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Criminal Procedure Survey

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CRIMINAL PROCEDURE SURVEY

INTRODUCTION

This Survey focuses on three issues addressed by the United States Court of Appeals for the Tenth Circuit in 1993. First, whether a blanket policy of strip searching misdemeanants violates the Fourth Amendment's prohibition against unreasonable searches? Second, what is the correct method of determining an appropriate version of a foreign sentence under the Prisoner Transfer Treaty between the United States and Mexico? Third, whether a defendant's interest in access to a child abuse victim's confidential social service records outweighs the state's legitimate interest in preserving the confidentiality of those records?

I. STRIP SEARCHING MISDEMEANANTS

A. *Background*

1. Inspections of the Body

In *United States v. Robinson*,[1] the U.S. Supreme Court held that full body searches incident to custodial arrest are not only an exception to the warrant requirement of the Fourth Amendment,[2] but that such searches are "reasonable" under that Amendment.[3] The Court also held that such searches are constitutional even without probable cause that weapons or evidence may be found.[4] The Court, however, did not hold that all possible searches of a person's body are permissible. In discussing the search in *Robinson*, the Court distinguished the constitutional search in that case from the unconstitutional search conducted in *Rochin v. California*.[5]

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1. 414 U.S. 218 (1973). *See generally*, Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (analyzing *Robinson* and suggesting measures to prevent arbitrary exercise of police power); 2 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) (1978 & Supp. 1986) (discussing search and seizure law). Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989) (arguing that the scope of permissible searches of traffic offenders needed to be limited).

2. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

3. *Robinson*, 414 U.S. at 235.

4. The Court rejected the requirement of probable cause for searches incident to lawful custodial arrest. The Court stated, "[t]he standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards [referring to protective frisks for weapons based on reasonable suspicion in *Terry v. Ohio*, 392 U.S. 1 (1968)] by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." *Robinson*, 414 U.S. at 234.

5. 342 U.S. 165 (1952). Under the *Rochin* doctrine, government conduct violates due process when the means used are egregious and "shock the conscience" of the court. *Id.* at 172.

In *Rochin*[6] the police forced an emetic into the defendant's stomach against his will. The emetic caused the defendant to vomit and allowed the police to recover evidence. The *Robinson* Court characterized this type of police conduct as both extreme and abusive and, therefore, in violation of the Due Process Clause of the Fourteenth Amendment.[7] The Court explicitly recognized that some body searches would be unconstitutional due to their character.[8]

In *United States v. Edwards*,[9] the Court reaffirmed the wide latitude given to law enforcement officers to search a person after a lawful custodial arrest. The Court, however, left open the possibility that certain searches "might 'violate the dictates of reason either because of their number or manner of perpetration.' "[10]

2. The *Bell* Balancing Test

In *Bell v. Wolfish*,[11] the Court articulated a test of reasonableness to be used under the Fourth Amendment in analyzing the constitutionality of a search.[12] In *Bell*, the Court derived a balancing test because reasonableness "is not capable of precise definition or mechanical application."[13] The Court fashioned a test which balanced the state's need for a search against the invasion of the searched person's rights.[14] The Court set forth factors to be considered in determining whether a search is reasonable: (1) the scope of the intrusion; (2) how the search is conducted; (3) the justification for initiating it; and (4) the location where the search is conducted.[15] In applying these factors in *Bell*, the Court held that visual body-cavity searches could be conducted with less than probable cause because of the security interests of a detention center.[16]

3. Courts' Approaches To Strip Searching Misdemeanants

Blanket policies of strip searches were first condemned in *Tinetti v. Wittke*.[17] In *Tinetti*, the defendant was arrested for speeding and detained

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6. *Id.*
7. *Robinson*, 414 U.S. at 236.
8. *See infra* notes 11-16 and accompanying text.
9. 415 U.S. 800 (1974).
10. *Id.* at 808 n.9 (citing Charles v. United States, 278 F.2d 386, 389 (9th Cir. 1960)).
11. 441 U.S. 520 (1979). *See generally*, Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. R. 1289 (1981) (discussing the Supreme Court's approach to balancing government police power with privacy rights of individuals); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313 (1981) (rejecting the concept of reasonable expectations to define the scope of Fourth Amendment protection).
12. *Bell* specifically addressed visual body-cavity strip searches of federal pretrial detainees following contact visits. *Bell*, 441 U.S. at 520. *See also* David C. James, Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033 (1982) (analyzing *Bell* and its consequences).
13. *Bell*, 441 U.S. at 559.
14. *Id.*
15. *Id.*
16. *Id.* at 560.
17. 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980). For a general discussion of circuit court cases see, Robin Lee Fenton, Comment, *The Constitutionality Of*

in the county jail because he was unable to post bail.[18] The defendant was strip searched according to the jail's blanket policy. The court recognized a legitimate interest in discovering weapons or contraband, but concluded:

> Unlike pretrial detainees charged with a criminal offense there is little reason to suspect that traffic violators will conceal contraband or weapons. . . . Defendant's blanket strip search policy cannot be maintained when to do so intrudes into the personal dignity of traffic violators without any relation to the likelihood of his concealment. . . .[19]

In *Mary Beth G. v. Chicago*,[20] the Seventh Circuit addressed a blanket strip search policy for all female detainees in Chicago jails. The defendant was jailed for not paying parking tickets and strip searched while she waited for bail money. The Seventh Circuit rejected extending the *Robinson* rationale.[21] The court, relying on *Bell*, stated that strip searches must be guided by a test of reasonableness and found that the jail's security interests did not outweigh the assault on the defendant's privacy.[22] Additionally, the court distinguished *Mary Beth G.* from *Bell* in three ways: (1) the *Bell* detainees were charged with serious federal offenses while the detainees in *Mary Beth G.* were charged with minor offenses; (2) the *Bell* detainees were confined longer; and (3) the *Bell* detainees were strip searched after contact visits, which could facilitate smuggling of weapons or contraband.[23]

The Tenth Circuit first addressed the strip searching of misdemeanants in *Hill v. Bogans*.[24] In *Hill*, the defendant was arrested for a traffic violation and subsequently strip searched in a lobby with approximately twelve other people present.[25] The Tenth Circuit applied the *Bell* balancing test and balanced the need for the search against the invasion of the defendant's privacy rights.[26] The court found that the offenses involved in *Hill* were not typically associated with the concealment of weapons or contraband in a body cavity. After balancing the state's need for the unusually invasive search with the defendant's privacy interest, the court held that the search was unreasonable and unconstitutional under the circumstances.[27]

Policies Requiring Strip Searches of All Misdemeanant and Minor Traffic Offenders, 54 U. CIN. L. REV. 175 (1985).

18. *Tinetti*, 479 F. Supp. at 486.

19. *Id.* at 491.

20. 723 F.2d 1263 (7th Cir. 1983). *See generally*, Frank C. Lipuma, Casenotes, Mary Beth G. v. City of Chicago: *How "Reasonable" Can A Strip Search Be?*, 18 J. MARSHALL L. REV. 237 (1983).

21. *See supra* notes 1-5 and accompanying text.

22. *Mary Beth G.*, 723 F.2d at 1273.

23. *Id.* at 1272.

24. 735 F.2d 391 (10th Cir. 1984).

25. *Hill*, 735 F.2d at 392-93.

26. *Id.* at 393.

27. *Id.* at 394.

B. *Tenth Circuit Cases in 1993*

In 1993, the Tenth Circuit extended its earlier ruling in *Hill* through two cases: *Chapman v. Nichols*[28] and *Cottrell v. Kaysville City*.[29] In these cases, the court held that if an officer lacks reasonable suspicion that a particular misdemeanant is concealing either weapons or contraband, strip searching is unreasonable under the *Bell* balancing test and violates the Fourth Amendment. The privacy of the search, an important factor in *Hill*, was not determinative for the court in either *Chapman* or *Cottrell*.

1. *Chapman v. Nichols*

Four women were arrested for minor traffic violations and subsequently confined in the Creek County Jail in Sapulpa, Oklahoma.[30] The women were searched pursuant to a blanket strip searching policy of all jail detainees.[31] The jail officials acted without reasonable suspicion to believe that the women were either concealing weapons or contraband on their persons.[32] The plaintiffs brought suit under 42 U.S.C. § 1983[33] against the Sheriff of Creek County, Doug Nichols, both individually and in his official capacity.[34] In district court both sides moved for summary judgment.[35] The district court concluded that the searches were unconstitutional under the established law but that the issue of "whether an 'objectively reasonable' officer could have believed that conducting the search in private comported with the Fourth Amendment is a question which may have to be submitted to the jury."[36] Sheriff Nichols appealed the denial of his qualified immunity claim and the plaintiffs appealed the district court holding that questions of fact regarding the qualified immunity claim needed to go to the jury.[37]

The Tenth Circuit Court of Appeals began its analysis with the reasonableness test articulated by the Supreme Court in *Bell v. Wolfish*.[38] The court noted several undisputed facts: the plaintiffs were arrested for minor

28. 989 F.2d 393 (10th Cir. 1993).

29. 994 F.2d 730 (10th Cir. 1993).

30. *Chapman*, 989 F.2d at 394.

31. A female jail employee strip searched each plaintiff in a small laundry room. One was asked to stand with her hands over her head, one was subjected to a visual inspection of her pubic area, one was required to bend over and grab her ankles and the last one had to bend over and pull her underwear down to her ankles and be searched while the door to the laundry room was open. *Id.*

32. *Id.*

33. "Every person who under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured at law . . . ." 42 U.S.C. § 1983 (1988).

34. *Chapman*, 989 F.2d at 394.

35. The district court denied plaintiff's claim for summary judgment against the sheriff individually but granted summary judgment against the sheriff in his official capacity. *Id.* at 395 n.2.

36. *Id.* at 395

37. *Id.*

38. *See supra* notes 11-16 and accompanying text. This is a balancing test weighing the "need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559.

traffic violations, no reasonable suspicion existed that these individuals were likely to be concealing weapons or drugs, and the plaintiffs were strip searched solely because of the jail's blanket policy.[39] The court then noted that every circuit court, including the Tenth Circuit, has used the *Bell* balancing test and under the same circumstances has found such strip searches unconstitutional.[40]

The court, relying on the analysis in *Mary Beth G.* and *Hill*, stated, "a strip search is an invasion of personal rights of the first magnitude."[41] The sheriff's contention that the private location of the strip searches distinguished this case from previous cases was rejected.[42] The court cited other cases where similar strip searches, found unconstitutional, were conducted in private.[43] The court concluded that it was not objectively reasonable for the sheriff to believe that strip searching minor offense detainees was constitutional merely because the searches were conducted in private and were not extensive.[44]

Next, the court turned to the principles of qualified immunity. Under qualified immunity, an official is protected from personal liability if allegedly unlawful official action was objectively reasonable in light of the legal rules established at the time of the action.[45] The court observed that "no circuit case has upheld the grant of qualified immunity when asserted against a claim based on an across-the-board policy of strip searching minor offense detainees."[46] The court affirmed the district court's ruling that the strip search policy was unconstitutional. The court also held that the law was clearly established at the time of the illegal searches and that the sheriff's belief that the policy was constitutional was not objectively reasonable as a matter of law.[47]

2. *Cottrell v. Kaysville City*[48]

The plaintiff, Lisa Cottrell, brought an action pursuant to 42 U.S.C. § 1983 to recover damages for alleged constitutional violations that oc-

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It should be noted that *Bell* did not involve a search incident to arrest, rather it dealt with strip searches of pretrial detainees. However, the *Bell* balancing test provides guidance to courts on the reasonableness of searches. As the *Bell* court stated, a balancing test is necessary because reasonableness as a standard "is not capable of precise definition or mechanical application." *Id.*

39. *Chapman*, 989 F.2d at 395.

40. *Id.*

41. *Id.*

42. The sheriff's position was that because the searches were conducted in private and did not involve visual body cavity inspections, the unlawfulness of the county's policy was not apparent. The Court rejected these arguments. *Id.* at 397-98.

43. *See, e.g.*, Watt v. City of Richardson Police Dep't, 849 F.2d 195, 196 (5th Cir. 1988); Weber v. Dell, 804 F.2d 796, 799 (2d Cir. 1986); Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614, 616 (9th Cir. 1984).

44. *Chapman*, 989 F.2d at 398.

45. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

46. *Chapman*, 989 F.2d at 398.

47. By characterizing the Sheriff's belief that the policy was constitutional as unreasonable *per se*, the Tenth Circuit removed it from the jury's purview. This holding effectively resolved the plaintiffs cross-appeal that the issue should not have gone to the jury. *Id.* at 399.

48. 994 F.2d 730 (10th Cir. 1993).

curred when she was arrested for driving under the influence and strip searched preceding confinement.[49] Police officers had received information that an individual was operating a vehicle while under the influence.[50] The officers were dispatched and stopped Cottrell.[51] The police asked her to perform roadside tests and the results of those tests were disputed; the police maintained that she had not performed them satisfactorily and the plaintiff maintained that she had.[52] The officers arrested the plaintiff and she allowed them to take a blood sample to prove she was not intoxicated.[53] She was strip searched and confined until her parents posted bond.[54] The blood test subsequently revealed that the plaintiff had not been under the influence of alcohol or drugs, except for legal amounts of the plaintiff's prescription medicine.[55]

The district court concluded that under Federal Rules of Civil Procedure 56(c)[56] the defendants were entitled to judgment as a matter of law because no genuine issues of material fact were in dispute.[57] The district court analyzed all of the plaintiff's claims from the single issue of "whether or not the strip search of the plaintiff violated her Constitutional rights."[58]

On appeal, the court noted that the district court's approach did not deal with each of the plaintiff's claims separately, but dealt with them all under the strip search analysis.[59] The appellate court first addressed the § 1983 claims, starting with wrongful arrest.[60] The court found that the district court's holding for summary judgment was error because the record contained factual disputes requiring credibility determinations. The court refused to conclude that the arresting officer had probable cause as a matter of law to arrest Cottrell.[61]

The court next addressed the illegal search claim.[62] The court started by quoting the language of *Chapman v. Nichols*[63] that "[t]here can be no doubt that a strip search is an invasion of personal rights of the first

49. *Id.* at 731.
50. *Id.* at 731-32.
51. *Id.* at 732.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. "The judgment sought shall be rendered forthwith if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).
57. *Cottrell*, 994 F.2d at 733.
58. *Id.* (citing Cottrell v. Kaysville City, 801 F. Supp 572, 574 (D. Utah 1992)).
59. The plaintiff raised numerous claims under § 1983 including wrongful arrest, wrongful search and seizure, and deliberate indifference to her constitutional rights because of the city's failure to train the officers. Additional separate claims included false imprisonment, assault and battery, malicious prosecution, abuse of process, intentional infliction of emotional distress, defamation, and invasion of privacy. *Id.*
60. *Id.*
61. *Id.* at 734.
62. *Id.*
63. 989 F.2d 393 (10th Cir. 1993).

magnitude."[64] The court acknowledged that consistent with *Bell*,[65] some searches incident to lawful arrest may violate Fourth Amendment rights. The court further supported this view by citing *Hill*,[66] a case factually similar to *Cottrell*.

The court noted that the officer did not have any reasonable suspicion that Cottrell had drugs, did not conduct a 'pat down search' because there was no indication that she was carrying any weapons, and did not believe that Cottrell was a danger to him.[67] The court found that these admissions raised serious doubts about the justification for the strip search.[68] Additional factors which supported the conclusion that the search was unconstitutional were that Cottrell was not placed with the general jail population[69] and that she wore light summer clothes when arrested.[70] The court concluded that the district court's granting summary judgment and its assumption that the search actually took place were both in error.[71]

C. *Analysis of Chapman and Cottrell*

Chapman and *Cottrell* represent an extension, rather than a change, in existing policy in the Tenth Circuit. The cases stand for the proposition that the nature, character and circumstances of a strip search are irrelevant if the threshold requirement of reasonable suspicion is not found for a particular detainee prior to the search. An across the board policy of strip searching all misdemeanants evades the necessity of finding reasonable suspicion that a particular individual is concealing contraband or weapons. The necessity of finding reasonable suspicion before the police can conduct a strip search protects both the arrested misdemeanant and the jail. The arrested misdemeanant, for whom no reasonable suspicion exists, is protected from the unnecessary degradation that a blanket strip search policy entails. However, if the jail personnel have articulable reasons why a particular misdemeanant might be concealing contraband or weapons, the reasonable suspicion standard is not unduly burdensome to meet. The abrogation of blanket policies simply means that reasonable suspicion must be developed on a case-by-case basis. This requirement means additional work for the police but that additional burden is reasonable when balanced with the rights of the individual that are protected.

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64. *Id.* at 395.

65. *Cottrell*, 994 F.2d at 734 (citing Bell v. Wolfish, 441 U.S. 520, 558-59 (1979)).

66. *Cottrell*, 989 F.2d at 734 (citing Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984)). *See also supra* notes 24-27 and accompanying text.

67. *Cottrell*, 989 F.2d at 734-35 (citing Appellant's Brief at 119, 130).

68. *Cottrell*, 989 F.2d at 734-35 (citing Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992) (security and concealed contraband are main reasons for conducting strip searches).

69. "Courts have consistently recognized a distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards." *Cottrell*, 989 F.2d at 734-35 (citing Fuller v. M.G. Jewelry, 950 F.2d 1437, 1448 (9th Cir. 1991); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981)).

70. *Cottrell* 989 F.2d at 734-35 (citing *Hill*, 735 F.2d at 394 (procedure was unnecessary because a pat down search would have been sufficient under the circumstances)).

71. *Cottrell*, 989 F.2d at 735.

The Tenth Circuit refused to abide the evasion of the reasonable suspicion requirement and through these cases has indicated that such policies will be unconstitutional.

In *Chapman v. Nichols*,[72] the court made clear that blanket policies of strip searches for traffic offense misdemeanants will be abrogated. In addition, the court held that it is unreasonable for law enforcement officers to believe that such policies might be legal. This ruling strips officials of qualified immunity and subjects them both personally and officially to liability under 42 U.S.C. § 1983 for perpetuating blanket strip search policies. The court's decision focused on the undisputed fact that the police searched the plaintiffs without individualized reasonable suspicion. The only articulable reason for strip searching these particular people was the jail's blanket policy based on security grounds. The court held that the security rationale was unpersuasive when balanced against the minor offense detainee's privacy rights under the Fourth Amendment. The court reasoned that minimum security concerns could be met by a less intrusive pat-down search. The court also held that it was not objectively reasonable for the sheriff to believe that the blanket policy was lawful because the strip searches were conducted in private. Indeed, the court noted that the lack of published cases on this issue is probably due to the fact that other authorities have sensibly abandoned or declined to establish such polices.[73]

In *Cottrell v. Kaysville City*,[74] the Tenth Circuit clearly stated that civil rights suits by strip searched traffic misdemeanants[75] will not be subjected to summary judgments favoring the malfeasant officials. These strip searches, absent particularized reasonable suspicion, will be deemed per se unconstitutional. In *Cottrell*, the court focused on factors similar to those that were relevant in *Chapman*. The court noted that in a deposition the officer who directed the strip search said he did not suspect that Cottrell had concealed drugs on her person and that he did not conduct a pat-down search because there was no indication that she had weapons or was a danger to him.[76] Additionally, the court found that considerations of overall jail security were not applicable because Cottrell was never placed with the general jail population—she was only waiting for bail.[77] The court also held that less intrusive alternatives to a strip search were available (namely the pat-down search) and that because Cottrell was wearing light summer clothes, the pat-down search would have been sufficient to discover any contraband.

With the decisions in *Chapman* and *Cottrell* the Tenth Circuit has effectively ended any dispute on the issue of blanket strip searches of all traffic offense misdemeanants. These two cases are in accord with the other cir-

72. *Chapman*, 989 F.2d at 393.
73. *Id.* at 399 (citing Weber v. Dell, 804 F.2d 796, 804 (2d Cir. 1986)).
74. *Cottrell*, 994 F.2d at 730.
75. *Cottrell* occurred in Utah where driving under the influence of alcohol is either a class A or B misdemeanor. *See* UTAH CODE ANN § 41-6-44(3)(a)(i),(ii) (1993).
76. *Cottrell*, 994 F.2d at 734-35.
77. *Id.* at 735.

cuits' decisions on the same issue. They effectively end a demeaning practice that was once widespread and possibly even constitutional under *Robinson's* vague directives.[78]

II. Analysis Of Sentencing Under The Prisoner Transfer Treaty

A. *Background*

On November 25, 1976, the United States and Mexico entered into a bilateral treaty which provided for the transfer of penal sentences.[79] Under this agreement, Mexicans convicted in the United States can be transferred to prisons in their home states.[80] Reciprocally, United States citizens convicted in Mexico can be transferred to federal prisons in the United States.[81] The explicit goal of this treaty is to "render mutual assistance in combating crime . . . and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation. . . ."[82] However, it is generally agreed that another unmentioned reason was congressional concern over the condition of American prisoners in the Mexican Penal System.[83] Many American prisoners have alleged that Mexican prison officials tortured them and engaged in extortion.[84]

Although the treaty has improved prisoner treatment abroad, some officials and scholars have questioned whether such transfers are constitutional.[85] The primary reason for concern over prisoner transfer treaties is that they allow the transferring state to retain jurisdiction over any collateral attacks on the foreign sentence.[86] The United States effectively defers to the foreign judgment on its citizen. Implicit to the transfer is the belief that the foreign system has due process similar to American requirements, a premise that some reject.[87] The state receiving the prisoner is bound to honor the judgment and sentence of the transferring state. Therefore, a United States citizen convicted in Mexico and transferred to the United States can challenge imprisonment, but is estopped by the treaty provisions from challenging the conviction.[88]

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78. *See supra* notes 1-8 and accompanying text.

79. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mex, 28 U.S.T. 7399, T.I.A.S. No. 8718 (entered into force on Nov. 30, 1977)[hereinafter Transfer Treaty].

80. *See* Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species?*, 24 Vand. J. Transnat'l L. 449, 456 (1991).

81. *Id.*

82. Transfer Treaty, *supra* note 79, at 7401.

83. *See* Abramovsky, *supra* note 80. *See also* Ronald M. Emanuel, Note, *Intervention of Constitutional Powers: The Prisoner Transfer Treaties*, 2 Fla. J. Int'l L. 203 (1986); Robert D. Steele, *The Impact of* Rosada v. Civiletti *on U.S. Prisoner Transfer Treaties*, 21 Va. J. Int'l L. 131-32 (1980).

84. Abramovsky, *supra* note 80 at 454-55. *See also U.S. Citizens Imprisoned in Mexico: Hearings before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st and 2d Sess. at 11-34 and 47-88 (describing the abuse of U.S. citizens imprisoned in Mexico).

85. Emanuel, *supra* note 83 at 205.

86. Transfer Treaty, *supra* note 79, Art. VI, at 7406.

87. Emanuel, *supra* note 83, at 207-08.

88. Transfer Treaty, *supra* note 79, Art. VI, at 7406.

B. *Trevino-Casares v. U.S. Parole Commission*[89]

1. Facts

Mr. Trevino-Casares, a United States citizen, was arrested on drug charges in Mexico on January 13, 1989.[90] He was convicted in Mexico and sentenced to nine years.[91] Pursuant to the Prisoner Transfer Treaty,[92] he was transferred to the United States on January 31, 1991.[93] The United States Parole Commission determined that Mr. Trevino-Casares would serve seventy-one months imprisonment and thirty-seven months of supervised release.[94] Because of the manner in which the United States Parole Commission characterized their determination, Trevino-Casares asserted that he was denied a substantial amount of earned and anticipated service credits due under 18 U.S.C. § 4105.[95]

Mr. Trevino-Casares appealed the Commission's determination directly to the United States Court of Appeals for the Tenth Circuit. He asserted that the Commission erred in two ways: (1) by imposing a sentence longer than the term of imprisonment imposed by Mexico in violation of 18 U.S.C. § 4106A(b)(1)(C);[96] and (2) by denying credit accumulated against his sentence in violation of 18 U.S.C. § 4105(c)(1).[97]

2. The Tenth Circuit's Opinion

The crux of the court's decision is that the Commission, by translating a foreign sentence into one for domestic enforcement, is in effect acting as a district court.[98] The court noted that translating the sentence is the Commission's duty under 18 U.S.C. § 4106A(b)(1)(A) which states:

> The United States Parole Commission shall, without unnecessary delay, determine a release date and a period and conditions of supervised release for an offender transferred to the United States to serve a sentence of imprisonment, as though the offender were convicted in a United States district court of a similar offense.[99]

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89. 992 F.2d 1068 (10th Cir. 1993).
90. *Id.* at 1069.
91. *Id.*
92. Transfer Treaty, *supra* note 79.
93. *Trevino-Casares*, 992 F.2d at 1069.
94. *Id.*
95. *Id.*
96. "The combined periods of imprisonment and supervised release that result from such determination [referring to the determination of a release date by the U.S. Parole Commission] shall not exceed the term of imprisonment imposed by the foreign court on the offender." 18 U.S.C. § 4106A(b)(1)(C)(1990).
97. "The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer." *Id.* § 4105(c)(1) (1990).
98. The Court noted that its jurisdiction was limited as to the plaintiff's claims, but because the two claims had analytical overlap, jurisdiction exited. It rejected the Commissions contention that the appeal was procedurally inappropriate. *Trevino-Casares*, 992 F.2d at 1069.
99. 18 U.S.C. § 4106A(b)(1)(A) (1988).

The court held that the Commission's translation was, in procedure, substance, and effect, equivalent to the imposition of a federal sentence by a district court, and therefore should be treated as such.[100] In support of its holding, the court noted that 18 U.S.C. § 4106A(b)(2)(A)[101] expressly makes the Commission's determination directly appealable to the circuit level.[102] The court exercised its appellate jurisdiction through holding that the Commission's determination was equivalent to a sentence by a district court. This crucial holding allowed the court to hear Mr. Trevino-Casares's first claim—that his sentence was in violation of the law.[103] Additionally, the court's review of the sentencing process was de novo.[104]

Mr. Trevino-Casares' second claim involved the administration of service credits, which was not part of the Commission's duty. Instead, credit is calculated by the Bureau of Prisons.[105] Because the calculation of credit involved the execution, rather than the imposition of a sentence, habeas corpus review was the appropriate remedy for the second claim.[106] This issue created a problem for the court because circuit courts of appeal do not have original jurisdiction to consider habeas corpus petitions.[107] The court stated that although it did not have jurisdiction to decide the dispute over the award of credit, the issue did overlap with the sentencing which was properly within the court's jurisdiction.[108]

The next matter the court discussed was how to arrive at a proper sentence for the petitioner. The proper length of the sentence was determined by the Commission to be one hundred eight months, commensurate with the Mexican sentence of nine years.[109] The Commission did reduce the petitioner's imprisonment to seventy-one months, followed by thirty-seven months of supervised release, because he suffered permanent physical damage due to abuse while in Mexican custody.[110]

After determining that one hundred eight months was the appropriate sentence, the court examined how the Commission characterized its sentence and what effect that characterization had on the Bureau of Prisons calculation of credit. The court found that the "Commission, evidently with the full agreement of the Bureau of Prisons, denies its § 4106A

100. *Trevino-Casares*, 992 F.2d at 1069.

101. This section states, "The court of appeals shall decide and dispose of the appeal in accordance with section 3742 of this title [referring to 18 U.S.C. § 3742] as though the determination appealed had been a sentence imposed by a United States district court." 18 U.S.C. § 4106A(b)(2)(B) (1990).

102. *Trevino-Casares*, 992 F.2d at 1070.

103. The Court's jurisdiction is derived from 18 U.S.C. § 3742(a)(1) (1988) which authorizes appeal of sentences imposed in violation of the law.

104. United States v. Banashefski, 928 F.2d 349, 351 (10th Cir. 1991) (legal conclusions in sentencing reviewed de novo, with due deference accorded application of law to underlying facts).

105. 18 U.S.C. § 3624 (1988 & Supp. IV 1992).

106. *Trevino-Casares*, 992 F.2d at 1070.

107. Noriega-Sandoval v. U.S. I.N.S., 911 F.2d 258, 261 (9th Cir. 1990).

108. *Trevino-Casares*, 992 F.2d at 1070.

109. The sentencing guidelines, as applied by the Commission, would yield a result of 121-151 months for this offense, but pursuant to U.S.S.G. § 5G1.1 the maximum 108 month Mexican sentence was adopted. *Trevino-Casares*, 992 F.2d at 1070.

110. *Id.* at 1071.

determination the status of a sentence for purposes of § 4105, leaving the Bureau of Prisons nothing but the effectively superseded foreign sentence to subtract the offender's service credits from."[111]

The court determined that the Commission's interpretation was erroneous and held, instead, that the service credits should be subtracted from the Commission's determination of time that the prisoner must remain imprisoned in the United States.[112] In support of this view, the court noted that two express congressional commands were incorporated into the statute.[113] The first command was that the domestic sentence, including both confinement and supervised release, may not exceed the length of imprisonment imposed by the foreign state.[114] The second was that transferred prisoners must receive the same treatment as other inmates with respect to their domestic confinement.[115]

The court concluded its opinion with an explanation of why its interpretation was proper even in light of the deferential standard accorded to administrative review. First, the statutes leave almost no ambiguity on the issue of treatment of transferred prisoners. Second, even if ambiguity exists, the court has a duty to decide whether the Commission had advanced a permissible construction of the statutes. In regard to the second issue, the court stated that "the Commission's construction is both internally inconsistent and impermissibly at odds with the evident intent of the statutory scheme."[116]

The court affirmed the Commission's determination of the length and composition of petitioner's sentence and modified the legal status of the Commission's determination of the sentence. This modification necessitated the application of service credits by the Bureau of Prisons; credits which had previously been barred. The case was then ordered transferred to the district court for a determination of the proper application of credit pursuant to a habeas corpus review.[117]

3. Analysis

In *Trevino-Casares v. U.S. Parole Commission*,[118] the Tenth Circuit was primarily involved in statutory construction and interpretation of congressional intent. The court's interpretation of the Prisoner Transfer Treaty between the U.S. and Mexico also played a large role in the decision-making process.

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111. *Id.*
112. *Id.* at 1071-72.
113. *Id.*
114. 18 U.S.C. § 4106A(b)(1)(C) (1988). *See also* Transfer Treaty, *supra* note 79, Art. V(3) at 7406.
115. "[A] [transferred] offender . . . shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States. . . . " 18 U.S.C. § 4105(a) (1988).
116. *Trevino-Casares*, 992 F.2d at 1073.
117. The circuit court did not have original jurisdiction to determine the application of credit which was properly a habeas issue. *Id.* at 1070 n.4.
118. *Id.*

The first difficult issue was whether jurisdiction existed for the court to hear the claim. The court wisely decided, after considering the statutory context, to treat the Commission's sentencing conversion as the legal equivalent of a domestic sentence imposed by a district court. This interpretation of the Commission's role was augmented by 18 U.S.C. § 4106A(b)(2)(A), which makes the Commission's determination directly appealable to the circuit level. Therefore, the court's treatment of the foreign sentence conversion as a domestic sentence issued by a district court is logical and consistent with the express statutory language.

Some critics may argue that the court overstepped its authority in not reviewing the administrative agency's decision under the normally deferential arbitrary and capricious standard. However, in apparent anticipation of this point, the court noted that the statutory framework left almost no ambiguity on the treatment of transferred prisoners. In essence, the Commission had very little to interpret on its own initiative—Congress expressly set out its mandate. The court also noted that, even when ambiguity does exist, courts have the authority to decide whether the administrative agency has advanced a permissible construction of the statutes. In answering the later question, the court characterized the Commission's construction as inconsistent and contrary to Congress's express intent.

Through this case, the court struck down the U.S. Parole Commission's convoluted interpretation of their statutory mandate to translate foreign sentences into domestic sentences. Prior to *Trevino*, transferred prisoners in the Tenth Circuit were denied earned service credits when their foreign sentence was converted into a domestic sentence by the Commission. Because the Commission refused to acknowledge that their translation was a "sentence," the Bureau of Prisons had nothing to subtract the prisoners acquired service credits from. The court replaced the Commission's practice with a cogent interpretation of the relevant statutes and treaty that accords well with the congressional intent, as revealed through the statutory language.

The court's interpretation reconciles the treaty and statutes.[119] More importantly, the interpretation formulated by the Tenth Circuit treats both prisoners sentenced domestically and by Mexican authorities the same in regard to the application of service credits. Because of *Trevino*, the Commission's translations will now be considered a sentence to which the Bureau of Prisons must apply earned service credits. This decision is more equitable than what existed under the Commission's prior interpretation, where foreign sentenced prisoners were denied earned service

119. An alternate construction of the statutes and treaty was propounded recently by the Fifth Circuit. *See* Cannon v. United States Dep't. of Justice Parole Comm'n, 961 F.2d 82 (5th Cir. 1992) (imposition of shorter sentences is also precluded because only the transferring state has jurisdiction to modify sentences of its courts). *See also* Thorpe v. United States Parole Comm'n, 902 F.2d 291 (5th Cir. 1990) (Commission does not impose a sentence, it merely sets a release date).

credits and effectively had to serve more time than their domestic counterparts.

III. *EXLINE V. GUNTER*[120] IN CAMERA REVIEW OF SOCIAL SERVICE RECORDS REQUIRED IN ACCORD WITH *PENNSYLVANIA V. RITCHIE*.[121]

A. *Background*

In prosecutions for sexual assaults on children, one of the most critical issues is the reliability of the victim—the child witness. Information on the child's reliability is extremely important to the defendant's case; however, access to crucial social service agency records may be hampered by state confidentiality laws.[122]

Pennsylvania v. Ritchie,[123] decided by the U.S. Supreme Court in 1987, is the seminal case on defendants' rights of access to records protected by state confidentiality laws. In *Ritchie*, a state agency, the Pennsylvania Children and Youth Services ("CYS"), had investigated children on an anonymous report of abuse. The files on this investigation were kept confidential pursuant to Pennsylvania's statutory scheme.[124] After the investigation, George Ritchie, the father of the children, was prosecuted for rape, incest, and other sexual offenses against his twelve year old daughter.[125]

Ritchie attempted to subpoena the CYS file to help his defense. He believed that the file might contain medical records, inconsistent statements by his daughter or other exculpatory information.[126] CYS refused to allow him access to the file, citing the Pennsylvania confidentiality statute.[127] The trial court refused to grant Ritchie access to the records in dispute and Ritchie was subsequently convicted.[128] On appeal, however,

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120. 985 F.2d 487 (10th Cir. 1993).

121. 480 U.S. 39 (1987).

122. For information on the reliability and credibility of child witnesses see Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927 (1993); Steven Penrod et al., *Special Issue on Child Sexual Abuse: Children as Observers and Witnesses: The Empirical Data*, 23 FAM. L.Q. 411 (1989); Therese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175 (1991); Robin W. Morey, Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?* 40 U. MIAMI L. REV. 245 (1985).

123. 480 U.S. at 39. For a general discussion of the impact of the Supreme Court's decision see Chris Hutton, *Confrontation, Cross-examination and Discovery: A Bright Line Appears after* Pennsylvania v. Ritchie, 33 S.D. L. REV. 437 (1988); Note, *The Supreme Court, 1986 Term Leading Cases*, 101 HARV. L. REV. 119 (1987). For a discussion of the Pennsylvania Supreme Court opinion see Penny J. Rezet, Note, *Criminal Procedure-Balancing Sixth Amendment Rights with the Victim's Right to Confidentiality*-Commonwealth v. Ritchie, 59 TEMP. L.Q. 715 (1986).

124. *See* PA. STAT. ANN. tit. II § 2215(a)(5) (Purdon Supp. 1987), providing that CYS files are confidential and access is permissible only to courts "of competent jurisdiction pursuant to a court order" (recodified at PA. STAT. ANN. tit. XXIII § 6340 (a)(5) (Purdon 1991)).

125. The prosecution stemmed from events unconnected with the initial CYS investigation. *See* Commonwealth v. Ritchie, 502 A.2d 148, 159 (Pa. 1985).

126. *Ritchie*, 480 U.S. at 44.

127. *Id.* at 43.

128. *Id.* at 44.

the Pennsylvania Superior Court overturned the conviction[129] and the Pennsylvania Supreme Court later affirmed.[130] The Pennsylvania Supreme Court held that the confrontation clause of the Sixth Amendment required allowing Ritchie's attorney access to the confidential child abuse records compiled by CYS.[131]

The U.S. Supreme Court reversed the Pennsylvania Supreme Court's order requiring full disclosure to Ritchie's attorney. In a plurality opinion, the Court held that the right of confrontation secured by the Sixth Amendment was only a trial right.[132] The right of confrontation did not allow pretrial discovery of confidential documents because discovery was not part of the "trial."[133] The plurality held that the Sixth Amendment's confrontation clause merely guaranteed "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish."[134]

The Court used a due process analysis under the Fourteenth Amendment instead of relying on the Sixth Amendment. It held that evidence which was important to the defense could not be suppressed without violation of the Fourteenth Amendment.[135] The plurality decision further held that an appropriate remedy would be for the trial court to review the files in camera.[136] If, after review, the trial court concluded there was a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different, then a new trial should be granted with all material evidence released to the defendant.[137]

In *Ritchie*, the Court balanced the state of Pennsylvania's interest in maintaining the confidentiality of CYS files with defendants' rights to have access to evidence material to their defense.[138] Had the Court rested its decision on the Sixth Amendment's confrontation clause, a broad discovery right would have been created. The right to access under the Sixth Amendment would have been unfettered and would have subsumed the state's confidentiality interest.[139] Through its reliance on the Fourteenth Amendment's Due Process Clause, the Court crafted a more narrowly tailored remedy. The trial judge would conduct the in camera review and determine what information was to be released. The Court decided this

129. Commonwealth v. Ritchie, 472 A.2d 220 (Pa. Super. Ct. 1984).

130. Commonwealth v. Ritchie, 502 A.2d 148, 149 (Pa. 1985).

131. *Id.* at 153 (citing U.S. CONST. amend. VI.).

132. *Ritchie*, 480 U.S. at 52.

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 56.

136. *Id.* at 60.

137. *Id.* at 57 (citing U.S. v. Bagley, 473 U.S. 667, 682 (1985)).

138. *Ritchie*, 480 U.S. at 60-61.

139. "To allow full disclosure to defense counsel . . . would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. . . . Neither precedent nor common sense require such a result." *Id.* at 60-61.

mechanism would properly balance the confidentiality interests with the right to access.[140]

B. *Exline v. Gunter*[141]

1. Facts

Larry Exline was convicted in October 1986 in the El Paso County District Court of one count of sexual assault on a child.[142] On appeal, Exline argued that the trial court erred in refusing to allow discovery of the victim's social service child abuse records.[143] The Colorado Court of Appeals ruled that Exline had failed to make the required offer of proof for the records and that the denial did not violate his constitutional right of confrontation.[144] The court of appeals affirmed the conviction[145] and the Colorado Supreme Court denied certiorari.[146]

After the denial of certiorari by the Colorado Supreme Court, Exline filed a habeas corpus petition in federal district court.[147] Exline claimed that the trial court should have reviewed the social service records in camera, and that its refusal to do so violated his rights under the due process and confrontation clauses.[148]

The federal district court agreed with Exline and held that Exline's right to due process was violated. The court then ordered the El Paso County District Court to conduct an in camera review of the social service records to determine whether they contained information that may have been necessary to Exline's defense.[149]

On October 10, 1991 the state court issued its certificate of compliance, as required by the federal district court.[150] In the certificate, the state court asserted that it had provided Exline with access to a juvenile dependency and neglect file. The state court found that Exline had failed to examine this file and make the required showing of "particularized need" for the social service records at issue.[151] The court also found, after conducting the in camera review, that four documents in the social service records may have been necessary to the defense.[152] However, the state court further held that Exline's failure to show particularized need obviated the need for any remedial action in his favor by the court.[153]

The federal district court, after reviewing the certificate of compliance, ordered the state court to conduct an in camera review of the

140. *Id.* at 60.
141. 985 F.2d 487 (10th Cir. 1993).
142. *Id.* at 488.
143. *Id.*
144. *Id.*
145. *Id.* at 488 (citing People v. Exline, 775 P.2d 48 (Colo. Ct. App. 1988)).
146. *Exline*, 985 F.2d at 488.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

records and determine whether any documents "probably would have changed the outcome of Exline's trial," and, if so, he was to be granted a new trial.[154] However, if the nondisclosure of the information was harmless beyond a reasonable doubt then the state court was not required to take any further action.[155] The federal district court relied on the holding in *Pennsylvania v. Ritchie*[156] to fashion its remedy for the due process violation. The State of Colorado appealed the federal district court's ruling to the Tenth Circuit.

2. The Tenth Circuit's Opinion

The Tenth Circuit's decision adhered closely to the U.S. Supreme Court's holding in *Pennsylvania v. Ritchie*.[157] The court upheld both the federal district court's ruling that Exline's due process rights had been violated and the federal district court's *Ritchie*-derived remedy. In arriving at its decision, the court made a variety of comparisons between *Ritchie* and *Exline*. First, the court explained that the facts of *Ritchie* were similar to the instant case because both defendants were charged with similar offenses. In both *Ritchie* and *Exline*, the defendants made offers of proof that the social service child abuse records were relevant and necessary to their defense.[158] In *Ritchie*, the defendant argued that he should have access to the records because they might contain the names of favorable witnesses or other exculpatory evidence.[159]

The court agreed with the federal district court's finding that Exline's offer of proof was equally as strong as the one in *Ritchie*, if not more specific.[160] Exline's offer of proof stated: "[A]nything in those . . . reports relating to credibility . . . would be crucial to the defense . . . they should be produced to the Court and then let the court decide . . . which ones we would be entitled to."[161]

The Tenth Circuit also reviewed the applicable Colorado law that allows access by a court to otherwise confidential child abuse records. After reviewing Colorado Revised Statutes § 19-10-115(1)(a), (2)(a), (2)(f),[162]

154. *Id.* at 488-89.
155. *Ritchie*, 480 U.S. at 58.
156. *Exline*, 985 F.2d at 488.
157. *Ritchie*, 480 U.S. at 39.
158. *Exline*, 985 F.2d at 489.
159. *Id.* (citing Pennsylvania v. Ritchie, 480 U.S. 39, 44 (1987)).
160. *Exline*, 985 F.2d at 490.
161. *Id.*
162. COLO. REV. STAT. § 19-10-115(1)(a)(1986) states that records of child abuse in Colorado, "[e]xcept as provided in this section . . . shall be confidential and shall not be public information."

COLO. REV. STAT. § 19-10-115(2)(1986) details the agencies which can gain access to confidential child abuse records. Subsection (a) provides that law enforcement agencies and prosecutors investigating abuse reports may have access. Most important to the Tenth Circuit were the provisions of subsection (2)(f) allowing access:

> A court, upon its finding that access to such records [referring to confidential child abuse records, as defined in section (1)(a)] may be necessary for determination of an issue before such court, but such access shall be limited to *in camera inspections* unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it. . . .

the court concluded that the statutes explicitly provided that the state district court could conduct in camera reviews of such records if necessary. In furtherance of the view that the *Ritchie* and *Exline* cases were not distinguishable on statutory grounds, the court commented that the Colorado statute which governed Exline's request was similar to the Pennsylvania statute involved in *Ritchie.*[163]

As additional support the court cited *Hopkinson v. Shillinger,*[164] in which the Tenth Circuit had previously held that "although a defendant could not point to specific exculpatory information in records he had never seen, he was entitled to an in camera inspection of those records under *Ritchie.*"[165]

In concluding its opinion, the Tenth Circuit used language that disparaged the state district court's recalcitrant behavior towards the federal district court's orders.[166] The court sternly stated that after the case was returned to the state court for the in camera review, "the state court was not asked to determine whether it should or should not review the social service record, and it was not asked to re-interpret what had occurred at the time of the original hearing .... [T]he state court has yet to make the findings required by *Pennsylvania v. Ritchie.*"[167]

3. Analysis

The court closely compared the facts of *Exline* to *Ritchie.* The court compared the offenses, the statutory schemes and the offers of proof made in both cases and concluded that the cases were not distinguishable on any of these substantive grounds.

The State of Colorado, however, argued that Exline's habeas corpus petition should have been dismissed because he failed to show particularized need for the social service records. The Tenth Circuit could have used this narrow interpretation of "need" to deny Exline's habeas relief. Instead, the court found that Exline's offer of proof was more particularized than that offered in *Ritchie.* The court took an expansive view of the rights propounded in *Ritchie* and granted Exline relief, refusing to reverse this case on irrelevant nuances and cosmetic differences.

The federal district court had held that Exline's due process rights under the Fourteenth Amendment were violated by the state trial court's refusal to conduct the in camera review required by *Ritchie.* Specifically, Exline was denied the right of access to documents under the control of the state's social service agency. Exline had a right to social service documents that could have had a material impact on his defense, even those protected by a confidentiality statute. Under the remedy created by *Ritchie,* it was the trial court's duty to conduct an in camera review and

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COLO. REV. STAT. § 19-10-115(2)(f) (1986).

163. *Exline,* 985 F.2d at 490.

164. 866 F.2d 1185 (10th Cir. 1989).

165. *Exline,* 985 F.2d at 490-91.

166. *Id.* at 491.

167. *Id.*

determine whether any of the documents in question were material. The state trial court's refusal to review the documents, and later its obstinate refusal to rule whether its nondisclosure was harmless beyond a reasonable doubt, initially denied Exline this crucial access and later denied him a new trial with access to the material documents.

The U.S. Supreme Court crafted the proper remedy in *Ritchie*. The Tenth Circuit correctly applied that remedy in *Exline*. The Tenth Circuit directed the state district court to determine whether the records contained information that likely would have changed the outcome of Exline's trial. If the state trial court had found that the outcome would have been the same, or that the nondisclosure was harmless beyond a reasonable doubt, then no further remedial action on Exline's behalf was necessary. If the state trial court held otherwise, Exline deserved a new trial. For the Tenth Circuit to have ordered the trial court to do otherwise, would have amounted to a subversion of *Ritchie*—a temptation which the court wisely resisted.

CONCLUSION

During 1993, the Tenth Circuit brought its law on blanket strip search policies into conformity with the majority of the other circuits. *Chapman* and *Cottrell* removed any ambiguity about the unconstitutionality of these blanket policies. *Trevino-Casares* was used by the Tenth Circuit as a vehicle for reforming the calculations made by the United States Parole Commission and the Bureau of Prisons in translating foreign sentences into domestic sentences. The Tenth Circuit construed ambiguous statutory and treaty provisions and created a feasible framework for sentencing translation. This framework, drawn from discordant statutory and treaty language, is cogent and seems to fit the discernible legislative goals. In *Exline*, the circuit closely followed the U.S. Supreme Court case of *Ritchie* and relied on a due process analysis as the basis for access to confidential social service child abuse records.

One commonality among these cases was the Tenth Circuit's guarded view of governmental power. First, the circuit curtailed the ability of police to conduct strip searches of misdemeanants. Second, the circuit interpreted the Prisoner Transfer Treaty and benefitted transferred prisoners who had previously been denied credit against their domestic sentences. Finally, the circuit limited the ability of state governments to maintain the absolute confidentiality of child abuse records.

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