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CRIMINAL PROCEDURE

OVERVIEW

The Tenth Circuit's criminal procedure decisions over the past survey period were especially significant for both sides of the criminal bar. The court confronted the affect the availability of a telephone warrant can have in precluding a warrantless search, analyzed the affect the use of firearms has in characterizing a police detention, adopted the "inevitable discovery exception" to the exclusionary rule, and once again addressed the problems inherent in police use of a drug courier profile. The court also explored the sixth amendment implications of judicially foreshortened trial preparation time, and resolved several issues relating to exhaustion of claims prior to filing a federal habeas corpus petition. Additional issues addressed by the court are illuminated by the section headings.

I. *UNITED STATES V. MASSEY*: POST-ARREST SILENCE AND THE DUE PROCESS CLAUSE

Massey and five others made a round trip from Oklahoma to Missouri to harvest wild marijuana.[1] Massey was arrested while returning to Oklahoma and was eventually convicted of possessing marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute.[2]

At trial, Massey testified that he had been a deputy sheriff and that he was acting in an undercover capacity when he made the trip to Missouri.[3] Massey told the jury that the undercover operation had been discussed in the presence of third parties prior to the trip.[4] This testimony was corroborated by two of those parties.[5] Massey was then cross-examined at length about his post-arrest failure to inform law enforcement authorities that he had been working in an undercover capacity.[6] During closing argument, the prosecutor encouraged the jury to conclude that Massey's exculpatory story was untrue because it had not been mentioned to the appropriate authorities following the arrest.[7]

Massey argued on appeal that reversible error occurred when the prosecutor was permitted to elicit evidence of Massey's post-arrest silence and comment upon that silence in an effort to impeach Massey's defense. The Tenth Circuit reversed Massey's conviction and remanded for further proceedings.[8] In an opinion by Judge Seymour, the court recognized that the

1. United States v. Massey, 687 F.2d 1348, 1351 (10th Cir. 1982).
2. *Id.* Massey's convictions were pursuant to 21 U.S.C. § 841(a)(1) (1982) (possession of marijuana with intent to distribute) and 21 U.S.C. § 846 (1982) (conspiracy to possess marijuana with intent to distribute).
3. 687 F.2d at 1351.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1356.

use of a defendant's post-arrest silence to impeach an exculpatory story violates due process if the silence follows the giving of *Miranda* warnings.[9] This is because the *Miranda* warnings contain an implicit assurance that the defendant will not be penalized for his silence.[10] Impeachment use of a defendant's silence before the giving of *Miranda* warnings, however, is permissible because in that context the defendant has not relied upon implicit police assurances that his silence will not be used against him.[11] The record in *United States v. Massey*[12] failed to indicate when, if at all, Massey was given his *Miranda* warnings.[13] The case was therefore remanded to the trial court for an evidentiary hearing on the timing of Massey's *Miranda* warnings.[14]

The Tenth Circuit's remand contained instructions for disposition of *Massey* following the evidentiary hearing. If the trial court found that Massey's post-arrest silence followed his receipt of *Miranda* warnings, the defendant would be entitled to a new trial because a review of the entire record convinced the Tenth Circuit that the constitutional error in *Massey* was not harmless beyond a reasonable doubt.[15] The court noted that Massey was questioned not only about his silence at the time of his arrest, but also about his silence at subsequent interrogations, at his initial appearance, at the magistrate's office, at the bond hearing, and at the arraignment.[16] Given the relentlessness of the prosecutor's attack on the "heart" of Massey's defense, the court ruled that if the trial court should find Massey's silence followed *Miranda* warnings, a new trial was mandated.[17]

II. *UNITED STATES V. CUARON*: TELEPHONE WARRANTS AND EXIGENT CIRCUMSTANCES

United States v. Cuaron[18] required the Tenth Circuit to consider, for the first time, whether the circumstances surrounding an arrest were sufficiently

9. *Id.* at 1353. Miranda v. Arizona, 384 U.S. 436 (1966) requires that persons subjected to custodial interrogations be informed of their right to remain silent, the likelihood that incriminating statements will be used by the prosecution, and the right to counsel even if indigent. *Id.* at 467-68.

10. Doyle v. Ohio, 426 U.S. 610 (1976). *Doyle* is the dispositive Supreme Court decision on the use of post-arrest silence. In *Doyle*, the Court held that because the *Miranda* warnings implied that a defendant would not be penalized for remaining silent, due process was violated by commenting on silence which had been encouraged by giving the warnings. *Id.* at 618-19 (citing United States v. Hale, 422 U.S. 171, 182-83 (1975)).

11. Fletcher v. Weir, 455 U.S. 603 (1982), *cited in* United States v. Massey, 687 F.2d 1348, 1353 (10th Cir. 1982).

12. 687 F.2d 1348 (10th Cir. 1982).

13. *Id.* at 1353.

14. *Id.*

15. *Id.* at 1354. The court stated that the following factors were significant in determining the degree of constitutional error caused by prosecutorial use of post-arrest, post-*Miranda* warning silence: 1) the nature of the prosecution's use of the silence; 2) whether the prosecution or defendant initiated the inquiry into the silence; 3) the quantum of other inculpatory evidence; 4) the degree of prosecutorial emphasis on the silence; and 5) the trial judge's opportunity to grant a mistrial or issue a curative instruction. *Id. See also* Williams v. Zadradnick, 632 F.2d 353 (4th Cir. 1980), *quoted in Massey*, 687 F.2d at 1353.

16. 687 F.2d at 1354.

17. *Id.*

18. 700 F.2d 582 (10th Cir. 1983).

exigent to justify police failure to obtain even a telephone warrant.[19] The Tenth Circuit, over a dissent by Judge Kelly,[20] upheld the trial court's ruling that the exigent circumstances in *Cuaron* justified a warrantless entry into a private home.[21]

Cuaron arose after Jon and William Neet sold four ounces of cocaine to undercover Drug Enforcement Agency (DEA) agents in Boulder, Colorado.[22] The agents negotiated for the purchase of two additional pounds of the drug, which the Neets agreed to procure from their supplier.[23] Jon was followed to the home of Frank Cuaron, which was immediately placed under surveillance.[24] When John returned to the hotel and delivered additional cocaine to the undercover agents, he and his brother were promptly arrested, and the agents began efforts to obtain a state court warrant to search Cuaron's home.[25] Less than an hour after the Neets were arrested, the agents decided to "secure" Cuaron's home without a warrant.[26] Entering the home, the agents saw one occupant apparently signal another person in an upstairs room; an agent rushed up the stairs and caught Cuaron in the act of flushing cocaine down the toilet.[27] Cocaine lying in plain view was also seized.[28]

Cuaron was later convicted on four related counts[29] and appealed on

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19. *Id.* at 586. Telephone warrants were authorized by Congress to encourage police officers to obtain warrants when circumstances existed which might induce an officer to conduct a warrantless search. *Id.* at 588-89 (citing United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1976); S. REP. NO. 354, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 527, 534. The provision for telephone warrants is found in FED. R. CRIM. P. 41(c)(2), which provides in pertinent part:

> *Warrant upon Oral Testimony*
>
> (A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.
>
> (B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.
>
> (C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist so that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

20. Honorable Patrick F. Kelly, District Judge, United States District Court for the District of Kansas, sitting by designation.

21. United States v. Cuaron, 700 F.2d 582, 591 (10th Cir. 1983).

22. *Id.* at 585.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Cuaron was convicted of two counts of distributing cocaine in violation of 21 U.S.C. § 841(a)(1) (1982) and 21 U.S.C. § 2 (1982); one count of conspiring to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982); and of possessing cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1982). 700 F.2d at 584.

the ground, inter alia, that the trial court had wrongfully failed to suppress evidence discovered through the warrantless search of his home.[30] Cuaron did not argue that exigent circumstances could never justify a warrantless search; rather, he argued that the DEA agents had no objective basis to believe that criminal evidence was about to to be destroyed, thereby precluding a finding of exigent circumstances in his case.[31] Cuaron further argued that in any event there was sufficient time to obtain a federal search warrant by telephone pursuant to Federal Rule of Criminal Procedure 41(c),[32] and that the agents' violation of the fourth amendment's[33] prohibition against warrantless searches therefore could not have been justified by exigent circumstances.[34]

The Tenth Circuit opinion, by Judge Seymour, noted that warrantless seizures inside a home are presumptively unreasonable,[35] and that the prosecution has the burden of establishing exigent circumstances.[36] The court found that the agents' initial entry into Cuaron's home was prompted by their reasonable belief that criminal evidence and contraband *might* be destroyed or removed before a warrant could have arrived.[37] The agents knew that the Neets were to return to effect yet another purchase, but that the Neets had been arrested and would not be returning to the home within the time expected.[38] The agents also knew that cocaine is easily transported or destroyed,[39] and that several people had arrived and left Cuaron's residence following Jon Neet's arrest.[40] Further, the agents had information that Cuaron was interested in selling his supply of cocaine as quickly as possible.[41] Finally, the agents were "aware" that the supplier was nervous about operating from his home.[42] In the court's view, under these circumstances the agents could reasonably believe there was insufficient time to obtain either a conventional warrant or a telephone warrant without losing impor-

30. 700 F.2d at 586.

31. *Id.* The Supreme Court has never expressly sanctioned an independent "destruction of evidence" exception to the fourth amendment's warrant requirement, although dicta has suggested approval for warrantless entries in such circumstances. *See, e.g.*, United States v. Santana, 427 U.S. 38 (1976). In *Santana*, a warrantless entry into the defendant's home was upheld on the basis that the police were in "hot pursuit" of the defendant. *Id.* at 43. One of the reasons supporting this holding was a "realistic expectation" that police delay would result in the destruction of evidence. *Id.*

The dissenting judge in *Cuaron* pointedly contrasts a "realistic expectation" test for recognizing an exigency with the majority's test for assessing the existence of a purported exigency—whether the officers have reason to believe that evidence may be lost or destroyed. *See* 700 F.2d at 592-93 (Kelly, J., dissenting). The dissent concludes that the latter test is so slippery and unreliable that its application threatens to swallow the warrant requirement altogether. *Id.*

32. 700 F.2d at 589. *See supra* note 19.

33. U. S. CONST. amend IV.

34. 700 F.2d at 586.

35. *Id.* at 586 (citing Payton v. New York, 445 U.S. 573 (1980)).

36. 700 F.2d at 580 (citing United States v. Baca, 417 F.2d 103 (10th Cir. 1969), *cert. denied*, 404 U.S. 979 (1971)).

37. 700 F.2d at 586-87.

38. *Id.* at 586.

39. *See id.* at 587.

40. *Id.* at 586-87.

41. *Id.* at 586.

42. *Id.* at 587.

tant evidence.[43] Thus, the warrantless search was constitutionally permissible, and the trial court properly admitted the evidence.[44]

Judge Seymour rejected the argument that the finding of an exigency should have been affected by the fact that the agents delayed their warrantless search for fifty-five minutes after Neet's arrest.[45] As long as probable cause and exigent circumstances existed under the specific facts of *Cuaron*, delaying a search did not remove the exigent circumstance, even if the period of delay would have allowed the officers to obtain a warrant.[46]

After rejecting Cuaron's arguments, the court articulated a prophylactic standard to be used in all future cases involving exigent circumstances. In *Cuaron*, the trial court had failed to consider the availability of a telephone warrant.[47] While the Tenth Circuit found that failure harmless in *Cuaron*,[48] the court did state that trial courts must henceforth consider the availability of a telephone warrant in determining whether exigent circumstances existed, unless the "critical nature of the circumstances clearly prevented the effective use of *any* warrant procedure."[49] Absent such a clear and compelling exigency, the prosecution must bear the burden of submitting evidence regarding the availability of a telephone warrant and the time necessary to obtain one before a warrantless "exigent search" will be upheld.[50]

Judge Kelly filed a sharp dissent. In his view, the majority's opinion will invite "excusable neglect" of established search and seizure procedures, license future abuse, and unnecessarily plague the courts.[51] Judge Kelly was bothered by the majority's reliance on one agent's speculative (and self-serving) testimony regarding the likelihood that evidence would be destroyed or removed.[52] In his opinion, the court should make an objective comparison between the likelihood that evidence will be lost or destroyed and the likelihood that a warrant cannot be timely obtained.[53] Judge Kelly preferred justifing a warrantless "destruction of evidence" exigency only when the constable has something near a "realistic expectation" that evidence will be lost if time is taken to obtain a warrant.[54] Additionally, Judge Kelly felt that the majority failed to accurately assess the time required to obtain a telephone warrant, because its calculation was based on reference to the time normally required to obtain a warrant from a state judge, rather than by reference to

43. *See id.* at 587-90. The trial court did not assess the possibility of obtaining a timely telephone warrant, and apparently the prosecution did not offer any evidence on the question. Despite this evidentiary vacuum, Judge Seymour managed to conclude that such a warrant could not possibly be obtained within 30 minutes. *Id.* at 590.

44. *Id.* at 591.

45. *Id.* at 590.

46. *Id.*

47. *Id.* at 588.

48. *See supra* note 43 and accompanying text.

49. 700 F.2d at 589 (emphasis in original).

50. *Id.* at 589-90. The court emphasized that *Cuaron* was a unique situation, and that law enforcement agencies should not treat the decision as creating a significant breach in the fourth amendment warrant requirement. *See id.* at 590 & n.6.

51. *Id.* at 591 (Kelly, J., dissenting).

52. *Id.* at 592.

53. *Id.* at 593.

54. *Id. See also supra* note 31.

the particular time efficiencies created by the availability of a telephone warrant.[55] Finally, Judge Kelly opined that because the prosecution offered no evidence on how long it would have taken to secure a telephone warrant, the search must fall to the presumption that warrantless searches are unreasonable.[56] The telephone warrant was not "an option tendered solely for the investigating officers' convenience."[57] Rather, even in circumstances like those of *Cuaron* a timely attempt to obtain a telephone warrant should have been mandatory, and conduct to the contrary by well-trained but overzealous federal agents should not have been excused.[58]

III. RESTRICTING THE LIMITS OF A *TERRY* PATDOWN SEARCH

In *United States v. Ward*[59] the defendant challenged the admission of evidence obtained from a non-arrest patdown search made during a lawful search of the defendant's home.[60] Internal Revenue Service agents had obtained a warrant to search Ward's residence for evidence of illicit bookmaking activities.[61] Although the agents' affidavits supporting issuance of the search warrant established probable cause to search Ward's person,[62] the warrant authorized only a search of the residence.[63] The agent executing the search conducted a cursory patdown search of Ward's person before searching the house, and then asked Ward if he carried weapons.[64] Ward was ordered to empty his pockets after revealing he carried a pocketknife;[65] this action precipitated discovery of betting slips and checks which were admitted into evidence at trial over Ward's objection.[66] Ward argued that this evidence should have been suppressed because the scope of the warrant did not authorize a search of his person.[67] The government argued that the patdown search constituted a reasonable frisk for weapons under the doc-

55. *See* 700 F.2d at 594 (Kelly, J., dissenting). Judge Kelly observed that the magistrate could have been put "on hold," obviating many time constraint exigencies. *Id.*

56. *Id.* The Supreme Court has stated that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980).

57. 700 F.2d at 594 (Kelly, J., dissenting).

58. *Id.* at 594-95. Neither the dissenting judge nor the majority discuss the agents' role in *creating* the exigency. It is not clear from either opinion why the agents chose to arrest the Neets when they did. Presumably, Jon Neet could have been allowed to return to Cuaron's while the warrant was being obtained. There is no indication in the opinions that any cocaine or cash would have been lost had the agents simply continued their surveillance without arresting the Neets while they waited the "two or three hours" necessary to obtain a state warrant, or the shorter time required to obtain a federal telephone warrant. In United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974), the court held that under circumstances similar to those in *Cuaron*, an exigency which followed the agents' conduct could *not* be utilized as an "easy by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." *Id.* at 630.

59. 682 F.2d 876 (10th Cir. 1982).

60. *Id.* at 879.

61. *Id.* at 877.

62. *Id.* at 878 n.2.

63. *Id.*

64. *Id.* at 878.

65. *Id.*

66. *Id.*

67. *Id.* at 879.

trine of *Terry v. Ohio*[68] and was therefore constitutionally sound regardless of the scope of the search warrant.[69] The trial court admitted the evidence, and Ward was convicted of failure to purchase a wagering stamp.[70]

The Tenth Circuit, with Judge McWilliams dissenting, reversed. In an opinion by Judge Barrett, the court held that a patdown search is permissible under *Terry* only if it is supported by a reasonable belief that the subject of the search is armed and presently dangerous.[71] Because nothing in the record indicated that the agents believed Ward was armed and presently dangerous,[72] the evidence discovered during the patdown was illegally seized and its admission into evidence gave rise to reversible error.[73] The court noted that this fourth amendment violation could have been easily avoided had the search warrant been drafted to include a search of Ward's person.[74]

In dissent, Judge McWilliams emphasized that Ward was the target of a criminal investigation, and obviously realized this fact when the agents arrived at his home for the purpose of executing the search warrant.[75] Judge McWilliams suggested that when a search of a residence must be conducted in the presence of a home owner who is aware that he is a "target" in a criminal investigation, the searching officer may reasonably infer that the homeowner is armed and dangerous and may therefore conduct a limited patdown search for weapons for their protection.[76] Thus, the search of Ward was permissible under *Terry*.[77]

Apparently the government did not argue, nor did the court consider, that the search of Ward's person was valid as an adjunct to the evidence-gathering function of the search warrant. For instance, in *Ybarra v. Illinois*[78] the defendant, a tavern patron, was illegally searched during the execution of a search warrant which made no mention of criminal involvement by any of the patrons.[79] The Court emphasized that none of the circumstances in that case indicated to the police that Ybarra was connected with the criminal activity to which the search warrant was addressed, and therefore no probable cause to search Ybarra existed.[80] The circumstances in *Ward* are quite different from those in *Ybarra*. As noted in the dissenting opinion, Ward was the "target" of the investigation,[81] and, as noted in the majority opinion, the agent's affidavit was adequate to establish probable cause for

68. 392 U.S. 1 (1968). *Terry* held that a police officer questioning a citizen as part of a police investigation may, when he reasonably suspects that person to be "armed and presently dangerous," frisk that person in an attempt to discover potential weapons of assault. *Id.* at 30.

69. *See* 682 F.2d at 879.

70. *Id.* Ward's failure to purchase a wagering stamp violated 18 U.S.C. § 7203 (1982).

71. 682 F.2d at 880. *Accord* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979).

72. 682 F.2d at 881.

73. *Id.*

74. *Id.*

75. *Id.* at 882 (McWilliams, J., dissenting).

76. *Id.* at 882-83.

77. *Id.* at 882.

78. 444 U.S. 85 (1979).

79. *Id.* at 90.

80. *Id.* at 90-91. The Court also held that, given Ybarra's behavior, the police could not subject him to a *Terry* search. *Id.* at 93-94.

81. *See supra* note 75 and accompanying text.

searching both the residence and Ward's person.[82] Further, many of the items mentioned in the search warrant could easily have been (and indeed were) concealed on Ward's person. Under these circumstances, state court cases since *Ybarra* almost invariably permit frisks of persons strongly identified with the premises searched.[83] Also, it might be argued that *Ward* is closer to *Michigan v. Summers*[84] than to *Ybarra*. *Summers* held that occupants of a private premises may be seized and detained while a search warrant for contraband is executed because of the potential danger attendant to executing the search warrant when persons connected with those premises are present.[85] *Summers'* holding was based on a recognition that, after a premises-specific search warrant issues, detaining the occupants present during the search constitutes a minimal intrusion on personal liberty while simultaneously providing significant personal protection to the searching officers.[86] In view of *Summers'* holding and rationale, it would not be implausible to suggest that the incremental liberty intrusion stemming from a frisk during a *Summers* detention is similarly outweighed by the increased protection that frisk provides for those executing the search. Thus, a slight extension of *Summers* could have validated the search made in *Ward*, even though the search would not have been justified by *Terry*.

IV. *UNITED STATES V. MERRITT*: SHOW OF FORCE AND THE *TERRY* STOP

A. *The Case*

Denver police officers had received word that Thomas Gerry, a Texas fugitive wanted for murder, was staying at a home on Sherman Street in Denver.[87] Several officers went to this location; Gerry was not there, but the officers learned that he would be returning later that evening.[88] Gerry was believed to be heavily armed and dangerous, and the officers observed an impressive array of weapons and ammunition at the Sherman Street address.[89]

The officers then set up a stakeout, in anticipation of Gerry's return.[90] Several hours later, while a police cruiser was parked in front of the Sherman Street home, some officers observed a white pickup truck circle the block, stop, and switch off its lights.[91] Nobody exited the truck, and it appeared that the truck's occupants had assumed a crouching position.[92] Three of-

82. *See supra* note 62 and accompanying text.

83. *E.g.*, People v. Broach, 111 Mich. App. 122, 314 N.W.2d 544 (1982); State v. Brooks, 51 N.C. App. 90, 275 S.E.2d 202 (1981); Lippert v. State, 653 S.W.2d 460 (Tex. Crim. App. 1982).

84. 452 U.S. 692 (1981).

85. *Id.* at 705.

86. *Id.* at 702-04.

87. United States v. Merritt, 695 F.2d 1263, 1265 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1898 (1983).

88. *Id.* at 1266.

89. *Id.* at 1265-66. The police observed shotguns, handguns, and what appeared to be an automatic rifle. *Id.* at 1266.

90. *Id.* at 1266.

91. *Id.*

92. *Id.*

ficers then approached the truck with weapons, including shotguns, pointed at the truck;[93] the occupants were ordered out and told to "freeze."[94] One or two shotguns were pointed at the suspects at this time, and one shotgun remained aimed at the suspects throughout the incident.[95] After identification revealed that Thomas Gerry was one of the truck's occupants, the truck was checked for weapons, and a loaded revolver was recovered from underneath the driver's seat.[96] Merritt, who was also one of the truck's occupants, was then formally arrested.[97]

The trial court suppressed the revolver and several inculpatory statements made by Merritt subsequent to his arrest on the ground that the police did not, at the time they ordered Merritt and the others from the truck, have the reasonable suspicion *Terry v. Ohio*[98] requires in order to justify a police investigatory stop.[99] In an alternative holding, the trial court ruled that in Merritt's case the police had actually made an arrest without probable cause, even though there may have been justification to make a "stop."[100]

The government took an interlocutory appeal from the trial court's suppression order.[101] In a well-reasoned opinion by Judge Anderson, the Tenth Circuit reversed the suppression order. The court held that, based upon the totality of the circumstances, the officers who effected the stop had a particularized and objective basis for suspecting that the occupants of the truck were or had been involved in a criminal activity, and could therefore make a stop to determine the identities of those in the truck.[102]

B. *Use of Hearsay in Suppression Hearings*

Judge Anderson observed that the trial court erred at the suppression hearing when it excluded testimony by two officers concerning critical information a third officer had conveyed to them describing the appearance and movements of the truck and its occupants near the Sherman Street address.[103] The Tenth Circuit found that this evidence, if admitted, would have provided the necessary link to justify a *Terry* stop.[104]

Before reversing the district court's determination that no reasonable suspicion existed, the Tenth Circuit pointed out that a trial court generally is

93. *Id.* at 1267.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. 392 U.S. 1 (1968). The "reasonable suspicion" required for a *Terry* stop is "[a] particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981). The reasonableness of a suspicion is determined by viewing the "totality of circumstances" confronting the officer. *Id.*
99. 695 F.2d at 1267.
100. *Id.* It is axiomatic that probable cause is required to make a valid arrest. Probable cause must be based on the likelihood of an individual's guilt, rather than on reasonable suspicion of possible criminal activity. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1 (1978).
101. 695 F.2d at 1267. *See* 18 U.S.C. § 3731 (1982).
102. 695 F.2d at 1269. *See supra* note 98 and accompanying text.
103. 695 F.2d at 1269. The third officer did not testify at the suppression hearing. *Id.*
104. *Id.*

not bound by the rules of evidence during a suppression hearing,[105] and that consideration should have been given to the officers' vital testimony, despite its hearsay character, because these statements were corroborated by other testimony.[106] Moreover, given Gerry's known dangerous character, the officers who made the hearsay statements had every reason to report their observations of suspicious behavior as accurately as possible.[107] Because police officers may rely on hearsay statements "as the basis for reasonable suspicion to make a stop, they should also be permitted to offer that same hearsay as testimony to support their reasonable suspicion when a defendant moves to suppress evidence on the ground that reasonable suspicion did not exist."[108] In reaching its conclusion the Tenth Circuit relied on *United States v. Matlock*,[109] which approved the use of hearsay evidence in a suppression hearing concerning third party consent to a premises search.[110]

Furthermore, reasonable suspicion could rest upon the collective knowledge of the police officers rather than solely upon the knowledge of the officer actually making the stop.[111] In light of the collective knowledge of the officers involved in the stakeout and stop, the requisite reasonable suspicion was manifest, and the initial stop was entirely proper.

C. *Show of Force During* Terry *Stop*

The Tenth Circuit also rejected the trial court's conclusion that Merritt was in fact arrested, not merely stopped.[112] The trial court reasoned that the encounter immediately escalated into an arrest because the level of force employed by the police officers during the encounter went beyond that apparently authorized by *Terry*.[113] The Tenth Circuit observed that the trial court's analysis somehow assumed that some level of police force during an otherwise valid *Terry* stop turns the stop into an arrest requiring probable cause, regardless of the justification that may exist for the degree of force used.[114] The Tenth Circuit reasoned that this view of the distinction between a stop and arrest diverted a court's focus from the central concern in all fourth amendment cases, which is the reasonableness of the police intrusion in light of all the surrounding circumstances.[115] The relevant inquiry was not whether the force used was of a quantum requiring characterization of a stop as an arrest, but rather whether the police used reasonable force.[116] In this case the officers' show of force, including the continuous pointing of

105. *See* FED. R. EVID. 104(a), 1101(d)(1).
106. 695 F.2d at 1270.
107. *Id.*
108. *Id.*
109. 415 U.S. 164 (1974).
110. *Id.* at 175. The Court indicated that hearsay evidence should be admitted at suppression hearings when the circumstances surrounding the evidence, including corroborating statements by other witnesses, indicate that the hearsay statement is reliable. *Id.* at 175-76.
111. 695 F.2d at 1268 n.9. The "fellow-officer" rule adopted in *Merritt* had previously been recognized in cases concerning the existence of probable cause for an arrest. *Id.*
112. 695 F.2d at 1272.
113. *Id.*
114. *Id.*
115. *Id.* at 1274.
116. *Id.*

weapons, was reasonable given their reasonable suspicion that an armed, dangerous murderer was present.[117] Thus, "the incremental intrusion visited upon a citizen's personal security by having a gun pointed at him instead of merely drawn, as was true here, is outweighed by the increased protection the officers afford themselves by making certain of their safety in face of the danger presented."[118]

This approach to the investigatory stop arrest distinction is apparently inconsistent with the approach recently taken by a Supreme Court plurality in *Florida v. Royer*.[119] In that case, the defendant fit a drug courier profile and was subjected to a valid *Terry* stop.[120] Following an initial public stop, however, the defendant was taken to a small room, where he was alone with two police officers who accused him of carrying narcotics.[121] The court held that because of the intensity of the detention and its purpose (to search the defendant's luggage) at some point the stop matured or escalated into a functional, though not a formal, arrest unsupported by probable cause.[122] To the extent the Tenth Circuit's reasoning diminishes the significance of an intensive, facially coercive detention, it appears inconsistent with *Royer*.

Merritt is also inconsistent with those circuits which hold that the use of a drawn, or at the very least pointed, gun converts a stop into an arrest.[123] The court, however, felt that if such clearly self-protective actions as those taken in arresting Merritt turned every such confrontation into an arrest, an important public interest in police safety would be sacrificed.[124] Weighed against the incremental intrusion on a person's liberty stemming from reasonable police use of weapons, the public interest in police safety required recognizing that the use of drawn and pointed weapons does not in and of itself transform a *Terry* stop into an arrest.[125]

V. ADOPTION OF THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE

In *United States v. Romero*[126] the Tenth Circuit both recognized that the scope of a weapons search incident to a *Terry* stop extends to the detainee's vehicle[127] and adopted the "inevitable discovery" exception to the exclusionary rule.[128] *Romero* began when a tip made to a Drug Enforcement Agency agent, supported by corroborative first-hand observations, led Albuquerque police officers to reasonably suspect that Romero and Ortega were in posses-

117. *See id.*
118. *Id.*
119. 103 S. Ct. 1319 (1983).
120. *See id.* at 1326.
121. *Id.* at 1327.
122. *Id.* at 1328-29.
123. *See* United States v. White, 648 F.2d 29 (D.C. Cir. 1981); United States v. Strickler, 490 F.2d 378 (9th Cir. 1974).
124. 695 F.2d at 1274.
125. *Id.*
126. 692 F.2d 699 (10th Cir. 1982).
127. *Id.* at 703.
128. *Id.* at 704.

sion of a substantial amount of marijuana.[129] The van in which these two were riding was stopped and they were ordered out of the vehicle.[130] Officer Espinosa conducted a patdown search of Romero.[131] While Espinosa was patting down Romero, Officer Ortiz was inspecting the driver's seat area of the van for weapons and detected a strong odor of marijuana.[132] As he walked around the van to check for weapons on the passenger side, Ortiz stated that "It smells like a ton of dope in there."[133]

Either immediately before or after Officer Ortiz's announcement concerning the marijuana smell[134] Officer Espinosa felt a "stiff bulge" in Romero's pocket.[135] Although not believing the bulge to be a weapon,[136] the officer reached into the pocket and pulled out a small amount of marijuana.[137] Romero and Ortega were arrested; a subsequent search of the van pursuant to a search warrant resulted in the discovery of several pounds of marijuana, and Romero was eventually convicted of possession of marijuana with intent to distribute.[138]

The defendants appealed on the grounds, inter alia, that the officers twice exceeded their authority under *Terry*, first by searching the van's interior for weapons, and second by seizing the marijuana from Romero's pocket despite Officer Espinosa's belief that the "stiff bulge" was not a weapon.[139]

A. *Search of Vehicle Permissible Under* Terry

In an opinion by Judge Logan, the Tenth Circuit affirmed the conviction.[140] The court first held that just as an officer may search a car for weapons during a lawful arrest,[141] an officer who has lawfully stopped a suspect whom he reasonably suspects is armed and dangerous may conduct a limited weapons search of the suspect's car.[142] The court reasoned that such a suspect may have concealed a weapon in a part of a car readily accessible to him, and might "break away from the police and grab the weapon or, if allowed to return to the car, . . . may shoot or harm an officer."[143] In light of the potential danger in a traffic stop involving a suspect reasonably be-

129. *Id.* at 701.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. The trial court's findings did not set forth the exact sequence of events. *Id.* at 704.
135. *Id.* at 701.
136. *Id.*
137. *Id.*
138. *Id.* at 701-02. Romero was found guilty of violating 21 U.S.C. § 841(a)(1) (1982).
139. 692 F.2d at 702.
140. *Id.* at 705.
141. New York v. Belton, 453 U.S. 454 (1981).
142. 692 F.2d at 703.
143. *Id.* The expansion of *Terry* recognized in *Romero* was recently validated by Michigan v. Long, 103 S. Ct. 3469 (1983). *Long* held that *Terry* did not limit protective searches to the suspect's person, and that a weapons search of the passenger compartment of a suspect's vehicle is permissible under *Terry* when an officer has a reasonable belief in articulable facts suggesting that the suspect may be dangerous and may have immediate access to weapons in the passenger compartment. *Id.* at 3480.

lieved to be armed,[144] the fact that Romero and Ortega were out of the van and under the control of other officers before the van was searched did not render the search an unreasonable intrusion upon a citizen's liberty.

B. *Adoption of the "Inevitable Discovery" Exception*

The seizure of marijuana from Romero's pants pocket was more troublesome for the court. The court reasoned that if Officer Ortiz's announcement concerning the marijuana odor preceded the seizure of marijuana, the seizure might be justified as a search incident to a lawful arrest because the marijuana odor, combined with the anonymous tip and the corroborating observations which initially justified the stop, gave the officers probable cause to arrest.[145] Any search thereafter would be proper as a search incident to a lawful arrest. If Officer Ortiz's announcement followed the seizure, however, the evidence was illegally seized because Officer Espinosa believed that the bulge in Romero's pocket was not a weapon, precluding seizure under *Terry*.[146]

Rather than remanding the case to the trial court for a finding as to the timing of Officer Ortiz's announcement, the Tenth Circuit adopted the "inevitable discovery" exception to the exclusionary rule.[147] Under this exception, illegally seized evidence is admissible if there is "no doubt" that the police would have lawfully discovered the evidence at a later time.[148] Applying this exception to the facts of *Romero*, the court observed that the van search was underway as Romero was being patted down, and that Officer Ortiz's announcement could have occurred no more than a few seconds after the seizure of marijuana from Romero's pocket.[149] The discovery of the marijuana odor in the van provided probable cause to arrest, and upon arrest the officers would unquestionably have searched Romero and inevitably would have discovered the marijuana in the pants pocket.[150]

C. *Exceptions to the Exclusionary Rule*

The Supreme Court has recognized several discrete situations where the victim of illegal police conduct cannot use the exclusionary rule to suppress evidence. One such situation is where the police are able to obtain illegally seized evidence from an "independent source"; that is, a source whose knowledge and possession of the evidence were not the result of the illegal police conduct.[151] Another exception is where the connection between the illegal police conduct and evidence subsequently acquired is so "attenuated"

144. *See* Michigan v. Long, 103 S. Ct. 3469, 3479 & n.13 (1983).
145. 692 F.2d at 703.
146. *Id.*
147. *Id.* at 704.
148. *Id.* The Tenth Circuit noted that although the Supreme Court has not formally adopted this exception to the exclusionary rule, *id.* (citing Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977)), most circuit courts recognize the inevitable discovery rule. 692 F.2d at 704.
149. 692 F.2d at 704.
150. *Id.*
151. This rule was announced in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Court reaffirmed *Silverthorne* in Nardone v. United States, 308 U.S. 338, 341 (1939) and in Costello v. United States, 365 U.S. 265 (1961).

as to warrant the conclusion that the evidence was not obtained by exploiting the illegal conduct.[152]

The Fifth Circuit has announced a "good faith" exception to the exclusionary rule. In *United State v. Williams*,[153] the court refused to suppress evidence "[d]iscovered by officers in the course of actions that are taken in good faith and in the reasonable though mistaken belief that they are authorized."[154] The Fifth Circuit reasoned that the "good faith" exception is consistent with the purpose of the exclusionary rule, which exists to deter willful or flagrant actions by law enforcement officers, not to deter reasonable, good faith actions.[155] Although the Supreme Court has not, to date, adopted such a broad good faith exception, it appears to be on the verge of doing so in its next term.[156]

Still another exception to the exclusionary rule, the inevitable discovery doctrine, has been explicitly recognized by lower federal and state courts, but has never been expressly sanctioned by the Supreme Court.[157] This exception permits the prosecution to use unlawfully obtained evidence if it can demonstrate that the evidence would inevitably have been discovered by lawful means. The prosecution must initially demonstrate that the police did not use illegal conduct as a means of discovering the evidence.[158] The prosecution must then prove that the evidence would have been found without use of illegal conduct and must prove how it would have been found.[159] All the courts adopting this exception agree that the prosecution has the burden of proving these elements, but have split as to whether the burden is a preponderance standard or a clear and convincing standard.[160]

Although the Tenth Circuit did not expressly adopt the inevitable dis-

152. Nardone v. United States, 308 U.S. 338 (1939) is the source of this rule. More recent cases applying this principle are United States v. Ceccolini, 435 U.S. 268 (1978) and Brown v. Illinois, 422 U.S. 590 (1975).

153. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). *See generally* Note, United States v. Williams: *The Good Faith Exception to the Exclusionary Rule*, 32 MERCER L. REV. 1329 (1981).

154. 622 F.2d at 840. Several states have enacted legislation codifying the good faith exceptions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3925 (Supp. 1983-84); COLO. REV. STAT. § 16-3-308 (Supp. 1983).

155. *See* 622 F.2d at 842.

156. Justice White's concurring opinion in *Illinois v. Gates*, 103 S. Ct. 2317 (1983) approves of a good faith exception to the exclusionary rule. *Id.* at 2344 (White, J., concurring). The Court declined to consider the good faith exception on jurisdictional grounds, *id.* at 2321-25, but has granted certiorari to review two cases which raise the good faith exception issue. *See* United States v. Leon, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983).

157. *See* Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977). The first clear application of this doctrine was in Somer v. United States, 138 F.2d 790 (2d Cir. 1943).

158. *See* State v. Williams, 285 N.W.2d 248, 261 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980) (prosecution must show that bad faith actions were not taken in order to hasten discovery of the evidence). *See also* United States v. Brookins, 614 F.2d 1037, 1048 (5th Cir. 1980) (prosecution must show that, at time of illegality, police were pursuing the evidence or leads which would have reasonably led to evidence).

159. *See* State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979).

160. *Compare* United States v. Schipani, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (preponderance) *with* Government of Virgin Islands v. Gereau, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (clear and convincing).

covery exception until *Romero*, it applied its rationale in *United States v. Leonard*,[161] a case decided two years earlier. In *Leonard*, police officers located a gun in the glove compartment of Leonard's car during an inventory search executed after his arrest.[162] Prior to that discovery, however, the arresting officer had discovered the gun's location through an illegal interrogation of Leonard.[163] The Tenth Circuit upheld the trial court's refusal to suppress the gun, because it was actually recovered during a valid inventory search and because its discovery was inevitable regardless of Leonard's statement.[164] The Tenth Circuit, however, based its decision on the independent source exception to the exclusionary rule[165] rather than the inevitable discovery exception.[166]

D. *Problems with* Romero

The court's decision in *Romero*, while it unambiguously adopts the inevitable discovery exception, offers little or no explanation as to when and how the exception should be applied by trial courts. The court did not intimate what the burden of proof should be, nor was any attention paid to the good faith vel non of the officer who improperly recovers the challenged evidence. Future cases are necessary to show how the Tenth Circuit will shape the criteria for use of the exception in district courts, and to demonstrate to what extent this exception will affect defendants seeking suppression of evidence.

VI. *McCRANIE V. UNITED STATES*: REASONABLE SUSPICION AND THE DRUG COURIER PROFILE

In *McCranie v. United States*[167] the Tenth Circuit, in affirming a conviction for possession of cocaine with intent to distribute, held that the correlation of a person's behavior with a "drug courier profile," in conjunction with evidence obtained through investigation based on that correlation, was sufficient to justify seizing that person for investigation of criminal activity.[168] The drug courier profile is a loosely formulated, unwritten checklist of characteristics or traits which narcotics agents believe are common to persons who traffic in illegal drugs.[169] Among the recurring elements are travel from drug "source cities" or travel to major drug "use" cities; unusual nervousness; intense scanning of the terminal area; travel with very little luggage; use of one-way tickets purchased with small bills; travel under an alias; and placing a telephone call immediately upon arrival.[170]

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161. 630 F.2d 789 (10th Cir. 1980).

162. *Id.* at 790.

163. *Id.* The interrogation was illegal because the officer had failed to provide Leonard his *Miranda* warnings. *Id.*

164. *Id.* at 791.

165. *See supra* note 151 and accompanying text.

166. 630 F.2d at 791.

167. 703 F.2d 1213 (10th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).

168. 703 F.2d at 1218.

169. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (Stewart, J., concurring).

170. *See* United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447

A. *Supreme Court Drug Courier Profile Cases*

The Court's first decision involving the use of the drug courier profile was *United States v. Mendenhall*.[171] Although there was no majority opinion in *Mendenhall*, Justice Powell, writing for three members of the Court, stated that in light of the training of the DEA agents and the matching of Ms. Mendenhall's conduct with that of the drug courier profile, the DEA agents had a reasonable and articulable suspicion of criminal activity sufficient to justify a *Terry* stop.[172] Justice Powell emphasized that it was the agents' experience which validated use of the drug courier profile to single Mendenhall out for questioning; reliance on the profile alone would probably have been an insufficient basis to initiate a *Terry* stop.[173] In a later case, *Reid v. Georgia*,[174] the Court again rejected the sufficiency of the drug courier profile ex proprio vigore as a basis for establishing the articulable, reasonable suspicion necessary for a *Terry* stop. *Reid* involved two travelers who fit the drug courier profile, but who did not otherwise act in a furtive or unusual manner.[175] The Court held that the agent could not, as a matter of law, have reasonably suspected the defendant of criminal activity on the basis of the observed circumstances[176] because the circumstances at best supported a "hunch" that the defendant was transporting narcotics.[177] Then, in *Florida v. Royer*,[178] a plurality of the Court, moving away from *Mendenhall* and *Reid*, apparently disagreed with a state appellate court's conclusion that mere similarity with the contents of a drug courier profile cannot establish the articulable basis for the reasonable suspicion required to justify a *Terry* stop.[179]

B. *Previous Tenth Circuit Drug Courier Profile Cases*

The Tenth Circuit had decided one drug courier profile case prior to *McCranie*. In *United States v. MacDonald*,[180] the court determined that the articulable suspicion required to justify a *Terry* investigatory detention was established when the defendant displayed the following "profile" characteristics: 1) checking of luggage at an airport which was not the defendant's final destination; 2) cash payment for a one-way standby ticket; 3) flight emanating from a drug source city; and 4) the defendant appeared nervous and did not approach the luggage claim area but directly left the termi-

U.S. 910 (1980). *Accord* United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (Stewart, J., concurring).

171. 446 U.S. 544 (1980).

172. *Id.* at 565 (Powell, J., concurring).

173. *Id.* at 565 n.6.

174. 448 U.S. 438 (1980).

175. *Id.* at 441.

176. The only behavior which deviated from that of ordinary travelers was that one petitioner occasionally looked backward at the other. *Id.*

177. *Id.*

178. 103 S. Ct. 1319 (1983).

179. *Compare* 103 S. Ct. at 1326 (plurality opinion) (evidence that defendant fit drug courier profile sufficient to justify detention) *with* Royer v. State, 389 So.2d 1007, 1019 (Fla. Dist. Ct. App. 1980) (rehearing en banc) (drug courier profile insufficient basis for detention), *aff'd sub nom.* Florida v. Royer, 103 S. Ct. 1319 (1983).

180. 670 F.2d 910 (10th Cir. 1981).

nal.[181] Although the court did not evaluate the sufficiency of the profile ex proprio vigore in establishing reasonable suspicion, its approach—which emphasized that reasonable suspicion was established by adding the agent's experience to the traveler's correlation with the drug courier profile[182]—closely paralleled that of Justice Powell in *United States v. Mendenhall*.[183]

C. McCranie v. United States

When DEA agents observed McCranie disembarking from a plane at the Atlanta airport, he seemed to fit the drug courier profile in a number of respects.[184] Based on this observation, the agent investigated further and, after learning that McCranie was flying on a one-way ticket from a "drug source" city in Florida, accosted McCranie and requested an interview.[185] During the interview, the agent accused McCranie of carrying drugs and requested permission to search McCranie's luggage.[186] McCranie became nervous and refused the requested permission, whereupon the agent terminated the interview and informed McCranie that other agents would meet him at his destination.[187]

The agent then notified a fellow DEA agent in Tulsa (McCranie's destination) of his suspicions about McCranie, also informing the other agent that investigation following the interview had revealed that McCranie had a prior criminal record which included marijuana convictions.[188] Upon arrival and after retrieving his luggage, McCranie consented to an interview with a DEA agent who was accompanied by a Tulsa policeman.[189] McCranie was then given his *Miranda* advisements.[190] After he refused to permit a search of his luggage, a sniffing dog (and three more policemen) were summoned.[191] The dog was not trained in narcotics sniffing, but nonetheless selected McCranie's suitcase.[192] McCranie was then permitted to leave, but was later arrested and convicted when a search pursuant to warrant revealed that his suitcase contained cocaine.[193]

On appeal, McCranie argued that he was "seized" for fourth amendment purposes in the Tulsa Airport, and that the seizure was not supported by a reasonable, articulable suspicion, but only by the DEA agents' hunches.[194] He conceded that the dog's signals provided reasonable suspi-

181. *Id.* at 913.
182. *See id.*
183. *See supra* notes 171-74 and accompanying text.
184. The "suspicious" characteristics exhibited by McCranie included: 1) flying on a one-way ticket; 2) a flight emanating from a major drug source city, Ft. Myers, Florida; and 3) McCranie's apparent nervousness. United States v. McCranie, 703 F.2d 1213, 1215 (10th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1216. McCranie was convicted for violating 18 U.S.C. § 841(a)(1) (1982).
194. 703 F.2d at 1216.

cion or probable cause, but argued that because these signals came after he and his suitcase had been illegally seized, the evidence obtained as a result of that seizure should have been suppressed.[195]

In an opinion by Judge Doyle, the Tenth Circuit, with Judge McKay dissenting, held that McCranie presented no fourth amendment violation because he was not seized in either Atlanta or Tulsa.[196] Because the police did not make an overt display of force, did not seize McCranie's wallet, move him from a public area, or detain him for a lengthy period, the court characterized the encounters as mere police-citizen contacts to which the fourth amendment does not apply.[197] The majority held that the circumstances of the detentions would not have indicated to a reasonable person that he or she was in custody and under official compulsion to answer questions.[198] Thus, any evidence which was discovered was not discovered pursuant to an illegal search.

The court held alternatively that even if the Tulsa encounter was a seizure, the participating agent had the reasonable suspicion necessary to make a *Terry* stop.[199] The reasonable suspicion was provided by the match between McCranie's conduct and some of the drug courier profile characteristics, in conjunction with the discovery of McCranie's criminal record.[200] The court stated that McCranie's behavior would not, by itself, have supported seizure, but that the drug courier profile characteristics combined with his criminal record did give rise to reasonable suspicion.[201]

Judge McKay filed a blistering dissent. For Judge McKay, the offensive note in the seizure and search was the use of the drug courier profile. He characterized the use of the profile as a "prime example of organized enforcement efforts that are rapidly eroding our protection against unwarranted, arbitrary intrusions of public officials."[202] Judge McKay stressed that the courts know little or nothing about the characteristics making up the profile, the standards that guide its application, or the probability that the profile incorporates a racial bias not amenable to judicial review.[203]

According to the dissent, McCranie's alleged drug courier characteristics could not have provided reasonable suspicion, much less probable cause, because these characteristics are indistinguishable from the traits exhibited by many perfectly innocent travelers.[204] Judge McKay also noted that even federal judges might become nervous when accosted by DEA agents.[205] Further, the defendant's criminal record should not have been permitted to add to the quality of the agent's suspicions "unless people who have previously

195. *Id.*
196. *Id.* at 1218.
197. *Id.* at 1217-18.
198. *Id.*
199. *Id.* at 1218.
200. *Id.*
201. *Id.*
202. *Id.* at 1218-19 (McKay, J., dissenting).
203. *Id.* at 1218-19 (citing United States v. Vasquez, 612 F.2d 1338, 1353 n.10 (2d Cir. 1979) (Oakes, J., dissenting)).
204. *See* 703 F.2d at 1219 (McKay, J., dissenting).
205. *Id.*

been arrested are excepted from Fourth Amendment protection."[206] Judge McKay found that McCranie had been "seized" as he was about to leave the Tulsa Airport, because a reasonable person in his position would have believed that he was not free to leave.[207] Thus, because the seizure was not supported by reasonable suspicion, the evidence discovered by the sniffing dog was tainted and therefore subject to suppression.[208]

D. *Implications of* McCranie

In *McCranie*, the court seemed to follow the Supreme Court's reasoning in *Reid v. Georgia*[209] by rejecting a person's similarity to the drug courier profile as an independently sufficient basis for a *Terry* stop.[210] This appears to be a retreat from *MacDonald*, where the court found that similarity to the drug courier profile, in light of the agent's experience in observing drug peddlers, was sufficient to provide the reasonable suspicion necessary for a *Terry* stop.[211] It should be noted, however, that even if *McCranie* is a retreat from *MacDonald* the "something more" than the drug profile now required for a reasonable suspicion is not very much at all; in *McCranie*, the defendant's criminal record was sufficient.

VII. *LINAM V. GRIFFIN*: THE DOUBLE JEOPARDY CLAUSE AND HABITUAL CRIMINAL ADJUDICATIONS

Pursuant to New Mexico's original habitual criminal statute,[212] when a defendant with prior felony convictions was again convicted of a felony, the district attorney could file a supplemental information seeking an enhanced sentence based on the number of felony convictions.[213] The court was then required to hold a jury hearing on the issue of whether the defendant had in fact been convicted of the alleged prior felonies.[214] If the jury found that the defendant did in fact commit the prior felonies as alleged, the judge was required to impose an enhanced sentence for the underlying felony conviction.[215]

Linam, a thrice convicted felon, was convicted of two counts of forgery and, after an habitual offender hearing, was given a life sentence pursuant to the enhanced punishment provisions of New Mexico's habitual criminal statute.[216] On appeal to the New Mexico Supreme Court, Linam argued that

206. *Id.*

207. *Id.* at 1220. Judge McKay noted that a person who has received *Miranda* warnings and who is the object of concern of four armed policemen would not reasonably feel free to leave. *Id.*

208. *Id.*

209. 448 U.S. 438 (1980).

210. *See supra* notes 200-01 and accompanying text.

211. *See supra* notes 180-83 and accompanying text.

212. N.M. STAT. ANN. § 31-18-5 (1978) (repealed 1977). A similar statute, which became effective in 1979, is codified in N.M. STAT. ANN. § 31-18-17 (Supp. 1981).

213. N.M. STAT. ANN. § 31-18-7 (1978) (repealed 1977). A similar statute, which became effective in 1979, is codified in N.M. STAT. ANN. § 31-18-20 (Supp. 1981).

214. N.M. STAT. ANN. § 31-18-7 (1978) (repealed 1977).

215. *Id.*

216. Linam v. Griffin, 685 F.2d 369, 370-71 (10th Cir. 1982).

the habitual offender statute should be construed to require proof that each prior felony was committed after conviction for the immediately preceding felony.[217] The prosecution had not presented evidence on the dates of Linam's prior felony convictions because earlier constructions and the plain language of the statute did not so require.[218] The New Mexico Supreme Court adopted Linam's argument and construed the enhanced sentencing statute to require proof of the sequence of prior felonies.[219] Linam's case was remanded to the trial court for a second hearing during which the prosecution would have an opportunity to supply the newly-required evidence of the dates of the prior felonies.[220] On remand, Linam was given a life sentence.[221]

Following exhaustion of state post-conviction relief procedures, Linam filed a habeas petition with the federal district court, arguing that the rehearing violated his fourteenth amendment right not to be subjected to double jeopardy.[222] Linam argued that because the New Mexico Supreme Court had stated that there was "no substantial evidence" to support the original enhanced sentence,[223] the double jeopardy clause barred his retrial.[224] Linam relied on the United States Supreme Court decision in *Burks v. United States*,[225] which held that where a conviction is reversed by an appellate court on the ground of insufficient evidence, the defendant may not be retried.[226] The district court rejected Linam's habeas petition, and he appealed to the Tenth Circuit.

The Tenth Circuit, in *Linam v. Griffin*,[227] rejected the proffered analogy to *Burks* and affirmed the lower court's dismissal of Linam's habeas petition.[228] The court emphasized that prior to Linam's state court challenge to the evidentiary requirements of New Mexico's enhanced sentencing statute, New Mexico courts had not required proof of the date of conviction for prior felonies.[229] Linam's conviction was not reversed because the prosecution put on all the evidence it had and came up short, or because there was negligent failure to carry the burden of proof.[230] In Judge Doyle's view, the reversal of Linam's conviction was caused by something more akin to trial error than a true inadequacy of evidence.[231] Because reversal for trial error does not subject a person to the risk of twice being at the mercy of the state's presenta-

217. State v. Linam, 93 N.M. 307, 307, 600 P.2d 253, 253, *cert. denied*, 444 U.S. 846 (1979).
218. *Id.* at 310, 600 P.2d at 256.
219. *Id.* at 309, 600 P.2d at 255.
220. *Id.* at 310, 600 P.2d at 256.
221. Linam v. Griffin, 685 F.2d 369, 371 (10th Cir. 1982).
222. *Id.* at 371. *See* Benton v. Maryland, 395 U.S. 784 (1969) (recognizing that fifth amendment is applicable to states via due process clause of fourteenth amendment).
223. State v. Linam, 93 N.M. 307, 310, 600 P.2d 253, 256, *cert. denied*, 444 U.S. 846 (1979).
224. 685 F.2d at 373.
225. 437 U.S. 1 (1978).
226. *Id.* at 18. The defendant may not be retried because reversal for insufficient evidence is an implicit aquittal on the charge. *See id.* at 16-18.
227. 685 F.2d 369 (10th Cir. 1982).
228. *Id.* at 372.
229. *Id.* at 373.
230. *Id.* at 373-74.
231. *Id.* at 373.

tion of its full case, double jeopardy did not bar Linam's retrial.[232]

The Tenth Circuit also held, as an alternative basis for its decision, that double jeopardy protections were inapplicable during Linam's rehearing because New Mexico's enhanced sentencing proceeding was merely part of the sentencing phase of trial, and not an adjudication of guilt or innocence to which double jeopardy protections traditionally apply.[233] Judge Anderson[234] refrained from joining this portion of the opinion.[235]

In reaching its alternative holding, the Tenth Circuit relied on the Supreme Court's decision in *DiFrancesco v. United States*,[236] which the Tenth Circuit read as holding that a criminal sentence, once pronounced, is not to be accorded finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal.[237] The court emphasized that New Mexico's enhanced sentencing proceeding did not involve conviction for a distinct crime and should not be equated with a judgment on the issue of guilt or innocence; rather, the proceeding was little more than a procedural formality required to establish that the defendant had committed prior felonies as shown by the public records.[238] Given its purely formal, almost perfunctory quality, New Mexico's habitual criminal proceeding was not, in the court's view, "[t]he kind of adjudication that is referred to in the fifth amendment."[239]

Judge Anderson, writing separately, concurred in the majority's denial of habeas on the basis of the trial error analysis, but sharply disagreed with the majority's application of *DiFrancesco*. In Judge Anderson's view, *Bullington v. Missouri*,[240] decided by the Supreme Court almost a half year after *DiFrancesco*, compelled the conclusion that the double jeopardy clause was implicated by New Mexico's habitual criminal proceeding.[241]

Bullington was convicted of capital murder.[242] Under Missouri's then existing statutory scheme, following a decision on guilt or innocence in a capital case a jury was required to make the sentencing determination and select between the death penalty and life imprisonment.[243] In this separate sentencing proceeding, which involved a virtual full scale trial on the existence of aggravating factors justifying capital punishment,[244] the jury failed to find the statutory aggravating circumstances and sentenced Bullington to life imprisonment.[245] Subsequently, Bullington was granted a new trial due

232. *Id.* at 374 (citing Burks v. United States, 437 U.S. 1, 15-16 (1978)).
233. 685 F.2d at 376.
234. Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.
235. 685 F.2d at 376 (Anderson, J., concurring).
236. 449 U.S. 117 (1980).
237. 685 F.2d at 374.
238. *See id.* at 373, 376.
239. *Id.* at 376.
240. 451 U.S. 430 (1981).
241. 685 F.2d at 376 (Anderson, J., concurring).
242. 451 U.S. at 435.
243. *See* MO. REV. STAT. § 565.006 (1978) (repealed 1983).
244. 451 U.S. at 438.
245. *Id.* at 436.

to certain sixth amendment violations.[246] The Supreme Court held that the double jeopardy clause prohibited the prosecution from seeking the death penalty upon retrial.[247] Essentially, the original jury's decision to sentence Bullington to life imprisonment after an effective trial on whether Bullington's behavior required imposition of the death penalty constituted a finding that Bullington was innocent of engaging in conduct punishable by death.[248]

Judge Anderson opined that New Mexico's enhanced sentencing proceeding was sufficiently similar to the sentencing procedure analyzed in *Bullington* to implicate the double jeopardy clause.[249] Judge Anderson emphasized that the sentencing proceeding was conducted like a trial, with the defendant entitled to be present at the proceedings, to have counsel, and to have the issues tried to a jury.[250] Further, the prosecution was required to prove essential issues of fact, and was most probably required to meet a burden of proof.[251] The trial nature of the proceeding triggered Linam's double jeopardy protections;[252] the majority's failure to recognize this crucial thrust of *Bullington* necessitated Judge Anderson's separate opinion.

VIII. OTHER TENTH CIRCUIT DOUBLE JEOPARDY DEVELOPMENTS

In *Abney v. United States*,[253] the Supreme Court held that a trial court's pretrial order denying a motion to dismiss on grounds of double jeopardy was a "final decision" and thus immediately appealable.[254] Typically, filing an *Abney* appeal will result in a stay of trial court proceedings.[255] In *United States v. Hines*,[256] the Tenth Circuit recognized that where a "district court has considered a double jeopardy claim after a hearing and, for substantial reasons given, finds the claim to be frivolous, the district court should not be divested of jurisdiction by an *Abney* appeal."[257] In that circumstance, both the district court and court of appeals will have jurisdiction to proceed.[258]

In *United States v. Puckett*,[259] the Tenth Circuit declared that, although the "same evidence" test is still the test used by the court in determining whether two statutes proscribe the same offense for double jeopardy purposes, the "totality of the circumstances" test might be adopted in the appro-

246. *Id.*

247. *Id.* at 446.

248. The Court stated: "*Because* the sentencing proceeding at petitioner's . . . trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one aquitted by a jury is also available to him, with respect to the death penalty, at his retrial." *Id.* (emphasis supplied, footnote omitted).

249. 685 F.2d at 377 (Anderson, J., concurring).

250. *Id.*

251. *Id.* at 378-79.

252. *Id.* at 379. *Accord* Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982).

253. 431 U.S. 651 (1977).

254. *Id.* at 662.

255. *See* United States v. Hines, 689 F.2d 934, 936 (10th Cir. 1982).

256. 689 F.2d 934 (10th Cir. 1982).

257. *Id.* at 937.

258. *See id.* at 938.

259. 692 F.2d 663 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 579 (1983).

priate case.[260] Under the "same evidence" or "*Blockburger*"[261] test, two offenses are identical for double jeopardy purposes only if the facts alleged in one would sustain a conviction if offered in support of the other.[262] The court noted that the same evidence test has been sharply criticized in recent years as an inadequate measurement of double jeopardy when applied to multiple prosecution for conspiracy charges.[263] The Sixth and Eighth Circuits have rejected the same evidence test in favor of a totality of the circumstances approach in multiple conspiracy prosecution.[264] Under this approach, double jeopardy protections are implicated unless the prosecution can demonstrate that the criminal agreements in separate conspiracy prosecutions are "indeed separate and distinct."[265]

IX. EFFECTIVE ASSISTANCE OF COUNSEL

During the period covered by this survey, the Tenth Circuit Court of Appeals heard three significant cases involving the sixth amendment[266] right to effective assistance of counsel. The three, *United States v. Golub* (*Golub II*),[267] *Griffin v. Winans*,[268] and *United States v. Verdin*,[269] apply and expand the principles set forth in *United States v. Golub*[270] (*Golub I*), an earlier Tenth Circuit consideration of a defendant's sixth amendment claims.

A. United States v. Golub (Golub II)

The Tenth Circuit Court of Appeals heard *Golub I* in 1980. In *Golub I*, Robert Golub appealed his mail fraud convictions,[271] claiming he was denied adequate assistance of counsel at trial because his trial attorney, Sheldon Emeson, was not skilled in criminal law, and further had not had adequate time to prepare.[272] Golub had originally retained another attorney; two weeks before trial, however, the attorney was permitted to withdraw because Golub was uncooperative, had not paid his fees, and, most importantly, because Golub had misled the attorney.[273] Golub then retained Emeson, his uncle by marriage.[274] Emeson attempted to obtain a

260. *Id.* at 668.
261. Blockburger v. United States, 284 U.S. 229 (1932).
262. 692 F.2d at 667.
263. *Id.* at 668.
264. *See* United States v. Jabarra, 644 F.2d 574 (6th Cir. 1981); United States v. Tercero, 580 F.2d 312 (8th Cir. 1978).
265. United States v. Tercero, 580 F.2d 312, 317 (5th Cir. 1978).
266. U.S. CONST., amend. VI.
267. 694 F.2d 207 (10th Cir. 1982).
268. 684 F.2d 686 (10th Cir. 1982).
269. No. 81-2346, slip op. (10th Cir. Mar. 21, 1983).
270. 638 F.2d 185 (10th Cir. 1980), *rev'd*, 694 F.2d 207 (10th Cir. 1982). Other recent Tenth Circuit opinions concerned with the effective assistance of counsel are United States v. King, 664 F.2d 1171 (10th Cir. 1981) and United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 103 S. Ct. 1182 (1983).
271. Golub was found guilty of violating 18 U.S.C. §§ 1341, 2314 (1982). 638 F.2d at 186.
272. *Golub I*, 638 F.2d at 188.
273. *Id.* Golub did not oppose the motion to withdraw. United States v. Golub, 694 F.2d 207, 208 (10th Cir. 1982) (*Golub II*).
274. *Golub I*, 638 F.2d at 188.

continuance by telephone, which the trial judge denied[275] in accordance with statements made at the time Golub's first lawyer was permitted to withdraw.[276] The case then proceeded to trial as scheduled and, as noted, Golub was convicted.

Golub I originally reversed Golub's convictions and ordered a new trial.[277] The Tenth Circuit found that Emeson performed adequately at trial, but had not been given adequate time to prepare for trial in light of the case's complexity, the geographical dispersion of witnesses, and his unfamiliarity with criminal law.[278] The government then filed a motion for rehearing, tendering an affidavit from the trial court which stated that Golub had received above average assistance of counsel.[279] The Tenth Circuit granted the motion, and on rehearing en banc stayed *Golub I*'s order for a new trial, instead ordering the trial court to hold an evidentiary hearing on whether Emeson's forensic performance was inadequate and whether Emeson's trial preparation time was inadequate.[280] The evidentiary hearing was held over a period of nine months to ensure that Golub would have an ample opportunity to present evidence of inadequate assistance.[281] After hearing Golub's evidence, including expert witnesses, the trial judge found that Emeson's forensic performance was extremely capable,[282] and that no prejudice resulted from the short trial preparation time.[283] The review of the evidentiary hearing and the trial court's findings formed the basis for the second *United States v. Golub*[284] (*Golub II*).

Applying the standards enunciated in the earlier Tenth Circuit decision *Dyer v. Crisp*,[285] *Golub II*, over Judge Doyle's dissent, found Emeson's forensic performance constitutionally adequate. Under *Dyer*, the court does not look for a flawless defense, but rather one which reflects the skill of a reasonably competent defense attorney.[286] Because the record at the evidentiary hearing indicated that Emeson's performance satisfied that standard, no constitutional right was violated by the manner in which Golub's counsel conducted the defense.[287]

The Tenth Circuit then had to consider whether the trial court had violated Golub's sixth amendment rights by denying Emeson adequate time to prepare for trial. The factors used by the Tenth Circuit to determine

275. *Id.* at 186.

276. At the withdrawal hearing, the trial judge told Golub that the trial would proceed as scheduled, with or without counsel. *Id.*

277. *Id.* at 190.

278. *Id.* at 189.

279. *Golub II*, 694 F.2d at 209.

280. *Id.* at 210.

281. *Id.* at 210-11.

282. *Id.* at 211.

283. *Id.* at 212.

284. 694 F.2d 207 (10th Cir. 1982).

285. 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980).

286. 613 F.2d at 278.

287. *Golub II*, 694 F.2d at 214. The court noted that the adequacy of trial counsel's representation had to be determined, at least in part, by reference to the defendant's behavior. Golub's uncooperativesness had, to some extent, contributed to the barrenness of his defense. *See id.*

whether given preparation time was constitutionally sufficient were: 1) the time allowed to investigate and prepare; 2) counsel's experience; 3) the severity of the offenses charged; 4) the complexity of the defense; and 5) counsel's accessibility to witnesses.[288] The majority found that these factors comported with a Supreme Court admonition that sixth amendment protections are not violated unless an asserted interference with the right to counsel either prejudices, or threatens to prejudice, the effectiveness of counsel's representation.[289] Thus, unless the facts of the particular case demonstrate that the defendant was actually prejudiced by the time allowed for preparation, or that there was a substantial threat of prejudice, the trial court has not deprived the defendant's sixth amendment rights.[290] Because Golub was unable to show, through the evidentiary hearing or otherwise, how he had been prejudiced by the short trial preparation period, the Tenth Circuit, over Judge Doyle's dissent, reversed and vacated *Golub I*.[291]

Judge Doyle dissented because he found that the trial court's actions had denied Golub effective assistance of counsel. The dissent emphasized that sophisticated mail fraud cases are inherently complex and difficult for both prosecution and defense.[292] This complexity, which by itself might have mandated a longer preparation period, was exacerbated by Emeson's unfamiliarity with the Federal Rules of Criminal Procedure.[293] Further, the trial court had failed to advise Golub of his right to appointed counsel,[294] thus virtually forcing him to retain counsel inexperienced in a federal court defense of a serious and difficult federal charge.[295] Finally, Judge Doyle stressed that the majority's reliance on the absence of prejudice wrongly focused the constitutional inquiry. In *United States v. Morrison*,[296] which the majority relied on in articulating its absence of prejudice standard,[297] the Court addressed whether police interference with the relationship between a defendant and her counsel justified dismissal of an indictment.[298] The Court did *not* decide whether proof of prejudice from prosecutorial interfer-

288. 694 F.2d at 214. These factors were originally announced in *Golub I*. *See* 638 F.2d at 189 (citing Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975)).

289. 694 F.2d at 214, (quoting United States v. King, 664 F.2d 1171, 1173 (10th Cir. 1981)) (quoting United States v. Morrison, 449 U.S. 361, 365 (1981)). *Accord* United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982), *cert. granted*, 103 S. Ct. 1182 (1983).

290. *Golub II*, 694 F.2d at 215.

291. *Id.* at 216.

292. *Id.* at 220-21 (Doyle, J., dissenting).

293. *See id.* at 218 (Emeson's failure to file written motion for continuance indicative of lack of familiarity with Federal Rules of Criminal Procedure, and therefore indicative of Emeson's lack of preparation).

294. *Id.* at 219. FED. R. CRIM. P. 44(a) provides: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment." *See also* 18 U.S.C. § 3006A (1982).

295. *See* 694 F.2d at 218-20 (Doyle, J., dissenting). Judge Doyle observed that Emeson was unable to obtain any of his colleagues to represent Golub, given the complex case and the short preparation period, *id.* at 218 and that Emerson's request for a continuance reflected his own belief that the preparation period was inadequate. *See id.*

296. 449 U.S. 361 (1981).

297. *See supra* notes 288-89 and accompanying text.

298. 449 U.S. at 363-64.

ence was necessary to *establish* a sixth amendment violation.[299] Judge Doyle flatly rejected the majority's position:

> [T]he presence or absence of prejudice should not be and cannot be the test of the violation of the Constitution. In an inadequacy of counsel case to require proof that a different result would have occurred had able counsel been present is not a true test of the unconstitutionality of the action.[300]

Accordingly, the dissent would have remanded the case for a new trial so that Golub could obtain effective counsel.[301]

B. Griffin v. Winans

The question presented to the Tenth Circuit in *Griffin v. Winans*[302] was whether the defendant's representation by a relatively inexperienced alcoholic attorney violated the sixth amendment right to effective counsel, thereby justifying the federal district court's grant of habeas relief.[303] Habeas relief was necessary because New Mexico's trial and appellate courts had rejected Griffin's sixth amendment claims because his attorney's conduct did not cause the trial to become a "sham and mockery" of justice.[304]

In affirming the grant of habeas relief, the Tenth Circuit observed that the trial court had properly conducted an evidentiary hearing, and had properly rejected New Mexico's application of the sham and mockery standard. The court recognized that although federal courts are bound by state court findings of fact absent a statutory exception,[305] in this case the state courts had made no findings of fact.[306] Thus, the federal district court's evidentiary hearing was proper. Similarly, the federal district court had properly rejected use of the sham and mockery standard, recognizing that the Tenth Circuit has adopted the more stringent "reasonably competent counsel" standard for assessing an asserted violation of a defendant's sixth amendment right.[307]

The district court found that Griffin's representation was constitutionally inadequate because his lawyer was unprepared, was forensically ineffective, and was chronically intoxicated.[308] Reviewing the district court's

299. *Id.* at 364.

300. 694 F.2d at 221 (Doyle, J., dissenting).

301. *Id.*

302. 684 F.2d 686 (10th Cir. 1982).

303. *Id.* at 687.

304. *Id.* at 688 & n.2 (quoting unpublished New Mexico trial, appellate court opinions).

305. *Id.* at 688 (citing Sumner v. Mata, 455 U.S. 591 (1982)). *See* 28 U.S.C. § 2254(d) (1982).

306. *See* 684 F.2d at 688.

307. *Id.* at 689. The "reasonably competent counsel" standard was adopted in Dyer v. Crisp, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980). New Mexico had alleged that its courts had in fact applied the reasonable counsel standard, and that the "sham and mockery" language actually used was "unfortunate semantics." 648 F.2d at 689. The Tenth Circuit agreed that the district court had properly rejected this argument, pointing to the testimony of the trial judge concerning the standard he had applied and the explicit language of the state appellate opinion. *See id.* New Mexico has since adopted the reasonably competent counsel standard. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

308. 684 F.2d at 689 n.4.

factual conclusions under the clearly erroneous standard,[309] the Tenth Circuit found the district court's findings supported by substantial evidence and therefore acceptable.[310] In light of those findings, the Tenth Circuit agreed that the district court had properly found that the defendant's sixth amendment rights were violated, and had properly granted the requested habeas relief.[311]

C. United States v. Verdin

Winans demonstrates that having inadequate, inexperienced, and ill-prepared counsel violates a defendant's sixth amendment right to effective assistance of counsel. In *United States v. Verdin*,[312] the Tenth Circuit articulated a distinction between ineffective counsel and counsel using unsuccessful trial strategy. In *Verdin*, counsel decided not to impeach an identifying witness and not to call alibi witnesses because, according to counsel, this testimony would have been cumulative and inconclusive.[313] The Tenth Circuit found that the decision to refrain from calling these witnesses was a mere strategic decision, which could not support a claim of constitutionally ineffective counsel.[314]

X. EXHAUSTION OF STATE REMEDIES AS PREREQUISITE TO FEDERAL HABEAS RELIEF

Under the recent United States Supreme Court ruling *Rose v. Lundy*,[315] habeas corpus petitioners must exhaust all of their claims at the state level before a federal district court can hear a petition for habeas corpus relief.[316] Prior to *Lundy*, the Tenth Circuit had held that where a petition presented both exhausted and unexhausted (or mixed) claims, the exhausted claims could be considered, but the unexhausted claims had to be dismissed.[317] This rule was changed in *Jones v. Hess*[318] to conform to *Lundy*'s standards.[319]

Jones was convicted by an Oklahoma jury in August, 1971 on two counts of murder and one count of shooting with intent to kill.[320] The Oklahoma Court of Criminal Appeals affirmed the convictions in May, 1973.[321] Jones then filed a petition for a writ of habeas corpus in Pittsburg County District Court in March, 1976.[322] The district court denied the ap-

309. *Id.* at 690.
310. *Id.*
311. *Id.*
312. No. 81-2346 (10th Cir. Mar. 21, 1983).
313. *Id.* at 3.
314. *Id.*
315. 455 U.S. 509 (1982).
316. *Id.* at 510.
317. *E.g.*, Smith v. Gaffney, 462 F.2d 663, 665 (10th Cir. 1972); Whiteley v. Meacham, 416 F.2d 36, 39 (10th Cir. 1969), *rev'd on other grounds sub nom.* Whitely v. Warden, 401 U.S. 560 (1971); Watson v. Patterson, 358 F.2d 297, 298 (10th Cir. 1966), *cert. denied*, 385 U.S. 876 (1966).
318. 681 F.2d 688 (10th Cir. 1982).
319. *See id.* at 695.
320. *Id.* at 685.
321. Jones v. State, 509 P.2d 924, 925-27 (Okla. Crim. App. 1973).
322. 681 F.2d at 689.

plication in September, 1977 after an evidentiary hearing.[323] The Oklahoma Court of Criminal Appeals finally affirmed the district court's denial of post-conviction relief on April 10, 1979.[324] In May, 1979, Jones filed a habeas corpus petition with the federal district court, which denied the petition in 1980 with respect to all claims except one relating to judicial bias and misconduct.[325] This claim was dismissed for failure to exhaust state court remedies.[326] Jones then appealed to the Tenth Circuit Court of Appeals.[327] Judge Holloway, writing for a unanimous court, observed that petitioner's claim of prejudicial ex parte communication between the trial judge and prosecution "if accepted, would present a very serious and disturbing challenge to the constitutionality of Jones's convictions, grounded on the constitutional right to a fair trial and the Due Process Clause of the Fourteenth Amendment."[328] The district court, however, had not reached the merits of the claim, holding that because the claim was not exhausted in the state courts it could not be considered.[329] The initial consideration on appeal was the propriety of that ruling.[330]

Jones asserted two bases for error in the district court's ruling. First, he argued that a general claim of bias had been presented to the state courts, and the additional evidence presented to the district court was merely additional evidence of bias.[331] Remanding his claim, Jones argued, would require him to file repetitious applications, in violation of *Wilwording v. Swenson*.[332] Alternately, Jones argued, because he had been incarcerated since 1971, the amount of time already spent in litigation and the seriousness of the constitutional violation made his case sufficiently exceptional to permit a relaxation of the exhaustion requirement.[333]

Judge Holloway quickly disposed of Jones' second argument by reference to the Supreme Court case of *Duckworth v. Serrano*.[334] *Duckworth* rejected the argument that hardship to a petitioner caused by delay, in conjunction with a strong showing of constitutional deprivation, could justify an exception to the exhaustion requirement.[335] The Court held that the only exception to exhaustion occurred when there was no opportunity to obtain redress in state court, or when the deficiencies in available state court procedures rendered resort to state court futile.[336] The Tenth Circuit found Oklahoma's post-conviction proceedings adequate,[337] so that Jones' case did

323. *Id.*
324. *Id.* at 690.
325. *Id.* at 690-91.
326. *Id.* at 691, 693.
327. *Id.* at 691.
328. *Id.* at 692.
329. *Id.* at 693.
330. *Id.*
331. *Id.*
332. 404 U.S. 249 (1971). *See* 681 F.2d at 693.
333. 681 F.2d at 693.
334. 454 U.S. 1 (1981).
335. *Id.* at 4.
336. *Id.* at 3.
337. *See* 681 F.2d at 694 n.7.

not fall within the exceptions to exhaustion permitted by *Duckworth*.[338]

The Tenth Circuit also rejected Jones' argument that he had in fact exhausted his judicial bias claim. The court observed that when newly discovered evidence, such as that presented by Jones, placed a claim in a "significantly different posture," the claim must be heard by the state courts prior to a federal habeas petition.[339] Because Jones' evidence of judicial impropriety was new, and significant,[340] the bias claim was placed in a new, and therefore unexhausted, posture.[341]

After determining that Jones' petition contained mixed claims, the court analyzed *Lundy*'s applicability to Jones' petition. The court noted that in the absence of manifest injustice, it was required to apply the law in effect at the time of decision.[342] Despite Jones' lengthy incarceration, and the further delay resulting from remand, the court felt compelled to apply *Lundy*'s total exhaustion rule.[343] Hence, following remand, Jones would have a choice of exhausting his bias claim, or amending his petition to exclude, and possibly forfeit, the claim.[344]

XI. EFFECT OF STATE WAIVER OF HABEAS EXHAUSTION REQUIREMENTS

Naranjo v. Ricketts[345] represents the Tenth Circuit's entry into the circuit court debate over whether a federal court should assume jurisdiction over a habeas claim when the state attempts to waive the exhaustion requirement.[346] *Naranjo* held that the general rule in the Tenth Circuit will be to require exhaustion regardless of the state's attempted waiver.[347]

The appellants in *Naranjo* had been convicted in Colorado of first degree kidnapping and first degree sexual assault.[348] These convictions were modified by the Colorado Supreme Court.[349] The Naranjos then brought a habeas claim to the district court, arguing that the Colorado Supreme Court's modification of their convictions was unconstitutional.[350] After the

338. *Id.* at 694.

339. *Id.*

340. *Id.* Copies of the ex parte communications are reproduced *id.* at 696-99.

341. *Id.*

342. *Id.* at 695 n.9.

343. *Id.* at 695.

344. *Id.* at 695 (citing Rose v. Lundy, 455 U.S. 509, 518-21 (1982)). A case which followed soon after *Jones* is Reed v. Brown, No. 82-1354 (10th Cir. Aug. 3, 1982). The petitioner, Reed, filed a mixed petition for habeas corpus relief presenting exhausted and unexhausted claims. Citing *Lundy*, the Tenth Circuit remanded the case giving Reed the same option as Jones in the earlier case: either amend the petition by deleting the unexhausted claims, thereby risking no further consideration of the unexhausted claims, or first exhaust the remaining unexhausted claims. *Id.* at 2-3 (citing *Jones*, 681 F.2d at 693).

345. 696 F.2d 83 (10th Cir. 1982).

346. *Compare* Batten v. Scurr, 649 F.2d 564, 568-69 (8th Cir. 1981); Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971) (deciding in favor of assuming jurisdiction) *with* Sweet v. Culp, 640 F.2d 233, 237 n.5 (9th Cir. 1981); Gayle v. LeFerre, 613 F.2d 21, 22 n.1 (2d Cir. 1980) (requiring strict compliance with exhaustion doctrine).

347. 696 F.2d at 87.

348. *Id.* at 84.

349. *Id.*

350. *Id.* at 85.

petitions were dismissed with prejudice by the district court for failure to exhaust state remedies, the Tenth Circuit, on appeal, remanded the cases to determine whether the Naranjos' claims had been properly exhausted.[351]

The state attorney general then applied for a rehearing, claiming that because the state had waived the exhaustion requirement, the circuit court could dismiss the case on the merits.[352] The Tenth Circuit declined to do so, stating that although exhaustion was not a jurisdictional prerequisite to federal jurisdiction over a habeas petition[353] protection of the state court's role in the enforcement of federal law required strict enforcement of the exhaustion requirement.[354] In reaching its conclusion, the Tenth Circuit weighed expediency and the efficient use of judicial resources against the need to protect and promote the state's role in preserving constitutional protections, finding the latter to be the more important consideration.[355]

XII. JUDICIAL REFERENCE TO CO-CONSPIRATORS AT VOIR DIRE

The Tenth Circuit found reversible error in *United States v. Baez*[356] when the trial judge's voir dire included comments about previous guilty pleas of alleged co-conspirators and the possibility that one of those co-conspirators might offer testimony exculpating the defendant.[357] The exculpatory testimony, which was to have come from the defendant's son, never materialized.[358] The other alleged co-conspirator testified and his guilty plea was elicited;[359] the trial court, however, failed to give the required instruction limiting the use of such testimony.[360] The Tenth Circuit found these actions constituted plain error sufficiently prejudicial to overturn the defendant's conviction.[361]

Judge Seymour found the logic of two Fifth Circuit cases directly on point to be controlling.[362] In reversing a conviction where the trial judge had told prospective jurors that the defendant's co-indictees had pled guilty, the Fifth Circuit stated:

> There is no need to advise the jury or its prospective members that someone not in court, not on trial, and not to be tried, has pleaded guilty. The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is

351. *Id.*
352. *Id.*
353. *Id.* at 86.
354. *Id.* at 86 (listing cases).
355. *Id.* at 87.
356. 703 F.2d 453 (10th Cir. 1983).
357. *See id.* at 454-55.
358. The defendant's son did not testify. *Id.* at 455.
359. *Id.*
360. *Id.* A co-defendant's guilty plea does not constitute substantive evidence, *id.* (citing United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981)), and must be accompanied by a limiting instruction so stating. 703 F.2d at 455 (citing United States v. Halbert, 640 F.2d 1000, 1006-07 (9th Cir. 1981)).
361. 703 F.2d at 455-56. The defendant had been convicted of distributing, and conspiring to distribute phencyclidine (PCP) in violation of 18 U.S.C. §§ 841(a)(1), 846 (1982). 703 F.2d at 454.
362. 703 F.2d at 455 (citing United States v. Vaughn, 546 F.2d 47 (5th Cir. 1977); United States v. Hansen, 544 F.2d 778 (5th Cir. 1977)).

obvious.[363]

Judge Seymour found the error in *Baez* to be even greater than that in the Fifth Circuit cases, because once the defendant's son failed to testify the jury might have readily concluded that the failure to testify was because the son felt he could not "honestly testify in his father's favor."[364] Given the prejudice resulting from the trial judge's conduct, reversal was required.[365]

David Dansky
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363. United States v. Hansen, 544 F.2d 778, 780 (5th Cir. 1977), *quoted in Baez*, 703 F.2d at 455.

364. 703 F.2d at 455.

365. *Id.*