of Oklahoma, or alternatively, to order that Judge Alley hold an evidentiary hearing for the recusal motions.[53] The writ of mandamus went before the Tenth Circuit as an original proceeding.[54]

b. *Decision*

The Tenth Circuit found that the reasonable appearance of bias mandated Judge Alley's recusal from the case.[55] After analyzing the legal standards governing mandamus,[56] the court addressed the statutory authority of Nichols's argument.[57] The statute requires the disqualification of a judge when the judge fails an objective test of the appearance of impartiality.[58] The inquiry turns on the factual basis of the case and any outward appearance of bias, not on the specific judge's "actual state of mind, purity of heart, incorruptibility, or lack of partiality."[59]

The government argued that recusal was not required when the judge's bias was not reasonably questionable.[60] The court rejected these arguments due to the unique and extraordinary facts surrounding this case, and noted that the law favors recusal when the issue is a close one.[61] While conceding that Judge Alley had conducted himself in a purely professional and unbiased manner, the court held that a reasonable person would question the partiality of the judge in light of the facts surrounding the case.[62] The holding, however, pertained only to Judge Alley and the court referred the matter to the Chief Judge of the Tenth Circuit for reassignment.[63]

C. *Analysis*

The 1976 amendments to the Federal Magistrates Act reflect the intent of Congress to expand the authority of United States magistrates.[64] The federal district courts broadly interpret magistrate duties to include all proceedings that do not violate any specific right of the defendant.[65] Failure of the defen-

53. *Id.*
54. *Id.*
55. *Id.* at 352.
56. *Id.* at 350. Mandamus requires a higher standard of review, therefore the petitioner must show a "clear and undisputable right to relief" by demonstrating a clear abuse of discretion by the district court and no adequate alternative for relief. *Id.*
57. *Id.* at 350-52 (discussing 28 U.S.C. § 455(a) (1994)). Nichols also argued that Judge Alley's recusal was warranted by actual bias under 28 U.S.C. § 144 and prejudice under 28 U.S.C. § 455(b)(1), but the court did not decide these arguments in light of their holding based on 28 U.S.C. § 455(a). *Id.* at 351 n.1.
58. *Id.* at 350-51.
59. *Id.* at 351 (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988)).
60. *Id.* at 352.
61. *Id.* (citing United States v. Dandy, 998 F.2d 1344 (6th Cir. 1993)).
62. *Id.* Additionally, the court found that Nichols met the increased burden required of those petitioning for mandamus relief. *Id. See also supra* note 56 (discussing the standard of review for a writ of mandamus).
63. *Nichols*, 71 F.3d at 352-53.
64. *See supra* note 8 and accompanying text.
65. *See* Peretz v. United States, 501 U.S. 923 (1991); Gomez v. United States, 490 U.S. 858

dant to consent to magistrate authority provides the only limitation to the magistrate presiding over the case.[66]

The circuit courts are reluctant to order a trial judge's recusal due to personal bias or prejudice.[67] This year, the Tenth Circuit overcame this reluctance in part due to the enormous publicity of the Oklahoma City Bombing trial.

D. *Other Circuits*

In determining the powers of magistrate judges under the Federal Magistrates Act, the Ninth Circuit ruled that magistrates lack the power to conduct probation revocation hearings without the express consent of the defendant.[68] In general, magistrates may assume limited power, pursuant to 28 U.S.C. § 636(b)(3), without the consent of the parties if the power relates to procedural or administrative matters.[69]

Other circuits are reluctant to grant a recusal motion to disqualify the trial judge, especially in instances where the foundation of the defendant's argument for recusal is the judge's connection to the defendant's previous, unrelated trial, or in the case of a retrial, the fact that the judge presided over the defendant's first trial.[70] The Second Circuit established a procedural rule that a defendant who entered an unconditional guilty plea could still appeal an order denying his motion for recusal.[71] The Eighth Circuit, however, allowed the recusal of the trial judge in another highly publicized trial, *United States v. Tucker*.[72] This case involved the prosecution of the governor of Arkansas was prosecuted for tax fraud, bankruptcy fraud, making false material statements, and conspiracy.[73] The court disqualified the trial judge because to the judge's personal relationship with Hillary Rodham Clinton, coupled with the Clintons' support for the defendant.[74]

(1989); United States v. Raddatz, 447 U.S. 667 (1980).

66. *See supra* note 19 and accompanying text.

67. *See infra* note 74 and accompanying text.

68. United States v. Colacurcio, 84 F.3d 326, 334 (9th Cir. 1996).

69. *See Colacurcio*, 84 F.3d at 332-33; *see also supra* notes 7-9 and accompanying text.

70. *See* United States v. Thompson, 76 F.3d 442, 450-51 (2d Cir. 1996) (holding that a trial judge is not required to recuse himself when he worked in the U.S. Attorney's office prior to the defendant's previous prosecution); United States v. Wilson, 77 F.3d 105, 110-11 (5th Cir. 1996) (holding that recusal was not warranted because the trial judge presided over the trial of the co-defendants and had made rulings on the same motions brought by the defendant); United States v. Mizell, 88 F.3d 288, 298-300 (5th Cir.), *cert. denied*, 117 S. Ct. 620 (1996) (holding that the trial judge was not required to recuse himself from the defendant's retrial simply because the judge had made adverse pre- and post-trial decisions in the defendant's earlier trial); United States v. Griffin, 84 F.3d 820, 829-31 (7th Cir. 1996) (holding that recusal was not required in an attorney's contempt hearing because of the judge's frustration with the attorney in the trial that led to the hearing); Hook v. McDade, 89 F.3d 350, 354-55 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997) (holding that recusal was not required when the judge's wife was the opposing counsel in a civil case against the defendant); Poland v. Stewart, No. 95-99022, 1996 WL 764695, at *47-*52 (9th Cir. Dec. 31, 1996) (holding that the fact that the same judge presided over both trial and retrial was insufficient to meet the standard for recusal).

71. United States v. Brinkworth, 68 F.3d 633, 638 (2d Cir. 1995).

72. 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

73. *Tucker*, 78 F.3d at 1316.

74. *Id.* at 1324-25. However, in an unrelated case, the Ninth Circuit denied the recusal mo-

II. FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

A. *Background*

The Fourteenth Amendment of the Constitution of the United States provides that no person shall be denied the equal protection of the laws.[75] In the landmark case of *Griffin v. Illinois*,[76] the United States Supreme Court held that practices in the criminal justice system which result in discrimination against defendants based on their inability to pay violate the Equal Protection Clause.[77] Following *Griffin*, indigent defendants have frequently invoked the Equal Protection Clause to challenge unfair practices, and the Supreme Court has usually invalidated those practices.[78]

While most states allow persons convicted of lesser crimes to choose imprisonment as an alternative to paying a fine,[79] the Supreme Court first decided the issue of imprisonment beyond the statutory maximum in *Williams v. Illinois*.[80] The Court found it unconstitutional to imprison a defendant longer than the maximum punishment allowed for a crime because of an inability to pay a fine.[81] However, the fact that an indigent person may be imprisoned longer than a non-indigent person convicted of the same offense does not violate the Equal Protection Clause.[82] The Court concluded that the Constitution required this ruling and that adequate alternative methods for satisfying the state's interest in enforcing the fine justified the decision.[83]

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tion in *United States v. Treiber*, 84 F.3d 1549, 1559-60 (9th Cir.), *cert. denied* 117 S. Ct. 267 (1996), which was brought because of the judge's published views on legal issues.

75. U.S. CONST. amend. XIV, § 1.

76. 351 U.S. 12 (1956).

77. *Griffin*, 351 U.S. at 19. Specifically, the Court declared that an indigent defendant is entitled to receive trial transcripts at public expense when required for appeals. *Id.*

78. *See generally* David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469 (1992) (advocating a "truth-seeking theory" as a way to determine if indigents are entitled to expert services in their defense); Fred Lautz, Note, *Equal Protection and Revocation of an Indigent's Probation for Failure to Meet Monetary Conditions:* Bearden v. Georgia, 1985 WIS. L. REV. 121 (1985) (analyzing the effect of the Court's decision on the financial conditions a trial court can impose when setting probation for indigents); Michael James Todd, Case Note, *Criminal Procedure — Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L.J. 609 (1986) (applauding the Supreme Court's decision to expand indigent's rights to include a right to a psychiatric evaluation when there has been a showing that insanity is an issue).

79. Williams v. Illinois, 399 U.S. 235, 239-40 (1970).

80. *Id.* at 235, 236. *See generally* Joseph L. Hendrickson, Note, *The Use of Uncounseled Misdemeanor Convictions to Enhance a Penalty for a Subsequent Offense After* Nichols v. United States, 39 ST. LOUIS U. L.J. 669 (1995) (analyzing recent Supreme Court decisions dealing with the collateral use of uncounseled convictions in setting standards); *The Supreme Court, 1982 Term-Criminal Sentencing of Indigents*, 97 HARV. L. REV. 86 (1983) (analyzing the Supreme Court's Court's *Bearden* decision and concluding that the Court's analysis of indigent rights in the judicial process had shifted from a focus on equal protection to fundamental fairness).

81. *Williams*, 399 U.S. at 240-41.

82. *Id.* at 243.

83. *Id.* at 244-45.

B. *Hall v. Furlong*[84]

1. Facts

Defendant James Edward Hall was arrested for violating Colorado law and confined to jail in August, 1977.[85] Because of his indigency, Hall was not able to post bail, and remained confined until his sentencing hearing for a total of 219 days.[86] Hall pleaded guilty to first degree sexual assault and received the maximum authorized sentence of twenty-seven to fifty years.[87] Hall moved to obtain credit for time served prior to sentencing.[88] The state trial court granted him an eighty-four day credit applicable to Hall's minimum sentence, but no credit toward Hall's maximum sentence.[89] Hall filed a writ of habeas corpus[90] as a *pro se* petitioner, and the district court determined that no justiciable controversy existed.[91] Hall then appealed to the Tenth Circuit Court of Appeals.

2. Decision

The Tenth Circuit reviewed the denial of the writ of habeas corpus and found in favor of granting presentence confinement credit to Hall.[92] The issue before the court was whether denying credit to an indigent prisoner violated the prisoner's rights to equal protection and due process under the Fourteenth Amendment.[93] In its decision, the court relied on the Supreme Court's rule from *Williams v. Illinois* which determined that the Equal Protection Clause requires that maximum authorized sentences for any crime be the same for all defendants regardless of their economic status.[94] The court noted that other circuits had previously applied the rule in *Williams* to factually similar situations,[95] although the Tenth Circuit had not previously done so.[96] Referring to the rulings of the other circuits, the court held that Hall must receive full credit for presentence incarceration due to his indigency as mandated by the Equal Protection Clause.[97]

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84. 77 F.3d 361 (10th Cir. 1996).
85. *Hall*, 77 F.3d at 362.
86. *Id.*
87. *Id.* at 362-63.
88. *Id.*
89. *Id.* at 363.
90. *See* 28 U.S.C. § 2254 (1994).
91. *Hall*, 77 F.3d at 363.
92. *Id.* at 364.
93. *Id.* at 363.
94. *Id.* at 363 (citing Williams v. Illinois, 399 U.S. 235, 240-41 (1970)).
95. *Id.* (citing Johnson v. Riveland, 855 F.2d 1477, 1484 n.7 (10th Cir. 1988)).
96. *Id.* In particular, the *Hall* court observed that in *Vasquez v. Cooper*, 862 F.2d 250 (10th Cir. 1988), the court did not extend the rule in *Williams* to apply to indigent defendants who received less than the statutory maximum term, and declined to determine whether the rule would apply to those who did receive the maximum. *Hall*, 77 F.3d at 363.
97. *Hall*, 77 F.3d at 364. The court also analyzed the district court's denial of the habeas corpus petition. The district court denied his petition because Hall could be released before serving the maximum sentence. *Id.* The court found that the district court too narrowly applied the rule from *Williams*. *Id.* It reasoned that early release did not have any relevance to the constitutional issue at hand. *Id.* Furthermore, under the district court's analysis, Hall would have to exceed the statutory maximum for his sentence before bringing the petition. *Id.* at 363-64.

C. *Analysis*

Given the large number of indigent criminal defendants, the courts must regularly analyze whether procedural discrimination constitutes a violation of the Equal Protection Clause.[98] Although the factual circumstances differ in the various cases, courts appear to have settled the issue by deciding whether the result would be the same if the defendant was able to pay. As evidenced by *Hall*, the Tenth Circuit followed this test as it related to the ability to post bail.

D. *Other Circuits*

Other circuits have upheld the rights of indigent defendants under the Equal Protection Clause. The Sixth Circuit ruled that a defendant's equal protection rights were violated when the court denied the defense counsel access to the transcripts from the defendant's two previous trials due to an inability to pay, and only provided access to the court reporter's tapes.[99] The Ninth Circuit found that a court's enhancement of a defendant's criminal history points, due to the defendant's inability to pay fines from a previous conviction, violated the defendant's rights absent a showing of willful failure to pay.[100] The Seventh Circuit, however, ruled that awarding costs against an indigent prisoner who has filed numerous civil lawsuits is permissible.[101]

The Ninth Circuit rejected a defendant's equal protection claim when the court denied the defendant presentence credit after sentencing for one conviction, but before sentencing for another.[102] The court noted that indigent defendants are entitled to presentence confinement credit, but only upon a showing that the defendant could have been released from custody if not for the inability to pay.[103]

III. SELF-INCRIMINATING STATEMENTS

A. *Background*

The Fifth Amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself."[104] Thus, self-incriminating statements procured through government coercion are excluded from evidence. Five criteria must exist in order for the defendant to invoke the privilege: "(1) the privilege must be personal to the individual; (2) the proceeding must be criminal or have criminal consequences; (3) the information must be self-incriminating; (4) the information must be

98. *See* Harris, *supra* note 75, at 474-91.
99. Riggins v. Rees, 74 F.3d 732, 737-38 (6th Cir. 1996).
100. United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996).
101. Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir.), *cert. denied*, 117 S. Ct. 266 (1996); *See also* FED. R. CIV. P. 54(d) (allowing costs to be awarded to the prevailing party in a civil lawsuit).
102. Robinson v. Marshall, 66 F.3d 249, 250-51 (9th Cir. 1995).
103. *Robinson*, 66 F.3d at 250.
104. U.S. CONST. amend. V.

compelled by the government; and (5) the information must be testimonial in nature."[105] A defendant may invoke the privilege at all stages of the criminal process including circumstances prior to arrest triggered by custodial interrogation.[106]

Courts frequently address the issue of defining protected, self-incriminating statements. The Supreme Court held in *Simmons v. United States*,[107] that although a defendant may choose to waive his Fifth Amendment privilege against self-incrimination at any time, conflicting laws cannot compel him to choose between that right and another constitutional privilege.[108] More specifically, the Court determined that a defendant's testimony at a pretrial hearing for a motion to suppress evidence is inadmissible at trial.[109] In contrast, the Court held in *Crampton v. Ohio*[110] that a defendant's allocution statement made at the penalty phase may be used against the defendant regarding issues of guilt.[111] Because the defendant may voluntarily choose whether to make any statement at sentencing, allocution statements fall outside the scope of the Fifth Amendment.[112]

The issue of Fifth Amendment protection becomes more complicated when the defendant enters into a plea agreement with the prosecution. Federal Rule of Criminal Procedure 11(e)(6) provides that the statements made during plea negotiations are generally inadmissible in a proceeding against the defendant.[113] Courts, however, analogize a final plea agreement with a contract, and if violated, the terms are void and the incriminating statements are admissible against the defendant. In *United States v. Mezzanatto*,[114] the Supreme Court held that a defendant may voluntarily waive the plea agreement rules for the purposes of impeachment without violating the defendant's Fifth Amendment privilege.[115]

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105. *Survey of Recent Cases*, 44 U. KAN. L. REV. 895, 917-18 (1996); *see also* Michael A. Conner, Comment, *The Constitutional Framework Limiting Compelled Voice Exemplars: Exploration of the Current Constitutional Boundaries of Governmental Power over a Criminal Defendant*, 33 SAN DIEGO L. REV. 349, 360-65 (1996) (reviewing traditional rationales for limiting compelled exemplars and proposing new rationales). *See generally* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996) (contrasting modern views regarding the rule against self-incrimination with historical perspectives); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (analyzing prior interpretations of the Self-Incrimination Clause and offering new views); John H. Langbein, Essay, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994) (critiquing prior scholarly analysis as to how and when the privilege against self-incrimination arose); Mary A. Shein, Comment, *The Privilege Against Self-Incrimination Under Siege:* Asherman v. Meachum, 59 BROOK. L. REV. 503 (1993) (criticizing the Second Circuit's decision in *Asherman* as incompatible with the Supreme Court's broad judicial interpretation of the Self-Incrimination Clause).

106. *See* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

107. 390 U.S. 377 (1968).

108. *Simmons*, 390 U.S. at 394.

109. *Id.*

110. 402 U.S. 183 (1971).

111. *Crampton*, 402 U.S. at 216-17.

112. *Id.*

113. FED. R. CRIM. P. 11(e)(6).

114. 115 S. Ct. 797 (1995).

115. *Mezzanatto*, 115 S. Ct. at 800. *See also* Michael S. Gershowitz, Note, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996) (arguing that the Supreme

B. *Tenth Circuit Decisions*

1. *United States v. Hardwell*[116]

a. *Facts*

Defendant Marcel Hardwell was convicted of conspiracy and money laundering after a Drug Enforcement Agency (DEA) investigation implicated him and six other defendants.[117] The DEA sting occurred when an undercover agent arranged to buy two kilograms of cocaine from the defendants, including Hardwell.[118] The evidence supporting the money laundering conviction suggested that Hardwell had insufficient legitimate income to purchase the cocaine, leading to the inference that he procured the money through drug distribution.[119] On appeal, Hardwell argued that because the government's information regarding his lack of income came solely from financial affidavits that he was compelled to provide in order to establish his eligibility for court-appointed counsel, the unintended use of this information violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.[120]

b. *Decision*

The Tenth Circuit reversed Hardwell's conviction for money laundering due to the violation of his constitutional right against self-incrimination.[121] The Supreme Court has ruled that it is unconstitutional to require a defendant to choose between his Fifth Amendment right to silence and his Fourth Amendment protection from illegal search and seizure.[122] The conflict at issue, however, presented a matter of first impression for the Tenth Circuit.[123] The court noted that other circuits have extended some types of protection to disclosures made for determining financial eligibility for counsel, but usually through a pretrial protection hearing.[124] The Tenth Circuit, in *United*

Court's decision in *Mezzanatto* undermines the rule that a criminal defendant's plea negotiations are inadmissible); *Waiver — Plea Negotiation Statements*, 109 HARV. L. REV. 249 (1995) (contending that in its *Mezzanatto* decision, the Supreme Court created a de facto rule of waivability with regard to a criminal defendant's right to have plea negotiations held inadmissible).

116. 80 F.3d 1471 (10th Cir. 1996).

117. *Hardwell*, 80 F.3d at 1479. Of the other six defendants implicated with Hardwell, three defendants were acquitted, two were convicted of conspiracy, and one was convicted of conspiracy, money laundering, and possession of cocaine with intent to distribute. *Id.*

118. *Id.* at 1479-83.

119. *Id.* at 1483. For the elements of money laundering, see 18 U.S.C. § 1956(a)(1)(A)(i) (1994).

120. *Id.* Hardwell argued unsuccessfully that there was insufficient evidence to support his conviction for money laundering; *id.* at 1482-83; double jeopardy violations with regard to his prosecution for money laundering and conspiracy to distribute cocaine, *id.* at 1484-85; abuse of discretion by the court in admitting evidence of prior bad acts and irrelevant evidence, *id.* at 1488-89, 1492; ineffective assistance of counsel, *id.* at 1495; and incorrect determination of drug quantity for the purpose of sentencing. *Id.* at 1496-98.

121. *Id.* at 1484.

122. Simmons v. United States, 390 U.S. 377, 394 (1968).

123. *Hardwell*, 80 F.3d at 1483-84.

124. *Id.* (citing United States v. Pavelko, 992 F.2d 32, 34-35 (3d Cir. 1993); United States v. Hitchcock, 992 F.2d 236, 239 (9th Cir. 1993); United States v. Gravatt, 868 F.2d 585, 589-92 (3d

States v. Peister,[125] had previously rejected the pretrial protection approach, but declined to resolve the issue of whether the use of a defendant's financial statement violates the Fifth Amendment, because the prosecution did not use the financial information at trial.[126] In *Hardwell*, in which the information was used against the defendant at trial, the court held that Hardwell's Fifth Amendment rights were violated, and that the error was sufficiently prejudicial as to require reversal.[127]

2. *Harvey v. Shillinger*[128]

a. *Facts*

Defendant Jetty Lee Harvey was convicted in Wyoming state court for kidnapping and first degree sexual assault.[129] At sentencing, Harvey chose to make an allocution statement in mitigation of his punishment, and in doing so, admitted to details of the crime.[130] The Wyoming Supreme Court vacated the conviction for violations of the defendant's right to a speedy trial.[131] Subsequently, the government charged and convicted Harvey of conspiracy to commit kidnapping and conspiracy to commit sexual assault for the same offending acts.[132] The prosecution used the allocution statement Harvey made at his first sentencing hearing as evidence against him.[133] Harvey filed a writ of habeas corpus in federal district court, which the court dismissed.[134] On appeal from the dismissal, Harvey argued that the use of his allocution statement violated his Fifth Amendment right against self-incrimination.[135]

b. *Decision*

The Tenth Circuit affirmed the dismissal of Harvey's petition for a writ of habeas corpus.[136] The State of Wyoming recognizes that statements made in mitigation of punishment are constitutionally protected, but federal law does not protect allocution statements, and federal law must support the habeas

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Cir. 1989); United States v. Sarsoun, 834 F.2d 1358, 1363-64 (7th Cir. 1987); United States v. Harris, 707 F.2d 653, 662-63 (2d Cir. 1983)).

125. 631 F.2d 658 (10th Cir. 1980).

126. *Hardwell*, 80 F.3d at 1484 (citing *Peister*, 631 F.2d at 661-62).

127. *Id.* Following this holding, co-defendant Dennis Hardwell appealed his conviction of money laundering on the same grounds, and based on the new rule developed in Marcel Hardwell's reversal, the Tenth Circuit reversed Dennis Hardwell's conviction. United States v. Hardwell, 88 F.3d 897, 898 (10th Cir. 1996).

128. 76 F.3d 1528 (10th Cir. 1996).

129. *Harvey*, 76 F.3d at 1531.

130. *Id.* at 1531-32.

131. *Id.* at 1531.

132. *Id.*

133. *Id.* at 1532.

134. *Id.* (citing Harvey v. Shillinger (Harvey III), 893 F. Supp. 1021 (D. Wyo. 1995)).

135. *Id.* Harvey also appealed on the grounds that his conspiracy conviction violated double jeopardy, the Sixth Amendment right to speedy trial, and the Sixth Amendment right to effective assistance of counsel because he had not been advised that his allocution statement could later be used against him. *Id.*

136. *Id.* at 1537.

corpus petition.[137] In forming its opinion, the Tenth Circuit examined whether the government violated Harvey's due process rights by forcing him to choose between his Fifth Amendment right to remain silent and his statutory right to speak on his own behalf at sentencing.[138] The court relied on the Supreme Court case of *Crampton v. Ohio*,[139] which held that pressuring a defendant into making an allocution statement during the punishment phase of trail did not violate the defendant's Fifth Amendment rights.[140] Because Harvey freely chose to make a statement at sentencing, the court held there was no due process violation.[141] Harvey's choice to testify on his own behalf constituted "an effective waiver of his Fifth Amendment" right against self-incrimination.[142] Additionally, the court found it irrelevant that Harvey did not understand that his statement could be used against him because no constitutional right requires knowledge of the consequences of waiver.[143]

3. *United States v. Watkins*[144]

a. *Facts*

Defendant Carlton J. Watkins was arrested and indicted for conspiracy to distribute and distributing crack cocaine.[145] Watkins entered into a plea agreement with the government in which he agreed to reveal his source for the crack cocaine in exchange for supervised release to a halfway house.[146] The agreement also provided that the government would not bring a case against Watkins unless he violated the terms of the agreement.[147] During the negotiations, the government informed Watkins that his statements were protected by Rule 11 of the Federal Rules of Criminal Procedure.[148] Subsequent to entering into the plea agreement, Watkins spoke with agents at the DEA office and repeated his earlier incriminating statements, which included the fact that he had sold crack cocaine and provided the identity of his source.[149] The day following his meeting with the DEA agents, Watkins escaped from the halfway house, thus violating the terms of the agreement.[150] The government prosecuted Watkins for conspiracy and distribution of crack cocaine, using the incriminating statements made during the plea negotiations and later at the DEA office.[151] The district court suppressed the first statements made during

137. *Id.* at 1534.
138. *Id.* at 1534-35.
139. 402 U.S. 183 (1971).
140. *Harvey*, 76 F.3d at 1535 (citing *Crampton*, 402 U.S. at 217); *see supra* notes 108-09 and accompanying text.
141. *Id.* at 1536-37.
142. *Id.*
143. *Id.* at 1536 (citing Colorado v. Spring, 479 U.S. 564, 574 (1987)).
144. 85 F.3d 498 (10th Cir.), *cert. denied*, 117 S. Ct. 269 (1996).
145. *Watkins*, 85 F.3d at 499. 21 U.S.C. §§ 841(a)(1) & 846 are the relevant statutes in violation.
146. *Watkins*, 85 F.3d at 499.
147. *Id.*
148. *Id. See generally* FED. R. CRIM. P. 11 (providing the rules regarding pleas).
149. *Watkins*, 85 F.3d at 499.
150. *Id.*
151. *Id.*

negotiations, pursuant to Rule 11(e)(6), but allowed the statements made at the DEA office to be used against Watkins at trial.[152]

b. *Decision*

The Tenth Circuit analyzed the purpose and language of Rule 11(e)(6) and found that any and all statements made after the finalization of the plea agreement are admissible in court.[153] The court stated that the language of the rule protects statements made "in the course of plea discussions with an attorney for the government."[154] The rule is designed to stimulate free and open negotiations between the defendant and the opposing counsel without fear of repercussions.[155] Noting that other circuits have applied the rule in similar factual situations, the court held that Watkins's subsequent statements were not protected since Watkins made the statements after the finalization of the plea agreement.[156] Watkins also argued for the protection of the statements due to the fact that they were similar to the information given during the protected negotiations.[157] The court rejected this argument with the reasoning that subsequent statements, regardless of whether they are identical, are beyond the scope of the rule.[158]

4. *United States v. Erekson*[159]

a. *Facts*

IRS Special Agent Howard contacted defendant Gene M. Erekson to discuss a business client of Erekson's who was under criminal investigation.[160] Erekson agreed to meet with Howard at the IRS office at which time Erekson gave a tape recorded interview, voluntarily answering certain questions, and choosing not to answer others.[161] Approximately eighteen months after the interview, a grand jury indicted Erekson for conspiracy to defraud the IRS.[162] Erekson argued for the exclusion of the statements he made during the interview with Special Agent Howard because the IRS had not given Erekson *Miranda* warnings prior to the interview.[163] The district court relied on the conclusions of a magistrate's evidentiary hearing to find that the circumstances

152. *Id.*

153. *Id.* at 500-01. *See generally* Anjili Soni & Michael E. McCann, *Guilty Pleas*, 84 GEO. L.J. 1039 (1996) (providing an in depth review of the case law involving Rule 11).

154. *Id.* at 500 (quoting FED. R. CRIM. P. 11(e)(6)(D)).

155. *Id.*

156. *Id.*

157. *Id.* In addition, Watkins argued that the contractual language of the agreement protected the use of his subsequent statements. *Id.* The court quickly rejected this claim because of the conditional sentence that voids the agreement on any violations of its terms. *Id.*

158. *Id.*

159. 70 F.3d 1153 (10th Cir. 1995).

160. *Erekson*, 70 F.3d at 1154.

161. *Id.* at 1155.

162. *Id.* at 1154. Erekson was also indicted for presenting a false social security number, but that count is not at issue in this appeal. *Id.*

163. *Id.* at 1156.

did not necessitate a Miranda warning.[164] Erekson was subsequently convicted of the charges, and he appealed the denial of his motion to suppress statements.[165]

b. *Decision*

The Tenth Circuit adopted the findings from the evidentiary hearing to hold that Erekson's interview with Special Agent Howard did not meet the requirements for a *Miranda* warning.[166] Erekson argued that the circumstances required a *Miranda* warning because the IRS agents knew that the nature of the questions would illicit incriminating responses.[167] The court concluded that Erekson voluntarily made the statements, based on the fact that he was not forced to answer questions,[168] the environment was not coercive,[169] the interview was not excessively long,[170] and Erekson's personal characteristics did not make him susceptible to coercion.[171] Additionally, Erekson argued that his statements were involuntary and inadmissible because the IRS agents induced his statements by deceit.[172] The court stated that statements are obtained through deceit when the "agents affirmatively mislead [a suspect] as to the true nature of their investigation."[173] Erekson himself was not under investigation at the time of his interview, and the investigation did not focus on him until after he made those incriminating statements.[174] The court concluded that Erekson voluntarily made the statements, warranting them admissible, and that the facts did not require a *Miranda* warning.[175]

C. *Analysis*

Courts have struggled with the issue of protecting self-incriminating statements, with varied results. The Tenth Circuit adhered to the approach that assumes the defendant knowingly and voluntarily chooses to waive his Fifth

164. *Id.* at 1155-56.

165. *Id.* Additionally, Erekson argued that the statements obtained during the interview violated his Fourth Amendment protection of unreasonable search and seizure but the court determined that a Fifth Amendment analysis was more appropriate. *Id.* at 1157-58.

166. *Id.* at 1156-58.

167. *Id.* at 1156.

168. *Id.* at 1157. The court noted that Erekson chose not to answer six questions for fear they might incriminate him. *Id.*

169. *Id.* The court explained that the coercive environment would exist if the agents made threats, intimidating gestures, or displayed their revolvers. *Id.*

170. *Id.* The interview lasted twenty minutes. *Id.*

171. *Id.* Susceptibility to coercion might result from youth, old age, lack of education, or lack of intelligence. *Id.*

172. *Id.* at 1157.

173. *Id.* at 1158 (citing United States v. Serlin, 707 F.2d 953, 956 (7th Cir. 1983)).

174. *Id.*

175. *Id.*

Amendment privilege. However, the court took a pro-defendant stance, following the Supreme Court, in its solution to the problem of requiring a defendant to choose between his constitutional protections. In such a case, the court will not require the defendant to waive one right for the purpose of invoking another.

D. *Other Circuits*

Other circuits frequently determine when incriminating statements receive protection. These circuits have addressed the basic issue of defining "custodial interrogation," which triggers the defendant's proper invocation of his Fifth Amendment right to silence.[176] The Eighth Circuit decided a case factually similar to *Erekson*, in which the court determined that the defendant was not in custody when questioned by FBI agents due to the surrounding circumstances.[177] Additionally, the circuits vary on decisions regarding whether defendants have properly invoked their Fifth Amendment rights and the use of subsequent statements.[178]

Beyond the scope of custodial interrogation, the circuits have determined which statements are protected under the rules governing immunity and plea bargains. The Ninth Circuit decided three cases that dealt with the relationship of protected statements and the grant of immunity.[179] In one of these cases, *United States v. Camp*,[180] the court held that although the defendant's statements were not admissible in the trial for which the defendant received

176. *See* United States v. Moya, 74 F.3d 1117, 1119 (11th Cir. 1996) (holding that aliens subjected to custodial interrogation at the United States border are entitled to *Miranda* warnings, but that a *Miranda* warning was not required when the questioning of an alien defendant did not constitute custodial interrogation); Sprosty v. Buchler, 79 F.3d 635, 641 (7th Cir.), *cert. denied*, 117 S. Ct. 150 (1996) (identifying the factors to be considered for determining whether the defendant was in custody for the purposes of requiring *Miranda* warnings); United States v. Ventura, 85 F.3d 708, 710-12 (1st Cir. 1996) (defining the conclusive meanings of "custody" and "interrogation" for the purposes of requiring *Miranda* warnings).

177. United States v. McKinney, 88 F.3d 551, 554-55 (8th Cir. 1996); *see supra* notes 156-172 and accompanying text.

178. *See* United States v. Ramirez, 79 F.3d 298, 305 (2d Cir.), *cert. denied*, 117 S. Ct. 140 (1996) (holding that when the defendant chooses not to answer certain questions but agrees to answer others, the defendant does not invoke his Fifth Amendment right and interrogation may continue); Pope v. Zenon, 69 F.3d 1018, 1024-25 (9th Cir. 1995) (holding that the prosecution's use at trial of defendant's confession obtained in violation of his Fifth Amendment privilege was harmless error when the confession did not contradict the defense's theory of the case).

179. *See* United States v. Anderson, 79 F.3d 1522, 1529-30 (9th Cir. 1996) (holding that defendant's compelled statements in related civil trial did not grant him immunity from criminal liability); United States v. Dudden, 65 F.3d 1461, 1467-69 (9th Cir. 1995) (holding that compelled testimony received under an informal immunity agreement may require a hearing to determine whether the compelled testimony may be used by the government in the present prosecution); *infra* notes 177-78 and accompanying text.

180. 72 F.3d 759 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1557 (1996).

immunity, those statements were not protected at the sentencing of the defendant for an unrelated criminal conviction.[181] The First and Fifth Circuits also decided issues regarding Fifth Amendment privileges at pretrial hearings challenging plea agreements.[182]

An additional issue surrounding a defendant's choice to invoke his privilege against self-incrimination concerns the prosecutor's comments at trial. Circuits' decisions vary depending on the facts and circumstances surrounding the comments made during the trial about the defendant's silence.[183]

Circuits agree that a court cannot compel a defendant to submit to a mental examination without violating his Fifth Amendment privileges, but the results after the defendant consents to an examination are admissible.[184] The circuits were also uniform in determining that although the Fifth Amendment applies to documents, there is no privilege for the compelled production of previously voluntarily produced statements and documents.[185]

CONCLUSION

The Tenth Circuit appears reluctant to expand the rights of criminal defendants, which is consistent with the lead of the conservative United States

181. *Camp*, 72 F.3d at 762.

182. *See* United States v. Conway, 81 F.3d 15, 16-17 (1st Cir. 1996) (finding that when the defendant did not fully understand the terms of the agreement in the plea hearing and believed he was being granted full immunity, the government violated this right against self incrimination by using his statements against him in sentencing); United States v. Bond, 87 F.3d 695, 700 (5th Cir. 1996) (finding that defendant did not preserve the issue for appeal when he invoked his right to remain silent in the pretrial motion hearing regarding the terms of the plea bargain because testifying would effectively waive his privilege against self-incrimination); United States v. Catano, 65 F.3d 219, 224 (1st Cir. 1995) (holding the defendant is not entitled to Fifth Amendment immunity for testifying at pretrial hearing to determine if the defendant met the terms of his plea agreement because he was not being required to make any statements that might have been incriminating).

183. *See* United States v. Francis, 82 F.3d 77, 79 (4th Cir.), *cert. denied*, 116 S. Ct. 2513 (1996) (holding that the government did not violate the defendant's right against self-incrimination when the prosecutor commented that the evidence was uncontradicted); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (holding that the prosecutor may use the defendant's silence during his arrest questioning to rebut the defense's theory without violating the defendant's right to remain silent); United States v. Cotnam, 88 F.3d 487, 499-501 (7th Cir.), *cert. denied*, 117 S. Ct. 326 (1996) (holding that the defendant's right against self-incrimination was violated when the prosecutor made indirect comments during closing arguments about the codefendant's failure to take the stand); United States v. Tenorio, 69 F.3d 1103, 1107 (11th Cir. 1995) (holding that the prosecution may not use the defendant's silence after he was given *Miranda* warnings to imply guilt); *cf.* United States v. Two Parcels of Real Property, 92 F.3d 1123, 1129 (11th Cir. 1996) (holding that in a civil case, the trier of fact may make an adverse inference from the invocation of the privilege against self-incrimination).

184. *See* Savino v. Murray, 82 F.3d 593, 603-04 (4th Cir.), *cert. denied*, 117 S. Ct. 1 (1996); United States v. Davis, 93 F.3d 1286, 1295 (6th Cir. 1996).

185. *See* United States v. Feldman, 83 F.3d 9, 14-15 (1st Cir. 1996) (holding that there is no Fifth Amendment protection to destroy documents that contain incriminating evidence); *In re* Grand Jury Witnesses, 92 F.3d 710, 712 (8th Cir. 1996) (holding that the Fifth Amendment does not protect the contents of a document that a person voluntarily prepared); *In re* Grand Jury Subpoena, 75 F.3d 446, 448 (9th Cir. 1996) (holding that the Fifth Amendment does not protect the production of previously compelled statements, but only protects against improper use); *In re* Grand Jury Subpoena Duces Tecum, 70 F.3d 521, 522 (8th Cir. 1995) (holding that there was no violation of an attorney's privilege against self-incrimination by requiring him to produce his business records).

Supreme Court. Decisions from this Survey period reflect the Tenth Circuit's position that defendants make knowing and voluntary choices for which they are accountable, regardless of the undesirable consequences. The only exceptions the court has made are those where the defendant's circumstances are beyond his control, or when the defendant must choose between two constitutional privileges, thus interpreting defendant's rights rather narrowly.

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