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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 addressed a variety of issues in the area of criminal law and procedure. This survey will examine only the more significant cases and will discuss the recent developments in criminal law and procedure in the Tenth Circuit.

I. FOURTH AMENDMENT

A. *Probable Cause*

In *United States v. Rucinski*[1] the Tenth Circuit rejected the argument that residents in mountain communities have a greater expectation of privacy than do residents in other communities.[2] The defendants operated a logging operation on national forest land in an isolated Colorado mountain valley. A clandestine surveillance of the logging operation was conducted by agents of the United States Forest Service from adjacent property. Using telescopic equipment, the agents gathered evidence which indicated that the defendants were depriving the government of the value of certain timber. The appellate court refused to suppress the evidence stating, "[w]e do not believe that those living in the mountains of Colorado have a greater right to expectations of privacy than do citizens in other parts of the country."[3]

The court also rejected the argument that the surveillance of the commercial property in the absence of a regulatory scheme authorizing warrantless searches was prohibited under *Donovan v. Dewey*.[4] Noting that *Donovan* held that warrantless "inspections of commercial property may be unreasonable if not authorized by law *or are unnecessary for the furtherance of federal interests*,"[5] the court concluded that the Forest Service had a legitimate interest in protecting against theft of logs from a national forest.

B. *Investigatory Stop*

In *United States v. Hart*[6] the Tenth Circuit held that an investigatory stop of a motor home was justified even though there existed sufficient probable cause and ample time to obtain a warrant.[7] Utah police assisted the FBI in

1. 658 F.2d 741 (10th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

2. The defendants argued that one has a reasonable expectation of privacy in a mountain habitat "based on a heightened sense of privacy and a heightened respect for private property." 658 F.2d at 744.

3. *Id.* at 746.

4. 452 U.S. 594 (1981).

5. 658 F.2d at 745 (quoting Donovan v. Dewey, 452 U.S. 594, 599 (1981) (emphasis in original)).

6. 656 F.2d 595 (10th Cir. 1981).

7. Justification for a warrantless investigatory stop requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968).

a search for Jones, a federal fugitive hiding in a remote campsite. The defendant Hart was believed to be an associate of Jones. An informant indicated that Hart was holding a woman against her will. Utah deputies discovered the campsite and Jones was apprehended. Jones' father-in-law, present at the campsite, told the deputies that Hart had driven his camper into town accompanied by a woman. While en route to town the deputies observed a vehicle that matched the description of Hart's camper heading towards the campsite. After confirming the description with Jones' father-in-law, the deputies stopped the camper. The woman was questioned and, with Hart's consent, the camper was searched. The woman was not being held involuntarily; however, the search revealed twelve weapons which formed the basis of Hart's prosecution.[8]

The district court suppressed the seizure of the weapons, reasoning that probable cause to search the vehicle existed for several days providing ample time for the deputies to obtain a warrant. The Tenth Circuit reversed, characterizing the police action as an investigatory stop which merely requires articulable reasons for believing a defendant to be engaged in criminal activity.[9] The district court's finding of probable cause was then interpreted to mean, *a fortiori*, that such articulable reasons existed. The appellate court also stated that the fact that Hart's vehicle was in transit constituted sufficient exigent circumstances to justify an immediate search of the camper pursuant to a lawful stop.[10]

In *United States v. MacDonald*[11] the Tenth Circuit held that observations by a Drug Enforcement Administration (DEA) agent could constitute sufficient grounds to justify an investigatory stop. The defendant MacDonald was traveling on a commercial airliner from Fort Lauderdale to Albuquerque via Dallas-Fort Worth. During the flight, MacDonald sat next to a DEA agent who soon became suspicious of him. When the plane made its stop in Dallas-Fort Worth, the agent alerted local DEA officials who, in turn, notified the DEA in Albuquerque. Upon arriving in Albuquerque, MacDonald was placed under surveillance. When he attempted to leave the terminal without his luggage, he was questioned by Albuquerque police. His answers conflicted with information supplied by the DEA agent. MacDonald was detained while a cocaine-detecting dog inspected his luggage. When the dog indicated that the defendant's luggage contained drugs, a search warrant was obtained and cocaine was discovered. The defendant sought to suppress this evidence contending that the police lacked reasonable suspicion of criminal activity to justify the investigatory stop outside the airport.[12]

Judge Logan, writing for the Tenth Circuit, considered the confronta-

8. Hart was indicted on eleven counts of unlawful interstate transportation of firearms in violation of 18 U.S.C. §§ 922(g), 924(a) (1976 & Supp. IV 1980) and two counts relating to unlawful possession of a .45 caliber machine gun in violation of 26 U.S.C. §§ 5861, 5871 (1976). 656 F.2d at 596.

9. *See* United States v. Cortez, 449 U.S. 411 (1981); *see also supra* note 7.

10. 656 F.2d at 600.

11. 670 F.2d 910 (10th Cir. 1981), *cert. denied*, 103 S. Ct. 373 (1982).

12. 670 F.2d at 911-12.

tion outside the airport between the defendant and the police a *Terry*-type stop[13] which requires reasonable suspicion of criminal activity to be justified. He stated that "[i]n assessing whether the grounds for a stop were adequate, courts should not ignore the considerable expertise that law enforcement officers have gained from their special training and expertise."[14] Noting that the DEA agent had ten years of experience in drug enforcement activity, Judge Logan found that the correspondence between the agent's knowledge of the behavior patterns of drug smugglers and MacDonald's behavior was sufficient to establish the necessary reasonable grounds for an investigatory stop.[15]

C. *Timely Execution of Warrants*

The Tenth Circuit addressed the issue of permissible delay in the execution of an arrest warrant in *United States v. Drake*.[16] The defendant Drake was under investigation by agents of the Fish and Wildlife Service for suspected violations of the Migratory Bird Treaty Act (Act).[17] Undercover agents visited Drake's home and negotiated a sale of two flamingos in violation of the Act. The agents arranged for delivery of the birds and payment of the balance of the purchase price to be made October 2, 1980. On October 1, 1980, the agents swore out a complaint and obtained an arrest warrant. The following day the agents returned to Drake's residence. They took possession of the flamingos and paid the balance of the purchase price. The agents then identified themselves and made the arrest. The trial court granted Drake's motion to suppress the evidence on the grounds that the agents had impermissibly delayed execution of the arrest warrant in order to complete the purchase and strengthen their case.[18]

The Tenth Circuit reversed, finding the delay in the execution of the warrant to be reasonable and the search to be incident to the arrest. The court stated that arrest warrants need not be immediately executed and that officers need not arrest at the first opportunity.[19] The court noted that a purposeful delay of execution intended to gain a tactical advantage not otherwise attainable would be impermissible.[20] The court, however, found no such purpose to the delay.[21] The court then observed that the arrest could have been made without a warrant at the time of the transaction.[22]

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13. *See supra* note 7.

14. 670 F.2d at 913 (citing United States v. Mendenhall, 446 U.S. 544, 563-64 (1980) (Powell, J., concurring); Brown v. Texas, 443 U.S. 47, 52 n.2 (1979); United States v. Lebya, 627 F.2d 1059, 1062 (10th Cir.), *cert. denied*, 449 U.S. 987 (1980)).

15. 670 F.2d at 913.

16. 655 F.2d 1025 (10th Cir. 1981).

17. 16 U.S.C. §§ 703, 707(b) (1976).

18. 655 F.2d at 1027. The defendant had also been granted a motion to dismiss the indictment on grounds of improper pretrial publicity. The Tenth Circuit reversed, holding that there was no showing of prejudice to the defendant. *Id.*

19. *Id.* (citing United States v. Joines, 258 F.2d 471, 472 (3d Cir.), *cert. denied*, 358 U.S. 880 (1958)).

20. 655 F.2d at 1027 (citing McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950)).

21. The warrant was executed one day after issuance and served within an hour after the agents arrived at the defendant's home. 655 F.2d at 1027.

22. *Id.* at 1028; *see* United States v. Watson, 423 U.S. 411 (1976).

The Tenth Circuit reasoned that penalizing the agents for delaying execution would discourage officers from obtaining warrants in the future.[23]

II. FIFTH AMENDMENT

A. *Self-Incrimination*

In *United States v. Madrid*[24] the Tenth Circuit was faced with the question of whether testimony by a psychiatrist concerning statements made by the defendant during examinations to determine his competency to stand trial may be admitted at trial on the issue of sanity. The defendant was arrested in connection with a bank robbery. The defense counsel requested, pursuant to 18 U.S.C. § 4244,[25] that the defendant be given a psychiatric examination. The defendant was found incompetent to stand trial and committed to a medical facility. Approximately eight months later, the trial court granted the government's motion to order the defendant to submit to a second psychological examination. The examiner, Dr. Dempsey, indicated that the defendant was both competent to stand trial and sane at the time of the alleged offense. After a hearing the trial court found the defendant competent to stand trial.[26]

At trial the defendant raised the insanity defense. The government then moved, pursuant to rule 12.2(c) of the Federal Rules of Criminal Procedure,[27] for an examination to be conducted by the same psychiatrist who had conducted the second competency exam for the purpose of determining the defendant's sanity at the time of the offense. The defendant did not object. Dr. Dempsey testified that the defendant was sane at the time of the alleged offense. He based his opinion, in part, on statements made by the defendant during the section 4244 competency examination concerning previous involvement in armed robberies to support a heroin addiction. The defendant was found guilty and appealed. He contended that Dr. Dempsey's testimony concerning the prior criminal behavior should have been ex-

23. 655 F.2d at 1028.

24. 673 F.2d 1114 (10th Cir.), *cert. denied*, 103 S. Ct. 96 (1982).

25. 18 U.S.C. § 4244 (1976) provides:

> Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense . . . may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused . . . . [T]he accused [shall] be examined as to his mental condition by at least one qualified psychiatrist . . . . No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

26. 673 F.2d at 1117.

27. FED. R. CRIM. P. 12.2(c) deals with the defense based on mental condition and provides in part: "In an appropriate case the court, may upon motion of the attorney for the government, order the defendant to submit to a psychiatrist designated for this purpose in the order of the court."

cluded under both section 4244 and the fifth amendment.[28]

Section 4244 prohibits the use of any statement made during a competency examination from later being used at trial against the accused on the issue of guilt.[29] However, the Tenth Circuit held that by failing to object to the government's use of Dr. Dempsey as the examiner in the rule 12.2(c) sanity examination, the defendant waived his right to exclude statements made to Dr. Dempsey at the earlier section 4244 competency examination.[30] The court believed it would be unreasonable to expect the doctor not to consider statements made in his earlier contact with the defendant.[31] The court would not go so far as to decide whether a defendant, by giving notice of an insanity defense under rule 12.2(a), waives section 4244 protections. Instead, the court limited its ruling to the defendant's failure to object to undergoing the examination with the same psychiatrist.[32]

The court then held that the fifth amendment privilege against self-incrimination did not prohibit the government from using the defendant's statements.[33] The court distinguished *Estelle v. Smith*[34] which prevents the use of statements made during pretrial competency examinations when the defendant has neither been informed of his right to remain silent nor warned of the possible adverse use which may be made of his statements. In *Madrid*, however, the issues of competence and sanity were raised by the defendant.[35] After *Madrid*, it appears in the Tenth Circuit that the fifth amendment protection of *Estelle* is limited to cases where the pretrial examination is involuntary.

The Tenth Circuit extended fifth amendment protection to hearings on waiver of juvenile jurisdiction in *Crisp v. Mayabb*.[36] In 1971, Mayabb pled guilty to a murder which occurred when he was seventeen years old. The plea was entered under an Oklahoma statute[37] which treated males over the age of sixteen as adults. Under that statute, a female aged sixteen to eighteen was treated as a juvenile unless, after a certification hearing it was determined that she should be tried as an adult. The Tenth Circuit declared the statute unconstitutional on equal protection grounds.[38] The court ruled that male prisoners convicted under the statute were entitled to a determination of whether they would have been certified as adults had the type of hearing previously afforded only female defendants been held.[39] At Mayabb's hearing, a statement which he made at the time of his arrest was suppressed on fifth amendment grounds. Without that statement the state was unable to

28. 673 F.2d at 1117-19.
29. *See supra* note 25.
30. 673 F.2d at 1120.
31. *Id.*
32. *Id.*
33. *Id.* at 1121.
34. 451 U.S. 454 (1981).
35. 673 F.2d at 1121.
36. 668 F.2d 1127 (10th Cir.), *cert. denied sub nom.* Fields v. Paul M., 103 S. Ct. 62 (1982).
37. OKLA. STAT. tit. 10, § 1101(a) (Supp. 1969).
38. 668 F.2d at 1129 (citing Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972)).
39. 668 F.2d at 1130-31 (citing Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)).

show that adult certification would have occurred.[40]

The Tenth Circuit upheld the suppression of the statement. The court noted that the Supreme Court had applied the fifth amendment privilege against self-incrimination to juveniles[41] and had recognized the importance of such certification hearings.[42] The court then held that "a confession or admission of a juvenile is not admissible in a hearing on waiver of juvenile jurisdiction unless the statement was made voluntarily and with knowledge of constitutional rights."[43]

The court ruled that Mayabb could not have knowingly and intelligently waived his rights at the time of the arrest. Although his mother was present and a *Miranda* warning was read, both Mayabb and his mother were unable to read or write and were incapable of comprehending the oral statement of rights. The Tenth Circuit decided that Mayabb's confession was properly suppressed[44] and affirmed the trial court's issuance of a writ of habeas corpus directing the release of Mayabb.[45]

B. *Double Jeopardy*

In *Wilkett v. United States*[46] the court addressed the issues of whether jeopardy attaches in a dismissal for lack of venue and the time at which jeopardy attached in conspiracy prosecutions. Wilkett, Hoover, and Conklin were charged with participating in a statewide conspiracy to distribute a controlled substance and tried in the Western District of Oklahoma. Conklin and Hoover moved to dismiss the indictments against them for lack of venue. The government failed to prove their involvement in a conspiracy in the Western District and the trial court granted the motions.[47]

Wilkett, however, was convicted. The government then filed charges against all three defendants in the Eastern District of Oklahoma. These charges were essentially identical to those brought in the Western District. The defendants interposed double jeopardy contentions, claiming the previous Western District prosecution barred further prosecution.[48]

Hoover and Conklin urged that the "same evidence test" of *United States v. Martinez*[49] barred the action in the Eastern District because the Western District had already heard evidence of the same activities for which they had been re-indicted.[50] Judge Doyle, writing for the Tenth Circuit, rejected that argument. He reasoned that the dismissal for lack of venue, though based on evidence presented at trial, was a procedural matter as opposed to a deci-

40. 668 F.2d at 1134.
41. *Id.* (citing *In re* Gault, 387 U.S. 1 (1967)).
42. 668 F.2d at 1134 (citing Kent v. United States, 383 U.S. 41 (1966)).
43. 668 F.2d at 1134.
44. *Id.* at 1135.
45. *Id.* at 1136.
46. 655 F.2d 1007 (10th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982).
47. 655 F.2d at 1009.
48. *Id.*
49. 562 F.2d 633 (10th Cir. 1977).
50. 655 F.2d at 1011. The test for determining whether the offenses charged in two indictments are identical is whether the facts alleged in one, if offered in support of the other, would sustain a conviction. *See* Bartlett v. United States, 166 F.2d 928, 931 (10th Cir. 1948).

sion on the merits. Judge Doyle noted that the motions to dismiss were brought by the defendants, who could have chosen to waive venue and proceed with an adjudication on the merits. Thus, the court held that jeopardy does not attach when a motion to dismiss is granted for lack of venue.[51]

The court then turned to the conspiracy charge against Wilkett. The court acknowledged that the "same evidence test" may be somewhat inadequate in the area of conspiracy because conspiracies often involve numerous acts committed over an extended period of time, and it is sometimes possible to show the same conspiracy through proof of more than one set of facts.[52] The "same evidence test" must be supplemented to insure that a defendant is not prosecuted twice for participating in a single conspiracy. Therefore, the court examined both the indictments and the evidence to be presented. Wilkett was indicted for conspiracy in the Eastern District for essentially the same activities which served as the basis for his previous indictment and, because the government proffered no new evidence in the second action, the court ordered the indictment dismissed.[53]

In *United States v. Martinez*,[54] a case involving allegations of prosecutorial and judicial misconduct, Judges Lay, Gibson, and Bright of the Eighth Circuit sat by designation in what had become a politically charged case. The defendant, Martinez, had been indicted on several counts relating to possession of unregistered explosives and sending explosives through the United States mails. Before trial, four counts were severed and Martinez was tried on the remaining counts before Chief Judge Winner of the District of Colorado. The trial was conducted in an extremely tense atmosphere. Two jurors openly complained about the conduct and apparel worn by spectators and members of the defense team.[55]

After the third day of trial, Judge Winner met secretly with the prosecution to discuss the atmosphere of intimidation which he felt pervaded the courtroom. The defense counsel was neither invited to attend nor informed of the meeting. As justification for this action, Judge Winner suggested the possibility of the defense counsel's involvement in a conspiracy to intimidate the jury. The judge offered to grant a mistrial to the prosecution and proposed that such a motion be delayed until after the defense had presented its case so that hidden cameras could be installed to record the alleged intimidation. The judge offered to provoke a mistrial if necessary.[56]

The following morning, however, the government was willing to accede to a mistrial motion, citing publicity about the jurors' complaints. The defense joined the motion which was then granted.[57]

At retrial, Martinez filed a motion to dismiss on the grounds of double jeopardy. Judge Kane of the United States District Court, District of Colorado, presiding over the retrial, denied the motion. On appeal, the case was

51. 655 F.2d at 1012.
52. *Id.* at 1013-14.
53. *Id.* at 1015.
54. 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2301 (1982).
55. 667 F.2d at 887-88.
56. *Id.* at 888.
57. *Id.*

partially remanded to Judge Eubanks, United States District Court Judge for the Western District of Oklahoma, for further evidentiary hearings. At these hearings the nature and substance of Judge Winner's secret meeting was revealed.[58]

The defense moved to dismiss all seven of the original counts. Judge Eubanks found that "the defendant was induced or lead [sic] into confessing, stipulating to, or agreeing to a mistrial motion without the benefit of all the facts"[59] and held that the defense did not knowingly consent to the motion for mistrial. The judge dismissed the three severed counts on double jeopardy grounds but refused to dismiss the remaining four counts. Both sides appealed.[60]

The double jeopardy clause bars retrial if bad faith conduct by the prosecutor or judge provokes the defendant into requesting a mistrial.[61] The appellate panel found that the prosecutorial and judicial misconduct was more than sufficient to bar retrial. Jeopardy attached, but only to three of the seven counts.[62]

The defendant sought dismissal of the four remaining counts based on prosecutorial and judicial misconduct, citing the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[63] and *Abney v. United States*.[64] The *Cohen* doctrine permits review of certain interlocutory orders drawn from "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[65] Three factors are used to determine whether a decision is "final" for review. First, the order must fully dispose of the matter, not leaving it "open, unfinished or inconclusive."[66] Second, the order must resolve an issue completely collateral to the cause of action and not be simply a "step toward final disposition of the merits of the case."[67] Third, the decision must involve an important right which would be irreparably damaged if review were postponed until after judgment.[68]

The Tenth Circuit held that the order failed two of the three prerequisites. It found that "[t]he issues—primarily the question of prejudice—are not 'completely collateral' to a decision on the merits and [the] defendant's right will not be irreparably infringed if review has to await a final judgment."[69] Thus, the court refused to extend *Cohen* to cases involving

58. *Id.*
59. *Id.* at 889.
60. *Id.*
61. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976); United States v. Jorn, 400 U.S. 470, 485 n.12 (1971).
62. 667 F.2d at 890.
63. 337 U.S. 541 (1949).
64. 431 U.S. 651 (1977) (applying the doctrine to a denial of a motion to dismiss based on double jeopardy).
65. 337 U.S. at 546.
66. *Id.*
67. *Id.*
68. *Id.*
69. 667 F.2d at 890.

prosecutorial and judicial misconduct, reserving it for "exceptional cases."[70]

III. SIXTH AMENDMENT

A. *Right to Confront Witnesses*

In *United States v. Rothbart*[71] the Tenth Circuit held that the sixth amendment's assurance of the right to confront witnesses requires that the government make an affirmative effort to ensure that its witnesses are available for trial. Rothbart was indicted for failing to file employment tax returns. The government's case required the testimony of Mitchell, a former employee, who was subpoenaed to appear at trial. Mitchell's employment required him to be out of the country during that time. As a result, the prosecution arranged to take his deposition even though a court order was never issued permitting it. The defense counsel attended the deposition and cross-examined Mitchell.[72]

At trial before a magistrate, the defense objected to the admission of the deposition as a violation of both rule 15 of the Federal Rules of Criminal Procedure[73] and the sixth amendment. On appeal to the district court, Judge Finesilver of the District of Colorado ruled that although rule 15 was not strictly complied with, "compliance [was] within the spirit and tenor" of the rule.[74]

The Tenth Circuit, unpersuaded by Judge Finesilver's reasoning, held that the government's failure to retain a present witness deprived Rothbart of his sixth amendment right of confrontation.[75] The court applied the two-pronged test of *Ohio v. Roberts*[76] which requires the prosecution first to demonstrate the unavailability of the declarant and then show the statement to be trustworthy.[77] Focusing on the availability of the witness, the court followed *Barber v. Page*[78] which holds that the previous testimony of a witness, whether or not subjected to cross-examination, is admissible only if "the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[79] The court found that, rather than making a good faith effort to obtain Mitchell's presence, the government assisted in releasing him from the subpoena.[80]

In *Valenzuela v. Griffin*[81] the defendant was tried for burglary. The government's witness was subpoenaed and a bench warrant was issued. The only other evidence of the state's effort to produce the witness was the prosecutor's statement that the state "had been looking for her."[82] The defendant

70. *Id.*
71. 653 F.2d 462 (10th Cir. 1981).
72. *Id.* at 463.
73. FED. R. CRIM. P. 15.
74. 653 F.2d at 464.
75. *Id.* at 465.
76. 448 U.S. 56 (1980).
77. *Id.* at 65.
78. 390 U.S. 719 (1968).
79. *Id.* at 725.
80. 653 F.2d at 466.
81. 654 F.2d 707 (10th Cir. 1981).
82. *Id.* at 710.

was convicted and sought habeas corpus relief, contending that the trial court violated the sixth amendment by allowing the introduction of the witness' tape recorded testimony which had been made at a preliminary hearing.[83]

The Tenth Circuit again applied the "good faith" standard[84] of *Ohio v. Roberts* and *Barber v. Page* and found the prosecution's effort to be inadequate. Noting a three-month time span between the issuance of the subpoena and the trial date, the court held that "good faith" required evidence of additional steps by the government to secure the presence of the witness at trial.[85]

B. *Effective Assistance of Counsel*

The Tenth Circuit held that adequate time to prepare a defense is a right of the accused under the sixth amendment in *United States v. King*[86] and *United States v. Cronic*.[87] In *King* the defendant was indicted for income tax evasion following a three-year investigation. He was arraigned on December 11, 1979 and trial was set for January 7, 1980. The defendant's motions for a continuance were denied even though his attorney was forced to withdraw and new counsel was not appointed until December 26, 1979. After an eight-day trial involving approximately 200 witnesses and 5,000 exhibits, King was convicted.[88]

Judge Seymour, writing for the court, recognized that a criminal defendant's right to effective assistance of counsel may be jeopardized by inadequate trial preparation.[89] In determining whether the court-induced lack of preparation time deprived the defendant of his sixth amendment rights,[90] the court applied the factors articulated by the Eighth Circuit in *Wolfs v. Britton*[91] and adopted by the Tenth Circuit in *United States v. Golub.*[92] These factors 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.' "[93] Applying the facts, the court in *King* found that the defendant had only twenty-seven days to prepare a defense to charges that were three years in the making; that the case was sophisticated and required extensive pretrial preparation; that the defendant faced a prison term of up to five years; and that the defendant had only fifteen days to meet with his new counsel before the trial.[94] The court held that these factors combined to violate the defendant's

83. *Id.* at 708-09.
84. *See supra* notes 76-79 and accompanying text.
85. 654 F.2d at 710-11.
86. 664 F.2d 1171 (10th Cir. 1981).
87. 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-660).
88. 664 F.2d at 1172.
89. *Id.* at 1172-73 (citing Powell v. Alabama, 287 U.S. 45 (1932)).
90. *See* Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971).
91. 509 F.2d 304 (8th Cir. 1975).
92. 638 F.2d 185 (10th Cir. 1980).
93. *King*, 664 F.2d at 1173 (quoting Golub v. United States, 638 F.2d 185, 189 (10th Cir. 1980)).
94. 664 F.2d at 1173.

sixth amendment rights.[95]

In *United States v. Cronic*[96] the defendant was indicted on mail fraud charges. The government's case involved seventeen witnesses and over fifty exhibits. The defendant had twenty-five days to prepare for trial and was represented by a court-appointed attorney with virtually no experience in federal criminal matters. The appellate court applied the *Golub*[97] test and concluded that inadequate preparation time denied the defendant effective assistance of counsel.[98]

C. *Speedy Trial*

The defendants in *United States v. Torres*[99] were arrested by local police in connection with a bank robbery. They consented to a search of their vehicle by local authorities.[100] A small caliber weapon was found in the door pouch.[101] Weapons were also found on the persons of both defendants.[102] While in custody, one of the defendants consented to a further search of the vehicle.[103] That search revealed stolen cash and the wallet of a robbery victim.[104] F.B.I. agents participated in the interrogation of the defendants and the search of the automobile while the defendants were in state custody.[105] Five days after the arrest, federal charges were filed and the defendants were taken before a magistrate the following day.[106] They appealed their subsequent convictions contending that there was undue delay between the time of their arrest and an appearance before a magistrate.[107] Arguing that the evidence seized from the automobile during that delay should be suppressed, the defendants cited *McNabb v. United States*[108] and *Mallory v. United States*[109] which require federal courts to exclude confessions obtained during such a period of undue delay. The principle was adopted in rule 5(a) of the Federal Rules of Criminal Procedure.[110] Rule 5(a) applies

95. *Id.*
96. 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-660).
97. United States v. Golub, 638 F.2d 185 (10th Cir. 1980). *See supra* text accompanying notes 92-93.
98. 675 F.2d at 1129.
99. 663 F.2d 1019 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2237 (1982).
100. 663 F.2d at 1021.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. 318 U.S. 332 (1943).
109. 354 U.S. 449 (1957).
110. FED. R. CRIM. P. 5(a) provides:

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears ini-

when the accused is taken into federal custody. The challenged search, however, occurred while the defendants were in state custody. The court, therefore, required the defendants to show that a "working arrangement"[111] existed between the F.B.I. and the police in order to tack the period of state custody to that of the federal government. The defendants were also required to show that such state custody was used to circumvent rule 5(a).[112] The court found no evidence of such a collusive arrangement. It noted that it is neither "suspicious [n]or irregular for both state and federal officials to investigate the same suspect, and to cooperate in the solution of a crime."[113]

As an alternative basis for its decision, the court held that the defendants failed to show that the discovery of the evidence resulted from the delay. The defendants were interrogated and consented to the search of their vehicle on the same day as the arrest. Although the evidence was found three days later, it was not based on consent given under duress caused by the delay.[114]

In *United States v. Guerrero*[115] the defendant was charged with assaulting a member of Congress after throwing eggs at John Anderson during his presidential campaign. The attack occurred on August 14, 1980 and trial was scheduled for September 29. On September 26, the trial judge granted the government's motion for a forty-five day continuance due to the unavailability of Congressman Anderson as a witness until the conclusion of the Presidential campaign. On October 6, the judge postponed the trial until December 8.[116] The defendant was subsequently convicted. He appealed, contending that the 101 day span between the arraignment and trial violated the seventy-day time limit of the Speedy Trial Act.[117] The defendant argued that the initial order postponing the trial did not adequately specify the reasons for granting the continuance as required by the Act.[118]

Judge Doyle, writing for the Tenth Circuit, conceded that the order was "cryptic."[119] Nevertheless, he found that the facts were presented in the government's motion for a continuance and, because they were so obvious, it was not necessary under the circumstances for the judge to repeat them in his order.[120]

In a forceful dissent Judge McKay stressed the importance of enforcing the Speedy Trial Act. He observed that Congress realized that the Act

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tially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

111. 663 F.2d at 1024. For an example of a working arrangement between federal and state officials, see Anderson v. United States, 318 U.S. 350 (1943).

112. 663 F.2d at 1024. *See* United States v. Rose, 415 F.2d 742 (6th Cir.), *cert. denied*, 396 U.S. 971 (1969); Barnett v. United States, 384 F.2d 848 (5th Cir. 1967).

113. 663 F.2d at 1025.

114. *Id.* In Part III of its opinion, the court rejected the defendant's contention that his consent to a "complete" search of the vehicle did not contemplate the extensive search that was undertaken. The court stated that "permission to search contemplates a thorough search." *Id.* at 1026-27.

115. 667 F.2d 862 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2044 (1982).

116. 667 F.2d at 866.

117. 18 U.S.C. § 3161 (1976 & Supp. V 1981).

118. 667 F.2d at 865.

119. *Id.* at 866.

120. *Id.* at 867.

places a heavy burden on trial judges and prosecutors and stated that "[o]nly vigilance by Courts of Appeals can prevent the erosion of the congressional mandate without Congress' consent."[121] He concluded with the "hope that this case will be confined to its peculiar facts and will not be the harbinger of an eventual erosion of this important statute rooted in constitutional imperatives."[122]

IV. CRIMINAL LAW AND STATUTORY INTERPRETATION

A. *Conspiracy*

In *United States v. Radeker*[123] the Tenth Circuit examined an exception to the hearsay rule which allows statements made in the course of and in furtherance of a conspiracy to be admitted into evidence. At trial, after establishing that Radeker helped manage a fence company, the prosecutor asked a witness how Radeker planned to replace one of the head men in the company. The defense objected to the response as hearsay.[124] The prosecutor argued that the testimony was admissible under the hearsay exception because it was made in the course of and in furtherance of a conspiracy. The judge permitted the testimony; however, he made no determination that a conspiracy existed or that the statement was made during the course of and in furtherance of a conspiracy.[125]

The Tenth Circuit reversed, ruling that the testimony should not have been permitted. The court relied on its previous interpretations of rule 104 of the Federal Rules of Evidence[126] in *United States v. Andrews*[127] and *United States v. Petersen*.[128] *Andrews* held that such hearsay statements are inadmissible "unless the existence of the conspiracy is established by independent evidence."[129] *Petersen* held that the testimony is inadmissible unless the trial judge determines that the prosecution has established that a conspiracy existed, that the declarant and the defendant participated in it, and that the statement was made in the course of and in furtherance of the conspiracy.[130] In *Radeker*, the Tenth Circuit held that when a defendant properly objects to hearsay testimony, the trial court must determine whether the prosecution has met the burden of proof required in *Andrews* regardless of whether the defendant has requested that such a finding be made.[131]

Chief Judge Seth dissented, arguing that the defendant should not be permitted to base an appeal on the trial court's failure to make a specific finding of conspiracy when a ruling on the hearsay objection was all that was

121. *Id.* at 869 (McKay, J., dissenting).
122. *Id.* at 870.
123. 664 F.2d 242 (10th Cir. 1981).
124. *Id.* at 246.
125. *Id.*
126. FED. R. EVID. 104(a), (b).
127. 585 F.2d 961 (10th Cir. 1978). For a brief review of *Andrews*, see *Criminal Law and Procedure, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 229, 260 (1980).
128. 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).
129. 585 F.2d at 966.
130. 611 F.2d at 1327.
131. 664 F.2d at 244.

necessary.[132] He noted that the defendant had the responsibility to request the specific finding either before or after the objection or after the trial judge had made his ruling.[133] Citing the Tenth Circuit opinion in *United States v. Brewer*,[134] Chief Judge Seth stated that the issue of whether the court must make a specific finding should be raised at trial, not on appeal.[135]

B. *Armed Robbery and Assault*

In *United States v. Crouthers*[136] the defendant, Crouthers, planned to rob the Aurora National Bank in Aurora, Colorado.[137] He convinced Trimm, his former student, to pretend to hold him up at gun point on the night he planned to be with Salski, a friend who was employed by the Wells Fargo Security Co. and whom Crouthers knew had access to the bank keys. Prior to the encounter, Crouthers gave Trimm a loaded gun and instructed him to keep it aimed at him during the holdup so that Salski would not become suspicious of his involvement.[138] Trimm cooperated and threatened the men with the gun which, unknown to Crouthers, was unloaded. Crouthers told Salski that there was a gun in his back. Trimm told Salski that if he cooperated and helped break into the bank no one would get hurt. Salski obeyed and the plan was carried out.[139]

After interviewing Salski and Crouthers, the F.B.I. searched Crouthers' apartment. Evidence was found linking Crouthers to the robbery. Trimm was subsequently arrested and his testimony led to Crouthers' conviction for armed bank robbery.[140]

On appeal, Crouthers argued that the evidence did not support a conviction for assault with a dangerous weapon because Salski never saw the gun and the gun was not loaded. The Tenth Circuit adopted the test established in *United States v. Beasley*.[141] The *Beasley* test as applied to Crouthers was "whether Salski perceived the situation as involving a dangerous weapon and, if so, whether the perception was reasonable."[142] The court found that Salski reasonably perceived his life to be in danger based on his

132. *Id.* at 248 (Seth, C.J., dissenting). The dissent stated, "[i]t seems apparent that had the defendant really wanted anything more than a bare ruling on his hearsay objection as he now urges he would have asked for it." *Id.*

133. *Id.*

134. 630 F.2d 795 (10th Cir. 1980). This case held that when a defendant fails to object to procedural omissions at the trial or on appeal, reversal is unwarranted unless a "fundamental miscarriage of justice" would result. *Id.* at 801 (quoting United States v. Morris, 623 F.2d 145, 150 (10th Cir.), *cert. denied*, 449 U.S. 1065 (1980)).

135. 664 F.2d at 248.

136. 669 F.2d 635 (10th Cir. 1982).

137. *Id.* at 638.

138. *Id.*

139. *Id.* at 639.

140. *Id.* at 638.

141. 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971). *Beasley* requires that the evidence show the defendant "(a) to have created an apparently dangerous situation, (b) intended to intimidate his victim to a degree greater than the mere use of language, (c) which does, in fact, place his victim in reasonable expectation of death or serious bodily injury . . . ." 438 F.2d at 1282. In applying this test, the *Beasley* court held that regardless of the robber's ability to actually inflict harm on the victim, if the victim is in fact shown to be apprehensive of the circumstances an assault conviction is warranted. *Id.* at 1283.

142. 669 F.2d at 639.

belief that Trimm possessed a loaded gun.[143]

C. *Illegal Gambling*

In *United States v. Boss*,[144] the defendant was tried for conducting illegal dice games at a private club in violation of 18 U.S.C. § 1955.[145] The evidence showed that the defendant and another man managed the club. In addition to the managers, the club employed two croupiers, one of whom participated in managing the gambling business, and three cocktail waitresses.[146] The defendant moved for a directed verdict contending that the government failed to prove that five or more persons were involved in the management of the operation as required by 18 U.S.C. § 1955(c).[147] The motion was denied and the defendant was convicted.

The Tenth Circuit reversed, holding that the prosecution had indeed failed to satisfy the requirements of section 1955(c). The court rejected the prosecution's argument that the cocktail waitresses should be included in the count, stating that the evidence was insufficient to establish that they "performed functions necessary to the illegal gambling business."[148] The court found that their relationship to the business was too attenuated to fall under the provisions of section 1955 and was not in accordance with congressional intent.[149]

The Tenth Circuit thus narrowed the scope of section 1955 to include only those persons necessary to the gambling business. It refused to allow the statute to encompass those merely helpful to the operations because to do so would exceed congressional intent.[150]

D. *Transmission of Radio Signals*

In *United States v. Brown*,[151] Federal Communications Commission (FCC) agents intercepted powerful radio signals which were being transmitted from Brown's home in Colorado. After obtaining a warrant to search the residence, the agents confiscated a radio transmitter, amplifiers, and miscellaneous equipment capable of transmitting signals over one hundred miles.

143. *Id.*

144. 671 F.2d 396 (10th Cir. 1982).

145. 18 U.S.C. § 1955(a) (1976) provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both." *Id.* § 1955(c) provides that:

> If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

146. 671 F.2d at 401.

147. *See supra* note 145.

148. 671 F.2d at 402.

149. *Id.*

150. For the same reasons the waitresses were not included as conductors of illegal gambling business, the court held that the bartender, back-up bartender, doorwoman, and band members could not be counted. The owners of the building who had leased the club could not be counted without proof of their actual participation or actual financial contributions to the operations. *Id.*

151. 661 F.2d 855 (10th Cir.), *cert. denied*, 454 U.S. 1127 (1981).

Brown was charged with making radio transmissions that "did extend" beyond the state line in violation of 47 U.S.C. § 301(d).[152] At trial, the agents testified that the transmission wattage on Brown's citizen's band transmitter was greater than that permitted by the FCC and that the transmissions "could have crossed state borders or interfered with interstate radio signals."[153] No evidence was presented that the signals actually interfered with interstate transmissions or crossed the state line. The jury was instructed that the defendant could be convicted if the effects of the radio transmission "extend or could extend beyond the borders of the state of Colorado."[154] Based on this evidence, Brown was convicted.

The Tenth Circuit upheld the conviction, holding that evidence which shows that radio signals are "powerful enough" to cross state borders is sufficient to satisfy the effects test of 47 U.S.C. § 301(d).[155] The court reasoned that, because the intent of the statute is to provide the government with plenary power over all channels of interstate radio transmissions, the government need not prove that the signals "actually" extend beyond the state border.[156]

Judge McKay dissented, distinguishing between broadcasts that "did extend" across the state line and those that did not.[157] Looking at the plain meaning of subsection 301(d), Judge McKay found that Congress did not intend to regulate those broadcasts which "could extend" past state borders.[158] He concluded that, although the defendant was properly charged under the "effects test," the addition of the words "or could extend" to the jury instructions was reversible error.[159] In Judge McKay's view, the majority's affirmance of the conviction "greatly expand[s] criminal jurisdiction in the face of a contrary congressional intent and [is] counter to the obvious purposes apparent in the general structure of the statutory scheme."[160]

E. *Malicious Damage*

The defendant in *United States v. Poulos*[161] was charged with the destruction of a building and personal property with explosives in violation of 18

152. 47 U.S.C. § 301 (1976) provides in part:
> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders . . . .

153. 661 F.2d at 855.

154. *Id.* at 857.

155. *Id.* at 856; *see supra* note 152. The appellate court determined that an onerous burden would be imposed upon the government if, in order to prove that every signal actually extended across the border, it was required to monitor the signals from outside the state.

156. 661 F.2d at 856.

157. *Id.* at 857 (McKay, J., dissenting).

158. *Id.* The dissent cited Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) as incorrectly interpreting the language of subsection 301(d) to allow Congress to regulate all broadcasts by citizen's band radios whether intra- or interstate. 661 F.2d at 857 n.2 (McKay, J., dissenting).

159. *Id.* at 857.

160. *Id.*

161. 667 F.2d 939 (10th Cir. 1982).

U.S.C. § 844(i).[162] At trial, the defendant contended that 18 U.S.C. § 844(j),[163] which defines "explosives," is void for vagueness. He argued that the statute fails to warn potential defendants of the criminal nature of their conduct and that reasonable men would have to "guess at its meaning and differ as to its application."[164] The defendant stated that the building was not destroyed by an explosive, as defined in the statute, but rather by a device consisting of two glass bottles filled with styrofoam and gasoline.[165] Furthermore, the gasoline was ignited by sparks from the pilot light of a water heater in the building, not by an explosive igniting device. The trial court refused to grant the defendant's motion for judgment of acquittal or to strike the indictment, and the defendant was convicted.[166]

The Tenth Circuit upheld the conviction, ruling that section 844(j) must be broadly construed to include all types of explosives, even those not specified.[167] The court stated that it is common knowledge that gasoline is a highly combustible substance that fits within the meaning of "explosives."[168]

F. *Sentencing*

1. Concurrent Sentence Doctrine

In *United States v. Montoya*[169] the trial court determined the defendant should serve concurrent sentences on the four counts of his conviction. On appeal, the Tenth Circuit affirmed the convictions for assaulting a federal law enforcement agent with a dangerous weapon[170] and possessing an unregistered firearm.[171]

The prosecution asked the Tenth Circuit to affirm the remaining two convictions[172] by applying the concurrent sentence doctrine.[173] The prosecution argued that even if a ruling on the remaining two convictions would

162. 18 U.S.C. § 844(i) (1976). This section penalizes anyone who "maliciously damages or destroys or attempts to damage or destroy, by means of an explosive, any building . . . or other real or personal property used in interstate commerce or in any activity affecting interstate or foreign commerce." *Id.*

163. *Id.* § 844(j) (1976). An "explosive" is defined as:

> gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

164. 667 F.2d at 941.

165. *Id.* at 940-41.

166. *Id.* at 941.

167. *Id.* at 942.

168. *Id.*

169. 676 F.2d 428 (10th Cir.), *cert. denied*, 103 S. Ct. 124 (1982).

170. 18 U.S.C. § 111 (1976). This section provides "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties shall be fined."

171. 26 U.S.C. § 5861(d) (1976). This statute section prohibits any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and transfer record. . . ."

172. The defendant was convicted under 26 U.S.C. § 5861(i) (1976) which prohibits one from receiving or possessing "a firearm which is not identified by a serial number as required by this chapter. . . ." The defendant was also convicted under the Omnibus Crime Control and

be in the defendant's favor, the sentences under the first two convictions would not change. The court refused to apply the doctrine, stating that the issues on the remaining counts were "uncomplicated."[174] The court cited *Benton v. Maryland*[175] to support its conclusion that application of the doctrine is a discretionary matter.

The court noted that strong criticism has been directed toward application of the doctrine due to the chance of "adverse collateral consequences."[176] It further noted that different approaches to this question have arisen in the Sixth and Seventh Circuits and in the District of Columbia and Fifth Circuits.[177] The Tenth Circuit rejected the District of Columbia and Fifth Circuit approach which would have vacated the convictions on the remaining counts. Instead, the court reaffirmed its discretionary authority not to apply the doctrine.[178]

2. Youth Corrections Act

In *Watts v. Hadden*[179] the Tenth Circuit issued a two-part opinion concerning the requirements of the Federal Youth Corrections Act (YCA).[180] Eleven inmates of the Federal Correctional Institution in Colorado complained that the United States Bureau of Prisons (Bureau) and the United States Parole Commission (Commission) failed to follow the provisions of the YCA. They argued that inmates sentenced under the YCA should be segregated from non-YCA offenders and placed in a facility designed and operated under the provisions of the YCA.[181] The district court determined that the petitioners were being held at the institution in violation of the YCA and ordered the Bureau to draft a plan in compliance with the YCA provisions.[182]

The Bureau's plan provided the YCA offenders with separate living

Safe Streets Act of 1968, § 1202(a), Pub. L. No. 90-351, 82 Stat. 197, 236 (1968) (codified at 18 U.S.C. § 922 (1976)).

173. The concurrent sentence doctrine states that "if any one of the counts is good and warrants the judgment, in the absence of anything in the record to show the contrary, the presumption of the law is that the court awarded sentence on the good count only." United States v. Arteaga-Limones, 529 F.2d 1183 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

174. 676 F.2d at 433.

175. 395 U.S. 784 (1969).

176. 676 F.2d at 432. *See also* United States v. Alexander, 471 F.2d 923, 933-34 n.17 (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1972) ("[T]he vitality of the concurrent sentence doctrine is rapidly waning.").

177. 676 F.2 at 432-33. The Seventh Circuit considers the validity of all challenged counts rather than applying the concurrent sentence doctrine. *See* United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). The Sixth Circuit assumes the existence of adverse consequences in its refusal to apply the doctrine. *See, e.g.*, Gentry v. United States, 533 F.2d 998, 1001 (6th Cir. 1976). The Fifth Circuit appears to have adopted the D.C. Circuit's practice of vacating the conviction on the additional counts where the concurrent sentence doctrine is applied. *See* United States v. Warren, 612 F.2d 887, 891-96 (5th Cir. 1980); United States v. Hooper, 432 F.2d 604, 605-06 (D.C. Cir. 1970).

178. 676 F.2d at 433. *See, e.g.*, United States v. Masters, 484 F.2d 1251 (10th Cir. 1973); United States v. Von Roeder, 435 F.2d 1004 (10th Cir.), *vacated on other grounds sub nom.* Schreiner v. United States, 404 U.S. 67 (1971).

179. 651 F.2d 1354 (10th Cir. 1981).

180. 18 U.S.C. §§ 5005 to 5026 (1976).

181. 651 F.2d at 1362.

182. 469 F. Supp. 223, 235 (D. Colo. 1979), *aff'd*, 651 F.2d 1354 (10th Cir. 1981).

quarters and special treatment programs.[183] At all other times the YCA inmates would associate with the other inmates. The district court found the Bureau's plan inadequate and ordered that the YCA inmates be completely segregated.[184] The Bureau appealed, arguing that section 5011 of the YCA[185] gives them discretionary authority to permit integration of inmates "insofar as practicable."[186]

The Tenth Circuit disagreed, finding such an interpretation of the YCA contrary to both the statutory language and legislative history. It stated that the Bureau's discretion to integrate inmates is limited and that section 5011 does not allow the abandonment of all efforts to maintain separate YCA facilities.[187] The court held that as Congress had not expressed an intent to alter the YCA, the Bureau could not arbitrarily determine that the YCA approach should be discarded. Any deviation from this approach must come within the "context of a comprehensive system of institutions and agencies devoted to youth offenders"[188] and "within the context of substantial compliance with the segregation requirements of the YCA. . . ."[189]

In the second part of the opinion, the Tenth Circuit considered whether the Commission lawfully held the YCA inmates after failing to comply with the YCA provisions relating to parole eligibility of youth offenders[190] and unconditional release.[191] The Commission contended that the 1976 Parole Commission Reorganization Act[192] repealed the parole provisions of the YCA, permitting it to apply its own parole criteria to all prisoners. The Commission required each prisoner to serve at least one-third of his term prior to parole or release.[193] All youth offenders sentenced to an indeterminate term of six years were, therefore, required to complete at least two years before being eligible for release or parole.

The Tenth Circuit held that the Commission's procedure disregarded

183. 651 F.2d at 1360-62.

184. *Id.* at 1356.

185. 18 U.S.C. § 5011 (1976). This section pertains to treatment of youth offenders under the YCA and provides in part that:

> [t]he Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

186. The Tenth Circuit went through a lengthy discussion of § 5011 and, in particular, the construction of the phrase "insofar as practical." It concluded that the phrase modifies all four of the clauses preceding it which allows the Bureau a limited discretion in granting exceptions to the norm of segregation. 651 F.2d at 1362-65.

187. *Id.* at 1364.

188. *Id.*

189. *Id.*

190. 18 U.S.C. § 4206 (1976) lists the criteria that are to be considered by the Parole Commission when determining when to release a prisoner on parole. The issue addressed by the appellate court was whether the YCA required the Commission to consider a youth offender's rehabilitation under the specific treatment program. 651 F.2d at 1369.

191. 18 U.S.C. § 5017(b) (1976). This section allows the commission to release unconditionally a committed youth offender "at the expiration of one year from the date of conditional release." *Id.*

192. 18 U.S.C. §§ 4201 to 4218 (1976).

193. *Id.* § 4205(a).

the indeterminate sentencing procedure required by the YCA[194] and was contrary to the law in *Dorszynski v. United States*.[195] *Dorszynski* recognized that the YCA was promulgated in accord with the existing sentencing authority vested in the trial court and was intended to provide the courts with more sentencing alternatives.[196] The court found that the Commission had usurped the sentencing function of the trial courts and, therefore, did not comply with the purposes and policies of the YCA.[197]

The court also noted that, under the YCA and *United States v. Addonizio*,[198] the Commission has discretionary authority to consider when an unconditional release may be granted.[199] The court held, however, that a unilateral decision that an inmate is not eligible for parole until serving two years of his indeterminable sentence is not within the Commission's discretion.[200]

G. *Habeas Corpus*

In *Runnels v. Hess*[201] the defendant was tried in state court for rape.[202] In his closing argument, the prosecutor commented on the defendant's failure to testify on his own behalf. The defense failed to object and the defendant, Runnels, was convicted. After exhausting his state remedies, Runnels petitioned for habeas corpus relief on the ground that his fifth amendment right against self-incrimination had been violated. The petition was granted and the state appealed to the Tenth Circuit.[203]

Judge Barrett, writing for the court, decided the case by applying *Wainwright v. Sykes*.[204] *Sykes* held that failure to make a timely objection at a trial in a state with a contemporaneous objection rule precludes federal habeas corpus proceedings unless cause can be shown for noncompliance and that prejudice to the defendant would result. Judge Barrett reasoned that review based on an inferred fundamental error exception to the rule would invite " 'sand-bagging,' on the part of defense lawyers, 'who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their gamble does not pay off.' "[205] He stated that *Sykes* was intended to prevent such sand-bagging and that "carving out fundamental error exceptions to *Sykes* would seriously undermine its force."[206] The court remanded the case to determine whether

194. *See* 18 U.S.C. § 5010(c) (1976).
195. 418 U.S. 424 (1974).
196. *Id.* at 440.
197. 651 F.2d at 1377.
198. 442 U.S. 178 (1979).
199. 651 F.2d at 1378.
200. *Id.* at 1378-79. The court concluded that the Commission's failure to consider the youth offender's rehabilitative progress and failure to determine "good cause" to release offenders is contrary to the purpose of the YCA and § 4206(a).
201. 653 F.2d 1359 (10th Cir. 1981).
202. *See* Runnels v. State, 562 P.2d 932 (Okla.), *cert. denied*, 434 U.S. 893 (1977).
203. 653 F.2d at 1361.
204. 433 U.S. 72 (1977).
205. 653 F.2d at 1363 (quoting Wainwright v. Sykes, 433 U.S. 72, 89 (1977)).
206. 653 F.2d at 1363.

cause existed for the defendant's failure to timely object.[207]

Judge Logan dissented, arguing against such a strict application of *Sykes*.[208] He stated that *Sykes* must be considered with *Henry v. Mississippi*[209] which held that procedural defaults in state proceedings do not prevent vindication of federal rights unless the procedural rule serves a legitimate state interest. He noted that the *Sykes* Court implicitly recognized this principle by applying *Henry* to determine whether a legitimate state interest existed before applying the "cause and prejudice" analysis.[210]

Judge Logan argued that, in Runnel's case, the contemporaneous objection rule would not serve a legitimate state interest.[211] He stated that the state's interest in finality and efficiency in the administration of justice are not served by requiring contemporaneous objection to the prosecutor's closing argument because an objection would have resulted in a mistrial.[212] He then noted that, based on the circumstances of the case, sand-bagging was unlikely.[213] Finally, Judge Logan argued that if prevention of sand-bagging is considered to be a sufficient state interest, then the requirements of *Henry* would always be met and rendered meaningless.[214]

H. *Trial Matters*

1. Reviewing a Judgment of Acquittal

In *United States v. White*[215] the defendant, White, was found guilty of mail fraud[216] and interstate transportation of fraudulently obtained money.[217] The trial judge set aside the verdict and granted White's motion for a judgment of acquittal.[218] The prosecution appealed, contending that the judge erred by applying the standard of review established in *Curley v. United States*[219] which, it argued, conflicts with the Tenth Circuit's position

207. *Id.* at 1364. The court in Part A of its opinion agreed with the district court that the prosecutor's remarks during closing argument had violated Runnel's fifth amendment rights. Thus, the prejudice element of the exception had already been shown. The court suggested that the cause element might be met by a showing of " 'ineffective counsel short of that necessary to make out Sixth Amendment claim . . . .' " *Id.* (quoting Tyler v. Phelps, 622 F.2d 172, 177 (5th Cir. 1980)).

208. 653 F.2d at 1365 (Logan, J., concurring in part and dissenting in part).

209. 379 U.S. 443 (1965).

210. 653 F.2d at 1366 (Logan, J., dissenting).

211. *Id.*

212. *Id.* at 1367.

213. *Id.* at 1367-68.

214. *Id.* at 1367.

215. 673 F.2d 299 (10th Cir. 1982).

216. 18 U.S.C. § 1341 (1976) prohibits one from developing and sending through the mail system "any scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, [or] representations . . . for the purpose of executing such scheme or artifice or attempting so to do . . . ."

217. 18 U.S.C. § 2314 (1976) prohibits transporting "in interstate . . . commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . ."

218. 673 F.2d at 301.

219. 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). In *Curley* the court held that, in ruling on a motion for judgment of acquittal, the trial court must weigh the evidence in light of the jury's determination of credibility and draw justifiable inferences which would result in a reasonable person finding guilt beyond a reasonable doubt. 160 F.2d at 232.

on judicial review of evidence.[220] The Tenth Circuit held that the trial court had used the appropriate standard of review; however, it found that the standard was erroneously applied.[221]

By viewing the evidence in a light most favorable to the prosecution, the court concluded that the evidence was sufficient to support the jury verdict on both counts of the indictment.[222] It reversed the judgment of acquittal which was based on the failure to establish the first element of mail fraud.[223] The court found that sufficient evidence existed to justify a verdict that White participated in a "scheme or artifice to defraud investors by use of false representations or promises."[224]

The evidence revealed that White solicited investments in a partnership to drill and rework oil wells. White represented that he held drilling and reworking rights to oil leases on three separate properties and that he had experience in the steam method of oil recovery. The evidence, however, indicated that White had assigned his interest in these properties prior to the formation of the partnership.[225] It was also revealed that White had never actually used the steam method of recovery but had merely observed its use.[226]

Based upon White's representations, five investors contributed funds to the partnership. After the partnership was formed, White spent several months constructing a trailer near the wells to hold the steam recovery unit. White then withdrew a substantial sum of money from the partnership account, converted it into cashier's checks, and cashed them in another state. The partners heard nothing from White until his arrest ten months later.[227]

The trial judge believed that White's efforts to construct the trailer were sufficient to cause a reasonable doubt about his intent to devise a fraudulent scheme. However, the Tenth Circuit held that such a belief "would not justify false or baseless representations"[228] and found that the jury could reasonably have inferred from the evidence that White falsely misrepresented material facts in violation of 18 U.S.C. § 1341.[229]

2. Judicial Grant of Witness Immunity

In *United States v. Hunter*[230] the defendant called a witness to testify in

220. The standard applied in the Tenth Circuit for judicial consideration of a motion for acquittal is to review all the evidence in the light most favorable to the prosecution, allowing a jury to find the defendant guilty beyond a reasonable doubt. 673 F.2d at 301 (citing Maguire v. United States, 358 F.2d 442, 444 (10th Cir.), *cert. denied*, 385 U.S. 870 (1966); Cartwright v. United States, 335 F.2d 919, 921 (10th Cir. 1964)).

221. 673 F.2d at 301.

222. *Id.* at 304.

223. *See supra* note 216 and accompanying text.

224. 673 F.2d at 304.

225. *Id.* at 302-04.

226. *Id.* at 304.

227. *Id.*

228. *Id.* at 305.

229. *Id.*; 18 U.S.C. § 1341 (1976). The court also held that the evidence was sufficient to support the conviction for transporting more than $5,000 in interstate commerce with knowledge that the money had been fraudulently appropriated. 673 F.2d at 305.

230. 672 F.2d 815 (10th Cir. 1982).

support of his duress defense. The witness invoked her fifth amendment right to remain silent after the prosecution refused to grant her immunity. Hunter contended that this denied him the opportunity to develop his defense.[231]

In conflict with the weight of authority, the defense urged the court to adopt the standard in *Government of Virgin Islands v. Smith*.[232] In *Smith* the Third Circuit held, based on *United States v. Herman*,[233] that when the prosecution refuses to grant immunity, the court may grant it under two circumstances. First, the court could force the prosecution to grant immunity or face an acquittal if it deliberately denies immunity in an attempt to distort the evidentiary conclusions.[234] The court could also grant immunity based on its "inherent authority" to promote the defendant's due process rights.[235]

The Tenth Circuit rejected the notion that a court has inherent authority to grant immunity "under the guise of due process."[236] Instead, it applied the law in *United States v. Graham*[237] in which it was held that the granting of witness immunity is confined to the United States Attorney and his superior officers. The court did not comment on the other circumstance mentioned in *Smith*,[238] therefore, it is unclear whether the Tenth Circuit would accept a judicial grant of witness immunity in the circumstance of prosecutorial misconduct.

3. Grand Juries

In another immunity case, *Sutton v. United States*[239] the defendant was the controlling officer of a company which was under investigation by a federal grand jury. Certain documents held by the company's attorney were subpoenaed; however, the grand jury's term expired before the documents could be reviewed. The trial court ordered the evidence transferred to a newly empaneled grand jury which never issued a subpoena for the documents. The defendant challenged the transfer.[240]

Writing for the Tenth Circuit, Judge Kerr of the District of Wyoming compared the facts of *Sutton* to those in *United States v. E.H. Koester Bakery Co.*,[241] where the transfer of documents between grand juries was permitted despite the absence of both a subpoena and a court order. Judge Kerr stated that to require the issuance of a second subpoena "would simply result in a complete waste of judicial time."[242] He agreed with the statement in *United*

231. *Id.* at 818.
232. 615 F.2d 964 (3d Cir. 1980).
233. 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). In *Herman* the court reviewed the circumstances in which a defendant may request that use immunity be applied and recognized the two situations promoted in *Smith*. 589 F.2d at 1204.
234. *Smith*, 615 F.2d at 968.
235. *Id.* at 969-70.
236. *Hunter*, 672 F.2d at 818.
237. 548 F.2d 1302 (8th Cir. 1977).
238. *Hunter*, 672 F.2d at 818.
239. 658 F.2d 782 (10th Cir. 1981).
240. *Id.* at 783.
241. 334 F. Supp. 377 (D. Md. 1971).
242. 658 F.2d at 784.

States v. Kleen Laundry and Cleaners, Inc.:[243] "That a different grand jury from the one which subpoenas the evidence is presented with that evidence is of little import. This procedure is common."[244]

4. Selective Prosecution

The Tenth Circuit addressed the issue of selective prosecution of tax protesters in *United States v. Amon*.[245] The defendants were convicted of filing false withholding allowance certificates. They appealed, contending that they were singled out for prosecution because they were "outspoken"[246] in their opposition to the tax system and that such selection violated their first amendment rights.

Judge Holloway, writing for the court, ruled against the defendants.[247] He agreed with the trial court that the standards articulated by the Second Circuit in *United States v. Berrios*,[248] applied to tax cases in *United States v. Johnson*[249] and endorsed by the Tenth Circuit in *Barton v. Malley*,[250] should be applied. These standards require that the defendant prove that he had been singled out for prosecution while others similarly situated had not generally been proceeded against for the type of conduct forming the basis of the charge against him. He must also prove that the government's discriminatory selection of him for prosecution has been invidious or in bad faith and has been based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights.[251] Judge Holloway held that the infringement on the defendants' first amendment rights was insufficient to show an impermissible purpose in the prosecution. Thus, the second prong of the *Berrios* test had not been met.[252]

In a vigorous dissent, Judge McKay argued that singling out the defendants because of their protest activities constituted an impermissible purpose for prosecution.[253] He stated that the trial court's findings showed that the second prong of the test had indeed been met and warned that "[t]he net [effects] of the majority's handling of this issue are . . . the establishment of a rule which permits government through selective prosecution to chill the exercise of a citizen's right to be 'outspoken' in protest against government policies."[254]

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243. 381 F. Supp. 519 (E.D.N.Y. 1974).
244. *Id.* at 523.
245. 669 F.2d 1351 (10th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).
246. 669 F.2d at 1355.
247. *Id.* at 1359. Judge Logan concurred in a separate opinion. *Id.* at 1359-61.
248. 501 F.2d 1207 (2d Cir. 1974).
249. 577 F.2d 1304 (5th Cir. 1978).
250. 626 F.2d 151 (10th Cir. 1980).
251. *Amon*, 669 F.2d at 1356 n.6.
252. The appellate court did not reach the question of whether the first prong of the *Berrios* test, requiring a showing that others similarly situated were not prosecuted, had been met. *Id.* at 1357 n.7.
253. *Id.* at 1361-64 (McKay, J., dissenting).
254. *Id.* at 1362.