Denver Law Review

Volume 59
Issue 2 *Tenth Circuit Surveys*

Article 9

February 2021

# Criminal Law and Procedure

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# CRIMINAL LAW AND PROCEDURE

## OVERVIEW

During the period covered by this survey, the Tenth Circuit Court of Appeals has again decided a large number of cases concerning criminal law and procedure. This survey will discuss only the more significant cases, and will briefly review the recent developments in criminal law and procedure in the Tenth Circuit.

## I. FOURTH AMENDMENT

### A. *Probable Cause*

In *United States v. Sporleder*,[1] probable cause for a warrant to search a building was established in the supporting affidavit largely through the hearsay statements of two informants. One informant tipped Drug Enforcement Agency (DEA) agents that he had delivered substantial quantities of phenyl-2-proponone, an ingredient commonly used in the manufacture of methamphetamine and amphetamine, to the subject location. The other informant claimed that the defendant said he was manufacturing methamphetamine in a fake radio shop at the location, and had previously used a similar lab at a location where officers had seized paraphernalia frequently used in methamphetamine labs.[2] On appeal, the defendant challenged the validity of the search warrants.

The Tenth Circuit recognized that under *Aguilar v. Texas*,[3] an affidavit supporting a search warrant must inform the magistrate "of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[4] In *Sporleder*, the affidavit clearly set out underlying circumstances which verified the informant's conclusions concerning the existence of narcotics on the premises.[5] The affidavit did not, however, reveal the identity of the informants or whether they had previously proven reliable.

The appellate court held that a previous track record of reliability is not necessary to satisfy *Aguilar*; an informant's trustworthiness may also be proven through independent police investigation which corroborates the

1. 635 F.2d 809 (10th Cir. 1980).
2. *Id.* at 811.
3. 378 U.S. 108 (1964).
4. 635 F.2d at 811-12. In two cases decided during this survey period, United States v. Pennington, 635 F.2d 1387 (10th Cir. 1980) and United States v. Gagnon, 635 F.2d 766 (1981), the Tenth Circuit implied that *Aguilar* is of limited applicability in challenges of affidavit statements supplied by nonprofessional informants who have little motivation for supplying false information to police officers.
5. 635 F.2d at 812. The statements were based on conversations with the defendant and personal observation of the premises.

tip.[6] In this case, the police placed a "beeper" in an order of methylamine, the immediate precursor chemical used in the manufacture of methamphetamine, and traced the delivery order to the subject location. The court found this to be sufficient independent corroboration to satisfy the second prong of the *Aguilar* test.[7]

In *United States v. Johnson*,[8] the defendant challenged the sufficiency of an affidavit in support of an application for electronic surveillance on the ground that the affidavit did not meet the necessary requirement of 18 U.S.C. § 2518(1)(c). This section of the statute provides that an application for an order authorizing the interception of a wire communication shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[9] In this instance, the affidavit outlined the investigative procedures that had been used, and stated that the wiretap on the phone of the principal actor of a drug conspiracy was necessary to identify the other conspirators.

The Tenth Circuit, in noting that wiretap affidavits are to be read in a practical rather than a hypertechnical manner, refused to interpret the section to mean that the government must exhaust all other conceivable investigative procedures before resorting to wiretapping. Rather, the affidavit need only show that traditional procedures would be inadequate. Since apprehension of the "satellites" of an extensive drug conspiracy is a proper purpose of electronic surveillance, the court held the affidavit to be sufficient in this instance.[10]

In *United States v. Schauble*,[11] the Tenth Circuit considered the necessity of a *Franks* hearing[12] in light of a challenge to the veracity of the factual statements made in an affidavit in support of a search warrant. The affidavit stated that the informant, while at the subject residence, had seen a quantity of green leafy vegetation believed to be marijuana. The defendant requested a *Franks* hearing on the basis of his own affidavit stating that only one person had visited the house during the stated time period. According to the affidavit, this person had come no further than the front porch, from where it is physically impossible to see inside the front door. The defendant also offered in evidence another affidavit filled out by the same affiant, identical to the one in issue except for the language that the informant was "inside" the residence instead of "at" the residence.[13]

The court of appeals noted that *Franks v. Delaware*[14] provides a challenge to a warrant's veracity only when the defendant makes a preliminary

6. 635 F.2d at 811-12. *See* Mapp v. Warden, N.Y. State Corr. Inst., 531 F.2d 1167 (2d Cir.), *cert. denied*, 429 U.S. 982 (1976).

7. 635 F.2d at 812.

8. 645 F.2d 865 (10th Cir. 1981).

9. 18 U.S.C. § 2518(1)(c) (1976 & Supp. III 1979).

10. 645 F.2d at 867.

11. 647 F.2d 113 (10th Cir. 1981).

12. Franks v. Delaware, 438 U.S. 154 (1978), allows the defendant an evidentiary hearing to challenge the factual allegations in a warrant affidavit in certain instances.

13. 647 F.2d at 117.

14. 438 U.S. 154 (1978).

showing that the affiant knowingly or recklessly disregarded the truth in including a false statement in the warrant affidavit.[15] In *Schauble*, the court held that the defendant failed to make this preliminary showing, since the defendant only produced facts showing that the informer's statement may have been false, and not that the affiant knew or should have known it to be false. That the affidavit stated that the informant was "at" the residence was held not to sustain an inference that the affiant knew of the informant's inability to see what the informant claimed to see.[16] The court concluded that the *Franks* hearing was properly denied.

B. *Investigatory Stop*

In *United States v. Merryman*,[17] the Tenth Circuit considered when an officer on roving patrol may stop a car suspected of carrying illegal aliens and what minimal intrusion upon the car's occupants may be justified by this suspicion. In *Merryman*, the officer watched a truck pull over to the side of the road just before it reached a United States border patrol checkpoint, wait until a string of cars passed, and then make a U-turn across the median and go back in the opposite direction. The officer followed the truck and observed that it was a type frequently used to transport illegal aliens, and that beneath the tarp covering the bed of the truck were lumpy objects.[18] The officer approached the truck when it stopped at a gas station and questioned the driver about his citizenship and the contents in the bed of the truck. The officer then stuck his head in the back of the truck "in preparation for reaching down and telling them to come out from under there."[19] The officer smelled what he believed to be marijuana, and saw something similar to hay sticking from under the tarp; the truck contained 242 pounds of marijuana.

The Tenth Circuit relied upon *United States v. Brignoni-Ponce*[20] in refusing to suppress the marijuana as evidence discovered through an illegal search. *Brignoni-Ponce* held that probable cause is not needed for an investigatory stop of a car suspected of carrying illegal aliens; such a stop may be justified by specific articulable facts together with rational inferences from the facts which warrant suspicion that the car contained illegal aliens.[21] By looking at the total circumstances, the appellate court was satisfied that the stop in *Merryman* met the *Brignoni-Ponce* test. The court distinguished *United States v. Ogilvie*,[22] which held that avoiding a checkpoint by exiting the high-

15. *Id.*
16. *Id.*
17. 630 F.2d 780 (10th Cir. 1980).
18. *Id.* at 781.
19. *Id.*
20. 422 U.S. 873 (1975).
21. *Id.*
22. 527 F.2d 330 (9th Cir. 1975). In United States v. Lebya, 627 F.2d 1059 (10th Cir.), *cert. denied*, 449 U.S. 987 (1980), also decided during this survey period, the Tenth Circuit found that sufficient "articulable facts" were present to justify a *Brignoni-Ponce* stop since the car in that case was travelling at night on a road near a border often used to transport illegal aliens, was heavily loaded, and contained back seat passengers who appeared to be "slouching down" to avoid detection when the car was illuminated. *Id.* at 1063.

way just prior to reaching it does not supply the requisite suspicion for a stop.

The appellate court in *Merryman* also relied upon *Brignoni-Ponce* in holding that bending over the bed of the truck to pat the "lumpy objects" was within the constitutional parameters of the investigatory stop.[23] Under *Brignoni-Ponce*, an officer may stop a car and investigate the circumstances that provoked suspicion.[24] According to the Tenth Circuit, the lumpy objects under the tarp constituted a suspicious circumstance, the investigation of which was a constitutional minimal intrusion upon the truck's occupants.[25]

The court's opinion represents a significant extension of *Brignoni-Ponce* principles. *Brignoni-Ponce* does not expressly authorize, in the absence of probable cause, the investigation challenged here; it only permits an officer to question the driver and passengers about their citizenship and immigration status, and ask them to explain any suspicious circumstances. Any further detention or search should be based on consent or probable cause.[26] By condoning investigatory conduct beyond mere questioning as permissible "minimum intrusion," the Tenth Circuit obscures the distinction between a "search" requiring probable cause and an "investigatory stop" which does not.[27]

### C. *Warrantless Searches*

#### 1. Searches Incident to an Arrest

In *United States v. Gay*,[28] the right to search incident to arrest was at issue before the Tenth Circuit. In this case, FBI agents had a warrant for appellant Gay's arrest as a federal escapee. En route to the intended arrest of Gay at a Denver garage, the agents heard on their car radio of a bank robbery by someone matching Gay's description. When the FBI agents arrested Gay at the garage, they searched him and seized considerable currency which they discovered in Gay's possession. This currency was used to convict Gay of the bank robbery.[29]

The Tenth Circuit relied on two cases to uphold the constitutionality of both the full search of Gay and the seizure of the currency. The court cited *Chimel v. California*[30] for the proposition that the arresting officer may seize any evidence found on the defendant at the time of the arrest. The court also relied on *United States v. Simpson*,[31] an earlier Tenth Circuit case, to the

23. 630 F.2d at 784.
24. 422 U.S. at 881.
25. 630 F.2d at 784.
26. *Id.* at 881-82.
27. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Supreme Court held that a border patrol officer may not search the car of a suspected illegal alien without probable cause to believe that a crime has been committed. *See* W. LAFAVE, SEARCH AND SEIZURE § 10.5(f) (1978 & Supp. 1981).
28. 623 F.2d 673 (10th Cir.), *cert. denied*, 101 S. Ct. 366 (1980).
29. *Id.* at 675.
30. 395 U.S. 752 (1969).
31. 453 F.2d 1028 (10th Cir.), *cert. denied*, 408 U.S. 925 (1972).

effect that the arresting officer may, pursuant to a search incident to an arrest, seize a totally unrelated object which provides grounds for prosecution of a crime different than that for which the accused was arrested. The court concluded that anything found on a defendant's person during a search incident to an arrest may be used as evidence in the prosecution of an offense unrelated to the one leading to the arrest.[32]

The Tenth Circuit apparently did not consider it significant that the FBI agents had reason to suspect Gay of robbing the bank at the time they arrested him as a federal escapee. Thus, the court did not address the question of whether an arrest warrant for one crime may justify an intentional search for evidence of another.[33] By seizing the currency pursuant to a search following Gay's arrest as a detainee, the FBI agents avoided judicial process for establishing probable cause to arrest Gay on suspicion of bank robbery. The court's opinion also ignores the issue of whether the agents had probable cause to seize the currency at the time of Gay's arrest.[34]

2. Searches of Persons Pursuant to a Premises Search Warrant

In *United States v. Sporleder*,[35] police officers, in executing a premises search warrant, also searched the defendant, thereby discovering and seizing some methamphetamine in the defendant's possession. Upon challenge, the Government attempted to justify the search as a constitutionally permissible patdown for weapons. In ruling that the methamphetamine should have been suppressed, the appellate court noted that the facts in *Sporleder* were similar to those presented in *Ybarra v. Illinois*.[36]

Under *Ybarra*, probable cause to search a location does not support a search of a person who happens to be there during execution of the warrant. That the person searched in *Sporleder* was an object of the Government's suspicion that led to the search of the premises was of no consequence.[37] The *Sporleder* court concluded that the search, unconstitutional under *Ybarra*, also could not be justified under *Terry v. Ohio*[38] as a patdown for weapons. According to *Terry*, the officers must have a reasonable belief the suspect is armed and presently dangerous in order to conduct a limited search for

32. 623 F.2d at 675.

33. In Abel v. United States, 362 U.S. 217 (1960), the Supreme Court upheld the seizure of evidence concerning a defendant's suspected espionage activities pursuant to a search incident to arrest for immigration violations. An argument can be made, however, that an intended search based upon probable cause of a separate crime should be supported by a separate warrant because warrantless searches are per se unreasonable under the fourth amendment. *See* Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971), where such an argument is implied. The weakness of this argument lies in its emphasis of technical over practical considerations.

34. Seizure of items pursuant to a lawful search must be based upon probable cause that the items seized are evidence of some crime. State v. Elkins, 245 Or. 279, 422 P.2d 250 (1966). *See also* Warden v. Hayden, 387 U.S. 294 (1967), W. LAFAVE, *supra* note 23, at § 5.2(j).

35. 635 F.2d 809 (10th Cir. 1980).

36. 444 U.S. 85 (1979). In *Ybarra*, police officers in execution of a search warrant for a tavern also searched a patron of the tavern, thereby violating his fourth amendment rights. The Supreme Court in *Ybarra* recognized that the right to privacy under the fourth amendment protects persons, not places, so that each patron's rights are distinct from those of the tavern's proprietor. *Id.* at 91-92.

37. 635 F.2d at 814.

38. 392 U.S. 1 (1967).

weapons. Since the Government presented no evidence in *Sporleder* leading to such a belief, the search was unconstitutional under *Terry*. The Government's final point in *Sporleder*, that the searching officer felt a metal object in the defendant's pocket, did not support a reasonable belief *before* the search that the defendant was armed.[39]

3. Searches of a Dwelling

In two cases decided during this survey period, the Tenth Circuit held that the Government had failed to meet its heavy burden of justifying a warrantless search of a dwelling. In *United States v. Ochoa-Almanza*,[40] an officer conducting an investigation of illegal aliens had reason to believe the aliens had entered a particular house. Pursuant to his investigation, the officer requested permission to enter the house from a six-year old child. Upon entering the house, the officer saw the suspected aliens.[41]

The Tenth Circuit affirmed the trial court decision that the Government had failed to meet its burden of proving that the six-year old freely, intelligently and knowingly gave consent to a search of the house.[42] The appellate court thus did not directly address the issue of whether a six-year old child has the capacity to waive another's fourth amendment rights.

Judge Barrett, in dissent, distinguished consent to enter a house from consent to search the house. Judge Barrett reasoned that assuming consent to *enter* the house was valid, the suspected aliens were discovered by the investigating officer in plain view without the officer searching the house.[43] Whether the officer intended to search upon entering was according to Judge Barrett, speculation irrelevant to proper fourth amendment analysis. He concluded that confusion between lawful entry and lawful search will result in discouragement of customary and proper police investigatory procedures.[44]

Despite Judge Barrett's admonition in *Ochoa-Almanza*, the Tenth Circuit in another case decided during this survey period presumed that police officers who entered a dwelling did so with intent to search. In *United States v. Anthon*,[45] the defendant, Anthon, was arrested outside his motel room. The arresting officers took Anthon back into his room to collect his personal belongings, where they discovered and seized various items used against Anthon at trial.[46]

The appellate court first noted that no exigent circumstances justified a warrantless search of the motel room incident to an arrest in the lobby.[47] In

39. 635 F.2d at 814.
40. 623 F.2d 676 (10th Cir. 1980).
41. *Id.* at 677.
42. *Id.* The court applied the three-part test set out in United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977), in determining whether consent to search the house was given knowingly.
43. 623 F.2d at 678 (Barrett, J., dissenting).
44. *Id.* at 680.
45. 648 F.2d 669 (10th Cir. 1981).
46. *Id.* at 672.
47. *Id.* at 675. This point of law was decided upon similar facts in Vale v. Louisiana, 399

holding that the evidence should have been suppressed, the court ruled that the officers' entry into and presence in the hotel room, absent Anthon's request or consent, violated Anthon's fourth amendment rights, even though the agents found the seized items once they were inside the motel room in a manner inoffensive to the Constitution.[48] Evidently, where the intent to search a dwelling is shown by the police officers' conduct, the officers' uninvited entry into a dwelling violates the occupant's rights regardless of whether the officers subsequently search the dwelling or find evidence in plain view.

### D. *Fruit of the Poisonous Tree*

In *United States v. Weller*,[49] the defendant, Weller, was arrested for suspected participation in a bank robbery. Weller made statements, later suppressed, to the police that he and the known principal to the robbery travelled from Oregon to Pueblo, Colorado, in a particular Monte Carlo automobile. A Monte Carlo with Oregon license plates was found later parked near the bank by a Colorado Bureau of Investigation agent. The car was towed into the basement of the police building. When the police asked Weller if he wanted to retrieve his personal effects from the car, Weller said he did and proceeded to take a small box out of the trunk. The box contained $1390 in cash; the money was inventoried and later used as evidence against Weller.[50]

The Tenth Circuit refused to suppress this evidence as resulting from an illegal search of the Monte Carlo. Rather, the court concluded that no search occurred in that the money was discovered pursuant to Weller's own request to retrieve certain belongings from the trunk.[51]

The appellate court did not consider the fruit of the poisonous tree doctrine applicable, despite Weller's claim that the Monte Carlo incident was "fruit" stemming from Weller's statements to the Pueblo police. Again, the court focused on the voluntary nature of Weller's retrieval of the money as dispositive of the issue.[52] Such analysis avoided the question of whether the Monte Carlo itself would have been discovered but for the police's illegal questioning of Weller. If the car would not have been impounded but for Weller's suppressed statements, the fruit of the poisonous tree doctrine is at least relevant to Weller's constitutional challenge.[53] If the appellate court

U.S. 30 (1970), in which a search of a house incident to an arrest on the house's front steps was found to be unconstitutional.

48. 648 F.2d at 675-76.

49. 652 F.2d 964 (10th Cir. 1981).

50. *Id.* at 968.

51. *Id.* at 969.

52. The court during this survey period also dismissed a "fruit of the poisonous tree" claim in United States v. Leonard, 630 F.2d 789 (10th Cir. 1980). In *Leonard*, the court held that a gun discovered in a glove compartment through illegal questioning need not be suppressed, since the gun would have been found anyway through the customary inventory of the impounded van. *Id.* at 791.

53. Under Wong Sun v. United States, 371 U.S. 471 (1963), evidence which is an indirect product of illegal police conduct must be suppressed, unless the evidence largely resulted from an independent and legal source, such as the defendant's voluntary confession.

considered Weller's voluntary request to retrieve his personal belongings as sufficient attenuation to "dissipate the taint" of the illegality, such reasoning was not expressed in the opinion.

## II. FIFTH AMENDMENT

### A. *Double Jeopardy*

In *United States v. Central Liquor Co.*,[54] the Government indicted two small partnerships and the most active partner of each for Sherman Act[55] violations. The defendants appealed prior to trial, the trial court's denial of their motion to dismiss the indictment. As grounds for the appeal, appellants urged that indictment of both the small partnerships and the individual partner of each for the same activity is precluded by the double jeopardy clause. As support for their interlocutory appeal, the appellants principally relied on *Abney v. United States*[56] in which the Supreme Court decided that a denial of a double jeopardy claim may be appealed when denial of the claim would place the defendants in the position of undergoing a second trial for the same offense.[57]

In a well-reasoned opinion, the Tenth Circuit recognized that the double jeopardy clause protects both the right not to be tried more than once for the same offense and the right not to receive multiple convictions for the same offense.[58] In denying the defendant's interlocutory appeal, the appellate court noted that immediate review of the trial court's rejection of a double jeopardy claim protects only the right against multiple prosecutions; the defendant may appeal prior to trial only when he has already undergone one trial for the offense. That the multiple counts in this case led to increased attorney expenses and complexity of the issues does not constitute multiple prosecution according to the court. The court therefore held that the *Abney* doctrine did not apply to these defendants.[59]

The appellate court concluded that protection against multiple convictions could best be reviewed upon final order by the trial court. If the trial results in conviction of only the partners or the partnerships, then no double jeopardy claim would be presented; the clause does not protect against the increased probability of a single conviction arising out of multiple charges. If both partners and partnerships are convicted, post-conviction appeal supported by a trial record would provide an appropriate remedy.[60]

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54. 628 F.2d 1264 (10th Cir. 1980).
55. 15 U.S.C. § 1 (1976).
56. 431 U.S. 651 (1977).
57. Under 28 U.S.C. § 1291 (1976), only "final decisions" are appealable; *Abney* held that at least some dismissals of double jeopardy claims may be considered as final decisions under the statute. In United States v. Eggert, 624 F.2d 973 (10th Cir. 1980), decided in this survey period, the Tenth Circuit held that an interlocutory appeal of a motion to dismiss an indictment on the grounds that the indictment violated terms of a plea agreement does not involve double jeopardy, and falls outside the *Abney* exception.
58. 628 F.2d at 1266. *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339 (1956).
59. 628 F.2d at 1266-67.
60. *Id.*

The Supreme Court decided in *United States v. Dinitz*[61] that retrial is not available to the prosecution when, through its own misconduct, the prosecution provokes the defense to request a mistrial in order to further the prosecution's chances of conviction upon retrial. In *United States v. Rios*,[62] the Tenth Circuit held that double jeopardy considerations are equally applicable when prosecutorial misconduct requires reversal of conviction on appeal, as when the misconduct leads to granting of the mistrial motion in the first instance. That the mistrial grounds are accepted as valid only on appeal is irrelevant to double jeopardy concerns.[63]

The appellate court further decided in *Rios* that while prosecutorial misconduct denied the defendants a fair trial, retrial was still available because the prosecutor did not intend, as in *Dinitz*, to cause a mistrial request in order to further the chances of conviction upon retrial.[64] The court relied on its earlier *United States v. Leonard*[65] decision for the proposition that the prosecutor's bad faith in the abstract, absent intent to provoke a mistrial request, will not bar retrial of the case. The court held that the record did not indicate such intent on the part of the prosecution, because a strong case had been made against the defendant, Government witnesses might not have been available again, and the prosecutor had stated that he did not want to retry the case.[66]

Judge McKay, dissenting, disagreed with the reasoning of the majority that the double jeopardy clause is not violated unless the prosecutor's purpose is to obtain a mistrial. Judge McKay indicated that prosecutorial bad faith, present in this case, is sufficient to bar retrial under *Dinitz*. He quoted language from *Lee v. United States*,[67] characterizing the *Dinitz* rule, that retrial is barred when the prosecutorial error was intended to provoke the mistrial motion *or* "was otherwise 'motivated by bad faith or undertaken to harrass or prejudice' the petitioner."[68]

In *United States v. Combs*,[69] the court was faced with the issue of whether acceptance of a guilty plea on one count of an indictment precludes prosecution of a second count which charges the same offense. The defendant, Combs, pled guilty to count I of bank larceny, and was later convicted of bank robbery under count II. The trial judge merged the verdicts based on the plea and the jury conviction, and handed down one sentence of twenty years.[70] Combs appealed on double jeopardy grounds.

The Tenth Circuit concluded that bank larceny and bank robbery are indeed lesser and greater forms of the same offense, and may not be the basis

61. 424 U.S. 600 (1976).
62. 637 F.2d 728 (10th Cir. 1980).
63. *Id.* at 729; *See* Comment, *The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?* 18 DUQUESNE L. REV. 103 (1979).
64. 637 F.2d at 729-30.
65. 593 F.2d 951 (10th Cir. 1979).
66. 637 F.2d at 730.
67. 432 U.S. 23 (1977).
68. *Id.* (McKay, J., dissenting) (quoting Lee v. United States, 432 U.S. 23, 33-34 (1977)).
69. 634 F.2d 1295 (10th Cir. 1980), *cert. denied*, No. 80-1071 (Feb. 23, 1981).
70. *Id.* at 1296.

of multiple punishment or prosecution. The court held, however, that Combs was prosecuted and sentenced only once, reasoning that jeopardy did not attach until Combs was sentenced on the guilty plea.[71] Since Combs was not sentenced on his plea until conclusion of the trial on the count of bank robbery, he was faced with only one prosecution for the offense. In support of this conclusion the court noted that had the offenses been merged in a single count, no double jeopardy claims could have been presented. The court then suggested that double jeopardy considerations should not depend upon how offenses are pled in a single indictment.[72]

Again in dissent, Judge McKay criticized the majority decision for exalting form over substance in focusing on imposition of the sentence as the point when jeopardy attaches. To Judge McKay, this reasoning worked "serious damage to the fabric of double jeopardy protection."[73] He noted that "[j]eopardy means exposure to the risk of a determination of guilt or innocence," and suggested that jeopardy attaches not when sentence is imposed, but when the guilty plea is accepted.[74] Judge McKay cited several cases to the effect that a judge's acceptance of the plea is analogous to a jury verdict, and concluded that jeopardy attaches when guilt or innocence is decided, whether by plea or trial verdict.

Judge McKay's partial dissent would seem the better supported and better reasoned opinion. The majority relied upon two Third Circuit decisions for the proposition that jeopardy does not attach until sentencing on the plea, yet Judge McKay correctly pointed out that the issue in the Third Circuit is unclear; another case held that jeopardy attached upon acceptance of the plea.[75] In the absence of clear case law to the contrary, the practical effect of acceptance of the plea in terminating the issue of guilt would seem to warrant attachment of jeopardy. The majority decision is, however, supported by the recognition in other circumstances that "the double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical."[76]

### B. *Self-Incrimination*

In *United States v. Jones*,[77] the Tenth Circuit considered the issue of whether a defendant's right against self-incrimination is violated by use of a psychiatric report at a sentencing hearing. In *Jones*, the trial court ordered the defendant to undergo psychiatric evaluation prior to sentencing on a guilty plea to possession of counterfeit obligations. During this evaluation, Jones told the psychiatrist that he had committed several other crimes, in-

71. *Id.* at 1298.

72. *Id.*

73. *Id.* at 1300 (McKay, J., dissenting in part).

74. *Id.*

75. The majority relied upon United States v. Goldman, 352 F.2d 263 (3d Cir. 1965) and United States v. Scarlata, 214 F.2d 807 (3d Cir. 1954). Judge McKay cited United States v. Jerry, 487 F.2d 600 (3d Cir. 1973), to support his contrary view.

76. Ward v. Page, 424 F.2d 491, 493 (10th Cir. 1970) (holding that a guilty plea to a lesser offense does not operate as an acquittal on all greater offenses, even though a jury conviction on a lesser offense does have that effect).

77. 640 F.2d 284 (10th Cir. 1981).

cluding the murder of a friend. The trial court considered these admissions only insofar as they showed that Jones believed he had committed the alleged crimes.[78]

The Tenth Circuit began its analysis with the observation that regardless of fifth amendment concerns, the trial court must base its sentencing on true and accurate information.[79] Since it was not verified that Jones actually committed the crimes mentioned in the psychiatric report, the trial court could not have used the statements in the report as substantive evidence that Jones committed them.[80] Furthermore, the sentencing process is within the scope of fifth amendment protection. Any involuntary statements by Jones included in the psychiatric report could not be used against him on the issue of guilt.[81]

Under the facts of this case, however, the Tenth Circuit held that no error was committed by the trial court. Neither the mandate that sentencing be based on accurate information nor the privilege against self-incrimination prohibits the court from considering the statements as pertinent to Jones' mental status at the time of sentencing.[82] The appellate court concluded that the record reflected that the trial court considered the statements only for that purpose. The court of appeals did recognize that in *Smith v. Estelle*[83] the Fifth Circuit had held that a defendant could not be forced to undergo psychiatric observations to determine the defendant's dangerousness at time of trial. The Tenth Circuit distinguished *Estelle* on the facts, including the fact that the defendant in *Estelle* had been charged with a capital offense.[84]

C. *Due Process*

1. Right to Know Identity and Existence of Informer

In *United States v. Perez-Gomez*,[85] the defendant challenged the Government's refusals to advise the defendant of whether an informer was involved in the case, and to disclose the informer's identity. The Government, in responding to a question on the omnibus hearing report, indicated that there was no informer. Upon the defendant's motion to compel existence of the suspected informer, the trial court ordered that the existence be disclosed. The informer's existence was then revealed, and the trial court determined after an *in camera* proceeding that the informer's identity need not be disclosed to defense counsel.[86]

The Tenth Circuit recognized that the Government's failure to answer the question on the omnibus report did not constitute reversible error absent

78. *Id.* at 287.

79. *Id.* The Tenth Circuit cited United States v. Lee, 540 F.2d 1205, 1211 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976), in support of this proposition.

80. 640 F.2d at 286.

81. The Supreme Court has recognized that the privilege against self-incrimination can be claimed in any judicial proceeding. *In re* Gault, 387 U.S. 1, 47-48 (1967).

82. 640 F.2d at 288.

83. 602 F.2d 694 (5th Cir. 1979), *aff'd*, 101 S. Ct. 1866 (1981).

84. 640 F.2d at 288.

85. 638 F.2d 215 (10th Cir. 1981).

86. *Id.* at 217.

a showing of prejudice.[87] Since the defendant learned of the informer's existence prior to trial, the appellate court held that the defendant was not prejudiced by the Government's admittedly improper actions.

The court then noted that in determining whether the informer's identity must be disclosed to the defense "a balance must be struck between the public interest in protecting the flow of information and the individual's right to prepare his defense."[88] In *Perez-Gomez*, there was a strong public interest in protecting the identity of an informer who was currently involved in ongoing investigations. The court held that the defendant's interest was less strong, in that the informer could not have supplied information useful in defense of the charges. The defendant was arrested for driving a car full of illegal aliens. The defendant did not raise the issue of probable cause at trial, so any information the informer may have had in this regard was irrelevant. The informer did not participate in transportation of the aliens, so disclosure was not necessary to prepare an entrapment defense. The court concluded that disclosure of the informer's identity was properly denied.[89] Finally, the appellate court held that conducting the *in camera* proceeding without the presence of defense counsel was not an abuse of the trial court's discretion.[90]

2. Right to Fair Trial

In *Soap v. Carter*,[91] a habeas corpus petition charged, in part, that the prosecutor's racial remarks during his closing argument were so unfair as to deprive the defendant of due process of law. The defendant, a Cherokee Indian, stood trial for the murder of another Indian. Those present in the home where the murder occurred were also Cherokees and had been drinking. In his closing argument, the prosecutor suggested that "it is sad to see, but when you see an Indian that drinks liquor, you see a man that can't handle it."[92] Later, the prosecutor said: "[y]ou try to impress upon people that they can change . . . but some people just don't live that way. . . . You have a class of people and a situation that exists that you and I can't change irrespective of what we do . . . ."[93] The prosecution then suggested that the alleged murder was "typical of the community in which this accident occurred."[94] No objection was made to these statements at trial.

The Tenth Circuit dismissed this due process claim as based on "a minor incident at trial to which no objection was made."[95] Judge Seymour, dissenting, opined that such an appeal to personal bias, in which the prosecutor attempted to place himself and the jury in a class apart from the Indians and the defendant, impermissibly threatened the defendant's right to a

87. *Id.* The Tenth Circuit relied on United States v. Phillips, 585 F.2d 745, 747 (5th Cir. 1978), for this proposition.
88. 638 F.2d at 218.
89. *Id.*
90. *Id.*
91. 632 F.2d 872 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 2021 (1981).
92. *Id.* at 878.
93. *Id.*
94. *Id.*
95. *Id.* at 876.

fair trial.[96] Judge Seymour cited *Haynes v. McKendrick*[97] for the applicable standard that in absence of overwhelming evidence of guilt, the probability of prejudice is sufficient to overturn a conviction. Since the defendant was convicted by circumstantial evidence and the statements made were not insignificant, Judge Seymour concluded that there was sufficient probability of prejudice, in the absence of mitigating circumstances, to deprive the defendant of his constitutional rights.[98]

## III. SIXTH AMENDMENT

### A. *Effective Assistance of Counsel*

In *Dyer v. Crisp*,[99] a case decided during the last survey period, the Tenth Circuit adopted the stricter "reasonably competent" test over the previous "sham, farce and mockery" test as the standard for determining whether a defendant has received effective assistance of counsel as guaranteed by the sixth amendment.[100] Several cases decided by the Tenth Circuit during this survey period have established some guidelines for what the court will consider as "reasonably competent" counsel.

The cases decided subsequent to *Dyer* have emphasized that defense counsel's reasonable but possibly unfortunate choice of strategy, which in hindsight may have been handled differently, is not a valid basis for a claim of ineffective assistance of counsel. In *United States v. Payne*,[101] the Tenth Circuit held that defense counsel's decision not to call any defense witnesses, because he believed the Government failed to meet its burden of proving the defendant's guilt, was a reasonable strategy choice. In *United States v. Miller*,[102] the appellate court decided that failure to call a specific witness whose testimony is only cumulative in nature is also a reasonably competent decision.

The court of appeals also rejected a sixth amendment claim in *United States v. Johns*.[103] In this case, defense counsel did not contest a charge of parole violation in a probation revocation hearing. The appellate court held that defense counsel's failure to contest the charge was not per se incompetent, in that counsel may have desired to avoid having the matter more fully explored by a judge who would eventually impose sentence.[104] Thus, in appeals on grounds of ineffective assistance of counsel, the Tenth Circuit apparently will infer a reasonable strategy choice by defense counsel where one is available. In such circumstances, the appellant may need to reach beyond

96. *Id.* at 879 (Seymour, J., dissenting).
97. 481 F.2d 152, 159 (2d Cir. 1973).
98. 632 F.2d at 879-80 (Seymour, J., dissenting). There were no eyewitnesses to the murder. *Id.* at 880.
99. 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980).
100. The Tenth Circuit followed the precedent of all the other circuits except the Second Circuit in adopting the stricter test. *See Criminal Law and Procedure, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 319, 335 (1980).
101. 641 F.2d 866 (10th Cir. 1981).
102. 643 F.2d 713 (10th Cir. 1981).
103. 638 F.2d 222 (10th Cir. 1981).
104. *Id.* at 224.

what was done and reveal an improper purpose behind the challenged act in order to present a successful claim of ineffective counsel.

In *Martinez v. Romero*,[105] the Tenth Circuit rejected a claim of ineffective counsel in a habeas corpus action. This claim was based on defense counsel's advice to the defendant to accept a plea bargain condition that the defendant not contest identity at the subsequent habitual offender proceeding. Through application of New Mexico's habitual offender statute, the defendant was sentenced to a ten- to thirty-year prison term. In compliance with the plea agreement, defense counsel did not bring to the sentencing court's attention that a previous conviction was secured after the defendant signed a form, possibly involuntarily, waiving his right to counsel.[106] In holding that the defense counsel's advice to the plea bargain was reasonable, the Tenth Circuit focused on both the likelihood of conviction on the merits and a much harsher sentence in a trial on the original charge.[107]

In *United States v. Golub*,[108] the Tenth Circuit did find a defendant's claim of ineffective counsel valid. In *Golub*, when the defendant's original counsel withdrew from the case, the trial court refused to grant a continuance of the trial scheduled to begin in two weeks. A relative of the defendant agreed to represent him, and received the case file six days before trial. The relative lacked recent experience in criminal law, and due to time and logistical constraints was unable to interview witnesses.[109]

The appellate court relied on *Wolfs v. Britton*,[110] an Eighth Circuit decision, for the applicable standards in determining whether a defendant has received effective assistance of counsel under such circumstances. These standards include "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel."[111] The appellate court concluded that the defendant's representation by his relative failed to conform to any of these accepted standards. Defense counsel's representation under the circumstances, including the seriousness of the charge and complexity of the legal issues and defenses, was per se ineffective.[112]

In reaching its conclusion that the defendant's sixth amendment rights were violated in *Golub*, the Tenth Circuit refused to consider whether defense counsel's conduct *in trial* prejudiced the defendant. Rather, the court held that regardless of counsel's conduct in trial the surrounding circumstances

105. 626 F.2d 807 (10th Cir.), *cert. denied*, 101 S. Ct. 585 (1980).

106. *Id.* at 809.

107. *Id.* If the defendant had been convicted of the original charge, he would have faced, depending on the outcome of challenges to prior convictions, a possible sentence of 50 to 150 years. *Id.*

108. 638 F.2d 185 (10th Cir. 1980).

109. *Id.* at 187.

110. 509 F.2d 304 (8th Cir. 1975).

111. *Id.* at 309; 638 F.2d at 189. For discussion of what investigation of a case is considered necessary to criminal defense, *see* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, § 4-4.1 (2d ed. 1980) (tentative draft).

112. 638 F.2d at 189. The defendant was charged with mail fraud, and upon conviction received a five-year sentence.

evidenced prejudice.[113] This same reasoning was used in *United States v. Payne*,[114] where the court of appeals noted that the Government has the burden of establishing lack of prejudice when "incompetence of counsel is pervasive . . . or other unusual circumstances exist."[115] The court recognized in *Payne* that this shift of the burden of proof in certain instances may be questionable in light of *United States v. Morrison*,[116] in which the Supreme Court held that a violation of sixth amendment rights does not merit reversal of a conviction absent a showing of prejudice to the defendant.[117]

In *United States v. Weninger*,[118] the Tenth Circuit considered whether appellant Weninger's refusal to hire an attorney within a reasonable time constituted a waiver of his right to effective assistance of counsel. Weninger appeared pro se to defend a charge of failure to file federal tax returns. He contended at trial that he deliberately did not file the returns as a protest against the conditions in our country and that he considered the income tax laws to be invalid. The trial court recognized that Weninger's protest defense was without legal merit and strongly urged him to retain counsel. The trial court provided a recess to allow Weninger an opportunity to retain counsel, but Weninger requested additional time to find a lawyer with Weninger's unique political and legal views. The trial court refused to grant such a continuance, and the trial proceeded.[119]

The Tenth Circuit affirmed the trial court's decision that Weninger's failure to hire an attorney, when given the opportunity, constituted a knowing and intelligent waiver of the right to assistance of counsel.[120] In so doing the appellate court recognized that "the right to assistance of counsel does not imply the absolute right to counsel of one's choice."[121] The court concluded that Weninger was given as much opportunity to retain counsel as the effective administration of criminal justice allowed. In light of this waiver of the right to counsel, the court noted that Weninger could not complain that his own representation was ineffective.[122]

B. *Right to Trial by Jury*

In *United States v. McAlister*,[123] the Tenth Circuit addressed the issue of

113. *Id.* at 190.
114. 641 F.2d 866 (10th Cir. 1981).
115. *Id.* at 867-68.
116. 449 U.S. 361 (1981).
117. *Id.* at 668-69.
118. 624 F.2d 163 (10th Cir. 1980).
119. *Id.* at 164-66.
120. *Id.* at 167; *see* Faretta v. California, 422 U.S. 806 (1975) (defendant has the right to appear in his own defense); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to assistance of counsel must be knowing and intelligent).
121. 624 F.2d at 166; *see* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) (defendant is not entitled to the services of a particular lawyer, when such services would lead to a conflict of interest on the part of counsel); Kates v. Nelson, 435 F.2d 1085 (9th Cir. 1970) (defendant is not entitled to appointment of different counsel upon expressed dissatisfaction with original appointed counsel); United States v. Rundle, 409 F.2d 1210 (3d Cir. 1969) (defendant is not entitled to a continuance of longer than one weekend in order to retain counsel upon assertion of dissatisfaction with appointed counsel).
122. 624 F.2d at 167.
123. 630 F.2d 772 (10th Cir. 1980).

whether a defendant charged with trespass on a nuclear plant site, a crime with a maximum penalty of $1000, had a constitutional right to trial by jury. The trial court had refused the defendant's jury request on the grounds that the charged offense was petty and therefore outside the scope of the sixth amendment's jury trial guarantee.[124]

The appellate court recognized that several circuits, including the Tenth Circuit, had traditionallly used 18 U.S.C. § 1(3) as a guideline for what constitutes petty offenses.[125] Under this statute, any crime, the penalty for which does not exceed either six months imprisonment or a fine of $500, is a petty offense.[126] The court admitted that in *Muniz v. Hoffman*,[127] the Supreme Court had held that sixth amendment concerns are not to be determined solely under the provisions of the statute, and that a $500 fine need not be considered "serious" in all circumstances. In *Muniz*, the Supreme Court upheld a $10,000 contempt fine levied on a 13,000-member labor union in the absence of a jury.[128]

The Tenth Circuit refused to apply *Muniz* in considering whether an *individual* is entitled to a jury. Instead, the court followed the Ninth Circuit in acknowledging that constitutional rights should not vary depending on the wealth of individual defendants.[129] In the absence of any other objective criteria by which to judge a crime's seriousness, the appellate court concluded that 18 U.S.C. § 1(3) should remain the benchmark for determination of an individual's right to jury trial.[130] Since the defendant had been charged with committing a crime with a maximum penalty of over $1500, he should have been afforded a jury trial.

### C. *Sufficiency of* Miranda *Warnings*

In *United States v. Anthon*,[131] the Tenth Circuit considered whether statements elicited before the defendant had been fully advised of his fifth and sixth amendment rights should be suppressed. Anthon, arrested under suspicion of possessing a pound of cocaine, was initially advised that he had a right to remain silent, that anything he said could and would be used against him in court, and that he had a right to counsel. He was not told that he had a right to appointed counsel if he could not afford one, that he had a right to have counsel present during questioning, and that he had a right to stop questioning at any time.[132] After this partial advisement of his rights, Anthon admitted that a small vial of cocaine and a marijuana cigarette found in his motel room were his. When Anthon reached the DEA office, an

124. *Id.* at 773.
125. *Id.*
126. 18 U.S.C. § 1(3) (1976).
127. 422 U.S. 454 (1975).
128. *Id.* at 476-77.
129. 630 F.2d at 774; *see* United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977) (upholding 18 U.S.C. § 1(3) (1976) as the monetary measure of the "seriousness" of a fine).
130. 630 F.2d at 774. The court cited Duncan v. Louisiana, 391 U.S. 145 (1968), and Frank v. United States, 395 U.S. 147 (1969), as requiring objective criteria by which to measure a crime's seriousness.
131. 648 F.2d 669 (10th Cir. 1981).
132. *Id.* at 672.

agent, in the words of his own testimony, "again advised him of his rights."[133] At this time, Anthon, in an attempt to plea bargain with the Government agents, acknowledged participation in the drug transaction under investigation.[134] Anthon was convicted of possession with intent to distribute a quantity of cocaine.

The Tenth Circuit decided without discussion that Anthon's admission to possessing the vial of cocaine and marijuana cigarette should have been suppressed. The appellate court simply held that the statements "were improperly admitted inasmuch as Anthon was not fully advised of his *Miranda* rights at the time he was originally arrested."[135] The court ruled, however, that Anthon's admission to participating in the transaction involving the pound of cocaine was properly admitted, since the Government agent had again advised him of his rights prior to this interrogation. The court concluded that nothing in the record indicated that this final advisement was inadequate. The court supported this conclusion with the recognition that these statements were given voluntarily in an attempt to plea bargain with the agents, and *Miranda v. Arizona*[136] does not bar admission of such voluntary statements.[137]

Judge Seymour dissented, pointing out that the Government had failed to meet its heavy burden under *Miranda* of proving that adequate warnings were given and knowingly waived. She believed the majority was unjustified in presuming that the final warnings were adequate, particularly in light of the inadequacy of previous warnings.[138] If the warnings were not adequate, then Anthon's fifth and sixth amendment rights could not have been knowingly waived. Nor did Judge Seymour believe that the statements could be admitted as purely voluntary; the *Miranda* Court had recognized that custodial interrogation contains inherently compelling pressures in response to which no statement may be considered voluntary in the absence of sufficient *Miranda* warnings.[139]

*Anthon* raises the interesting question of whether a defendant's statements made during attempted cooperation with Government agents for leniency or immunity purposes, while the defendant is under arrest, may be considered voluntary.[140] Since such statements are not in response to specific questions and are made for the defendant's own purposes, they are arguably free of compulsion. However, such reasoning would appear to offend the spirit if not the law of *Miranda* and *Rhode Island v. Innis*,[141] which taken

133. *Id.* at 672-73.

134. *Id.*

135. *Id.*

136. 384 U.S. 436 (1966).

137. 648 F.2d at 674.

138. *Id.* at 679 (Seymour, J., dissenting).

139. *Id.* at 680. Judge Seymour quoted from *Miranda* examples of voluntary statements as "a person who enters a police station and states that he wishes to confess a crime, or a person who calls the police to offer a confession or any other statement he desires to make." 384 U.S. at 478.

140. While the Tenth Circuit majority considered Anthon's statements to be voluntary, this conclusion was not necessary to the holding and was, therefore, dicta. 648 F.2d at 676.

141. 446 U.S. 291 (1980).

together suggest suppression of an expected response to custodial interrogation.[142]

## IV. PRISONERS' RIGHTS

In *Parkhurst v. Wyoming*,[143] the defendant appealed the dismissal of an action brought under 42 U.S.C. § 1983.[144] The defendant had sought both monetary relief and release from prison for his unconstitutional arrest, conviction and imprisonment, for murder and assault. The trial court had construed all the claims as lying in habeas corpus, and denied relief for failure to exhaust state remedies.[145] Appeal of the defendant's conviction was currently pending in the Wyoming Supreme Court when this action was brought in federal court.

The Tenth Circuit held that while the defendant's request for release from prison was cognizable only through habeas corpus, the request for money damages was a permissible claim under 42 U.S.C. § 1983.[146] The appellate court cited *Wolff v. McDonell*[147] for the procedural rule that a section 1983 action may proceed while exhaustion of remedies runs its course in state proceedings. Nevertheless, the court concluded that where the case for damages arose from a claim of unconstitutional conviction, it was appropriate to stay the action pending resolution of the defendant's state appeal.[148] To handle the section 1983 action would be to decide the issues currently on appeal to the Wyoming Supreme Court which, the court of appeals resolved, would work undesirable interference with state criminal proceedings.

*Phillips v. Carey*[149] addressed the issue of what procedures must be followed in order to dismiss prisoner complaints *in forma pauperis* as being without merit. In *Phillips*, the trial court, after review of the defendant's prior litigation history, concluded that the defendant had abused court process by filing a series of frivolous complaints. The trial court set aside previous *forma pauperis* authorization for a pending action, and placed certain limitations on future actions brought by the appellant.[150]

The Tenth Circuit recognized that the trial court's actions were not per se improper; frivolous actions which cannot present a rational argument may

142. The Supreme Court in *Innis* succinctly held that "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." 446 U.S. at 301.

143. 641 F.2d 775 (10th Cir. 1981).

144. This civil rights law provides that "[e]very person who, under color of any statute . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976).

145. 641 F.2d at 776. Under 28 U.S.C. § 2254 (1976), any claim of unconstitutional confinement, pursuant to judgment of a state court, lies in habeas corpus and may not be heard in federal court unless the petitioner "has exhausted the remedies available in the courts of the State."

146. 641 F.2d at 776.

147. 418 U.S. 539 (1974).

148. 641 F.2d at 777.

149. 638 F.2d 207 (10th Cir. 1981).

150. *Id.* at 208.

be dismissed, and the imposition of restrictions on future actions is permissible in "well documented and extreme cases."[151] The appellate court stressed, however, that restrictions on an indigent person's access to the courtroom are limited, and must be based on a record justifying such use of the trial court's discretion. In the absence of the requisite procedures at the trial level, the Tenth Circuit reversed the trial court's summary dismissal of the action *in forma pauperis* and remanded for further proceedings.[152] The appellate court's reversal was thus based on the paucity of the record and not on a particular violation of the defendant prisoner's rights. The appellate court did not say what specific procedures must be followed before a *forma pauperis* petition may be dismissed.

## V. CRIMINAL LAW AND STATUTORY INTERPRETATION

### A. *Conspiracy*

In *United States v. McMurray*,[153] the Tenth Circuit was faced with the difficult task of deciding when apparently unrelated incidents should be treated as parts of a single conspiracy. The alleged conspiracy involved a sham investment plan to support an Application for Guarantee to the Small Business Administration (SBA). Under SBA regulations, small businesses could apply to the SBA for issuance of government guaranteed debentures. The amount of debentures available through the SBA depended upon the applicant's paid-in capital.

The alleged illegal acts in *McMurray* consisted of the "hub" defendants, officers of the applicant investment company, borrowing money from "spoke" defendants to swell the company's paid-in capital.[154] After submission of the applications, the invested money was returned to contributing defendants by way of sham loans. A grand jury handed down several indictments of conspiracy to defraud the government based on these transactions, treating the separate investments as distinct conspiracies. After conviction upon one indictment, the appellants sought to dismiss further indictments of conspiracy on double jeopardy grounds, claiming that the involved actions constituted a single conspiracy for which they could be tried only once.

The Tenth Circuit cited *Blumenthal v. United States*[155] and *Kotteakos v. United States*[156] as the applicable law on whether defendants who participate in only a portion of a criminal activity may be considered as members of the same conspiracy with other peripheral defendants of whose identity and activities they are unaware. In *Kotteakos*, the principal defendant acted as a broker for placement of illegal loans on behalf of unrelated clients. The Supreme Court held that since each illegal loan transaction was complete in itself, individual client defendants who had no knowledge of or concern for

151. *Id.* at 209.
152. *Id.*
153. No. 78-1928, 1929 (10th Cir. Feb. 10, 1981).
154. *Id.* slip op. at 3.
155. 332 U.S. 539 (1947).
156. 328 U.S. 750 (1946).

the others could not be treated as members of a single conspiracy.[157] In *Blumenthal*, however, the Supreme Court held that the purchasers, middlemen, and sellers of an illegal whiskey distribution scheme were members of a single conspiracy, although ignorant even of the existence of the other members in the distribution chain, since they all had knowledge of and a stake in the overall plan.[158]

In upholding the appellants' double jeopardy claim in *McMurray*, the Tenth Circuit likened the defendants' common objective to that found in *Blumenthal*. The appellate court found that each of the investing defendants must have known of the existence of other investors to the capital pool, and that all shared the single goal of submitting the fraudulent Guarantee Application to the SBA. As the court said, "[t]he objective here was to defraud the SBA by the Application of Guarantee based on fictitious bank deposits. All the convicted defendants knew the objective—the purpose of the accumulation of funds, and all participated in attaining the objective."[159] Judge Doyle, dissenting, focused on the separation between the independent loan transactions in claiming that there was no basis for imputing knowledge to the spoke defendants of similar transactions involving the same hub defendants.[160] Judge Doyle thus saw the facts as similar to those in *Kotteakos*, presenting multiple conspiracies.

There is apparent similarity between the arrangement presented here, where core defendants instigate multiple transactions with isolated defendants, and that in *Kotteakos*, where each might have been considered as a "hub and spoke" arrangement different than the "chain" distribution in *Blumenthal*.[161] However, the majority correctly distinguished *Kotteakos* in emphasizing the common objective of the SBA investors; no one defendant was to be successful unless the single application was accepted. The majority and dissent differed less regarding the law than in their perceptions of the facts and the nature of the understanding between the defendants.

In *United States v. Johnson*,[162] the Tenth Circuit affirmed appellant Armstrong's conviction for conspiracy to distribute both marijuana and cocaine, even though Armstrong was not directly involved in the distribution of cocaine. Armstrong, an assistant district attorney in Oklahoma, aided his coconspirators in the theft of confiscated marijuana by informing them of its

157. *Id.* at 755.

158. 332 U.S. at 557. Justice Rutledge, writing for the Court, stated "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." *Id.*

159. No. 78-1928, 1929, slip op. at 9.

160. *Id.* slip op. at 13 (Doyle, J., dissenting).

161. In *Kotteakos*, the Supreme Court agreed with the Government that "the pattern was that of separate spokes meeting in a common center . . . ." 328 U.S. at 755. The operation of a criminal enterprise involving the distribution of a commodity, as in *Blumenthal*, has been likened to a chain, with each participant a necessary link. *See* Note, *Resolution of the Multiple Conspiracies Issue Via a "Nature of the Enterprise" Analysis: The Resurrection of Agreement*, 42 BROOKLYN L. REV. 243, 257 (1975). For discussion of the multiple conspiracy problem, *see id.*; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948).

162. 645 F.2d 865 (10th Cir. 1981).

location and allowing them to steal it. After this transaction, the conspirators' operation was expanded to include the acquisition and sale of cocaine. Armstrong discussed the cocaine transactions with the other participants, obtained cocaine for personal use from them, and advised them of the status of proceedings before a grand jury.[163]

The appellate court's conclusion that Armstrong conspired to distribute cocaine was based on both Armstrong's failure to withdraw from the original conspiracy and his continued participation with the co-conspirators after they began distribution of the cocaine. For the court, this constituted sufficient connection with and knowledge of the illegal scheme to warrant conviction under *Blumenthal*.[164]

While the appellate court pointed out Armstrong's connection with the co-conspirators, the court did not discuss the intent element. A remaining question is whether Armstrong actually agreed to participate in the distribution of cocaine. That he had previously conspired in the theft of marijuana, an unrelated transaction, is insufficient to prove such agreement, as is Armstrong's knowledge of the cocaine distribution and even his purchase of cocaine for personal use.[165] That Armstrong warned the other defendants that they were under suspicion and advised them of the status of grand jury proceedings, however, does evidence Armstrong's implicit agreement to participate in the distribution.

### B. *Interstate Transportation of Securities*

In *United States v. Sparrow*,[166] the defendant was charged with several counts of interstate transportation of false securities under 18 U.S.C. § 2314.[167] Both counts involved alleged tampering with a Cadillac's certificate of title issued in Oregon. The first count charged the defendant with bringing the car into Idaho with a certificate of title which had been altered by substituting the defendant's name for the actual lienholder's name. Count II charged the interstate transportation of a new certificate of title issued in Oregon and sent to a Utah bank which the defendant indicated would be the new lienholder. Some of the representations which the defendant made to the Oregon authorities in order to indice them to issue the new certificate of title allegedly were false.[168]

This appeal had previously been before a Tenth Circuit panel, which

163. *Id.* at 868.

164. 332 U.S. 539 (1947).

165. Knowledge of a conspiracy is insufficient to prove participation in the conspiracy. *See* United States v. Falcone, 311 U.S. 205 (1940) (knowledge by seller that yeast was bought to make illegal liquor was insufficient to prove the seller's participation in the conspiracy); Weniger v. United States, 47 F.2d 692 (9th Cir. 1931) (county sheriff's failure to enforce National Prohibition Act does not make the sheriff a conspirator to violate the Act).

166. 635 F.2d 794 (10th Cir. 1980).

167. The relevant section of 18 U.S.C. § 2314 (1976) provides that "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." The defendant was also convicted under 18 U.S.C. § 1014 (1976) for making a materially false statement to a federally insured bank.

168. 635 F.2d at 795.

affirmed the conviction on both counts.[169] In hearing the appeal en banc, the Tenth Circuit reversed the conviction on both counts.

The issue most recently facing the appellate court under Count I was whether the Government must prove that the security was in a forged or altered condition at the time of its interstate passage. There was no evidence that the Oregon certificate of title presented in Utah was actually falsified before the defendant entered Utah. In upholding the defendant's challenge, the appellate court agreed that the security must be forged prior to its interstate travel in order to warrant conviction under 18 U.S.C. § 2314.[170] In reaching this conclusion the court followed precedent set by the Fifth and Eighth Circuits and strictly construed the criminal statute.[171] Judge Barrett, who wrote the original panel opinion, dissented, noting that the interstate element was included in the statute solely to afford federal jurisdiction, and that in this case interstate movement of the false certificate of title was necessary to complete the fraudulent design.[172]

The appellate court also overturned the conviction for the interstate transportation of the new certificate of title issued in Oregon. The court distinguished documents "falsely made" or "false in their execution" from those "false in fact." The court held that under a Tenth Circuit opinion, *Marteney v. United States*,[173] a security that is only false in fact is not "falsely made, forged, altered, or counterfeited" under the statute. Since the new certificate of title was what it purported to be, and was false only in content, the certificate could not be the basis for conviction of transportation of a falsely made security.[174] Again in dissent, Judge Barrett stressed that the State of Oregon was without legal authority to issue the new certificate, so that it was falsely made as well as false in fact.[175]

### C. *Theft and Interstate Commerce*

*United States v. Luman*[176] called into question the sufficiency of evidence for conviction under 18 U.S.C. § 2315. This statute prohibits the disposition of goods moving to interstate commerce, with knowledge that the goods have been stolen.[177] In *Luman*, certain oil field drill bits were stolen in Wyoming and were sold by the defendants to undercover agents in Oklahoma twenty-eight days later. The defendants claimed that the evidence was insufficient to show that the defendants knew the property was stolen, or that the drill

169. 614 F.2d 229 (10th Cir. 1980).

170. 635 F.2d at 796.

171. United States v. Hilyer, 543 F.2d 41, 43 (8th Cir. 1976); United States v. Owens, 460 F.2d 467, 469 (5th Cir. 1972).

172. 635 F.2d at 797 (Barrett, J., dissenting).

173. 216 F.2d 760 (10th Cir. 1954).

174. 635 F.2d at 797.

175. *Id.* (Barrett, J., dissenting).

176. 624 F.2d 152 (10th Cir. 1980).

177. 18 U.S.C. § 2315 (1976) states that "Whoever receives, conceals, stores, barters, sells or disposes of any goods . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

bits were still moving in interstate commerce.[178]

The Tenth Circuit rejected the argument that the Government must present direct evidence that the property was known to be stolen, or that it had recently crossed state lines. Rather, both elements could be proven through inference arising from established facts.[179] The appellate court first held that unexplained possession of recently stolen property may support a finding that the possessor knew he was dealing with stolen property. Under this standard, the jury's guilty verdict was more than justified by the facts that the defendants were not in the business of selling drill bits, the bits were sold for less than one tenth of their worth, the bits were new and in their original boxes, and the transaction took place in a motel parking lot and involved no receipt or bill of sale.[180] Regarding the interstate element, the court further held that unexplained possession in Oklahoma of drill bits stolen in Wyoming was sufficient to support the finding that the challenged transaction was one step in a total scheme of interstate transportation of the stolen goods.[181]

### D. *False Statements to a Federal Agency*

The defendant in *United States v. Irwin*[182] was convicted for, among other charges, willingly making false statements in a grant application to a federal agency, and for knowingly concealing material facts in a matter within the jurisdiction of the federal agency, in violation of 18 U.S.C. § 1001.[183] The misrepresentations were made in an application to the Economic Development Administration (EDA) for a federal grant. The defendant Irwin was hired by the City of Delta, Colorado to help obtain federal and state funds to finance a proposed industrial park. Prior to submitting the grant application, Irwin orally agreed with the industrial park project engineer to be paid for work in preparing the application.[184] Under EDA rules, Irwin's services in preparing the application were ineligible for payment with EDA funds. Irwin indicated in response to a question on the grant application that he was not to receive compensation for such services. Irwin was later appointed Delta's city manager; in this capacity Irwin submitted bills to EDA for work done on the industrial park. These bills did not specify that EDA funds would be used to pay Irwin for his services in apply-

178. 624 F.2d at 154.

179. *Id.* at 155. United States v. White, 649 F.2d 779 (10th Cir. 1981), also decided during this survey period, held that a jury instruction permitting such an inference did not give rise to a presumption of guilt and an unconstitutional shift of the burden of proof. For discussion of the difference between a permissible inference and a presumption, see Sandstrom v. Montana, 442 U.S. 510, 527 (1979) (Rehnquist, J., concurring).

180. 624 F.2d at 154.

181. *Id.* at 155.

182. 654 F.2d 671 (10th Cir. 1981).

183. The pertinent portion of 18 U.S.C. § 1001 (1976) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

184. 654 F.2d at 674.

ing for the grant.[185] Irwin was eventually paid for the services with the EDA funds by the project engineer.[186]

The Tenth Circuit decided that under these facts Irwin was properly convicted of making a false statement of material facts in the grant application. The failure to specify, in response to a question on the application, that Irwin was to receive compensation constituted a false statement.[187] This statement was material, in that it had a capacity to influence EDA's decision to offer Delta financial assistance with the industrial park project.[188] The court concluded that the issue of materiality was one of fact properly before the jury under an instruction that the statement must have the capacity to influence "action" by the EDA, instead of "payment" by the EDA, as requested by the defendant.[189]

The appellate court did, however, reverse Irwin's conviction for concealing a material fact within the jurisdiction of a federal agency (EDA). This charge arose out of Irwin's failure to mention on the bills submitted to EDA that part of the funds would be paid to himself. The court recognized that it is not illegal for Irwin to omit this information from the bills in the absence of any legal duty to disclose the information.[190] Since the project engineer was not required under law to indicate the names of every employee who was to receive grant funds, it was not unlawful to fail to mention that Irwin was one of the employees.[191]

*United States v. Wolf*[192] also involved interpretation of 18 U.S.C. § 1001, which prohibits the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." Appellant Wolf was vice-president of Pioneer Energy Corporation which had contracted to furnish Apco Oil Corporation with crude oil. The challenged false statement was the certification on invoices from Pioneer to Apco of the shipments of "stripper crude oil," while Pioneer actually delivered inferior fuel oil. This certification was included on monthly reports sent by Apco to the United States Department of Energy (DOE) as part of an entitlement program based on the pricing of different types of crude oil. The certification allowed Pioneer to receive the higher price for stripper crude allowed under federal regulations.[193] Evidence indicated that Wolf was aware of the entitlement program and the significance of the certificate.[194]

Wolf contended that the certification on the invoice was not a matter within the jurisdiction of the DOE or any other federal agency. In finding that the federal jurisdiction element had been met in this case, the Tenth

185. *Id.* at 675.
186. *Id.*
187. *Id.* at 676.
188. *Id.* at 678.
189. *Id.* at 677.
190. *Id.* 678-79. *See* Chiarella v. United States, 445 U.S. 222, 227-28 (1980) (petitioner, a financial printer with "inside" knowledge about a corporation, had no duty to disclose information to other individuals with whom the printer was trading stock of the corporation).
191. 654 F.2d at 679.
192. 645 F.2d 23 (10th Cir. 1981).
193. *Id.* at 24.
194. *Id.*

Circuit recognized that the false statement need not be made directly to a federal agency to sustain a section 1001 conviction, as long as federal funds are involved.[195] Since the false certification of the type of oil would eventually affect disbursement of DOE funds to Apco under the entitlement program, the false statement was a matter within the jurisdiction of DOE.[196] Under these circumstances, it was immaterial that the statements were made to wrongfully induce a private entity to make payments to which Pioneer was not entitled, rather than to induce the wrongful disbursement of federal funds.

### E. *Aiding and Abetting*

In *United States v. Cotton*,[197] the defendant contended that he was illegally convicted of aiding and abetting under 18 U.S.C. § 2 in the distribution of cocaine, a controlled substance.[198] The defendant argued that since the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Act)[199] was designed to include all drug control offenses in one comprehensive act, he could not be convicted of aiding and abetting, an offense not included in the Act.[200]

The appellate court refused to find that aiding and abetting could not be combined with a substantive offense in an indictment, no matter how comprehensive the pertinent statutory scheme. Rather, the court, citing *United States v. Alvillar*[201] to the effect that the "language [of 18 U.S.C. § 2] neither defines nor denounces as criminal any act or omission which, without it, would have been unlawful,"[202] held that 18 U.S.C. § 2 need not be specifically incorporated in any particular substantive offense in order to be properly joined with it in an indictment. The court concluded that aiding and abetting constitutes an alternative theory of criminal responsibility rather than a prohibition of specific conduct, and may be appropriately joined with any substantive charge.[203]

In *United States v. Cueto*,[204] the Tenth Circuit focused on aiding and abetting as an alternative theory of responsibility in holding that aiding and abetting need not be specifically charged in the indictment to warrant conviction for aiding and abetting at trial. In *Cueto* the defendant was charged

195. *Id.* at 25. The appellate court cited cases from five circuits as authority for this rule of law. The court quoted United States v. Baker, 626 F.2d 512, 514 n.5 (5th Cir. 1980) to the effect that, "the necessary link between deception of the non-federal agency and effect on the federal agency is provided by the federal agency's retention of 'the ultimate authority to see that the federal funds are properly spent.'" *Baker* held that submission of false time sheets claiming pay for hours not actually worked to a federally-funded housing authority violates the statute.

196. 645 F.2d at 25.

197. 646 F.2d 430 (10th Cir. 1981).

198. 18 U.S.C. § 2 (1976). Under this general statute concerning criminal responsibility, anyone who "aids, abets, counsels, commands, induces or procures" the commission of a crime "is punishable as a principal."

199. 21 U.S.C. § 841(a)(1) (1976).

200. 646 F.2d at 432.

201. 575 F.2d 1316 (10th Cir. 1978).

202. *Id.* at 1319-1320.

203. 646 F.2d at 432.

204. 628 F.2d 1273 (10th Cir. 1980).

with robbing a bank.[205] While the Government initially proceeded on the theory that the defendant was the principal of the robbery, the Tenth Circuit concluded that, based on the evidence presented at trial, an aiding and abetting instruction was properly submitted to the jury by the trial court.[206] The appellate court noted that the defense counsel was not misled as to the nature of the charge. While the defense tried to create confusion as to the identity of the actual robber, this confusion did not preclude the jury from finding the defendant guilty as an aider and abettor based on other evidence before the court.[207]

### F. *Wire Fraud*

*United States v. Blitstein*[208] involved the conviction of an attorney for wire fraud on the basis of the attorney's discussion with a client concerning fees and the status of the client's case.[209] When the client, DeYoung, an actor working in Colorado, consented to a baggage check for weapons at Denver Stapleton Airport, the security officer discovered and confiscated a small vial containing a substance later identified as less than one gram of cocaine. Upon his arrival in California, DeYoung contacted the defendant attorney, Blitstein, concerning the possible legal consequences of the incident. Blitstein requested a retainer fee based upon the information that the confiscated substance had tested positive as cocaine, even though he had not yet asked the police about the test results.[210] When DeYoung was subsequently indecisive about paying Blitstein's large fee for the case, Blitstein notified DeYoung that there was a warrant out for his arrest, and that upon his return to Colorado the police would drag him off in chains.[211] Blitstein further stated in conversation with DeYoung that he must act quickly, in that Blitstein would not be able to "control" the evidence once it was shipped to Miami.[212] During this time, however, no warrant had been issued for DeYoung's arrest.

In holding that these facts supported a conviction for wire fraud, the Tenth Circuit focused less on the technical elements of the statute than on the generally unethical aspects of Blitstein's conduct. The appellate court held that the high standards of moral conduct imposed on members of the legal profession were violated by Blitstein's intimidation of his client for prepayment of the fee before any criminal charges had even been filed in the case.[213]

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205. 18 U.S.C. § 2113(a), (d) (1976).

206. 628 F.2d at 1275.

207. *Id.* at 1276.

208. 626 F.2d 774 (10th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

209. 18 U.S.C. § 1343 (1976) prohibits the transmission of sounds by means of wire for the purpose of making false representations. Blitstein was also convicted under 18 U.S.C. § 1952 (1976) for interstate travel with the intent to promote an illegal activity (extortion). 626 F.2d at 776.

210. 626 F.2d at 777.

211. *Id.* at 778.

212. *Id.*

213. *Id.* at 781.

## VI. TRIAL MATTERS

*United States v. Winner*[214] involved the issue of whether the deputy attorney general and the assistant attorney general of the United States could be compelled to attend a post-conviction hearing, and if necessary, personally invoke Governmental privileges concerning certain matters in that hearing. This issue arose when the real party in interest (Feeney) filed a post-trial motion for production seeking documentary information concerning certain conversations he participated in during the course of his informant activities.[215] Noting that Feeney had a constitutional right to exculpatory evidence in mitigation of punishment, the trial judge granted access to tapes of conversations with Government agents in which Feeney had participated during the course of his informant activities.[216]

After Feeney claimed that the produced documents were incomplete, assistant attorney general Heymann was subpoenaed to appear at an evidentiary hearing and to bring relevant documents concerning the taped conversations. Heymann did not appear at the hearing; instead, two other Department of Justice employees appeared, with instructions from deputy attorney general Renfrew not to answer any questions pertaining to ongoing investigations of the matter in which Feeney was used as an informer.[217] The trial judge ordered Renfrew to appear before the court and to invoke the Government privilege in person, but indicated that Renfrew's testimony could be given through an *in camera* hearing. The Government petitioned for a writ of mandamus to vacate the order requiring the attendance of Renfrew and Heymann at the post-conviction hearing.[218]

The Tenth Circuit, in considering the mandamus petition, recognized that the deputy attorney general had not followed the recognized procedure for invoking the law enforcement evidentiary privilege, which requires personal consideration of and objection to production of the requested information.[219] Even so, the appellate court accepted a Government compromise, with modifications, which did not require Renfrew's attendance at the hearing. Under this compromise, Government representatives were to testify as to the privileged information *in camera*. Any continued claims for privilege were to be made by Renfrew after his personal review of the challenged questions, and had to be supported in writing by his reasons for the continued claim of privilege.[220] Concerning assistant attorney general Heymann's attendance at the hearing, the appellate court held that attendance could be

214. 641 F.2d 825 (10th Cir. 1981).

215. Feeney was convicted of submitting materially false statements to federally insured financial institutions for the purpose of influencing credit decisions in violation of 18 U.S.C. §§ 1014, 2 (1976), wire fraud in violation of 18 U.S.C. §§ 1343, 2 (1976) and interstate transportation of fraudulent securities in violation of 18 U.S.C. §§ 2314, 12 (1976).

216. 641 F.2d at 828.

217. *Id.* at 829.

218. *Id.* at 830. In United States v. Feeney, 641 F.2d 821 (10th Cir. 1981), the Tenth Circuit held that a third party who had intervened in United States v. Winner must risk contempt and appeal from such citation in order to contest a *subpoena duces tecum*.

219. *See* Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977); Black v. Sheraton Corp., 564 F.2d 531 (D.C. Cir. 1977).

220. 641 F.2d at 833.

required only after the trial court determines that Government representatives' testimony shows a sufficient likelihood that Heymann's testimony is of sufficient relevancy to require production.[221]

The Tenth Circuit's opinion in *Winner* presents a reasonable resolution of the conflict between Feeney's due process right to disclosure of exculpatory material and the Government's law enforcement privilege for the protection of ongoing investigations. The opinion provides, however, a curious review of a petition for writ of mandamus.[222] The appellate court held that the district court did not abuse its discretion so as to justify issuance of a writ of mandamus, yet it did overrule the district court's order mandating Heymann's and Renfrew's attendance at the post-conviction hearing. The practical effect of the Tenth Circuit's decision was a reconsideration of the trial court's exercise of discretion which the appellate court said was improper in this instance.

*United States v. Tager*[223] concerned disclosure of matters occurring before a grand jury. In *Tager*, Mr. House, employed by the Insurance Crime Prevention Institute (ICPI), developed sufficient evidence to refer the case to the United States Postal Inspection Service. A grand jury was convened, and Mr. House continued to assist the Government in the investigation. The Government moved for, and was granted, an order for disclosure to Mr. House of certain grand jury materials to enable him to further assist in the investigation. On the grounds that this disclosure was illegal, the defendant moved to dismiss the indictment presented against him.[224]

The appellate court established that the legality of the disclosure must be decided under rule 6(e)(2) of the Federal Rules of Criminal Procedure. This rule generally prohibits the disclosure of matters occurring before the grand jury. Exception is made for disclosures to a Government attorney, by court order in connection with a judicial proceeding, and to a criminal defendant under certain conditions.[225]

The Government sought to bring the disclosure to the admittedly non-government investigator under the "judicial proceeding" exception. The Government cited cases holding that the grand jury proceeding itself is a judicial proceeding under the exception.[226] The appellate court distinguished these cases as upholding disclosure either to Government personnel or to a discharged grand jury. In holding that the disclosure in this instance was improper, the court reasoned that to interpret a "judicial proceeding" as

221. As did the district court, the Tenth Circuit cited Brady v. Maryland, 373 U.S. 83 (1963), for the proposition that all exculpatory material must be disclosed to both the accused and his counsel. This rule is also incorporated in rule 16 of the Federal Rules of Criminal Procedure.

222. A writ of mandamus is authorized by 28 U.S.C. § 1651 (1976), and brought under rule 21 of the Federal Rules of Appellate Procedure, FED. R. APP. P. 21. Under Supreme Court Rule 30, the issuance of such a writ "is not a matter of right but of sound discretion sparingly exercised."

223. 638 F.2d 167 (10th Cir. 1980).

224. *Id.* at 168.

225. These exceptions are listed in FED. R. CRIM. P. 6(e)(3)(A) 3(C).

226. United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); *In re* Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975); *In re* Minkoff, 349 F. Supp. 154 (D.R.I. 1972); *In re* Grand Jury Witness Subpoenas, 370 F. Supp. 1282 (S.D. Fla. 1974).

including an ongoing grand jury before which the challenged material was being considered would effectively emasculate the intent of rule 6(e)(2). Rather, disclosure in connection with a judicial proceeding must be for a purpose other than assistance of the present grand jury proceedings.[227]

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227. 638 F.2d at 170.