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OVERVIEW

"Steady as she goes" was obviously the motto of the Tenth Circuit Court of Appeals during the period of time covered by this survey article. The Tenth Circuit neither wandered far afield from previous decisions nor forged ahead into unknown legal waters. As a result, the cases examined in this article were chosen more for their factual intrigue than for the legal significance of the court's reasoning.

The survey article covers two areas of criminal law: habeas corpus proceedings and convictions on appeal. The habeas corpus section discusses two cases representing opposite extremes in how juveniles are treated. In the first case, the Tenth Circuit granted the writ of habeas corpus. The court held that a juvenile's right to parental notice of his criminal offense is a right which is not waivable by a juvenile offender, even where the right was not recognized by the courts at the time the right was allegedly waived. In the second case, the Tenth Circuit denied the writ of habeas corpus, holding that a juvenile who violates his parole loses any rights he may have been entitled to under the Federal Youth Corrections Act.

The second section, covering convictions on appeal, discusses three convictions, two of which were vacated by the Tenth Circuit. In the first case, the court vacated a conviction for making a threat to kill the President. In the second case, the court reviewed the heat of passion defense and vacated the conviction based on the inadequacy of the jury instructions relating to the defense. Finally, the court upheld a conviction while applying the Racketeer Influenced and Corrupt Organizations Act (RICO) to the activities of a county sheriff.

I. HABEAS CORPUS

A. *Juvenile Rights in Criminal Courts*

1. History of the Juvenile Court Movement in the United States

The Juvenile Court movement in the United States began with the juvenile court statute adopted in Illinois in 1899.[1] Since the passage of that statute every state, the District of Columbia, and Puerto Rico have enacted similar statutes.[2]

The move to create a juvenile court system through statutory change was a reaction to unacceptable conditions in the handling of young criminals. Early reformers were dismayed by the adult criminal

1. 1899 Ill. Laws 131; *see* 2 G. ABBOTT, THE CHILD AND THE STATE 330 (1938); R. PERKINS & R. BOYCE, CRIMINAL LAW 940-949 (3d ed. 1982) [hereinafter PERKINS & BOYCE]; Kean, *The History of the Criminal Liability of Children*, 53 L. Q. REV. 364 (1937).

2. PERKINS & BOYCE, *supra* note 1, at 940; *In re* Gault, 387 U.S. 1, 14 (1967).

procedures and penalties to which children were subjected.[3] Equally appalling was the fact that children received long prison sentences and were placed in jails with hardened criminals.[4] Reformers believed that society's role was not to ascertain a child's guilt or innocence, but rather to discover "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[5] Using adult criminal procedures for children was viewed negatively.[6] These people thought the child was essentially good and should be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial.[7] They wished to abandon the idea of crime and punishment in favor of treatment and rehabilitation.[8]

The reformers felt that the state, acting in its role as *parens patriae*, had a right to deny to the child procedural rights available to adults.[9] The state's right to deny due process evolved from the theory that a child had a right to custody, but not liberty.[10] If the child's parents failed to supervise and care for the child, the state could intervene on his behalf.[11] Through intervention, the state provided the supervision to which the child was entitled.[12] By characterizing juvenile proceedings as "civil" and not "criminal," these proceedings were then not governed by the same constitutional requirements of due process as mandated in adult criminal proceedings.[13]

The justification for this denial of due process was that the benefits received by juveniles from these special proceedings outweighed the constitutional guarantees of conventional criminal proceedings.[14] These benefits included processing and treating the juvenile separately from adults,[15] keeping confidential the juvenile's record of deviant behavior,[16] and classifying the juvenile as a "delinquent" and not a "criminal."[17] In addition, the classification of the child as a delinquent would not affect his eligibility for civil service appointment.[18]

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3. *In re Gault*, 387 U.S. at 15.
4. *Id.*
5. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909).
6. *Id.* at 120.
7. *Id.*
8. *In re Gault*, 387 U.S. at 15-16.
9. *Id.* at 17; *see also* Mack, *supra* note 5, at 109. *Parens Patriae*, translates into "parent of the country," and refers to the traditional role of the sovereign as "guardian of persons under a legal disability." BLACKS LAW DICTIONARY 1003 (5th ed. 1979) (quoting State of W. Va. v. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971)).
10. *In re Gault*, 387 U.S. at 17.
11. *Id.*
12. *Id.*
13. *Id.*; *see also* Appendix B to the opinion of Judge Prettyman in Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) (listing of constitutional guarantees which do not apply to juvenile proceedings).
14. *In re Gault*, 387 U.S. at 21.
15. *Id.* at 22.
16. *Id.* at 24.
17. *Id.* at 23.
18. *Id.* at 24.

These benefits, however, were also accompanied by increased juvenile misbehavior, violence, and brutality.[19] Studies were conducted showing a high percentage of repeat juvenile offenders.[20] These high percentages and the increased crime rate led some people to believe that the juvenile system, functioning free of constitutional inhibitions, was ineffective in reducing crime or rehabilitating offenders.[21]

Studies attacking the basic premise of the juvenile system — a fatherly judge or a benevolent institution providing guidance and help to an erring youth — began to appear.[22] These studies pointed out that fairness and impartiality, rather than paternal advice and admonition, would have a more inspiring and rehabilitative impact on the juvenile.[23] For example, sociologists Wheeler and Cottrell noted that the contrast between the paternal attitude of the judge as adjudicator and the impartial attitude of the judge as disciplinarian may adversely affect the child.[24] The child may feel that he has been betrayed.[25] Wheeler and Cottrell reasoned that "[u]nless appropriate due process of law is followed," the juvenile "may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."[26]

Studies such as these, as well as the apparent inability of the juvenile court system to reduce the juvenile crime rate, led to the landmark decision of *In re Gault*.[27] The Supreme Court held that in a juvenile delinquency hearing the following must occur:

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19. PERKINS & BOYCE, *supra* note 1, at 944. According to the National Crime Commission Report, "[i]n 1965, persons under 18 accounted for about one-fifth of all arrests for serious crimes and over half of all arrests for serious property offenses, and in the same year some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts." *In re Gault*, 387 U.S. at 20 n.26 (citing Report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," 55 (1967) [hereinafter National Crime Commission Report]).

20. A study of repeat offenders or recidivism was conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia. The Court, quoting the Commission's Report, stated:

> In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before.

In re Gault, 387 U.S. at 22.

21. *Id.* at 22.

22. *Id.* at 26.

23. *Id.*

24. *Id.*; *see* JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL (Russell Sage Foundation 1966) [hereinafter JUVENILE DELINQUENCY] (juveniles are likely to resent uneven court treatment). Quoting this study, conducted by Wheeler and Cottrell, the Court stated:

> [T]here is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers.

In re Gault, 387 U.S. at 26 n.37.

25. *In re Gault*, 387 U.S. at 26 (citing JUVENILE DELINQUENCY, *supra* note 24, at 33).

26. *Id.*

27. 387 U.S. 1 (1967); *see* PERKINS & BOYCE, *supra* note 1, at 947.

1. The juvenile must have timely notice of the specific issues he must address.
2. The child and his parents must be notified of the child's right to be represented by counsel. If he is unable to afford counsel, he must have counsel appointed to represent him.
3. The juvenile has the right to confront and cross-examine witnesses against him.
4. The court has a duty to advise the child of his privilege against self-incrimination, and this right to counsel. The court may not consider any confession or admission if such advice has not been given.[28]

The Court took great pains to emphasize that the requirement of these procedural safeguards was not, in any way, to repudiate the basic theory of juvenile legislation.[29] The methods of avoiding undue publicity of the trial and treatment of juveniles would remain part of the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."[30]

2. The Tenth Circuit Opinion: *Ball v. Ricketts*

The Tenth Circuit's opinion in *Ball v. Ricketts*[31] focused on the retroactive application of the rights recognized in *Gault*. The court held that the rights to parental notice recognized in *Gault* were not waivable by a juvenile offender, even though the *Gault* rights were not recognized by courts at the time they were allegedly waived.[32]

Richard Lee Ball was charged with being a habitual criminal under Colorado's habitual criminal statute.[33] If a person has three prior felony convictions, the Colorado statute requires a sentence of life imprisonment.[34] In determining whether Ball was a habitual criminal, the jury heard evidence concerning Ball's commission of four prior felonies,[35] including a burglary, to which Ball had pleaded guilty in 1957 in Colorado state court.[36]

Ball petitioned for a writ of habeas corpus to set aside his conviction as a habitual criminal.[37] As a basis for his petition, Ball relied on the circumstances surrounding his 1957 guilty plea.[38] In 1957, Ball was sixteen years old but claimed that he was seventeen.[39] Additionally, he lied

28. *In re Gault*, 387 U.S. at 31-57.
29. *Id.* at 21. The Court stated that "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Id.*; *see also* Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COL. L. REV. 281 (1967).
30. State v. Guerrero, 58 Ariz. 421, 430, 120 P.2d 798, 802 (1942).
31. 779 F.2d 578 (10th Cir. 1985), *cert. denied sub nom.* Riveland v. Ball, 107 S. Ct. 236 (Oct. 6, 1986).
32. *Id.* at 581.
33. COLO. REV. STAT. § 16-13-101(2) (1973).
34. *Id.*
35. *Ball*, 779 F.2d at 579.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

to the court when he explained that his parents were aware that he was in jail.[40] Ball also refused the court's offer to appoint an attorney to assist him.[41] In contending that his conviction was invalid, Ball asked the court to consider these factors, as well as the transcript of his 1957 arraignment, and his current testimony that he was unable to understand the charges and court procedures at the time he pleaded guilty.[42] The district court granted the writ, which was immediately appealed to the Tenth Circuit by the State of Colorado.[43]

Because Ball was sixteen at the time of the disputed guilty plea, the Tenth Circuit could not uphold the 1957 state court decision.[44] The court, following *Gault*, recognized that "special procedural protections" were required in juvenile court proceedings.[45] One such procedural protection was giving notice of the offense to a juvenile's parents.[46] The court noted that the record was silent as to whether Ball's parents were notified that their son was incarcerated or that an arraignment hearing was being held.[47] In rendering its decision, the court also considered the allegation that Ball had never told his parents about his arrest.[48]

The Tenth Circuit indicated that, because Ball had lied to him about his age, the state court judge should also have assumed that Ball was not telling the truth about whether his parents knew he was in jail.[49] In light of the fact that there were no special procedural protections in the 1957 juvenile process, the court thought it understandable that the state court judge failed to take further precautions to protect Ball's interests.[50] Nevertheless, the court held that notice to the juvenile's parents is a right that could not be waived, regardless of whether the right was recognized by the courts at that time.[51]

The Tenth Circuit justified its opinion by citing cases where the rights recognized in *Gault* have been retroactively applied.[52] The court recognized that in these cases, the rights, or rather, the absence of the

40. *Id.* The 10th Circuit court observed that this statement may have been a fabrication. *Id.*

41. *Id.*

42. *Id.* Ball also asserted that his guilty plea was involuntary and that his waiver of counsel was ineffective. *Id.*

43. *Id.*

44. *Id.* at 580.

45. *Id.*; *see In re Gault*, 387 U.S. 1, 31-57 (1967).

46. *Ball*, 779 F.2d at 580.

47. *Id.*

48. *Id.*

49. *Id.* The court stated: "We realize that Ball told the state court judge conducting his arraignment that his parents knew he was in jail; but he also told the judge that they were taking no steps to get him out or to obtain an attorney for him." *Id.*

50. *Id.* at 580-81.

51. *Id.* at 581. Ball was arraigned in 1957, and the *In re Gault* decision was handed down in 1967.

52. *Id.*; *see* United States v. Slipka, 735 F.2d 1064, 1066 (8th Cir. 1984) (juvenile's right to counsel in juvenile delinquency proceeding); Kemplen v. Maryland, 428 F.2d 169, 175-77 (4th Cir. 1970) (juvenile's right to counsel and notice in juvenile jurisdiction waiver proceeding); Heryford v. Parker, 396 F.2d 393, 396-97 (10th Cir. 1968) (juvenile's right to counsel in involuntary commitment proceeding).

rights, "affect[ed] the integrity of the truth-finding process."[53] In *Ball*, the court thought it likely that, if the parents had been notified of their son's arrest, the parents would have attempted to help him.[54] Thus, the court concluded that the absence of proper notice may have "affected the ultimate outcome" of Ball's case.[55]

3. Analysis and Conclusion

In *Ball*, the Tenth Circuit failed to address whether "affecting the integrity of the truth-finding process"[56] was the same standard as "affecting the ultimate outcome of the case."[57] By implication, the appellate court has declared that these two standards are the same.[58] By analytical reasoning, however, one could conclude that these two standards are not the same. For example, lying on the witness stand affects the integrity of the truth-finding process. Yet, this lie may or may not affect the ultimate outcome of the case.[59] Therefore, by failing to address the relationship between the two standards, the court's decision may have limited precedential impact.[60]

The Tenth Circuit did, however, demonstrate the importance of due process and its constitutional requirements whenever a juvenile is involved in a criminal court proceeding. The decision appears to indicate that the Tenth Circuit would seriously consider retroactive application of any of the rights recognized in *Gault*, if the rights or absence of the rights would have an impact on the truth-finding process or on the outcome of the case.

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53. *Ball*, 779 F.2d at 581.

54. *Id.*

55. *Id.*

56. *Id.* The court stated that "[t]he rights recognized in *Gault* have been applied retroactively in a variety of settings because they affect the integrity of the truth-finding process." *Id.*

57. The court stated that "the lack of such notice [in *Ball*] may well have affected the ultimate outcome of the case . . . . But the rights to parental notice that *Gault* created are not waivable by a juvenile offender." *Id.*

58. The court held that the *In re Gault* rights should be applied retroactively where to do so would affect the outcome of the case; by citing cases where the rights recognized in *In re Gault* have been applied retroactively because they affect the integrity of the truth-finding process, the Tenth Circuit has implied that the two standards are the same. *Id.*

59. *See generally* F. DINKINES, INTRODUCTION TO MATHEMATICAL LOGIC 36-53 (1964). Putting the court's reasoning in mathematical terms can show the invalid inference of the court more clearly. The court held, basically that if an absence of the *In re Gault* rights affects the integrity of the truth-finding process, then the *In re Gault* rights should be retroactively applied, which can be represented as if "*A*, then *B*." The court also held that if such an absence affects the ultimate outcome of the case, then it should be retroactively applied, or if "*C*, then *B*." Then, by using the cases of the first proposition to support its second proposition, the court drew the inference that A = C, which is not a valid inference to draw.

60. Because the court never gave guidance as to what happens when the integrity of the truth-finding process is affected but the outcome of the case is not affected, nor what happens when the situation is reversed, one must be careful in using this case as a precedent for retroactive application of rights, *unless* there is no doubt that the ultimate outcome of the case has been affected by the absence of the rights, an identical situation to that in *Ball*.

B. *Mandates of the Federal Youth Corrections Act*

1. History of the Act

Enacted in 1950, the Federal Youth Corrections Act (YCA)[61] was a reaction to the inordinate amount of crime committed by youthful offenders[62] and the obvious breakdown of the modern penal system in attempting to rehabilitate these young men and women.[63] The YCA increased the sentencing alternatives for youthful offenders by specifying treatment[64] in certain facilities[65] separated from the harmful influence of adult inmates.[66] Under the YCA, an offender usually received an indeterminate sentence, not to exceed six years.[67] The guidelines for rehabilitation mandated by the YCA were regarded as "comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison."[68]

The YCA was repealed in 1984[69] in an attempt to provide for comprehensive and consistent sentencing for similarly situated offenders.[70] Behind Congress' action was the doubt that rehabilitation could be induced reliably in a prison setting and the certainty that no one could really detect whether or when a prisoner was actually rehabilitated.[71]

2. The Tenth Circuit Opinion: *Scott v. United States*

Even though the YCA was repealed, courts are still addressing the issues which have been generated by the statute. The Tenth Circuit faced one of these issues in *Scott v. United States*.[72] The question in *Scott* was whether an offender sentenced under the YCA, who violated his parole, had a right to the same equitable remedy as offenders who have

61. Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1982) (repealed 1984).

62. 18 U.S.C. § 5006 (1982) (repealed 1984). "Youth offender" is defined in the Act as "a person under the age of twenty-two years at the time of conviction." *Id.* at § 5006(d).

63. *See* Dorszynski v. United States, 418 U.S. 424, 433 (1974); Watts v. Hadden, 651 F.2d 1354, 1356 (10th Cir.), *reh'g denied*, 686 F.2d 841 (1981); H.R. REP. No. 2979, 81st Cong., 2d Sess. 2-3 (1950); Note, *Sentencing of Youthful Misdemeanants Under the Youth Corrections Act: Eliminating Disparities Created by the Federal Magistrate Act of 1979*, 51 FORDHAM L. REV. 1254 (1983) [hereinafter *Sentencing Misdemeanants*].

64. 18 U.S.C. § 5006 (1982) (repealed 1984). "Treatment" is defined in the Act as "corrective and preventive guidance and training designed to protect the public by correcting the anti-social tendencies of youth offenders." *Id.* at § 5006(f).

65. 18. U.S.C. § 5011 (1982) (repealed 1984). The YCA required that "[i]nsofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders" and from each other according to their treatment needs. *Id.*

66. *See* Ralston v. Robinson, 454 U.S. 201, 207-08 (1981); *Watts*, 651 F.2d at 1354, 1357, 1365; *Sentencing Misdemeanants*, *supra* note 63, at 1255.

67. 18 U.S.C. §§ 5010(b), 5017(c) (1982). An indeterminate sentence was given regardless of the maximum sentence an adult could serve for the very same offense. *See Sentencing Misdemeanants*, *supra* note 63, at 1255.

68. Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962).

69. Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1840 (1984).

70. S. REP. No. 225, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3220-23.

71. *Id.* at 3221.

72. 778 F.2d 1444 (10th Cir. 1985).

not violated the terms of their parole.[73]

In 1979, Ricardo Scott was convicted of burglary.[74] He was sentenced under the YCA[75] to a 0-6 year indeterminate term.[76] Scott was imprisoned at the Federal Correctional Institution (FCI) at Lompoc, California.[77] The FCI at Lompoc did not segregate YCA offenders from adult inmates.[78]

In 1981, Scott was paroled.[79] Also in 1981, the Tenth Circuit ruled that administrators could not hold youthful offenders sentenced under the YCA in institutions which failed to separate such youths from adult inmates.[80] The court held that the benefits of the YCA would be denied to youthful offenders if there was no separation between the youths and older inmates.[81]

Subsequently, the parole board held a revocation hearing in January of 1984.[82] The board revoked Scott's parole and reinstated his original sentencing term.[83] Scott was incarcerated at the FCI at Englewood, Colorado until September of 1984.[84] He was then transferred to the FCI at Lompoc, where he remained until his sentence expired in June of 1985.[85] At no time since his parole revocation hearing was Scott incarcerated with adult inmates in violation of the YCA.[86]

Scott filed a petition for a writ of habeas corpus contending that he was entitled to good-time credits on his sentence for the period of time that he was incarcerated at the FCI in Lompoc in violation of the YCA.[87] The United States District Court dismissed the habeas corpus petition[88] and Scott appealed.[89]

In affirming the district court's dismissal, the Tenth Circuit reaffirmed its earlier holding in *Staudmier v. United States*[90] that allowing good-time credits for time served in an unsegregated facility was "technically inconsistent with the YCA framework."[91] The court also recog-

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73. *Id.* at 1445.
74. *Id.*
75. *Id.* Scott was sentenced under the provisions of 18 U.S.C. § 5010(b) (1982) (repealed 1984).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Watts v. United States, 651 F.2d 1354, 1366 (10th Cir. 1981). The court was directing its holding to the Bureau of Prisons.
81. *Id.*
82. *Scott*, 778 F.2d at 1445. The hearing was held to consider Scott's burglary conviction which occurred in July of 1983. Additionally, a "failure to fully report" charge was being considered. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. The period of time that Scott was incarcerated with adult inmates in violation of the YCA was from November of 1974 until March of 1981. *Id.*
88. *Id.*
89. *Id.*
90. 496 F.2d 1191 (10th Cir. 1974).
91. *Scott*, 778 F.2d at 1446 (citing *Staudmier*, 496 F.2d at 1192). An offender sentenced

nized the appropriateness of granting such credits as an equitable remedy where the youth sentenced under the YCA was deprived of any of its benefits.[92]

Because the allowance of good-time credits is an equitable remedy, the court stated that it "should only be granted where 'in equity and conscience' the petitioner is so entitled."[93] The Tenth Circuit went on to agree with the district court's conclusion that the equities did not favor the granting of such relief.[94] By violating his parole, Scott was not entitled to equitable relief, and therefore, could not receive good-time credits for time already served.[95]

3. Conclusion

In *Scott v. United States*, the Tenth Circuit addressed the issue of statutory rights of a juvenile and the conditions under which those rights may be lost. By holding that good-time credits can be forfeited if one violates his parole, the court gave an example of a situation where a statutory right can be lost. The court's decision serves as a reminder that statutory rights, in contrast to constitutional rights, are not guaranteed.

II. Convictions on Appeal

A. *Making a Threat to Kill the President*

1. Background

The statute imposing criminal liability for making a threat to kill the President is located at 18 U.S.C. § 871.[96] The statute states:

> Whoever knowingly and willfully deposits . . . any letter. . . containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President . . . or knowingly and willfully otherwise makes any such threat against the President . . . shall be fined not more than $1000 or imprisoned not more than five years, or both.[97]

The Supreme Court has had the opportunity to interpret this statute. In *Watts v. United States*,[98] the Supreme Court held that section 871 requires that a "true threat" must have been made.[99] In *Watts*, the Court reversed the conviction of an 18-year-old who allegedly

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under the YCA is not eligible for good-time credit since the indicator for early release is not the sentence as reduced by good time, but demonstrated progress toward rehabilitation. *See Staudmier*, 496 F.2d at 1192.

92. *Scott*, 778 F.2d at 1446 (citing Johnson v. Rodgers, 756 F.2d 79 (10th Cir. 1985)).

93. *Id.* at 1446 (citing *Johnson*, 756 F.2d at 81).

94. *Id.*

95. *Id.*

96. Threats Against President and Successors to the Presidency, 18 U.S.C. § 871 (1982).

97. *Id.*

98. 394 U.S. 705 (1969).

99. *Id.* at 708.

threatened to kill President Lyndon Johnson.[100] The alleged threat occurred during a discussion of police brutality and the draft, following a rally at the Washington Monument.[101] The Court classified the comment as "political hyperbole," which did not constitute a true threat.[102] In deciding the case, however, the Court declined to address whether the government must prove actual intent to carry out the threat.[103]

Since *Watts*, the statute has been interpreted by several circuit courts. The Second Circuit has held that, in order to show that the speech in question is not protected by the first amendment, the government must demonstrate that a threat "according to [its] language and context conveyed a gravity of purpose and *likelihood of execution* so as to constitute speech beyond the pale of protected 'vehement, caustic . . . unpleasantly sharp attacks on government and public officials.' "[104] The Fourth Circuit has held that when a "threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under . . . section 871(a) only if made with a *present intention* to do injury to the President."[105] The Tenth Circuit has held that a defendant can be convicted under section 871 without proof of actual intent to carry out the threat.[106]

2. The Tenth Circuit Opinion: *United States v. Crews*

The Tenth Circuit examined section 871 in *United States v. Crews*.[107] In the opinion, the court reiterated that section 871 does not require intent to kill the President. The court held, however, that a "true threat" was made by Crews, but it vacated his conviction on other grounds.[108]

Marvin Arnesto Crews, Jr., was a patient in the psychiatric ward of the Veteran's Hospital in Sheridan, Wyoming.[109] He was extremely upset after watching several evening television programs and was, thus, administered a large dose of antidepressant medication.[110] Crews

100. *Id.* at 705-06.
101. *Id.* at 708.
102. *Id.* at 707-08.
103. *Id.* at 708.
104. United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir.) (emphasis added) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)), *cert. denied*, 429 U.S. 1022 (1976.)
105. United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir. 1970) (emphasis added), *aff'd en banc*, 438 F.2d 13 (1971).
106. United States v. Welch, 745 F.2d 614 (10th Cir. 1984); United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983); United States v. Hart, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972).
107. 781 F.2d 826 (10th Cir. 1986).
108. *Id.* at 835-36. The Tenth Circuit vacated Crews' conviction on the basis of his fifth claim: that the district court wrongly refused to appoint a psychiatrist to aid defendant's attorney.
109. *Id.* at 829.
110. *Id.* Crews watched the television broadcast of "The Day After," a movie depicting the nuclear destruction of a midwestern town, Lawrence, Kansas. Warnings about the disturbing nature of the movie's content accompanied the presentation. A televised panel discussing the movie's implications followed the movie. Being extremely upset after

stated to a nurse "[i]f Reagan came to Sheridan, I would shoot him."[111] After the nurse reported this statement to her superiors, the hospital contacted the Secret Service.[112]

Crews was indicted for making a threat to kill President Ronald Reagan in violation of 18 U.S.C. § 871.[113] He was found guilty by a jury and sentenced to four years in prison.[114] On appeal, Crews claimed that the purported threat came within a psychotherapist-patient privilege, that the statement came within the protection of the first amendment as political speech, and that the court erred by not instructing the jury that Crews must have intended to carry out his threat.[115] The Tenth Circuit disagreed with all of these claims.[116]

Crews claimed that his statement to the nurse, the purported threat, was privileged communication between a psychotherapist and the patient.[117] The Tenth Circuit, having never addressed the privilege between a psychotherapist and a patient, again declined to decide whether to adopt the privilege.[118] The court stated, "[e]ven if we were to recognize it, we would have to hold that defendant waived his right to the privilege."[119] The court did not formally recognize the privilege,[120] but argued that Crews had waived any privilege he might have had, because he had openly discussed the comment that he made to the nurse with the Secret Service Agent.[121]

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watching both programs, Crews requested sedatives from one of the hospital's psychiatric nurses.

111. *Id.* at 829-30. Crews denied making that precise statement, but admitted an extreme dislike for President Reagan. Crews claimed to have told the nurse that it "would be in the best interest of this nation if that red-necked, bigoted, war-mongering motherfucker were shot." *Id.* at 830. In addition, it was found that Crews owned a shotgun and a rifle as well as several other weapons. Crews had these weapons and other personal property delivered to him from a hospital in Garden City, Kansas, where he had received prior treatment. Apparently Crews had requested their delivery before the purported threat, but the exact time as to when he arranged for the weapons to be sent was unclear. Crews did not have control over the weapons at the Veteran's Hospital, but if he had left the hospital, he could have taken the weapons with him. *Id.* at 830 n.1.

112. *Id.* at 829-30.

113. *Id.* at 829.

114. *Id.*

115. *Id.* Crews also claimed that (1) the prosecution failed to satisfy its burden to prove defendant was sane at the time of the alleged threat; (2) the district court erred in denying defendant a competency hearing and in not making findings required by statute; (3) that the district court wrongly refused to appoint a psychiatrist to aid defendant's attorney; and (4) cross-examination of the psychiatrists who examined defendant to determine competency violated the evidentiary rules.

116. *Id.* at 835-36. The Tenth Circuit did agree with one of the defendant's contentions, vacated his conviction, and remanded for a new trial.

117. *Id.* at 830. The Federal Rules of Evidence do not recognize a psychotherapist-patient privilege explicitly. *See* FED. R. EVID. 501. Some federal courts have adopted it. *See, e.g., In re* Zuniga, 714 F.2d 632, 638-39 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983); *see generally* Note, *Evidence — The Psychotherapist-Patient Privilege — The Sixth Circuit Does the Decent Thing*: In re Zuniga, 33 U. KAN. L. REV. 385 (1985).

118. *Crews*, 781 F.2d at 830-31.

119. *Id.* at 831.

120. *Id.*

121. *Id.*; *see also* Central Soya Co. v. Geo. A. Hormel & Co., 581 F. Supp. 51, 52-53 (W.D. Okla. 1982); United States v. Mierzwicki, 500 F. Supp. 1331, 1334 (D. Md. 1980) (disclosure of privileged communication is a waiver of privilege).

Crews also claimed that his statement was political speech protected by the first amendment.[122] The Tenth Circuit disagreed and found that Crews' statement was more like a common threat made in cases of extortion.[123] Although the statement followed a panel discussion and television program with political overtones and concerned a political figure, it was reasonably clear to the court that Crews was not engaged in political advocacy.[124]

The court also discussed whether the instruction given to the jury sufficiently informed the jury as to the content of an unprotected threat.[125] The instruction given to the jury was that "[a] threat is a statement expressing an intent to kill or injure the President, and a true threat means a serious threat as distinguished from words uttered as mere political argument, talk, or jest."[126] The Tenth Circuit was satisfied that this instruction adequately informed the jury of the difference between protected political speech and unprotected threats.[127]

The final argument made by Crews was that the court erred in instructing the jury that defendant could be convicted absent proof of an intention to carry out the threat.[128] Because the Tenth Circuit had rejected the same substantive contention in earlier cases, the court again rejected the idea that the government must prove intent.[129] The court reasoned that "[t]he statute speaks of the requirement being that the threat is 'knowingly and willfully' made, and, of course, it must be made in terms of a 'true threat' . . . ."[130] The majority rejected Crew's contention that the statute requires proof of intent when the threat is not made directly to the President or in such a manner as to reach him or his security personnel.[131]

3. The Opinion of Judge Logan

Judge Logan concurred with the majority opinion except for the question of whether section 871 requires intent for conviction.[132] If a

122. *Crews*, 781 F.2d at 830-31.

123. *Id.* at 832. The court found the statement analogous to that made in United States v. Welch, 745 F.2d 614, 615-16, 618 (10th Cir. 1984). In *Welch* the defendant, distraught about the unavailability of vocational training, stated that he would kill President Reagan if he had the opportunity. The court found that the first amendment did not protect the statement. *See also* United States v. Howell, 719 F.2d 1258, 1260-61 (5th Cir. 1983) (statement that "It's too bad that John Hinkley did not get him. I will kill the President if I get a chance" not protected by first amendment), *cert. denied*, 105 S. Ct. 2683 (1985); United States v. Lincoln, 589 F.2d 379, 382 (8th Cir. 1979) (letter containing explicit threats unprotected by the first amendment).

124. *Crews*, 781 F.2d at 832; *see also Welch*, 745 F.2d at 618-19.

125. *Crews*, 781 F.2d at 832.

126. *Id.*

127. *Id.*

128. *Id.* at 834-35.

129. *Id.* at 835; *see* United States v. Welch, 745 F.2d 614 (10th Cir. 1984); United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983); United States v. Hart, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972).

130. *Crews*, 781 F.2d at 835.

131. *Id.*

132. *Id.* at 836 (Logan, J., concurring in part and dissenting in part).

threat was made directly to the President, or in such a way that one could reasonably expect that it would reach the President or those charged with his protection, then Judge Logan agreed that the government need not prove that a defendant actually intended to carry out the threat.[133] However, if a threat was made that was not intended to reach the President or his security personnel, and in such a manner that it was highly unlikely to be so communicated, then Judge Logan found that it would be necessary for the government to prove intent.[134]

Judge Logan stated that, when a threat against the President was made to a companion, or, as in the Crews' case, the declarant's psychiatric nurse, the statement was probably idle chatter or political criticism.[135] Second, by punishing the utterance of a statement without further proof of intent to carry out the threatened action, Logan believed that the court would be bordering on punishing mens rea alone — punishing an individual for merely having evil thoughts.[136] Finally, Judge Logan argued that a threatening comment made to one not intended to relay the message, and under circumstances where it was improbable that the comment would be so communicated, could not reasonably be considered a threat, unless actual intent to carry out the threat existed.[137]

4. Analysis

On the surface, Judge Logan's arguments sound logical, but after closer examination one can clearly see the difficulties. In his first argument, Judge Logan gave no support for his comment that the declarant's statement "is much more likely to be idle talk or political commentary."[138] He claimed that "[w]e must recognize this is so," even though he approved of charging the jury that it must measure the "true" nature of the threat by how the hearer would interpret it.[139]

Second, it is clear that the statute punishes the utterance of a threat and not just the thinking of evil thoughts.[140] Because it is the President which is the subject of the threat, mere voicing of the evil thoughts in the form of a threat is enough to warrant protection through imposition of criminal liability.[141]

Third, the statute does not speak in terms of actual intent to carry out the threat.[142] The statute speaks to "knowingly and willfully" mak-

133. *Id.*
134. *Id.* at 836-37.
135. *Id.*
136. *Id.* at 837.
137. *Id.*
138. *Id.* at 836-37.
139. *Id.*
140. *See* 18 U.S.C. § 871 (1982). Note that Judge Logan agreed that the very utterance of a threat is punishable under the statute. *Crews*, 781 F.2d at 837 (Logan, J., concurring in part and dissenting in part).
141. *Crews*, 781 F.2d at 832.
142. *See* 18 U.S.C. § 871 (1982).

ing a threat.[143] Because of the plain language of the statute, the majority would be justified in not considering the actual intent of the declarant in determining criminal liability.

An argument which was not presented by the dissenting judge, and not discussed by the majority, is that by definition, a "true threat" may require actual intent.[144] In future cases, rather than arguing a dichotomy in the statute, the court, hopefully, will be more explicit in defining the elements of a "true threat."

5. Conclusion

Crews v. United States leaves the viability for the psychotherapist-patient privilege in question. In addition, *Crews* serves as an example of what is not protected political speech under the first amendment. It appears that the appellate court will continue to hold that proof of actual intent to carry out a threat to kill the President is not necessary.

B. *The Heat of Passion Defense*

1. Background

The heat of passion defense has been a part of the American legal system since the 1800's.[145] The defense reduces the charge in a homicide from murder to manslaughter.[146] In order for the heat of passion defense to exist, there are four requirements.[147] First, adequate provocation must have existed.[148] Second, one must have killed in the heat of passion.[149] Third, there must not have been a reasonable opportunity for the passion to cool.[150] Fourth, the provocation, the passion, and the fatal act must have had a connection.[151]

If heat of passion is the theory of defense, then the prosecution's burden of proof beyond a reasonable doubt becomes an issue. For example, to obtain a murder conviction, the prosecution must prove beyond a reasonable doubt that the defendant unlawfully killed another *with* malice aforethought.[152] In comparison, a voluntary manslaughter conviction requires proof beyond a reasonable doubt that the defendant unlawfully killed another *without* malice and acting "[u]pon a sudden quarrel or heat of passion."[153] Because of this distinction between mal-

143. *Id.*

144. Watts v. United States, 394 U.S. 705, 708 (1969). The Supreme Court stated that it would not express an opinion as to whether the court of appeals was correct in holding that a "true threat" did not require proof of intent, thus leaving the door open for precisely that argument.

145. PERKINS & BOYCE, *supra* note 1, at 85.

146. *Id.*

147. *Id.*

148. *Id.*; *see* Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021 (1958).

149. PERKINS & BOYCE, *supra* note 1, at 85.

150. *Id.*

151. *Id.*

152. 18 U.S.C. § 1111(a) (1984 & 1985 Supp.).

153. 18 U.S.C. § 1112(a) (1982).

ice and heat of passion, the Supreme Court held in *Mullaney v. Wilbur* that the prosecution must prove *absence* of the heat of passion on sudden provocation in order to obtain a murder conviction.[154] The Court stated that failure to impose this requirement would unlawfully exempt the prosecution from its burden of proving the defendant guilty of murder beyond a reasonable doubt.[155]

2. The Tenth Circuit Opinion: *United States v. Lofton*

The distinction between malice and heat of passion as well as the requisite jury instructions were the subject of an appeal to the Tenth Circuit.[156] The court held that the trial court failed to adequately instruct the jury on the heat of passion defense and its effect on the government's burden of proof.[157]

Jessica Mae Lofton fired a .22 caliber revolver into the back of her husband's head on the morning of June 5, 1984; four days later, he died from the gunshot wounds.[158] The shooting occurred at the Fort Riley Military Reservation in Geary County, Kansas.[159] Lofton claimed that she acted in the heat of passion on adequate provocation.[160] She was found guilty of murder in the second degree under 18 U.S.C. § 1111.[161] Lofton appealed her conviction to the Tenth Circuit Court of Appeals.[162]

Lofton's first argument was that there was insufficient evidence of malice to uphold a second-degree murder conviction.[163] Lofton's motion for a judgment of acquittal at the close of the prosecution's case was denied.[164] Lofton did not renew the motion at the close of all the evidence.[165] The Government argued that Lofton's failure to renew the motion waived her objection to denial of the motion.[166] The Tenth Circuit held that even if Lofton had renewed the motion, the record revealed enough evidence of malice to sustain the conviction, without requiring the court to examine the Government's waiver argument.[167]

Lofton's second argument concerned the adequacy of the jury in-

154. Mullaney v. Wilbur, 421 U.S. 684, 697-98, 704 (1975), *limited by* U.S. *ex rel.* Goddard v. Vaughn, 614 F.2d 929 (3rd. Cir.), *cert. denied*, 449 U.S. 844 (1980).

155. *Id.*

156. United States v. Lofton, 776 F.2d 918 (10th Cir. 1985).

157. *Id.* at 919.

158. *Id.*

159. *Id.*

160. *Id.* This defense would reduce the offense of murder to the lesser offense of voluntary manslaughter.

161. *Id.*

162. *Id.*

163. *Id.* at 919.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* Lofton testified that several days before the shooting, she placed the gun in the car. There was also evidence that she returned to her house to "pick something up" just before the shooting. In addition, there was testimony that Lofton had told two different people shortly before the shooting that she might kill her husband.

structions concerning her heat of passion defense.[168] Because a criminal defendant has a right to jury instructions on any defense theory finding support in the evidence and the law, failure to so instruct would be reversible error.[169] The Tenth Circuit had previously held that

> [A] defendant in a federal murder case who has sufficiently raised a heat of passion defense is entitled to instructions informing the jury of the theory of defense and of the Government's duty to prove beyond a reasonable doubt the absence of heat of passion in order to obtain a murder conviction.[170]

The record established and the Government conceded that Lofton sufficiently raised a heat of passion defense and was entitled to an instruction.[171]

Accordingly, the Tenth Circuit examined the instructions to determine if the jury was advised of Lofton's defense and its effect on the prosecution's burden of proof.[172] The Tenth Circuit found that the instructions did not inform or even suggest to the jury that Lofton's sole defense to murder was that the killing of her husband was in the heat of passion.[173] The manslaughter instruction was the only instruction which referred to the heat of passion defense, but it did not advise the jury that this was Lofton's sole defense to murder.[174] In addition, the court found that there was no instruction to the jury regarding the Government's burden when a heat of passion defense is raised: that the prosecution must prove beyond a reasonable doubt the *absence* of heat of passion.[175] Although both "heat of passion" and "malice" were defined, the court was concerned that the instruction did not differentiate between the two or explain to the jury that finding one necessarily prevented the finding of the other.[176]

3. Conclusion

The Tenth Circuit has sent a warning to all counsel and trial courts not to blindly rely on pattern jury instructions. The court expressly af-

168. *Id.*
169. Bird v. United States, 180 U.S. 356, 361-62 (1901).
170. *Lofton*, 776 F.2d at 920.
171. *Id.* at 919. Lofton had testified that her daughter was sexually abused by a friend while the family was stationed in Germany. Lofton had threatened the abuser with a gun. Also at that time, Jessica's daughter told her that Ronald, Lofton's husband, had also abused her, a story which Lofton did not believe. The testimony presented at trial tended to show that Ronald had sexually assaulted his stepdaughter in January of 1983 in Kansas, in addition to the Germany incident. Lofton unsuccessfully tried criminal prosecution, therapy, and separation. Several weeks before the shooting, Lofton found her husband, Ronald, lifting up her daughter's nightgown. An assistant county attorney declined to refile aggravated incest charges against Ronald on the morning of the shooting. Angered by this information, Lofton had asked a friend to take her to her husband. While the friend drove them around, Lofton and her husband had argued. In the middle of the argument, Lofton fired a revolver into the back of her husband's head, not once but twice. *Id.*
172. *Id.* at 921.
173. *Id.* at 921-22.
174. *Id.*
175. *Id.*
176. *Id.*

firmed that pattern instructions which may provide valuable guidance to the courts must still be tailored to the peculiar facts of each case and to the constitutional minimums required by case law. Trial courts must explain jury instructions in clear detail so that jurors will know what is expected of them. Additionally, lawyers must tailor instructions to make them understandable to the jury.

C. *Racketeer Influenced and Corrupt Organizations Act (RICO)*

1. Background of the RICO Act

Congress has attempted to address the problems presented by organized crime in the Racketeer Influenced and Corrupt Organizations Act (RICO).[177] The concept of organized crime, which is normally considered a multi-faceted criminal undertaking, does not fit neatly into the common law of conspiracy.[178] In large criminal organizations, similar to large corporations, each of the members operate on different levels.[179] Therefore, depending on which level the member operates, it is highly probable that different responsibilities for each member of the conspiracy exist.[180] The possibility of different responsibilities and objectives existing for each level of the organization, requires that each level be punished according to what each level has sought to accomplish.[181] Otherwise, individual defendants may be prosecuted for the acts of others, the significance of which the individual defendant might not have comprehended.[182] Thus, no matter how large the criminal organization, criminals could thwart prosecution by playing only a small part in the larger conspiracy.

Since general conspiracy laws could not curtail such conduct, Congress enacted RICO to stop large scale criminal activity. RICO prohibits a person from using income derived "from a pattern of racketeering activity" to acquire, establish, or operate any enterprise which is engaged in or which affects interstate commerce.[183] Second, RICO makes it unlawful for any person through a "pattern of racketeering activity" to acquire or maintain any interest in or control over any enterprise which is engaged in or which affects interstate commerce.[184] Third, RICO forbids any person to conduct or participate in managing the enterprise's

177. 18 U.S.C. §§ 1961-1968 (1982). Congress responded to the inadequate enforcement of laws against organized crime by enacting RICO as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). *See* McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. REV. 55 (1970). *See generally* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983).

178. PERKINS & BOYCE, *supra* note 1, at 705. *See also* Rex v. Meyrick, 21 Crim. App. 94, 102 (1929) (English case); Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-1968: Broadest Of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978).

179. PERKINS & BOYCE, *supra* note 1, at 705.

180. *Id.*

181. *Id.* at 706.

182. *Id.*

183. 18 U.S.C. § 1962(a) (1982).

184. *Id.* at § 1962(b) (1982).

affairs through a "pattern of racketeering activity."[185] Finally, it is unlawful to violate any one of the above-mentioned provisions.[186]

2. The Tenth Circuit Opinion: *United States v. Hampton*

Since passage of RICO, judicial interpretation of its broad, substantive provisions has been required. The Tenth Circuit Court of Appeals faced such interpretation during the survey period in the case of *United States v. Hampton*.[187]

Gene Edward Hampton was indicted for misusing his position as Sheriff of Bryan County, Oklahoma.[188] Sheriff Hampton allegedly would not enforce liquor, gambling, and other laws in exchange for money from bar owners and club operators.[189] A jury convicted Hampton on nine counts of a ten count indictment.[190] On appeal, the Tenth Circuit disagreed with all of Hampton's contentions and affirmed his conviction.[191]

Hampton based his appeal on issues involving the RICO conspiracy count.[192] Hampton first argued that there was insufficient evidence presented by the government proving that the designated co-conspirator, Deputy Roy Harris, committed two of the necessary predicate offenses.[193] Hampton claimed that such failure in proof meant that Harris was not a member of a conspiracy.[194] If Harris was not a member of a conspiracy, then, Hampton argued, they could not have conspired together.[195]

In addressing Hampton's claim, the Tenth Circuit determined that a substantive RICO provision must be violated in order for a RICO conspiracy to exist.[196] Using the Bryan County Sheriff's Office to conduct racketeering activity constituted a substantive RICO offense.[197] Merely conspiring to commit the predicate crimes which establish the pattern of racketeering activity was not enough.[198] Rather, Hampton and Harris, through the use of the sheriff's office, had to have conspired to engage

185. *Id.* at § 1962(c) (1982).
186. *Id.* at § 1962(d).
187. 786 F.2d 977 (10th Cir. 1986).
188. *Id.* at 978.
189. *Id.*
190. *Id.* The indictment also included six counts of conspiracy in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982) (counts 3-8) and two counts of violating 18 U.S.C. § 1512 (1982 & Supp. III 1985) (counts 9-10). Hampton allegedly used a "bagman" to collect the extorted payoffs as well as having the club owners make "donations" to a "Narcotic Fund." The payments were to ensure non-harassment, remaining open beyond the required 2:00 a.m. closing time, and the safe operation of dice games. Sheriff Hampton allegedly directed a deputy, Roy Harris, to terminate a gambling investigation and warned participants in an ongoing dice game of an impending raid by authorities. *Id.*
191. *Id.* at 981.
192. *Id.* at 978.
193. *Id.* at 979.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

in a pattern of racketeering activity.[199] The evidence of the extortion scheme, the involvement in the gambling operations, and the termination of an ongoing investigation was more than enough to satisfy the Tenth Circuit that both conspirators intended to take advantage of the sheriff's office through a pattern of extortion and other racketeering activity.[200]

Next, Hampton argued that serving consecutive sentences for violating both RICO and the Hobbs Act constituted double jeopardy in violation of the fifth amendment.[201] The Tenth Circuit, in rejecting this argument, relied on the statutory framework and the legislative history of RICO.[202] According to the court, it was clear that Congress intended to allow punishment for violations of the substantive RICO provisions as well as for the commission of the underlying acts.[203] The court refused to hold that a conviction on the underlying acts was absolutely necessary before one could be convicted under RICO;[204] rather, it indicated that a predicate crime for which the defendant had already been punished was one of the possible bases for a RICO conviction and subsequent sentence.[205]

Hampton also argued the existence of separate conspiracies.[206] He contended that his mere participation in the conspiracies was not enough to warrant combining them in a single count.[207] Therefore, the combination was, in fact, a charge of multiple conspiracies in a single count, which is not allowed.[208] The Tenth Circuit rejected this argument by finding more than just participation as the common element.[209] The court found that "[t]he common denominator between the 'kickbacks,' dice games and other schemes" involved Hampton's participation as well as the corruption of the Bryan County Sheriff's Office.[210]

3. Conclusion

One of the purposes of RICO is to seek the eradication of organized crime in the United States. The Tenth Circuit has taken a hard-line ap-

199. *Id.*
200. *Id.*
201. *Id.* at 980. For a discussion of the Hobbs Act, passed to punish interference with interstate commerce by extortion, see Stern, *Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SEXTON HALL L. REV. 1 (1971).
202. *Hampton*, 786 F.2d at 980. The court refered to the following cases to show Congress' intent to permit cumulative punishment for substantive RICO violations: United States v. Hartley, 678 F.2d 961 (11th Cir. 1982); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.*, Little v. United States, 445 U.S. 946 (1980); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970).
203. *Hampton*, 786 F.2d at 980.
204. *Id.*
205. *Id.*
206. *Id.* at 980-81.
207. *Id.*
208. *Id.* at 981; *see* Kotteakos v. United States, 328 U.S. 750 (1946).
209. *Hampton*, 786 F.2d at 981.
210. *Id.*

proach in support of the purposes of the Act. The *Hampton* decision is a sample of the court's attitude toward patterns of racketeering activity, regardless of the number of people involved and the scope of the impact following from that activity. Because of the Tenth Circuit's concern with organized crime, one should look for the court to continue to broadly interpret the RICO provisions.

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