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M. Caroline Turner

CRIMINAL LAW AND PROCEDURE

OVERVIEW

I. SELF-INCRIMINATION

In *Holloway v. United States*[1] the Tenth Circuit held that a defendant's incriminating statements made three or four hours after being advised of his *Miranda* rights[2] were the result of a voluntary and intelligent waiver of his privilege against self-incrimination. At the time of arrest defendant exercised his right to remain silent but later initiated a conversation with an agent. The circuit court did not consider lapse of time a significant factor in the determination of whether or not there was a valid waiver.[3] The court treated all of defendant's statements as part of one conversation and held that because he initiated it, his statements came within the rule that spontaneous utterances are admissible.[4] From the facts it appears that there were two conversations and that the second was an interrogation rather than part of the conversation initiated by defendant. His answers, however, were admissible under the rule that once warnings are given and understood, repeated warnings are not necessary prior to subsequent interrogation.[5]

United States v. Pommerening[6] involved convictions for bribing a government official and for perjury before a grand jury. Claiming to have been "prime targets" of the grand jury investigation defendants argued that they should have been warned of their constitutional privilege against self-incrimination before testifying. The court disposed of this claim by finding that defendants were not in fact the target of the grand jury investigation.

The privilege against self-incrimination is applicable to a grand jury proceeding.[7] While a grand jury witness cannot in the

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[1] 495 F.2d 835 (10th Cir. 1974).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] *Accord*, United States v. Manar, 454 F.2d 342 (7th Cir. 1971); United States v. Osterburg, 423 F.2d 704 (9th Cir.), *cert. denied*, 399 U.S. 914 (1970); Maguire v. United States, 396 F.2d 327 (9th Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969).

[4] *See, e.g.*, United States v. Gaynor, 472 F.2d 899 (2d Cir. 1973); United States v. Trosper, 450 F.2d 319 (5th Cir. 1971); United States v. Bourrassa, 411 F.2d 69 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969); United States v. Duke, 369 F.2d 355 (7th Cir. 1966), *cert. denied*, 386 U.S. 934 (1967).

[5] *See* Miller v. United States, 396 F.2d 492 (8th Cir. 1968); Maguire v. United States, 396 F.2d 327 (9th Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969); United States v. Kinsey, 352 F. Supp. 1176 (E.D. Pa. 1972).

[6] 500 F.2d 92 (10th Cir. 1974).

[7] *E.g.*, Hale v. Henkel, 201 U.S. 43 (1906); Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Parker, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957).

federal system claim a privilege against testifying,[8] he may refuse to answer a question which would tend to incriminate him[9] unless he has been granted immunity.[10] The general rule is that a grand jury witness is not entitled to be warned of his constitutional right not to answer particular questions, but himself bears the burden of asserting that right.[11] The Tenth Circuit applied this rule in *Pommerening*, holding that there was no duty to warn the defendants "in absence of any indication that it [the grand jury] might bring charges against them."[12] The court left open the question of the right of an individual who *is* the target of the grand jury investigation to be warned of his privilege against self-incrimination, a question that has been the subject of much discussion and controversy among the circuits.[13]

The court also ruled that even if defendants were entitled to warnings, failure to give them would not have barred their conviction for perjury. It is settled that the privilege against self-incrimination relates to past crimes—not to present or future acts.[14]

By ruling not only on the issue of defendants' right to

[8] United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972); United States v. Irwin, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); United States v. Winter, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

[9] *See, e.g.*, United States v. Parker, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957).

[10] *See* Lefkowitz v. Turley, 414 U.S. 70 (1973); Kastigar v. United States, 406 U.S. 441 (1972); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

[11] United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972); Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3d Cir.), *cert. denied*, 389 U.S. 838 (1967); United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

[12] 500 F.2d at 99.

[13] United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967), and Stanley v. United States, 245 F.2d 427 (6th Cir. 1957), both held that a "virtual defendant," unlike a "mere witness," must be advised of his right to refuse to answer incriminating statements and that anything he says can be used against him. United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972), and United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955), expressly left this question open. In the latter the Second Circuit noted district courts' rulings that warnings are required and strongly recommended that warnings be given where indictment of the witness is a possibility. Apparently since *Scully* such witnesses are given *Miranda* warnings in the Second Circuit. *See, e.g.*, United States v. Binder, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972); United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); United States v. Klein, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

[14] *See, e.g.*, Glickstein v. United States, 222 U.S. 139 (1911); Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. Winter, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

Miranda warnings, but also on the question of their right to be warned of their rights to remain silent and to the assistance of counsel, the Tenth Circuit showed its awareness that a conclusion that *Miranda* is inapplicable to a grand jury situation[15] does not answer the question whether or not it is necessary to warn certain witnesses of their privilege against self-incrimination.[16]

A second case in which the Tenth Circuit ruled on the necessity of warning individuals of their privilege against self-incrimination was *United States v. Bettenhausen*.[17] In that case the defendant complained that the advisement of his rights given by a special agent of the IRS at a tax investigation interview was inadequate in violation both of IRS published procedures and of *Miranda*. The court held *Miranda* inapplicable in this case and held that when ruling on the adequacy of warnings under an IRS procedure the burden is on the defendant to show noncompliance.

The question of the applicability of *Miranda* to a tax investigation has been the subject of much discussion and litigation.[18] In 1967 and 1968 the IRS published procedures to insure the uniform practice of advising individuals of their privilege to remain silent.[19] The more recent and detailed publication stated:

> At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any

[15] *See* United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972) (noting that there is no "custodial interrogation" as required by *Miranda*); Commonwealth v. Columbia Inv. Corp., 325 A.2d 289, 295-96 (1974) (holding *Miranda* inapplicable to a grand jury proceeding because there is no right to the presence of an attorney and no right to remain silent, as expressed in *Miranda* warnings).

[16] See pre-*Miranda* cases considering witnesses' rights to warnings, *e.g.*, Stanley v. United States, 245 F.2d 427 (6th Cir. 1957); United States v. Scully, 255 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

[17] 499 F.2d 1223 (10th Cir. 1974).

[18] *See* United States v. Brevik, 422 F.2d 449 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970); United States v. Jaskiewicz, 433 F.2d 415 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) (and cases cited therein); Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969) (and cases cited therein); United States v. Wainwright, 284 F. Supp. 129 (D. Colo. 1968); United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967); Duke, *Prosecutions For Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966); Note, *Extending Miranda to Administrative Investigations*, 56 VA. L. REV. 690 (1970).

[19] IRS News Release No. 897, October 3, 1967, reprinted in 7 CCH 1967 STAND. FED. TAX REP. ¶6832.

> documents, and that he has the right to seek the assistance of any attorney before responding.[20]

The publication of this warning procedure greatly diminished the significance of the question of the applicability of *Miranda* to a tax investigation[21] because the procedure provided what on its face would seem to be a complete substitute for *Miranda* warnings.[22] Since the IRS initiated these procedures, all of the circuits[23] except the Seventh[24] have ruled that *Miranda* is inapplicable to a general tax investigation interview. Only if the interview is held in a custodial situation are *Miranda* rights required.[25] The court in *Bettenhausen* found no coercion or meaningful restraint on defendant's freedom of action that would bring *Miranda* into play.

The court might still have found that defendant was denied his constitutional privilege against self-incrimination had it applied the rule of *Miranda* and placed the burden on the government to show compliance with warning requirements. Instead, the court said that because this case involved an administrative

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[20] IRS News Release No. 949, November 26, 1968, reprinted in 7 CCH 1969 STAND. FED. TAX REP. ¶6946.

[21] *See* United States v. Dickerson, 413 F.2d 1111, 1117 n.13 (7th Cir. 1969), where the court, aware of the new IRS procedures, stated that the impact of its holding that *Miranda* warnings are required was thus diminished.

[22] *But see* Cohen v. United States, 405 F.2d 34, 39 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969), where the court said without explanation that the IRS procedures were a "step forward," but they "fall short . . . of extending to the taxpayer the protections set forth in *Escobedo* and *Miranda*."

[23] *See* United States v. Brevik, 422 F.2d 449 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970); United States v. Jaskiewicz, 433 F.2d 415 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971), (and cases cited therein); Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969), (and cases cited therein).

[24] United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969).

[25] Mathis v. United States, 391 U.S. 1 (1968); United States v. Jaskiewicz, 433 F.2d 415 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); United States v. Prudden, 424 F.2d 1021 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970); United States v. Brevik, 422 F.2d 449 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970). The Tenth Circuit joined in this holding of the limited applicability of *Miranda* to tax investigations in Hensley v. United States, 406 F.2d 481 (10th Cir. 1968). Strangely, though, there is the following statement in the 1971 case United States v. Lockyer, 448 F.2d 417 (10th Cir. 1971):

> The better reasoned cases hold that a warning in accordance with Escobedo v. Illinois [378 U.S. 478 (1964)] and Miranda v. Arizona [384 U.S. 436 (1966)] must be given to the taxpayer by either the revenue agent or the special intelligence agent at the inception of the first contact with the taxpayer following transfer of the case to the Intelligence Division.

Id. at 422 (dictum). The court cited United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969); United States v. Wainwright, 284 F. Supp. 129 (D. Colo. 1968); and United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967), which hold that *Miranda* rights are required at a tax investigation.

procedure, not a custodial interrogation, the defendant had the burden of showing noncompliance, and the noncompliance must be "substantial."[26] The court noted that the record did not show "the nature or extent of what part of the prescribed warning was not given"[27] and concluded that the defendant had failed to carry this burden.

Courts have enforced the IRS warning requirements by excluding from evidence statements obtained in violation of the published procedures.[28] Because of its allocation of the burden of proof in *Bettenhausen*, the Tenth Circuit did not reach the question of the effect of a violation of the warning procedures. Its ruling reduces the scope of these procedures so that they are less than a complete substitute for *Miranda*. Contrary to the presumption against waiver where *Miranda* applies, where the IRS procedures are applicable, there is a presumption that an individual was properly warned of his rights and intelligently waived them.

In *Pauldino v. United States*[29] the defendant, convicted of traveling in interstate commerce for the purpose of engaging in gambling activities, challenged as a violation of his privilege against self-incrimination, the admission into evidence of his 1966 tax return to establish his occupation as a gambler. The issue faced by the court, as phrased by the Ninth Circuit, was, "to what extent and under what circumstances may incriminating information supplied by a taxpayer . . . be used against the taxpayer in a criminal prosecution unrelated to the income tax laws."[30]

The court relied on cases upholding the use of tax returns in evidence at trials of tax crimes[31] and non-tax crimes,[32] and made

[26] The court relied on Nardone v. United States, 308 U.S. 338 (1939), and United States v. Bland, 458 F.2d 1 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972). In *Bland*, the court placed the burden on the defendant to show misconduct by an agent at a time when the only duty of an IRS agent was not to use misrepresentation or deception.

[27] 499 F.2d at 1231.

[28] United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969); *cf.* United States v. Bembridge, 458 F.2d 1262 (1st Cir. 1972). *See also* cases enforcing other administrative regulations, *e.g.*, Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[29] 500 F.2d 1369 (10th Cir. 1974).

[30] Garner v. United States, 501 F.2d 228, 230 (9th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3216 (U.S. Aug. 9, 1974) (No. 74-100).

[31] United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

[32] Garner v. United States, 501 F.2d 236 (9th Cir. 1974), *rev'g* 501 F.2d 228 (9th Cir.

no distinction between the two. The court held that while Pauldino could have claimed the privilege when he filed his tax return,[33] his failure to do so was a waiver of that privilege, and he could not claim the privilege retroactively.

In one of the recent cases relied on by the court in *Pauldino* the Ninth Circuit, before reversing itself on rehearing, did distinguish between use of tax returns as evidence in trials of tax crimes and non-tax crimes. In *Garner v. United States*[34] that circuit originally ruled that a tax return was not admissible in a trial of a non-tax crime. In the 1949 case *Stillman v. United States*[35] the Ninth Circuit held a tax return admissible as evidence of a non-tax crime under an "implied waiver" theory. However, in the original *Garner* opinion the court effectively overruled *Stillman*.[36] The Ninth Circuit noted that a taxpayer is compelled to give information on his return under fear of criminal prosecution for failure to do so—and so is given a "Hobson's choice."[37] The court held that while the government can compel the giving of information, it may not later claim that such information was volunteered. By filing a return without objection, therefore, a taxpayer has *not* waived his privilege against self-incrimination for purposes of a non-tax crime.

After much comment on *Garner*[38] the Ninth Circuit reversed itself on rehearing en banc, and held that because the defendant knew his answers might be incriminating, he had a choice either of claiming his privilege or answering the questions. Once he answered the questions, he could not "immunize himself" by claiming the privilege retroactively.[39] The Tenth Circuit's ruling in *Pauldino* is in line with this final holding of the Ninth Circuit.

1972), *petition for cert. filed*, 43 U.S.L.W. 3216 (U.S. Aug. 9, 1974) (No. 74-100); Grimes v. United States, 379 F.2d 791 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967); Stillman v. United States, 177 F.2d 607 (9th Cir. 1949); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

[33] United States v. Sullivan, 274 U.S. 259 (1927).

[34] 501 F.2d 228 (9th Cir. 1972), *rev'd*, 501 F.2d 236 (9th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3216 (U.S. Aug. 9, 1974) (No. 74-100).

[35] 177 F.2d 607 (9th Cir. 1949).

[36] 501 F.2d 228, 231.

[37] *Id.* at 233.

[38] *See, e.g.*, Comment, *Constitutional Law—Self-Incrimination—Use of Information Provided without Objection on Income Tax Return Prohibited in Prosecution for Nontax Offense*—Garner v. United States, 86 HARV. L. REV. 914 (1973); Comment, *The Use of the Income Tax Return in Unrelated Criminal Prosecutions*: Garner v. United States, 14 WM. & MARY L. REV. 203 (1972).

[39] 501 F.2d 236, 240.

In two cases decided the same day, *Wall v. United States*[40] and *Williams v. United States*,[41] the voluntariness of guilty pleas was challenged on the grounds that the defendants were not advised that the sentences imposed would be served consecutively with sentences they were presently serving for other convictions. In both cases it was argued that the fact that the sentences would be consecutive was a consequence of their pleas of which they should have been informed under Federal Rule of Criminal Procedure 11, which provides that the court must determine before accepting a quilty plea that the accused understands the consequences of the plea.[42]

Defendants in both cases were imprisoned on state charges at the time they plead guilty to the federal charges. Under 18 U.S.C. § 3568 (1970) a federal sentence commences on the date the convicted individual is received at the federal penal institution. Because Wall and Williams would not arrive at the federal institution until the completion of their existing state sentences, their federal sentences were necessarily consecutive to the state sentences.

In *Wall* the effect of section 3568 was not mentioned, and the court simply concluded that the fact the federal sentences would follow the previously imposed state sentence was "not a definite 'practical consequence of the plea' within the meaning of Rule 11."[43] In *Williams*, where defendant specifically argued that he should have been warned of the effect of section 3568, the court admitted that defendant's contention had support in a Ninth Circuit case, *United States v. Myers*.[44] But the court said that it preferred the reasoning of *Anderson v. United States*,[45] a case affirmed by the Tenth Circuit, and noted that "[s]ubsequent to the *Myers* case, the Ninth Circuit held that Rule 11 did not require the sentencing court to advise a defendant that prison terms on separate counts might run consecutively."[46] The court was

[40] 500 F.2d 38 (10th Cir. 1974).

[41] 500 F.2d 42 (10th Cir. 1974).

[42] AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE RELATING TO PLEAS OF GUILTY 25, § 1.4(c)(i) (approved draft 1968) provides that a judge accepting a guilty plea must inform the accused "of the maximum possible sentence on the charge, *including that possible from consecutive sentences*" (emphasis added).

[43] 500 F. 2d at 39.

[44] 451 F. 2d 402 (9th Cir. 1972).

[45] 302 F. Supp. 387 (W.D. Okla.), *aff'd*, 405 F.2d 492 (10th Cir.), *cert. denied*, 394 U.S. 965 (1969).

[46] 500 F.2d at 44.

referring to the Ninth Circuit case *Johnson v. United States*.[47]

An examination of the two Ninth Circuit cases cited by the court, *Myers* and *Johnson*, reveals a distinction recognized by that circuit which the Tenth Circuit apparently does not find significant. In *Myers* the Ninth Circuit held that while a defendant under an indictment with several counts need not be advised of the possibility of consecutive sentences, a defendant presently serving a sentence must be advised of the effect of section 3568, which is that his federal sentence must be consecutive with his present one. The distinction is based on the fact that while a judge has discretion in the decision on concurrence of sentences under a multiple count indictment, section 3568 gives the court *no* discretion. The fact that section 3568 means that consecutive sentences are a necessary result for a defendant serving another sentence makes that statute a factor affecting the maximum term. Section 3568 is, therefore, a consequence of a guilty plea of which a defendant must be advised under Rule 11. In *Johnson v. United States*[48] the defendant was given consecutive sentences for multiple counts on a single indictment. The Ninth Circuit clearly distinguished *Myers* on the grounds that Myers was in custody for another crime at the time of his plea.

The district court case relied on by the Tenth Circuit, *Anderson v. United States*,[49] involved a situation like that in *Myers*: Anderson was in state custody when he plead guilty to a federal charge. In that case the district court found no error in the failure of the court to tell defendant that his federal sentence would not begin until the completion of his state sentence. The court erroneously said that concurrent sentences were *discretionary* with the judge.[50] In *Myers* the Ninth Circuit criticized this statement:

> In [*Anderson*], however, the question of the impact of § 3568 was apparently not raised and the court mistakenly assumed that "determining if a federal sentence is to run concurrent with or consecutive to a state sentence is a part of the sentencing process left to the judgment and discretion of the Judge."[51]

In the Tenth Circuit's affirmance of *Anderson*, the court cited section 3568 but did not correct this apparent misconception.[52]

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[47] 460 F.2d 1203 (9th Cir.), *cert. denied*, 409 U.S. 873 (1972).

[48] *Id.*

[49] 302 F. Supp. 387 (W.D. Okla. 1969).

[50] *Id.* at 388.

[51] 451 F.2d at 404 n.2.

[52] 405 F.2d at 493 (1969).

In *Wall* and *Williams* the Tenth Circuit did speak of the consecutiveness of sentences as a fact, not as a possibility. The court cited the Ninth Circuit cases which put great emphasis on the nondiscretionary character of the imposition of consecutive sentences where a defendant, like Wall and Williams, is serving another sentence. But the court did not explicitly recognize the distinction made in these cases between a defendant affected by section 3568 and one for whom consecutive sentences for multiple counts of a single indictment is a possibility. The court rejected that distinction only by implication. Other circuits have faced the issue more squarely. The Eighth Circuit recognized the distinction made in *Myers* and expressly declined to rule on the issue of whether a defendant in state custody must be informed of the effect of section 3568 by finding that the defendant knew his sentence would be consecutive.[53] The Fifth Circuit has ruled that due process does not require that a defendant be informed of the consequences of section 3568.[54]

II. Right to Counsel

In *United States v. Dolack*,[55] the Tenth Circuit applied a unique approach to unique facts by merging the doctrines of right to counsel and right to speedy trial. The court reversed a conviction for abducting a female for sexual gratification because the indigent defendant, incarcerated in a Canadian prison when the charge was brought, in effect was denied the speedy appointment of counsel.

Defendant requested the court where the charge was brought to appoint counsel, to grant travel expenses so counsel could confer with him in prison, and to employ private investigative assistance. This motion was denied. When counsel was appointed 13 months after this request, a renewed motion for investigative assistance was also denied without explanation. Defendant claimed to have been unable to rebut the testimony of the complaining witness because he could not locate witnesses necessary for his defense.

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[53] Harris v. United States, 493 F.2d 1213 (8th Cir. 1974). *Cf.* United States v. Nichols, 440 F.2d 222 (D.C. Cir. 1971), where the failure to advise a defendant that any sentence imposed in the present case would run consecutively to any sentence he was already serving was held not prejudicial because the state sentence for which he was in custody at the time of the challenged plea had been reversed.

[54] Opela v. United States, 415 F.2d 231 (5th Cir. 1969).

[55] 484 F.2d 528 (10th Cir. 1973).

The court relied in part on *Kirby v. Illinois*,[56] which held that the right to counsel arises "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[57] The court declared that adversary judicial criminal proceedings had begun while defendant was incarcerated in the foreign jurisdiction and that his right to counsel arose at that time.

The court could have held that the delay in appointment of counsel constituted ineffective assistance of counsel because earlier appointment was necessary under the circumstances to prepare an effective defense. Instead, the court relied on cases dealing with the right to speedy trial. The court reviewed part of the rationale of this right as spelled out in the landmark case on speedy trial, *Barker v. Wingo*:[58] the right protects defendant's ability to prepare his case and prevents prejudice from the disappearance or death of witnesses and from loss of memory. And the court stressed the particular importance of a speedy trial to a defendant who is incarcerated and unable to gather evidence.

In *Smith v. Hooey*[59] and *Dickey v. Florida*[60] the Supreme Court held that the government is not excused from a denial of speedy trial because the defendant is incarcerated in another jurisdiction; the state must make a diligent, good faith effort to bring defendant to trial. In a case in which a defendant incarcerated (like Dolack) in a *foreign* jurisdiction asserted and was denied his right to a speedy trial, it seems clear that a court, in deciding whether a delay was excused, would apply a balancing test, weighing among other factors, both the prejudice to defendant caused by the delay and the reasons for the government's failure to acquire the defendant's presence.[61] In this case Dolack did not demand a speedy trial; he requested appointment of counsel and investigative assistance. The court found great prejudice to defendant's defense caused by the delay and no justification for the delay—and decided that a 13-month delay in the appointment of counsel was not excused.

Having analogized the harm to this defendant to the harm resulting from a denial of a speedy trial, the court proceeded to

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[56] 406 U.S. 682 (1972).

[57] *Id.* at 689.

[58] 407 U.S. 514 (1972).

[59] 393 U.S. 374 (1969).

[60] 398 U.S. 30 (1970).

[61] *Cf.* Moore v. Arizona, 414 U.S. 25 (1973); Barker v. Wingo, 407 U.S. 514 (1972).

dismiss the charges against him, a remedy usually associated with denial of speedy trial.[62]

III. PRE-TRIAL PROCEDURES

In two cases this year the Tenth Circuit held photo identifications permissible. In *United States v. Coppola*[63] the fact that defendant's photo carried the name of the state where the crime was perpetrated against the witness was held not to create a likelihood of misidentification. The court stressed the fact that the witness had an excellent opportunity to observe the perpetrator of the crime and found evidence of no other suggestibility in the identification.

The general rule under *Simmons v. United States*[64] is that each photo identification is to be judged on its own facts—and will be upheld if it is not so suggestive "as to give rise to a very substantial likelihood of irreparable misidentification."[65] The court's action, both in looking at the totality of the circumstances[66] and in finding the writing on the picture not impermissibly suggestive[67] is in line with holdings in other circuits.

In *United States v. Roby*[68] an employee at the grocery store from which defendant stole a check protector used in cashing falsely-made money orders identified defendant's photograph at a photo "showup" 5 months after the crime. At trial he testified that his identification was based on observation of the theft, not on the photo identification. In holding that the showup was not suggestive, the court said that delay alone is not determinative.[69] Even a suggestive photo identification will not be held error if the witness shows an independent identification which dispels the

[62] The court cited the recent Supreme Court case, Strunk v. United States, 412 U.S. 434 (1973), which held that dismissal is the only fair remedy for denial of speedy trial.

[63] 486 F.2d 882 (10th Cir. 1973).

[64] 390 U.S. 377 (1967).

[65] *Id.* at 384.

[66] United States v. Milano, 443 F.2d 1022, 1025 (10th Cir.), *cert. denied*, 404 U.S. 943 (1971).

[67] *See* United States v. Counts, 471 F.2d 422 (2d Cir. 1973) (number on picture suggested date stolen articles were found, but witness not influenced by the number); United States v. Faulkner, 447 F.2d 869 (9th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972) (photo inscribed with "Denver Police Department" where Denver was connected with the crime; permissible because no other suggestibility); United States v. Robinson, 432 F.2d 1348 (D.C. Cir. 1970) (date suggested date of crime; court said date *could* be overly suggestive, but here witness testified she did not realize significance of numbers).

[68] 499 F.2d 151 (10th Cir. 1974).

[69] *Id.* at 154. The court relied on Neil v. Biggers, 409 U.S. 188 (1972); United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973).

likelihood of a mistaken identification.[70] In *Roby* that the witness had enough opportunity to observe defendant and could describe his attire at the theft was held enough to establish independent identification.

Another pretrial matter considered in two cases this year was the motion to suppress evidence. In *United States v. Romero*[71] the Tenth Circuit approved a lower court's denial of a motion to suppress. The circuit court ruled on the correctness of the action of the lower court by examining testimony developed at trial as well as evidence presented at the suppression hearing. The court justified this by reference to the 1972 amendment to Federal Rule of Criminal Procedure 41(f): "It would appear that the new subdivision (f) under Rule 41 . . . has more clearly extended the inquiry [concerning a motion to suppress] to include new facts developed at trial . . . ."[72] Former Rule 41(e) provided that:

> The motion [to suppress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

In 1972 Rule 41(e) was replaced with a provision for motions for the return of seized property to be made in the court of the district where a challenged seizure occurred. Section (f), an apparent complement to the new section (e), was added: "A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Why the court feels that this amendment broadens the review of action on a motion to suppress to permit consideration of evidence developed at trial is unclear. Commentators suggest that the new 41(f) reflects the position that it is better to hear a motion to suppress in the district of trial than in the district where the seizure occurred.[73] On its face the change involves only the proper court to hear particular motions and has no bearing on the scope of an appellate court's review of a ruling on a motion. The new rule says that motions to suppress are to be made "as provided in Rule 12." Under Rule 12 a motion is to be "determined before trial unless the court orders that it be deferred for

[70] United States v. Harrison, 460 F.2d 270 (2d Cir.), *cert. denied*, 409 U.S. 862 (1972); United States v. Patterson, 447 F.2d 424 (10th Cir. 1971), *cert. denied*, 404 U.S. 1064 (1972); Davida v. United States, 422 F.2d 528 (10th Cir.), *cert. denied*, 400 U.S. 821 (1970).

[71] 484 F.2d 1324 (10th Cir. 1973).

[72] *Id.* at 1327.

[73] *See* 8A J. MOORE, FEDERAL PRACTICE ¶41.01[3] (2d ed. rev. 1974); 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 673 (Supp. 1973).

determination at the trial of the general issue." It is unclear how this practice differs from that under former Rule 41(e).

In the second case involving motions to suppress the Tenth Circuit addressed the issue of standing to challenge a search. In *United States v. Smith*[74] the court anticipated the demise of the "automatic" standing rule of *Jones v. United States*.[75]

In *Jones* the Supreme Court resolved the dilemma faced by a defendant when possession of the seized evidence is itself an essential element of the offense with which he is charged; an exercise of his fourth amendment right in challenging a search requires the sacrifice of his fifth amendment privilege against self-incrimination. The Court held that where possession both convicts and confers standing there is eliminated the "necessity for a preliminary showing of an interest in the premises searched or the property seized" ordinarily required to establish standing.[76] In *Smith* the defendant was convicted of possession of stolen money orders. The money orders were seized by police officers from an unoccupied car which did not belong to Smith, but in which he had placed them. As the defendant did not own the car that was searched, his standing to challenge the search depended on his showing a possessory interest in the items seized. Because evidence of a possessory interest in the stolen money order would both confer standing and convict, Smith claimed that he had "automatic" standing.

The Tenth Circuit, however, said that the rationale of automatic standing was removed by *Simmons v. United States*.[77] In *Simmons*, a case where possession was not an element of the crime charged and where the defendant was therefore required to establish standing, the Supreme Court ruled that testimony given by a defendant to show standing is inadmissible against him at trial on the issue of guilt.[78] In *Brown v. United States*,[79] another case where possession was not an element of the crime, the Court held that defendants had failed to meet their burden of establishing standing. The Court expressly reserved the question of the "continued survival of *Jones*' 'automatic' standing now that . . . *Simmons* has removed the danger of coerced self-incrimination"[80]

[74] 495 F.2d 668 (10th Cir. 1974).
[75] 362 U.S. 257 (1960).
[76] *Id.* at 263.
[77] 390 U.S. 377 (1968).
[78] *Id.* at 390.
[79] 411 U.S. 223 (1973).
[80] *Id.* at 229.

for a case in which possession at the time of the contested search is an essential element of the offense.[81]

Smith is clearly the kind of case in which the Supreme Court will decide whether or not to overrule the *Jones* rule of automatic standing. The Tenth Circuit, however, ruled in *Smith* as though the Supreme Court had already settled this question. The court said:

> The reservation in *Brown* of the "automatic" standing question means to us that one who attacks a search must assert and establish a personal right protected by the Fourth Amendment and that when such an assertion is contested, "a full hearing on standing" . . . must be held.[82]

The court remanded the case for a hearing on the issue of the defendant's proprietary interest in the items seized. Having rejected the protections of *Jones*, the court noted that *Simmons* would apply, that is evidence produced in the hearing is inadmissible at trial on the issue of defendant's guilt.

In requiring defendants to establish standing even where possession is an element of the crime charged, the Tenth Circuit forces a defendant to produce more evidence that could potentially be admitted against him for purposes of impeachment or on issues other than guilt. The decision in *Smith* represents an easing of the restrictions on the use of illegally obtained evidence and thus a weakening of the exclusionary rule.

IV. PROCEDURE AT TRIAL

In *United States v. Acosta*[83] the Tenth Circuit held improper a denial of defendant's request for a free transcript of his first trial which he claimed was necessary to prepare his defense for his second trial. The court construed the 1971 Supreme Court case *Britt v. North Carolina*[84] very narrowly. In *Britt* the Court said that the defendant did not have to show a particularized need for the transcript and did not have the burden of showing the inadequacy or unavailability of alternative devices, but held that it was not improper to deny a transcript in that case. Although the defendant did not have the burden of showing need or the inadequacy of alternatives, the Supreme Court found strong evidence of the adequacy of the alternatives in the fact that the trial was

[81] *Id.* at 228.
[82] 495 F.2d at 670.
[83] 495 F.2d 60 (10th Cir. 1974).
[84] 404 U.S. 226 (1971).

in a small town before the same judge, and the court reporter could have read back the trial record to counsel at any time before the second trial. Furthermore, defense counsel conceded the availability and adequacy of alternatives to a transcript.

The Tenth Circuit limited *Britt* to the situation where defense counsel *concedes* the availability of a functional alternative. In its view in the absence of such a concession and in the absence of clear evidence of such an alternative, it is error to deny a defendant a free transcript.

The holding that an indigent defendant has a basic right to a free transcript under the equal protection clause, first articulated in *Griffin v. Illinois*,[85] and the later holding that a state may provide an adequate alternative to a transcript[86] have been refined and elaborated upon. Some courts, for example, considered significant the fact that the same counsel represented defendant in both hearings.[87] In 1969 the Second Circuit held that the use of the same counsel did not justify denial of a transcript and that access to a court reporter at the second trial to read back from the record of the first trial was "too little and too late."[88] The Supreme Court has since said that counsel's memory is no alternative to a transcript.[89] In *Britt* the Supreme Court summarized the factors relevant to a ruling on a request for a free transcript and to an evaluation of the adequacy of alternative devices. The Court said that neither counsel's notes from the previous hearing nor counsel's memory nor limited access to a court reporter at the second trial is an adequate alternative to a transcript.

In *Acosta* the Tenth Circuit focused on this dictum in *Britt* and concluded that even though the Supreme Court held that a transcript was not required in that case, *Britt* did not lower the high standard of proof required to find that an adequate alternative to a transcript existed. The Sixth Circuit, too, has limited *Britt* to its facts, putting emphasis on the fact that counsel for Britt conceded the adequacy of alternatives to a transcript.[90] In an Eighth Circuit case[91] defense counsel did not concede the ade-

[85] 351 U.S. 12 (1956).

[86] Draper v. Washington, 372 U.S. 487 (1963).

[87] *Compare* Peterson v. United States, 351 F.2d 606 (9th Cir. 1965), *with* Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966).

[88] United States *ex rel.* Wilson v. McMann, 408 F.2d 896, 897 (2d Cir. 1969).

[89] Gardner v. California, 393 U.S. 367 (1969) (dictum).

[90] United States v. Young, 472 F.2d 628 (6th Cir. 1972).

[91] United States v. Talbott, 454 F.2d 1111 (8th Cir.), *cert. denied*, 407 U.S. 922 (1972).

quacy of an alternative, but the court in effect inferred concession from the fact that counsel was given access to the court reporter at the second trial to read back from the record of the first trial, but did not request the reporter to read back, and was allowed to use the government's copy of the transcript. In *Acosta*, defense counsel protested the lack of an adequate alternative and there was no evidence like that in *Britt* of such an alternative.

In *Leggroan v. Smith*[92] the Tenth Circuit held a Utah jury selection statute, which provided for use of real and personal property tax rolls in jury selection, constitutional. However, the court ruled unconstitutional the practice of choosing persons for jury service from only the real property tax lists. The effect of the practice was held to exclude non-property owners from juries, prejudicially reducing the number of women, young people, poor people, and members of minority races. This in the court's opinion amounted to systematic exclusion of an identifiable class of persons not based on a sufficiently reasonable classification. *Leggroan* will apply retroactively for those defendants convicted under this system who timely objected to the panel.

An early Supreme Court case, *Gibson v. Mississippi*,[93] listed "freeholders" as one of the valid classifications states could impose on jury selection. This holding has never expressly been overruled and has been cited with approval as recently as 1965 by a federal district court.[94] The Tenth Circuit said that the validity of the "freeholder" classification was implicitly overruled when the Supreme Court in *Carter v. Jury Commission of Greene County*,[95] citing *Gibson v. Mississippi*[96] without quoting it, omitted the "freeholder" item from its list of valid criteria.

Most cases on jury selection have been concerned with racial discrimination, and most cases involving use of tax lists have been viewed in terms of the manner of their use and their racially discriminatory effect.[97] More recent cases, however, have exam-

[92] 498 F.2d 240 (10th Cir. 1974).

[93] 162 U.S. 565 (1896). *See also* Brown v. Allen, 344 U.S. 443 (1953).

[94] Williams v. State, 237 F. Supp. 360, 370 (E.D.S.C. 1965), *vacated on other grounds sub nom.* Morris v. State, 356 F.2d 432 (4th Cir. 1966).

[95] 396 U.S. 320, 332 (1970).

[96] 162 U.S. 565 (1896).

[97] *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Brown v. Allen, 344 U.S. 443 (1953); Roach v. Mauldin, 391 F.2d 907 (5th Cir. 1968), *cert. denied*, 393 U.S. 1095 (1969). *See also* United States *ex rel.* Davis v. Henderson, 330 F. Supp. 797 (W.D. La. 1971), *modified*, 474 F.2d 1098 (5th Cir. 1973), where in rejecting defendant's claim that a system

ined jury selection procedures in terms of their affirmative effect on obtaining a fair cross section of the community rather than merely for the absence of racially discriminatory application.[98] One federal district court has said in dictum that if a statute "limits jurors to taxpayers assessed as owners of real property, the statute must be deemed unconstitutional."[99] That court, like the Tenth Circuit in this case, based its statement on an analogy with Supreme Court cases declaring statutes unconstitutional which restricted eligibility for voting on special issues or eligibility for holding schoolboard office to owners of real property.[100]

In another Tenth Circuit case this year, *United States v. Williams*,[101] the defendant claimed that he was denied his due process right to the presumption of innocence when he appeared at trial in jail attire. The Tenth Circuit rejected his claim on the grounds that he had other clothes available and chose to wear the jail clothes.

In looking at the particular facts of the case to determine whether there was a voluntary waiver of his right, the court was following its own 1972 precedent[102] and is in a clear majority. However, the court cited the landmark Fifth Circuit case, *Hernandez v. Beto*[103] as if it stated an automatic rule. In fact that case held that a defendant could not wear jail clothes willingly and claim error, and that each case is to be judged on its own facts. The Tenth Circuit's holding in *Williams* is right in line with the rule expressed in *Hernandez*.

The rationale given for this right not to appear at trial in jail attire has been explained by saying that the presumption of innocence requires that a defendant be entitled to the "garb of inno-

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of selection resulted in juries of higher social, economic, and racial stature than the community median, the court noted that the Supreme Court had yet to apply equal protection to jury selection for any reason other than race or nationality.

[98] *See, e.g.*, Moore v. Dutton, 294 F. Supp. 684, 688 (S.D. Ga. 1968), *modified*, 432 F.2d 1281 (5th Cir. 1970) (the court rejected the idea that use of tax digests in nondiscriminatory fashion is per se proper, holding that use of property tax digests *could* be unacceptable in some circumstances even in the absence of racial bias).

[99] Clark v. Ellenbogen, 319 F. Supp. 623, 626 (W.D. Pa. 1970), *aff'd mem.*, 402 U.S. 935 (1971).

[100] Turner v. Fouche, 396 U.S. 346 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[101] 498 F.2d 547 (10th Cir. 1974).

[102] Watt v. Page, 452 F.2d 1174 (10th Cir.), *cert. denied*, 405 U.S. 1070 (1972), *on appeal from remand sub nom.* Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973).

[103] 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971).

cence"[104] and that a defendant has the right to appear with dignity and self respect instead of as one branded as convicted.[105] Although the rule may first have been expressed as a per se rule,[106] in practice courts look to see if the defendant was compelled to wear clothes identifiable as prison clothes or if he did so voluntarily. If there is clear compulsion, courts reverse and order a new trial[107] or remand to determine the question of waiver[108] unless the wearing of jail attire on particular facts is found to be harmless.[109] Compulsion will exist where an indigent defendant has no other clothes, as well as from a denial of his request for civilian attire.[110] Where courts find clear evidence that a defendant wore jail attire willingly as a trial strategy, there is of course no denial of due process.[111] The Tenth Circuit ruled that *Williams* involved no denial of due process because the defendant was given the opportunity to change to civilian clothes and chose not to.

Another trial issue considered by the Tenth Circuit involved the discovery of statements made by government witnesses under the Jencks Act.[112] The Jencks Act provides that following a government witness' testimony at trial, a defendant may request the production of certain previous statements made by the witness. In *United States v. Pennet*[113] the defendant claimed that the trial court erred in denying his request to examine the "daily logs" of a government narcotics agent who had testified against him. The Tenth Circuit held that the logs were not discoverable because they did not fit the definition of "statements" in subsection (e)(2) of the Jencks Act: "a substantially verbatim recital of an oral statement made by . . . [a] witness and recorded contemporaneously with the making of such oral statement." The circuit

[104] Dennis v. Dees, 278 F. Supp. 354, 359 (E.D. La. 1968); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946).

[105] Commonwealth v. Keeler, 216 Pa. Super. 193, 264 A.2d 407 (1970).

[106] *See* Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967).

[107] Gaito v. Brierley, 485 F.2d 86 (3d Cir. 1973); Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973); Hernandez v. Beto, 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971).

[108] Lemons v. United States, 489 F.2d 344 (3d Cir. 1974); Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972); Goodspeed v. Beto, 460 F.2d 398 (5th Cir. 1972).

[109] Thomas v. Beto, 474 F.2d 981 (5th Cir.), *cert. denied*, 414 U.S. 871 (1973); United States *ex rel.* Stahl v. Henderson, 472 F.2d 556 (5th Cir.), *cert. denied*, 411 U.S. 971 (1973); Xanthull v. Beto, 307 F. Supp. 903 (S.D. Tex. 1970); McFalls v. Peyton, 270 F. Supp. 577 (W.D. Va. 1967).

[110] Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972).

[111] Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

[112] 18 U.S.C. § 3500 (1970).

[113] 496 F.2d 293 (10th Cir. 1974).

court determined that the logs were internal recordkeeping procedures, setting forth daily operations, expenses, and vehicle operations. The exclusion of such a document is clearly consistent with the general definition of "statements" within the Act.[114]

However, in holding that the logs were not discoverable the court erroneously stated that the defendant had the burden of showing that an item qualifies as a "statement," citing its own 1973 case which so held.[115] In fact, the annotation which the court relied upon in *Pennet*[116] does not establish that the burden of *this* question is on the defendant, but rather that the defendant has the burden of showing the possible or probable existence of a document that might be producible within the Act.[117] The defendant does *not* have the burden of showing that a document requested is a "statement."[118] The Jencks Act itself does not provide a procedure for determining whether an item comes within subsection (e)(2),[119] but the Supreme Court has approved a procedure whereby when there is doubt on the question the trial court examines the evidence in an in camera hearing.[120] Because defense counsel has not seen the documents, it seems unfair to place on him the burden of showing whether an item comes within subsection (e)(2),[121] and the "burden" is properly placed on the trial judge himself to call for such evidence as he needs to make a fair determination.[122] The Supreme Court has approved a *nonadversary* hearing on the issue, saying, "The statute says nothing of burdens of producing evidence. Rather it implies the duty of the trial judge affirmatively to administer the statute in

[114] *But see* United States v. Phillips, 482 F.2d 1355 (9th Cir. 1973), holding signed receipts for payments made to informer to be statements within section 3500.

[115] United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

[116] Annot., 1 A.L.R. Fed. 252 (1969).

[117] United States v. Hilbrich, 232 F. Supp. 111, 120 (D. Ill. 1964), *aff'd*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965); Badon v. United States, 269 F.2d 75, 83 (5th Cir.), *cert. denied*, 361 U.S. 894 (1959).

[118] Campbell v. United States, 365 U.S. 85 (1960); Williams v. United States, 328 F.2d 178 (D.C. Cir. 1963).

[119] Palermo v. United States, 360 U.S. 343 (1959).

[120] Campbell v. United States, 373 U.S. 847 (1963); Palermo v. United States, 360 U.S. 343 (1959).

[121] *See* Campbell v. United States, 365 U.S. 85, 96 (1960); United States v. Lamma, 349 F.2d 338, 341 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965).

[122] Williams v. United States, 328 F.2d 178 (D.C. Cir. 1963); Hilliard v. United States, 317 F.2d 150 (D.C. Cir. 1963); Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 935 (1964).

such way as can best secure relevant and available evidence . . . ."[123]

V. STANDARDS AND BURDENS OF PROOF; JURY INSTRUCTIONS

The court heard two cases this term involving the defense of insanity, one in which the issue was the sufficiency of the evidence to raise the issue of insanity, and one in which the issue was the weight of the evidence necessary to require direction of a verdict of acquittal by reason of insanity.

In *United States v. Bettenhausen*[124] the court ruled that in determining whether or not a defendant has presented enough evidence to rebut the presumption of sanity, a court may consider only evidence presented at the present trial or in preliminary hearings related to the present trial; the presumption may not be rebutted by proof offered at a prior trial.

The general rule is that when "some evidence" of insanity is introduced from any source, the presumption of sanity disappears and sanity becomes an element of the crime which the government must prove beyond a reasonable doubt.[125] The trial judge determines as a matter of law when the presumption has been dissipated.[126] How *much* evidence defendant must produce to raise the issue has been described various ways: as enough to raise a reasonable doubt;[127] as something less than enough to raise a reasonable doubt;[128] as "more than a scintilla;"[129] and as "slight" and though disbelieved by the trial judge.[130]

What *kind* of evidence is enough to raise the issue and shift the burden of proving sanity to the government varies. The mere claim of irresponsibility by the defendant[131] or notice of his intent

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[123] Campbell v. United States, 365 U.S. 85, 95 (1960).

[124] 499 F.2d 1223 (10th Cir. 1974).

[125] *See, e.g.*, United States v. Jacobs, 473 F.2d 461, 464 (10th Cir.), *cert. denied*, 412 U.S. 920 (1973); Keys v. United States, 346 F.2d 824, 826 (D.C. Cir.), *cert. denied*, 382 U.S. 869 (1965); Fitts v. United States, 284 F.2d 108 (10th Cir. 1960).

[126] *See, e.g.*, Davis v. United States, 364 F.2d 572 (10th Cir. 1966); Otney v. United States, 340 F.2d 696 (10th Cir. 1965); Fitts v. United States, 284 F.2d 108 (10th Cir. 1960).

[127] United States *ex rel.* Robinson v. Pate, 345 F.2d 691 (7th Cir. 1965), *aff'd*, 383 U.S. 375 (1966); Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1948).

[128] Hall v. United States, 295 F.2d 26 (4th Cir. 1961); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951).

[129] McDonald v. United States, 312 F.2d 847, 849 (D.C. Cir. 1962); Hawkins v. United States, 310 F.2d 849, 851 (D.C. Cir. 1962).

[130] Hurt v. United States, 327 F.2d 978, 981 (5th Cir. 1964).

[131] Smith v. United States, 353 F.2d 838 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 974 (1966).

to use the insanity defense[132] is generally not enough to rebut the presumption of sanity. A psychiatrist's opinion[133] and the fact of a long history of mental illness[134] have been found to be enough to raise the issue of insanity. In a previous case the Tenth Circuit held that a defense motion for a psychiatric exam coupled with a long history of mental illness was enough to make the government aware of defendant's claim and so shift the burden.[135] But in the present case, the court said that the language of that case was merely descriptive, not prescriptive of a general rule.

In Bettenhausen's first trial the court ruled that he had rebutted the presumption of sanity by information provided at the omnibus hearing and at the arraignment, by a motion to determine competence to stand trial, and by records of prior psychiatric consultation. At the first trial, which ended in a mistrial, a psychiatrist and a psychologist testified for the defense. Prior to the retrial, the government requested a psychiatric exam, but at trial there was no expert testimony on the insanity issue—in fact no defense testimony at all. The government discussed the insanity issue in its opening statement and developed lay testimony to show defendant's competence. Defense counsel attempted to develop proof of insanity on cross-examination alone. The second trial court ruled that notice of reliance on the insanity defense and evidence elicited on cross-examination were not enough to dissipate the presumption of sanity. The court did *not* consider the matters raised before the first trial or the evidence produced at that trial. The Tenth Circuit agreed that "the question whether the presumption of sanity disappeared for purposes of the second trial should be determined only in light of the proof, from whatever source, actually introduced at *that* trial, or of a showing furnished during pretrial procedures of an adjudication of incompetence."[136] The court ruled that the second trial judge

[132] Kregger v. Bannan, 273 F.2d 813 (6th Cir. 1960).

[133] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[134] Phillips v. United States, 311 F.2d 204 (10th Cir. 1962).

[135] Otney v. United States, 340 F.2d 696 (10th Cir. 1965).

[136] 499 F.2d at 1229 (emphasis added). In stating that the showing in pretrial procedures must be of an adjudication of incompetence, the court relied on United States v. Shultz, 431 F.2d 907 (8th Cir. 1970), and Tarvestad v. United States, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970). This rule is surely more strict than that applied at least within the Tenth Circuit. The issue has been held to be properly raised in pretrial proceedings by less than such an adjudication. *See, e.g.*, Otney v. United States, 340 F.2d 696 (10th Cir. 1965); Phillips v. United States, 311 F.2d 204 (10th Cir. 1962).

is bound only by prior final judgments and that the judge's ruling on this question was not a final judgment. On the basis of evidence that counsel should have been aware that the trial judge did not consider the issue properly raised, the court rejected defendant's claim that he relied on the first ruling to his prejudice.

In the other case involving the insanity defense, *United States v. Coleman,*[137] the defendant was convicted of aircraft piracy and interfering with flight attendants. The issue was whether the trial court should have directed a verdict of acquittal by reason of insanity. The court held that there was no error in the trial court's refusal to direct a verdict.

Other courts have said that to require a directed verdict for the defendant, the evidence must be so as to *compel* a reasonable juror to have a reasonable doubt,[138] or such that reasonable men could not reasonably reach any conclusion except that the government has failed to prove beyond a reasonable doubt that the defendant was sane at the time of the crime.[139] The nature and quantum of evidence which the government is required to produce so that a jury could conclude that the defendant is sane depends on the circumstances of the case, and to some degree on the weight and credibility of defendant's evidence.[140] If the government produces no evidence of sanity, defendant is entitled to a directed verdict,[141] but if there is enough evidence so that a reasonable man simply may (as opposed to must) have a reasonable doubt, the issue is for the jury.[142]

In *Coleman* the defendant presented expert testimony of insanity. The only other evidence was lay testimony concerning defendant's rather bizarre behavior aboard the aircraft (ordering creme de menthe with bourbon, pulling a toy gun, asking if his fellow passengers were Secret Service agents, and crying) and before boarding (playing mute and announcing he thought he was going to die) and evidence of a parachute and newsclippings about hijackings found in his apartment. The court looked to its

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[137] 501 F.2d 342 (10th Cir. 1974).

[138] McDonald v. United States, 312 F.2d 847, 850 (D.C. Cir. 1962).

[139] Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957); Bradley v. United States, 249 F.2d 922, 924 (D.C. Cir. 1957).

[140] Brown v. United States, 351 F.2d 473 (5th Cir. 1965); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962); Dusky v. United States, 295 F.2d 743 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962); United States v. Westerhausen, 283 F.2d 844 (7th Cir. 1960).

[141] Fitts v. United States, 284 F.2d 108 (10th Cir. 1960).

[142] Bradley v. United States, 249 F.2d 922 (D.C. Cir. 1957).

own precedents: *McKenzie v. United States*,[143] where the court found defendant's evidence "overwhelming" and the government's evidence "meager" and ordered a directed verdict of acquittal, and *United States v. Stewart*,[144] where they found defendant's evidence less than "overwhelming" and the government's evidence relevant and probative. The court found that *Bettenhausen* fell somewhere between the two. In applying the Tenth Circuit's test of insanity announced in *Wion v. United States*,[145] the court did not think it controlling that government presented only lay testimony to rebut defendant's expert witness.[146] The court held that although reasonable men could conclude from this very ambiguous evidence that the defendant was incompetent, they could also conclude that he was competent.

The Tenth Circuit has held that a forfeiture proceeding is a civil proceeding for purposes of the government's burden of proof. In *Bramble v. Richardson*[147] the constitutionality of a provision of the forfeiture statute,[148] was challenged. Bramble was charged with possession of marijuana, and his automobile was seized for use in violation of the drug laws. Had he challenged the forfeiture he would have had to post bond for his car[149] and prove by a preponderance of the evidence[150] that the car was not used in violation of the law. Instead, Bramble claimed that because a forfeiture proceeding is in reality a criminal action, the fifth amendment due process clause requires that the government prove his criminal violation beyond a reasonable doubt.

In rejecting this claim the Tenth Circuit entered the mire of 90 years of case law and emerged having imposed upon it a convincingly logical structure. As the court noted, there is support for the characterization of a forfeiture proceeding as "criminal." In 1886[151] the Supreme Court held that forfeiture actions "though

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[143] 266 F.2d 524 (10th Cir. 1959).

[144] 443 F.2d 1129 (10th Cir. 1971).

[145] 325 F.2d 420, 430 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964): "at the time the accused committed the unlawful act, he was mentally capable of knowing what he was doing, was mentally capable of knowing that it was wrong, and was mentally capable of controlling his conduct."

[146] *Accord*, United States v. Robinson, 327 F.2d 959 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

[147] 498 F.2d 968 (10th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 24, 1974) (No. 74-280).

[148] 19 U.S.C. § 1615 (1970).

[149] *Id.* § 1608.

[150] *Id.* § 1615.

[151] Boyd v. United States, 116 U.S. 616 (1886).

they may be civil in form, are in their nature criminal." It termed "quasi-criminal" those forfeitures which were incurred by the commission of offenses against the law. The Court said that such proceedings are to be considered "criminal proceedings for all the purposes of the fourth amendment" and of the self-incrimination clause of the fifth amendment.[152] Recent cases have reaffirmed that holding.[153] Another line of cases has ruled on the effect of a criminal prosecution on a subsequent forfeiture action related to the same criminal act. This question involves both the issue of double jeopardy and the issue of res judicata. In general it is held that if the government's recovery is "civil" or "remedial," as opposed to punitive, there is no problem of double jeopardy.[154] Where there has been an acquittal, the question of res judicata is resolved in two ways: by finding that the elements required for conviction differ from those required in a forfeiture proceeding[155] and by reference to the difference in degree of the burden of proof in criminal and civil cases.[156] An acquittal is merely an adjudication that the proof was not sufficient to overcome all doubt of the guilt of the accused, not an adjudication by a preponderance of the evidence.

A landmark case in this area is *Helvering v. Mitchell*.[157] In that case the Supreme Court held that an acquittal on the criminal charge of tax evasion did not bar a subsequent deficiency assessment by the government. The Court explained this holding by putting great emphasis on the fact that the action was "remedial" in its nature. If the purpose of the action were punishment, the Court held, the action would be barred by double jeopardy. If the sanction imposed is "remedial" the action is not barred by double jeopardy and has all the elements of a civil action: a verdict may be directed against a defendant, the government may appeal an adverse decision, the defendant has no right to confrontation and no right to refuse to testify, and the government need

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[152] *Id.* at 634.

[153] *See* United States v. United States Coin & Currency, 401 U.S. 715 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[154] *See* Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938); Murphy v. United States, 272 U.S. 630 (1926).

[155] One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938); Stone v. United States, 167 U.S. 178 (1897).

[156] One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938); Murphy v. United States, 272 U.S. 630 (1926).

[157] 303 U.S. 391 (1938).

not prove its case beyond a reasonable doubt.

This distinction between "punitive" and "remedial" forfeitures, even if vague, has significance in relation to the question of double jeopardy. It has, however, been applied to other questions arising from the issue of forfeiture proceedings with very confusing results. The cases upholding the applicability of fourth and fifth amendment rights to forfeiture proceedings have been couched in terms of "punitive" forfeitures,[158] and the most recent case holding that an acquittal does not bar forfeiture by collateral estoppel[159] emphasized the remedial nature of the sanction. To rest these holdings on the punitive-remedial distinction leads to the questions: if a sanction is "remedial," are the fourth and fifth amendments *not* applicable, and if a sanction is "punitive," *does* the reasonable doubt standard apply?

The Tenth Circuit avoided the confusing maze into which such questions lead by rejecting the punitive-remedial characterization as "elusive." Had the court applied that distinction to the present case, it might have been argued for Bramble that the only cases holding that the reasonable doubt standard is not available in a forfeiture action[160] are all cases in which the sanction is "remedial." *Helvering v. Mitchell*[161] never reached the question of the standard of proof in a "punitive" forfeiture proceeding because it held that such a proceeding would have been barred in that case by double jeopardy. The forfeiture in this case was not barred by double jeopardy because Bramble was given a one-year probation and was never tried. *Helvering* merely said that if an action is "remedial," the standard of proof is a preponderance. The forfeiture in Bramble's case is clearly punishment (unless one argues that seizure of automobiles helps defray the cost of enforcement of drug laws). Under such analysis of the punitive-remedial distinction, Bramble was asking the Tenth Circuit to rule on a ques-

[158] United States v. United States Coin & Currency, 401 U.S. 715 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[159] One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972).

[160] Helvering v. Mitchell, 303 U.S. 391 (1938); United States v. Regan, 232 U.S. 37 (1914); McClendon v. Rosetti, 460 F.2d 111 (2d Cir. 1972) (dictum); Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971). *See* cases under the Internal Revenue Code holding that the standard of proof is preponderance of the evidence in forfeiture for violation of tax laws, *e.g.*, Lilienthal's Tobacco v. United States, 97 U.S. 237 (1887); Utley Wholesale Co. v. United States, 308 F.2d 157 (5th Cir. 1962); D'Agostino v. United States, 261 F.2d 154 (9th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959); United States v. One 1955 Mercury Sedan, 242 F.2d 429 (4th Cir. 1957); Grain Distillery No. 8 of E. Distillery Co. v. United States, 204 F. 429 (4th Cir. 1913).

[161] 303 U.S. 391 (1938).

tion of first impression: when a forfeiture is punitive, what is the standard of proof?

Instead of answering that question, the Tenth Circuit, noting the futility of working with the remedial-punitive distinction in this case, found a more logical way of phrasing the issue by referring to a footnote to the *Helvering* opinion:

> The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedures are applicable, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the sanction being enforced.[162]

In the view of the Tenth Circuit whether a criminal procedural right applies to a forfeiture proceeding should not depend on whether the sanction is imposed for "punitive" or "remedial" purposes.[163] Whether a right applies in a forfeiture proceeding depends on the purpose for which the question is asked. Regardless of the characterization of the sanction, the action itself is "criminal" for the purposes of some constitutionally guaranteed criminal procedures. Bramble's claim, in these terms, is that a forfeiture action is "criminal" for purposes of setting the standard of proof. The Tenth Circuit's answer is that it is not. The Supreme Court has ruled that a forfeiture proceeding is "criminal" for purposes of the fourth amendment and the privilege against self-incrimination. For no other purpose to date has the proceeding been characterized as "criminal." And the Tenth Circuit refused to expand the list.

Two jury instructions explaining the reasonable doubt standard were criticized by the Tenth Circuit in recent cases.[164] In two cases the trial courts instructed juries to the effect that a reasonable doubt was established "if the evidence is such that you would be willing to rely and act upon it in the more important of your

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[162] *Id.* at 400 n.3.

[163] The penal-remedial distinction theoretically retains significance when the question is double jeopardy. It is doubtful, however, that a forfeiture penalty would ever be found to be so severe as to become "penal" for this purpose. *See, e.g.*, One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Toepleman v. United States, 263 F.2d 697 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

[164] In no case was the use of the instructions held to be reversible error because the instructions viewed as a whole were held to have made the standard of proof clear. *See, e.g.*, United States v. Beitscher, 467 F.2d 269 (10th Cir. 1972); United States v. Fletcher, 444 F.2d 619 (10th Cir. 1971); Russell v. United States, 429 F.2d 237 (5th Cir. 1970); Bynum v. United States, 408 F.2d 1207 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 935 (1969).

own personal affairs."[165] In responding to the challenge to this instruction in one case,[166] the court noted that the Supreme Court, affirming a Tenth Circuit case, has said that the instruction is better if made in terms of "the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act."[167] In *United States v. Pepe*[168] the court said that the Supreme Court's preference for the "hesitate to act" formulation should be heeded.

The other instruction challenged is the "nothing peculiarly different" instruction:

> There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

In *United States v. Pepe*[169] the court noted the criticism of this instruction in other circuits[170] and said:

> In view of its apparently frequent usage by some of the trial courts of this Circuit we take this opportunity to express our disapproval of future use of the instruction. Although it purports to deal only with consideration and evaluation of the evidence, and does not appear to offer any serious misdirection, we do not believe the instruction provides any particular assistance to the jury in the performance of its tasks. And at least in the eyes of some analysts, it offers possible confusion as to the standards required for conviction. We therefore think the instruction is best omitted.[171]

VI. POST-CONVICTION PROCEDURES

The court rejected defendant's claim in *United States v. Majors*[172] that the sentencing judge should not have considered a charge dismissed in plea bargaining in imposing sentence. The

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[165] United States v. Smaldone, 485 F.2d 1333, 1347 (10th Cir. 1973); United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974).

[166] United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

[167] Holland v. United States, 348 U.S. 121, 140, *aff'g* 209 F.2d 516 (10th Cir. 1954).

[168] 501 F.2d 1142, 1144 (10th Cir. 1974).

[169] *Id.*

United States v. Cummings, 468 F.2d 274 (9th Cir. 1972) (finding error in the use of the instruction and ordering either its omission or the insertion after "question" of "arising in the most important of their affairs"); Tarvestad v. United States, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (holding the instruction improper but not prejudicial).

[171] 501 F.2d at 1144.

[172] 490 F.2d 1321 (10th Cir. 1974).

court stated that defendant's contention was plausibly supported by *United States v. Tucker*,[173] in which the Supreme Court held that it was error for a trial judge to consider a defendant's unconstitutional convictions in setting sentence. The court distinguished *Tucker* from the present facts on the grounds of the presumption of innocence:

> The presumption of innocence shielded Tucker from enhancement of his sentence by reason of the Constitutionally invalid convictions. By his plea bargain and the subsequent dismissal of the indictment against him . . . Majors was neither acquitted nor convicted . . . .[174]

The presumption of innocence is a very unconvincing ground upon which to base a distinction between use of an unconstitutional conviction and use of a dismissed charge.[175] Because Majors was "neither acquitted nor convicted" he still *has* the presumption of innocence. What is really behind the distinction—and the court would have done better to focus on this—is that while a sentencing judge may consider any relevant and responsible information, including criminal behavior for which there has been no conviction, *untrue* information should not be considered. Had the court recognized this distinction, it would have found it unnecessary to distinguish *Tucker* at all.

It has long been settled that a sentencing judge is not bound by the rules of evidence[176] and may consider responsible unsworn or out-of-court information relevant to the crime and to "the convicted person's life and characteristics."[177] Federal Rule of Criminal Procedure 32(c), regarding presentence investigation, states:

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. . . .

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[173] 404 U.S. 443 (1972).

[174] 490 F.2d at 1324.

[175] *See* United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973), where the court found defendant's argument based on presumption of innocence "implausible." *But see* United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), where the court stated that a dismissal is not an adjudication on the merits against the government.

[176] Williams v. New York, 337 U.S. 241 (1949).

[177] Williams v. Oklahoma, 358 U.S. 576, 584 (1959).

Cases prior to the *Tucker* decision consistently held that a judge may consider criminal conduct not charged or tried.[178] It is equally well settled that a judge may not rely upon false information.[179]

The Tenth Circuit questioned the impact of *Tucker* on this settled distinction. Other circuits have had no problem.[180] They have read *Tucker* as in line with and affirming the cases under *Townsend v. Burke*,[181] which held that a judge should not consider false or misleading information. Under these cases the rule remains undisturbed that a sentencing judge may consider behavior of which a defendant has not been convicted—as long as the information is reliable.[182]

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[178] *See, e.g.*, United States v. Sweig, 454 F.2d 181 (2d Cir. 1972), where a court ruled admissible evidence from a trial resulting in acquittal because of its reliability. *See also* United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); United States v. Donohoe, 458 F.2d 237 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972); United States v. Cifarelli, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); Jones v. United States, 307 F.2d 190 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 919 (1963); Young v. United States, 259 F.2d 641 (8th Cir. 1958), *cert. denied*, 359 U.S. 917 (1959). However, there is recent support for the exclusion of such information. *See* Baker v. United States, 388 F.2d 931, 934 (4th Cir. 1968), where the Fourth Circuit said, "No conviction or criminal charge should be included in the [presentence] report, or considered by the court unless referable to an official record." And see ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO PROBATION, § 2.3 (ii)(B), comment at 37 (approved draft, 1970):

> By [prior criminal record] the Advisory Committee means to include only those charges which have resulted in a conviction. Arrests . . . and the like, can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions. If such items should be included at all—and the Advisory Committee would not provide for their inclusion—at the very least a detailed effort should be undertaken to assure that the reader of the report cannot possibly mistake an arrest for a conviction.

[179] Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); United States *ex rel.* Jackson v. Myers, 374 F.2d 707 (3d Cir. 1967); *cf.* United States v. Sheppard, 462 F.2d 279 (D.C. Cir.), *cert. denied*, 409 U.S. 985 (1972). In United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), the court extended the rule and excluded information that was poorly substantiated.

[180] *See* Collins v. Buchkoe, 493 F.2d 343 (6th Cir. 1974); United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973); United States v. Picard, 464 F.2d 215 (5th Cir. 1972).

[181] 334 U.S. 736 (1948).

[182] Of course, whether or not a presentence report contains information about charges for which defendant has not been tried or information that is false, there is the further problem of how a defendant *knows* what a judge considered—*i.e.*, the problem of disclosure of a presentence report to the defendant. *See* Lehrich, *The Use & Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969); ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 4.3-4.5, 5.6 (approved draft, 1971). Challenges to the accuracy of information can be made only if the

In *Small v. Britton*[183] defendant's federal parole was revoked after he was convicted of a state crime. The United States Board of Parole lodged a revocation warrant as a detainer against him with state authorities. Defendant's parole revocation hearing was not held until the completion of this intervening state sentence. He challenged the delay in his revocation hearing as a denial of due process. The issue faced by the court was whether within the due process requirements of *Morrissey v. Brewer*[184] a delay of a revocation hearing is excused by a parolee's being incarcerated.[185] *Morrissey* held that a parolee must be afforded a hearing within a reasonable time after being retaken into custody. In ruling that the delay was not a violation of due process, the court said that the promptness requirement of *Morrissey* is not triggered until the execution of the revocation warrant after completion of the intervening sentence.[186] The court arrived at this conclusion by imposing a strict reading on the language of *Morrissey*, which requires a hearing "within a reasonable time after the parolee is *taken into custody*,"[187] and the language of 18 U.S.C. § 4207: "A prisoner *retaken upon a warrant* . . . shall . . . appear before the Board . . . ."

The federal courts are split on the question of whether or not a parole revocation hearing can be delayed when the parolee is serving an intervening sentence. While the Fifth Circuit is in accord with the Tenth, holding that the revocation hearing need not be held until the *execution* of the warrant,[188] the District Court for the District of Columbia has consistently held that the

judge explicitly relies on some item. *See, e.g.*, United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973). There is the additional problem of establishing a procedure for a defendant to challenge an item relied upon. *See* United States v. Needles, 472 F.2d 652 (2d Cir. 1973); United States v. Picard, 464 F.2d 215 (5th Cir. 1972); Hoover v. United States, 268 F.2d 787 (10th Cir. 1959).

[183] 500 F.2d 299 (10th Cir. 1974).

[184] 408 U.S. 471 (1972).

[185] It is well settled that a revocation warrant must be *issued* within the maximum term of the intervening state conviction, but its execution may be delayed until the completion of the intervening sentence. *See, e.g.*, Cox v. Feldkamp, 438 F.2d 1 (5th Cir. 1971); Smith v. Blackwell, 367 F.2d 539 (5th Cir. 1966). Federal jurisdiction is resumed when the state sentence is completed. Small v. United States Bd. of Parole, 421 F.2d 1388 (10th Cir. 1970); Taylor v. United States Marshal, 352 F.2d 232 (10th Cir. 1965). This, of course, means that a parolee cannot serve the intervening sentence and his uncompleted sentence concurrently.

[186] *Cf.* Simon v. Moseley, 452 F.2d 306 (10th Cir. 1971) (delay of hearing after *execution* of a warrant is a violation of due process).

[187] 408 U.S. 471, 488 (emphasis added).

[188] Cook v. United States Attorney General, 488 F.2d 667 (5th Cir. 1974); Moultrie v.

promptness requirement of *Morrissey* is triggered by the *issuance* of the revocation warrant.[189]

Morrissey held that a prompt hearing is required to protect a parolee from loss of evidence for his defense to the parole violation charge—loss from the death or disappearance of witnesses and from loss of memory. There are two questions to be determined by the hearing: 1) whether parole has been violated and 2) if so, whether parole should be revoked.[190] Once it is determined there has been a violation, the parolee must have the opportunity to present mitigating evidence to show why his violation does not warrant revocation.[191]

When parole is revoked because of an intervening conviction, the fact of the violation has already been litigated and is closed. The District Court for the District of Columbia and the Eighth Circuit have held that in such cases the promptness requirement of *Morrissey* still applies to protect the parolee from the loss of mitigating evidence.[192] The District of Columbia court has said that while the fact of a parolee's conviction alters the content of the hearing, it does not affect the requirement that it be held promptly.[193]

The Fifth and Tenth Circuits, on the other hand, emphasize the lack of harm from delay where the fact of a parole violation has previously been established by a conviction.[194] While both

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Georgia, 464 F.2d 551 (5th Cir. 1972); Galloway v. Attorney General, 451 F.2d 357 (5th Cir. 1971).

[189] Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973). The District Court for the District of Columbia held in *Sutherland, supra*, that *Morrissey v. Brewer* overruled the previous D.C. Circuit case, Shelton v. United States Bd. of Parole, 388 F.2d 567 (D.C. Cir. 1967), which held that where parole was revoked for an intervening sentence there was no requirement of a revocation hearing.

[190] The Supreme Court in *Morrissey* said: "Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted or are other steps better . . . ." 408 U.S. at 479-80.

[191] 408 U.S. at 488.

[192] Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973).

[193] Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270, 272 (D.D.C. 1973).

[194] Small v. Britton, 500 F.2d 299, 301 (10th Cir. 1974); Cook v. United States Attorney General, 488 F.2d 667, 672-73 (5th Cir. 1974). *See also* the pre-*Morrissey* case, Shelton v. United States Bd. of Parole, 388 F.2d 567 (D.C. Cir. 1967), in which the D.C. Circuit held that *no* revocation hearing is required when parole violation is established by a conviction, but where the violation warrant does not charge the intervening conviction as the reason for revocation, a hearing should be held promptly.

recognize that there are two issues in a revocation hearing, both have found no prejudice to a parolee's presentation of mitigating evidence where he has not shown what facts he would have presented in mitigation if given an earlier opportunity and how delay has prejudiced his ability to present such evidence.[195] While the District Court for the District of Columbia holds that a delay in a revocation hearing is per se error,[196] apparently the Fifth and Tenth Circuits will permit a delay in the absence of a showing of actual prejudice.

Loss of favorable evidence is not the only form of prejudice with which those courts requiring a prompt hearing despite a parolee's incarceration have been concerned. The District Court for the District of Columbia and the Eighth Circuit have recognized the fact that delay in a revocation hearing results in the loss of the chance to have the present sentence run concurrently with the reinstated one.[197] Both have noted that when a parole revocation warrant is issued, a detainer is held against the parolee serving an intervening sentence. As a result an inmate loses eligibility for vocational training and work release programs and other prison privileges, and there is a detrimental effect on his rehabilitation.[198]

In a case in which a detainer based on a revocation warrant issued by one state was held against a parolee incarcerated in another state, the Eighth Circuit held that delaying the revocation hearing affected "fundamental fairness."[199] Focusing on the effects of the detainer, the court ordered that either the parolee be made available to the seeking state for a prompt hearing or that the conditions imposed by the custodial state as a result of the detainer be discontinued. Although such a hearing might not result in a removal of the detainer, the Eighth Circuit was obviously concerned with the punitive effects of a detainer where there had not been a final determination of its validity. The Tenth Circuit in *Small* did not acknowledge these other forms of

[195] Small v. Britton, 500 F.2d 299, 302 (10th Cir. 1974); Cook v. United States Attorney General, 488 F.2d 667, 673 (5th Cir. 1974).

[196] Where a revocation hearing has been delayed unreasonably after issuance of the warrant, the District Court for the District of Columbia cancels the warrant. *See* cases cited note 189 *supra*.

[197] Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp 270 (D.D.C. 1973).

[198] *Id.*

[199] Cooper v. Lockhart, 489 F.2d 308, 313 (8th Cir. 1973).

prejudice. The Fifth Circuit has noted such effects and found "no constitutional relief available."[200]

VII. STATUTORY INTERPRETATION

The Tenth Circuit held a federal gambling statute[201] constitutional in the face of three challenges. Defendant in *United States v. Smaldone*[202] charged that the statute was not a valid exercise of congressional powers under the commerce clause because the statute requires no showing of involvement in interstate commerce in each individual case. In rejecting this argument the court joined five other circuits.[203] The court relied, as have the Second,[204] Fifth,[205] and Seventh[206] Circuits, on *Perez v. United States*,[207] which upheld a statute prohibiting "loan sharking" and stated that if a defendant's activity fits into a class of activity within the reach of federal power under the commerce clause, the government need not show in each individual case that defendant's activity affected commerce.[208]

The second challenge to the statute, which prohibits gambling businesses illegal under state or local law,[209] was that the statute violates the equal protection clause. This claim has been rejected in two circuits.[210] The Tenth Circuit relied on cases upholding other statutes that vary in effect because of a variation in state law.[211]

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[200] Moultrie v. Georgia, 464 F.2d 551 (5th Cir. 1972).

[201] 18 U.S.C. § 1955 (1970).

[202] 485 F.2d 1333 (10th Cir. 1973).

[203] *See* United States v. Hunter, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973); United States v. Becker, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 94 S. Ct. 2597 (1974); United States v. Riehl, 460 F.2d 454 (3d Cir. 1972); United States v. Harris, 460 F.2d 1041 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972); *cf.* United States v. Palmer, 465 F.2d 697 (6th Cir.), *cert. denied*, 409 U.S. 874 (1972).

[204] United States v. Becker, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 94 S. Ct. 2597 (1974).

[205] United States v. Harris, 460 F.2d 1041 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972).

[206] United States v. Hunter, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973).

[207] 402 U.S. 146 (1971).

[208] The other two circuits have rejected claims of unconstitutionality by upholding the congressional conclusion that this particular activity has an effect on interstate commerce. *See* United States v. Riehl, 460 F.2d 454 (3d Cir. 1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972).

[209] Under 18 U.S.C. § 1955 (1970) an illegal gambling business is one in "violation of the law of a State or political subdivision in which it is conducted . . . ."

[210] United States v. Palmer, 465 F.2d 697 (6th Cir.), *cert. denied*, 409 U.S. 874 (1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972).

[211] Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963).

Finally, defendant argued that because the federal statute incorporates the state gambling statute, he was being tried twice under the same statute in violation of the double jeopardy prohibition of the fifth amendment. The court ruled that this was a case of prosecutions by "separate sovereigns" under *Bartkus v. Illinois*[212] and *Abbate v. United States*.[213]

In *United States v. MacClain*[214] the court was asked to determine whether on the facts of the case defendant had used the mails for the purpose of executing a scheme to defraud.[215] Defendant was charged with misrepresenting the financial condition of a corporation in defrauding purchasers of its stock. Defendant visited one defrauded purchaser in her home and there arranged the sale of some of the stock. Later he mailed her a stock certificate and at a later time returned to her home to finalize the sale by exchanging a note for a good check. Defendant contended that the transaction was complete before the mail was used and that the mailing was incidental to the scheme. Defendant relied on *United States v. Lynn*,[216] a case involving purchases with a stolen credit card, the sales drafts of which were mailed to BankAmericard. In that case the Tenth Circuit held use of the mails to be incidental to a scheme already completed.[217] The court distinguished *Lynn* by noting that in that case the mailing was done by a third party and was not an integral part of the transaction and that there the defendant had no stake in the mailing.

Indeed, for a conviction to lie under the statute use of the mails need not be an essential element of the scheme.[218] The Supreme Court has said that where the mails are used after a defendant has obtained money, each case will be considered on its own facts to determine if the mailing was part of the scheme.[219]

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[212] 359 U.S. 121 (1959).

[213] 359 U.S. 187 (1959).

[214] 501 F.2d 1006 (10th Cir. 1974).

[215] 18 U.S.C. § 1341 (1970) provides in relevant part:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter . . . .

[216] 461 F.2d 759 (10th Cir. 1972).

[217] *See* United States v. Maze, 414 U.S. 395 (1974), where the Court ruled that the mailing of invoices from credit card sales did not come within the mail fraud statute because the mails were not used to *execute* the scheme. 18 U.S.C. § 1341 (1970).

[218] United States v. Maze, 414 U.S. 395 (1974); Pereira v. United States, 347 U.S. 1 (1954).

[219] United States v. Sampson, 371 U.S. 75 (1962). *Compare* United States v. Sampson

The Tenth Circuit found that defendant's mailing his victim the stock certificate enabled him to acquire and maintain dominion over the proceeds and that it lulled his victim into a false sense of security and prevented her from refusing to substitute a good check for the note.[220]

In *United States v. Harpel*[221] the Tenth Circuit interpreted 18 U.S.C. § 2510 (1970) in a way new within the federal court system.[222] Defendant, convicted of disclosing the product of an illegal electronic interception, claimed that the interception was likely to have been made by means of an extension telephone and so fit the exception to section 2510 in (5)(a):

> electronic, mechanical or other device means any device or apparatus which can be used to intercept a wire or oral communication other than—
> (a) any telephone . . . . (i) furnished to the subscriber or user in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business.

The court held that to fit the exception a telephone must be used in the ordinary course of business and that the unauthorized interception in this case did not fit that requirement.

United States v. Marx[223] involved a unique fact pattern. Defendants forced a bank president to cash a check and deliver to them the proceeds by threatening to detonate bombs placed with his family and on his person. Defendants challenged their conviction under the federal bank robbery statute[224] by claiming that because they took the money from the victim, not from the bank, there was no bank robbery but rather extortion, obtaining by false pretenses, and kidnapping. The court was forced to meet this argument and did so by holding that the victim was acting in his

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with Kann v. United States, 323 U.S. 88 (1944), *and* Henderson v. United States, 425 F.2d 134 (5th Cir. 1970).

[220] "Lulling" by use of the mails has frequently been found to fall within section 1341. *See* United States v. Sampson, 371 U.S. 75 (1962); United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969); Bliss v. United States, 354 F.2d 456 (8th Cir.), *cert. denied*, 384 U.S. 963 (1966); Beasley v. United States, 327 F.2d 566 (10th Cir.), *cert. denied*, 377 U.S. 944 (1964).

[221] 493 F.2d 346 (10th Cir. 1974).

[222] A Michigan court has given the same reading to the statute. People v. Tebo, 37 Mich. App. 141, 194 N.W.2d 517 (1971).

[223] 485 F.2d 1179 (10th Cir. 1973).

[224] 18 U.S.C. § 2113(a) (1970) provides in relevant part:
> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank . . . .

capacity of bank officer, an agent of the bank, and that the money did not leave the bank's possession until the victim gave it to defendants.[225]

In *Wallis v. O'Kier*[226] the Tenth Circuit interpreted the provision in the *Manual for Courts-Martial* for the exclusion of evidence obtained in illegal searches[227] as permitting searches on warrants not supported by oath or affirmation. Although the fourth amendment to the constitution requires that probable cause be supported by sworn affidavits, the manual has no such provision. The court concluded that this omission was intentional, noting that "[a]ny draftsman of a rule providing for probable cause as an incident to the issuance of a search warrant would be consciously aware of the Fourth Amendment provision."[228]

The court ruled that the omission of this requirement was valid, saying, "There seems to be no doubt but that an express provision of the military law that probable cause should be shown by oral statements would be valid."[229] The court explained that such a formal requirement might in some circumstances be impracticable or impossible in a military setting. Although the court cited no support, its holding and its reasoning are in line with a body of cases applying constitutional rights to military situations.

In 1867 the Supreme Court held that "the power of Congress, in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment."[230] This holding has never been expressly overruled.[231] However, since the mid-1950's much attention has been given to the general question of the applicability of the Bill of Rights to servicemen.[232] The

[225] *See* United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957) (robbery from an armored car held to fall within section 2113). *Cf.* United States v. Fox, 97 F.2d 913 (2d Cir. 1938), and White v. United States, 85 F.2d 268 (D.C. Cir. 1936) (both involving robberies of bank employees).

[226] 491 F.2d 1323 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3226 (U.S. Oct. 22, 1974) (No. 73-1950).

[227] THE MANUAL FOR COURTS-MARTIAL, ¶152, 27-64 (1969). The manual was authorized by Exec. Order No. 11,476, 3 C.F.R. 802, (Comp. 1966-1970) under the power vested in the President of the United States under 10 U.S.C. § 836 (1970).

[228] 491 F.2d at 1325.

[229] *Id.*

[230] *Ex parte* Milligan, 71 U.S. (4 Wall) 2138 (1867).

[231] J. BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 113 (1974).

[232] Reid v. Covert, 354 U.S. 1 (1957); Burns v. Wilson, 346 U.S. 137 (1953); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. I, II),

Uniform Code of Military Justice[233] now provides many rights similar to those in the first eight amendments to the constitution.[234] The rule generally followed now by both military and federal courts is one of qualified application of the Bill of Rights: constitutional rights extend to servicemen except where "expressly or by necessary implication inapplicable"[235] because of the special needs of the military and the special conditions of military life.[236]

This attention to the different needs of military life given by courts in applying constitutional principles to the military was approved again by the Supreme Court in its 1974 decision in *Parker v. Levy*.[237] The Court held that the doctrine of constitutional overbreadth will not necessarily invalidate a military statute which might be invalid in a civilian context. The Court said:

> For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. . . .
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> . . . .
>
> . . . The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[238]

Applying this reasoning, military courts have not required sworn affidavits for the issuance of search warrants in military settings. This constitutionally-provided procedure has been said to be impracticable because of the particular conditions and interests of military life.[239] Although the Court of Military Appeals has criticized the rule that a Commanding Officer may authorize

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72 HARV. L. REV. 266 (1958); Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 38-70 (1972).

[233] 10 U.S.C. §§ 801-940 (1970).

[234] The Code includes the right against self-incrimination, double jeopardy, cruel and unusual punishment, right to counsel, etc. *See* J. BISHOP, *supra* note 231, at 137.

[235] United States v. Manos, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[236] J. BISHOP, *supra* note 231, at 133, 144.

[237] 94 S. Ct. 2547 (1974).

[238] *Id.* at 2561-62, 2563.

[239] *See* United States v. Doyle, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); United States v. Florence, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952). *See also* J. BISHOP, *supra* note 231, at 145-46; McNeill, *Recent Trends in Search and Seizure*, 54 MIL. L. REV. 83, 86 (1971).

a search for probable cause established by oral and unsworn information,[240] this practice continues to be the law in the military, and the Tenth Circuit bowed to that practice.

M. Caroline Turner

I. CONFUSION AND CONFLICT IN SEARCH AND SEIZURE

United States v. Nevarez-Alcantar, 495 F.2d 678 (1974)

BY ROBERT L. MCGAHEY, JR.*

INTRODUCTION

The Supreme Court headed by Warren Burger has demonstrated a marked distaste for the exclusionary rules favored by the Warren Court and a decided preference for the measuring rod of "reasonableness."[1] This shift by the Burger Court has had a very real impact on lower federal and state courts. Although some courts have happily accepted the new trend, the decisions have also bred confusion, conflict, and in some cases outright disapproval.[2]

The Tenth Circuit Court of Appeals recently handed down a decision with the potential for creating the same type of judicial unrest. In *United States v. Nevarez-Alcantar*[3] a panel of the

[240] *See, e.g.*, United States v. Penman, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966); United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

* Attorney at Law, Denver, Colorado; A.B., 1971, Princeton University; J.D., 1974, University of Denver College of Law.

[1] United States v. Matlock, 415 U.S. 164 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Calandra, 414 U.S. 338 (1974); United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Wyman v. James, 400 U.S. 309 (1971). *See also* Voorsanger, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CON. L. Q. 179 (1974); Note, *United States v. Robinson: Toward a Neutered Principle of the Exclusionary Rule*, 8 U. SAN FRAN. L. REV. 777 (1974).

[2] For example, *Robinson* and *Gustafson* were met with almost uniform disapproval by commentators. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974); Voorsanger, *supra* note 1; 7 AKRON L. REV. 499 (1974); 45 MISS. L.J. 800 (1974); 43 U. CINN. L. REV. 428 (1974).

This disagreement has not been limited to commentators. Courts, too, have complained—and strenuously. *See* Hammond v. Bostic, 368 F. Supp. 732, 736 (W.D.N.C. 1973); State v. Kaluna, 520 P.2d 51 (Hawaii 1974) (rejecting the applicability of *Robinson* and *Gustafson* to search and seizure law in Hawaii); People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111 (Crim. Ct. Bronx County 1974); People v. Copeland, 77 Misc. 2d 649, 354 N.Y.S.2d 399 (Dist. Ct. Nassau County 1974) (both holding *Robinson* and *Gustafson* inapplicable in New York).

[3] 495 F.2d 678 (10th Cir. 1974).

Tenth Circuit upheld the warrantless search of the locked suitcase of a suspected illegal alien; the search occurred while he was being detained for questioning. The court, following the Supreme Court's lead, found the search to be "reasonable." Although the search may well have been justifiable, the court's opinion is confusing in its use and choice of precedent. Not only does the decision seem to be directly at odds with decisions of both the Fifth and Ninth Circuits, but it conflicts as well with decisions of state courts within the Tenth Circuit, and with other decisions of the Tenth Circuit itself.

Gilberto Nevarez-Alcantar had two problems when he stepped off the bus in Lordsburg, New Mexico, on April 12, 1973. One was that he was so intoxicated that he believed himself to be in San Francisco.[4] The other was the 13¼ ounces of heroin which he carried in his locked suitcase.

At about 12:20 a.m. Alcantar approached two Lordsburg police officers and asked them to drive him to an address which the officers knew was not in Lordsburg. The officers began to question Alcantar. In response to the questions, Alcantar produced as identification an Alien Registration Receipt card and a driver's license. The card gave his address as San Francisco, California; the license listed his home as Zaragoza, Chihuahua, Mexico. The officers arrested Alcantar for drunkenness and after discovering that he was a Spanish-speaking alien,[5] transported him to the Lordsburg office of the United States Border Patrol.

At the Border Patrol office, Agent Ashton continued to interrogate Alcantar. According to the Tenth Circuit's opinion "Alcantar was in possession of his suitcase during the interrogation."[6] The agent was not satisfied with Alcantar's identification, since to Ashton it was not clear whether Alcantar resided in Mexico or the United States. Ashton and the two Lordsburg policemen then forcibly opened Alcantar's suitcase "in search of further

[4] Alcantar had boarded the bus in El Paso, Texas, with San Francisco as his ultimate destination.

[5] *But see* United States v. Guana-Sanchez, 484 F.2d 590, 592 n.3 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 3169 (1974), where the court said, "there is no crime in speaking Spanish or being Mexican or Puerto Rican." *See* United States v. Mallides, 473 F.2d 859 (9th Cir. 1973).

[6] 495 F.2d at 679. As will become clear, this simple sentence holds the key to the subsequent search of the suitcase. Exactly what is meant by "possession"?—in his hands, in his lap, at arm's length on the floor next to him, ten feet away, in the same room? Such fine distinctions can often make the difference between a legal and an illegal search.

identification."[7] When the suitcase was opened, the heroin was discovered and Alcantar was subsequently charged with illegal possession of a controlled substance.[8]

Alcantar moved to suppress the heroin, contending that the seizure which netted the evidence was made without a warrant, without probable cause, without his consent, and was unreasonable in light of the fourth amendment. At an evidentiary hearing the district court denied the motion, holding: that Alcantar was still intoxicated when interviewed by Agent Ashton; that he did not consent to the search; that he had been arrested for intoxication and that the search therefore could not be justified as incident to arrest; that there was no danger that Alcantar could reach into his locked suitcase to seize a weapon or to destroy evidence; that the search of the suitcase was in no way an inventory of Alcantar's personal property; that the search was solely an effort to find more information by which to establish Alcantar's identity; and that the officers had probable cause to search the suitcase for such information.[9]

Alcantar appealed, and the Tenth Circuit ruled against him. The majority opinion was written by Judge Barrett, for himself and Judge Durfee of the Court of Claims (sitting by designation); Chief Judge Lewis filed a concurring opinion.

In finding the search of Alcantar's suitcase reasonable, the court offered three major justifications for the search: (1) that the search fell within the border search exception to the warrant requirement of the fourth amendment; (2) that Alcantar had been detained pursuant to a valid *Terry v. Ohio*[10] "investigative stop"; (3) that the search was conducted pursuant to a valid arrest. These rationales, especially the second and third, are somewhat contradictory. The problems with the opinion are compounded by the court's failure to adequately delineate the differences between each of these justifications. The remainder of this article will discuss each of the reasons given by the court for upholding the search. *Nevarez-Alcantar* will be compared with decisions rendered by other circuits in similar cases. There will also be a short discussion of whether the court of appeals could have used *United States v. Edwards*[11] to bolster its opinion.

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[7] *Id.* at 679.

[8] 21 U.S.C.A. § 841(a)(1) (1973).

[9] 495 F.2d at 680.

[10] 392 U.S. 1 (1968).

I. BORDER SEARCH

Border searches made without warrants constitute a long recognized exception to the exacting requirements of the fourth amendment.[12] The United States Supreme Court recently considered some of the ramifications of border searches, and attempted to confine the exception within acceptable limits. In *Almeida-Sanchez v. United States*[13] the Supreme Court stated that warrantless searches of random vehicles conducted by roving squads of Border Patrol officers are unconstitutional. *Almeida-Sanchez* was designed to delimit and define the extremely broad authority granted to border patrol and customs officials in their attempts to ferret out illegal aliens and contraband. Justice Stewart, writing for himself and three others, confined legitimate border searches to the border itself and the "functional equivalents" thereof. Justice Powell concurred, agreeing that the roving patrols conducted in the case before the Court were improper, but stating that he might be inclined to uphold such patrols if their searches were made pursuant to "area search warrants."[14] Justice White dissented vigorously, stating that Congress intended that border searches be broad and all-encompassing, and that they should therefore be permitted at any location, without the necessity of a warrant or probable cause.[15]

Almeida-Sanchez caused immediate waves within the three circuits whose dockets contain the majority of border search cases—the Fifth, the Ninth, and the Tenth. The Tenth Circuit considered *Almeida-Sanchez* in several cases prior to *Nevarez-Alcantar*. In *United States v. Bowman*[16] a panel including Chief Judge Lewis and Judge Barrett distinguished *Almeida-Sanchez* on the basis of the type of search involved. In *United States v. King*[17] the court remanded to the district court for a factual determination of whether a fixed checkpoint some distance from the border constitutes the "functional equivalent" of a border. For the same reason a remand was also ordered in *United States v.*

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[11] 415 U.S. 800 (1974).

[12] For good overviews of the border search issue see Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53 (1974) and Note, *In Search of the Border*, 5 N.Y.U.J. OF INT. L. & POLITICS 93 (1972).

[13] 413 U.S. 266 (1973).

[14] *Id.* at 283-85.

[15] *Id.* at 293.

[16] 487 F.2d 1229 (10th Cir. 1973).

[17] 485 F.2d 353 (10th Cir. 1973).

Maddox.[18] In both *King* and *Maddox* the court emphasized that border searches are an exception to the warrant requirement and are not dependent upon probable cause for their validity.

Judge Barrett's dissent in *Maddox* was a forerunner of his majority opinion in *Nevarez-Alcantar*. He indicated his preference for Justice Powell's *Almeida-Sanchez* concurrence with its comments on "roving patrols" and "area warrants," and also quoted approvingly from Justice White's dissent in *Almeida-Sanchez* concerning the problems presented by illegal aliens and the intent of Congress relative to those problems. He discounted entirely the majority opinion of Justice Stewart.

The *Nevarez-Alcantar* opinion ignores the question of functional equivalency, as well as the limiting tenor of the majority opinion in *Almeida-Sanchez*. Instead, Justice Powell's concurrence and Justice White's dissent are emphasized as if these opinions are the holding of the case.[19] The judges of the *King* and *Maddox* panels stated that the question of functional equivalency must be examined by the district court. It would thus appear that a conflict now exists among the judges of the Tenth Circuit as to the meaning, applicability, and proper procedures required by *Almeida-Sanchez*.[20] Furthermore, no other controlling opinion of any circuit court uses *Almeida-Sanchez* in the manner *Nevarez-Alcanter* uses it, with the opinions of Justices Powell and White in the positions of prominence, with the opinion of the Court relegated to a position of no importance.[21]

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[18] 485 F.2d 361 (10th Cir. 1973).

[19] It hardly bears commenting that concurrences and dissents are not the law, although they may become law in time. *Compare* Betts v. Brady, 316 U.S. 455 (1942) (Black, J., dissenting) *with* Gideon v. Wainwright, 372 U.S. 335 (1963).

[20] This conflict between the Tenth Circuit's judges is well illustrated in the recent Ninth Circuit case of United States v. Bowen, 500 F.2d 960 (9th Cir.), *cert. granted*, 95 S. Ct. 40 (1974). *Bowen*, discussed more fully below, dealt with the retroactive effect, if any, to be given to *Almeida-Sanchez*. *See* discussion in note 26 *infra*. The judges in the majority cite the Tenth Circuit cases of *King* and *Maddox* to support their contention that *Almeida-Sanchez* is to apply to both fixed and movable checkpoints, and to both full-scale searches and investigative stops. *Bowen, supra* at 967. Judge Wallace, in dissent, cites *Bowman, King*, and *Maddox*, stating that the Tenth Circuit has a two-step procedure: the initial stop may be made without a warrant, but if the search goes beyond plain view, there must be the added factor of either probable cause or the functional equivalent of a border. *Bowen, supra* at 969 n.3.

[21] Some recognition of a link between Justice Powell's concurrence and Justice White's dissent can be found. *See* United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), in which District Judge Turrentine, in a lengthy and well-reasoned opinion considers and rejects an analysis like that made in *Nevarez-Alcantar*: "the plurality's language and reasoning [in *Almeida-Sanchez*] appears to require courts to address the question

Both the Fifth and the Ninth Circuits have the same large-scale problems with illegal aliens as the Tenth Circuit. Both have considered *Almeida-Sanchez* and its implications in detail. The Fifth Circuit, before allowing a search to be justified as a border search, requires that the person or vehicle to be searched have a "strong nexus with the border" coupled with a "reasonable suspicion" of illegal activity.[22] In addition, an initial inquiry must be made as to whether the "search occurred either at the border or at the functional equivalent thereof. If not, then it is not a border search."[23] The Fifth Circuit has shown itself willing to void searches which clearly violate the letter of *Almeida-Sanchez*,[24] as well as searches which violate its spirit.[25]

The Ninth Circuit places a heavy emphasis on "founded suspicion" (which may be less than probable cause) as a prerequisite for not only border searches, but for any sort of lawful detentive stop.[26] The Ninth Circuit has also developed an effec-

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of whether searches at the checkpoints are 'border searches' for immigration purposes as that term is defined in *Almeida-Sanchez*." *Id.* at 408. *See also* United States v. Bowen, 500 F.2d 960, 967 (9th Cir. 1974):

> [T]he government's difficulty in detecting and repatriating illegal aliens along our southern border needs no new documentation here. The short answer to this argument [that necessity demands certain practices] however, is that necessity alone cannot override the Fourth Amendment's prohibition against unreasonable searches and seizures. A similar argument was made and rejected in *Almeida-Sanchez* itself. *See* 413 U.S. at 29 (dissenting opinion of White, J.).

Compare the majority opinion in *Nevarez-Alcantar with* the dissenting opinion of Judge Wallace in *Bowen, supra* at 968-75.

In fairness to Judge Barrett, it should be noted that several commentators have reacted favorably to Justice Powell's concept of area search warrants, calling it a reasonable or commonsense approach to the problems presented by searches for illegal aliens. Sutis, *The Extent of the Border*, 1 HASTINGS CON. L.Q. 235 (1974) (but note the strong rejection of Justice White's dissent); *The Supreme Court—1972 Term*, 87 HARV. L. REV. 55, 196-204 (1973); *Recent Developments*, 27 VAND. L. REV. 523 (1974).

[22] *See, e.g.*, United States v. Bursey, 491 F.2d 531 (5th Cir. 1974); United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973); United States v. Steinkoenig, 487 F.2d 225 (5th Cir. 1973).

[23] United States v. Speed, 489 F.2d 478, 479, (5th Cir. 1973), *aff'd on rehearing*, 497 F.2d 546 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3307 (U.S. Nov. 16, 1974) (No. 74-599) (footnotes omitted).

[24] *Id.* United States v. McKim, 487 F.2d 305 (5th Cir. 1973); United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973), *aff'd on rehearing*, 494 F.2d 1284 (5th Cir. 1974).

[25] *See* United States v. Olivares, 496 F.2d 657 (5th Cir. 1974); United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973). In *Lonabaugh* the circuit court stated that proximity to the border is not the only standard which is to be used in determining functional equivalency; the searcher must have knowledge that the person or thing to be searched has just crossed the border. *Id.* at 1261.

[26] United States v. Juarez-Rodriquez, 498 F.2d 7 (9th Cir. 1974) (per curiam); United States v. Ward, 488 F.2d 167, *rev'g on rehearing* 488 F.2d 162 (9th Cir. 1973); United

tive and easily applicable definition of "functional equivalency": if the place at which the search is conducted is a location where virtually everyone searched has just come from the other side of the border, it is the functional equivalent of the border; if a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not a border search.[27]

If the *Nevarez-Alcantar* court had made use of the Fifth Circuit's concept of "nexus with the border" or the Ninth Circuit's "founded suspicion," the *Nevarez-Alcantar* opinion might not be so hard to fathom and the search which took place would not seem to be grounded on such a weak foundation.[28] Or if the court had dealt with retroactivity and held *Almeida-Sanchez* inapplicable, it could have avoided the quixotic use to which that case is put in *Nevarez-Alcantar*.[29]

States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). The founded suspicion must be of a customs or immigration violation. United States v. Diemler, 498 F.2d 1070 (5th Cir. 1974) (per curiam).

[27] United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974).

[28] But where should the Tenth Circuit find a strong nexus with the border? In the fact that Nevarez-Alcantar spoke Spanish? That he boarded the bus in El Paso? That Lordsburg is approximately 40 miles from the Mexican border? That Alcantar's identification documents were contradictory? And where would they find founded suspicion? In his drunkenness? In the conflict in his documents? The *Nevarez-Alcantar* panel appears to assume that a search falls within the border search exception if conducted by a Border Patrol agent at a location near a foreign border. This is one of the points which *Almeida-Sanchez* rejected. *See also* cases cited note 22 *supra*.

[29] Both the Fifth and the Ninth Circuits have also come to grips with the question of whether *Almeida-Sanchez* should be given retroactive effect. Their results differ. The Fifth Circuit, attempting to simplify matters, will not apply the *Almeida-Sanchez* rules to any case tried before *Almeida-Sanchez* was decided. United States v. Miller, 492 F.2d 37 (5th Cir. 1974). The Ninth Circuit has developed a somewhat more complicated set of rules. Cases in which the search was made by roving patrols are entitled to have *Almeida-Sanchez* applied if they were on appeal at the time *Almeida-Sanchez* was handed down. United States v. Peltier, 500 F.2d 985 (9th Cir.), *cert. granted*, 95 S. Ct. 302 (1974). Searches made at fixed checkpoints are entitled to have *Almeida-Sanchez* applied, but only if the search was conducted after *Almeida-Sanchez* was decided. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974). The Tenth Circuit has yet to deal definitively with the retroactivity issue. *But see Peltier, supra* at 990 where Judge Goodwin cites *King* and *Maddox* in support of his holding that *Almeida-Sanchez* is applicable to pending cases. It is not clear if the issue has yet been properly before the Tenth Circuit, although it appears that it could have been considered in *Nevarez-Alcantar*. *Almeida-Sanchez* was decided on June 21, 1973; the search of Nevarez-Alcantar's suitcase took place on April 12, 1973. *Cf.* Michigan v. Tucker, 94 S. Ct. 2357 (1974).

The Supreme Court is apparently ready to deal with the question of the retroactivity of *Almeida-Sanchez*; the Court granted certiorari in *Bowen*, 95 S. Ct. 40 (1974), *Peltier*, 95 S. Ct. 302 (1974), United States v. Brignoni-Ponce, 95 S. Ct. 40, and United States v. Ortiz, 15 CRIM. L. REP. 4133 (1974).

II. INVESTIGATIVE STOP

A second ground on which the court justified the search of Nevarez-Alcantar's suitcase was that the search was one conducted pursuant to a valid investigative stop as authorized by *Terry v. Ohio*.[30] However, the minimum *Terry* criteria were not met in the present case. *Terry* authorized brief detentive stops for the purpose of investigating possible criminal behavior,[31] but the underlying basis for such stops limited to a frisk of the outer clothing of the person detained,[32] was to protect police officers or others from possibly armed individuals.[33] Those boundaries were exceeded in Agent Ashton's forcible opening of Nevarez-Alcantar's suitcase. Recall that the district court found that Nevarez-Alcantar could not seize weapons or evidence from his suitcase. Therefore the search of the suitcase could not be legitimated on the basis of protecting Ashton or the Lordsburg officers. And a search of Nevarez-Alcantar's suitcase is far from the limited pat-down of outer clothing allowed by *Terry*.[34] Perhaps the *Nevarez-Alcantar* court invoked *Terry* in an attempt to extricate itself from the problem of applying *Almeida-Sanchez*, since the Tenth Circuit had already held that the limitations of *Almeida-Sanchez* are not applicable to investigative stops.[35]

The Tenth Circuit implies that the search in the present case is justifiable under both *Robinson*[36] and *Terry*,[37] and in so doing slurs the distinction between investigative stops and lawful custodial arrests. *Robinson* went to great lengths to distinguish the difference between the two types of searches.[38] The *frisk* allowed

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[30] 392 U.S. 1 (1968).

[31] *Id.* at 22.

[32] *Terry* has been elaborated upon and expanded by the Burger Court. Adams v. Williams, 407 U.S. 143 (1972).

[33] 392 U.S. at 23, 25.

[34] The Tenth Circuit has shown a tendency to misapply *Terry*; it should not be used to justify *any* detention. *Compare* United States v. Saldana, 453 F.2d 352 (10th Cir. 1972) and United States v. Sanchez, 450 F.2d 525 (10th Cir. 1971) *with* Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972), *cert. denied*, 410 U.S. 987 (1973). *Ramirez* involved weapons and was a proper application of *Terry*; the other cases lack the element of a need to protect the police officer, and hence are not true *Terry* cases. *Saldana* and *Sanchez* are cited as authority in *Nevarez-Alcantar*.

[35] United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973). The Ninth Circuit has held *Almeida-Sanchez* applicable to investigative stops, specifically rejecting both the holding and reasoning of *Bowman*. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974).

[36] 414 U.S. 218 (1973).

[37] 392 U.S. 1 (1968).

[38] 414 U.S. at 227-29.

at an investigative stop is limited in scope; the *search* permitted by a valid custodial arrest is much broader, encompassing a full scale search of the person. *Nevarez-Alcantar* justifies the search of the suitcase both as an investigative stop and a search incident to a valid arrest, without recognizing that different factual considerations are required to justify each type of search. Giving the two types of searches identical treatment creates problems both theoretical and practical.[39]

The Tenth Circuit could have indicated where the investigative stop ends and the search incident to arrest begins. This was done very well by the Eighth Circuit in *United States v. Peep*.[40] In *Peep* federal agents were in the process of validly searching a house suspected of being a manufacturing plant for illegal drugs. Peep and a friend entered the house while the search was going on. One of the agents noticed a suspicious bulge in Peep's front pants pocket. Thinking it might be a weapon, the agent reached out to pat it, per *Terry*. Peep slapped the agent's hand away. The lump turned out to be a large wad of bills which coupled with the attendant circumstances gave the officers probable cause to arrest Peep. A thorough search of his person, as authorized by *Robinson*, ensued and a matchbox containing illicit drugs was discovered. Both the initial pat-down and subsequent search were upheld but with judicial recognition that there were important factual distinctions between the two. The initial frisk was proper for the protection of the officers. After probable cause was established and a valid arrest effected, the full search of Peep's person which uncovered contraband was correct. The events in *Peep* occurred in rapid succession, and a proper frisk became a proper search incident to a valid arrest, each justified by different factual considerations and each supported by a distinct and separate set of precedents. *Peep* illustrates the line of demarcation between *Terry* and *Robinson* which courts should draw.

III. SEARCH INCIDENT TO A VALID ARREST

The final reason given by the Tenth Circuit for upholding the forcible search of Nevarez-Alcantar's suitcase was that the search was conducted pursuant to a valid arrest for public drunkenness. The court relied on its own opinion in *United States v. Simpson*,[41]

[39] *See* the Tenth Circuit cases *supra* note 31. *See also* People v. Stevens, 517 P.2d 1336 (Colo. 1973), especially Erickson, J., dissenting at 1342-46.

[40] 490 F.2d 903 (8th Cir. 1974).

[41] 453 F.2d 1028 (10th Cir.), *cert. denied*, 408 U.S. 925 (1972). This case would appear

and found further support in the recent decisions of *United States v. Robinson*[42] and *Gustafson v. Florida*.[43] As will be shown, none of these cases properly applied can justify the search of Nevarez-Alcantar's locked suitcase.[44] Indeed, the application of *Robinson* and *Gustafson* to the search in the present case shows a clear misunderstanding of the cases and represents an improper and potentially harmful extension of their holdings.

There is a very real and important difference between opening a cigarette package found in a suspect's inside pocket (*Robinson*) and opening a locked suitcase over which a suspect no longer has any control.[45] *Robinson* and *Gustafson* allowed for a full search of the *person* of one placed under a lawful custodial arrest. This is clear from the language of *Robinson*:

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a *full search of the person* is not only an exception to the warrant requirement of the Fourth Amendment but is also a "reasonable" search under that Amendment.[46]

Robinson is thus not applicable to the search of Nevarez-Alcantar's suitcase.

A United States Supreme Court case which would seem to validate the search of the suitcase is *Chimel v. California*,[47] where it was held that pursuant to a valid arrest: "There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing the phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[48] *Chimel* rejected any broader-based search.[49]

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to be nonapplicable to *Nevarez-Alcantar* since it involves the search of a suspect's wallet after he was incarcerated. Recall that the district court found that the search of Nevarez-Alcantar's suitcase was not an inventory of his personal effects.

[42] 414 U.S. 218 (1973).

[43] 414 U.S. 260 (1973).

[44] Recall that the district court found that the search of the suitcase was not made pursuant to a valid arrest. 495 F.2d at 680.

[45] *Compare* concurring opinion of Lewis, C.J., in *Nevarez-Alcantar*, *id.* at 682-83, *with* dissenting opinion of Marshal, J., *in Robinson*, 414 U.S. at 238-59.

[46] 414 U.S. at 235 (emphasis added). That *Robinson* allowed searches of the person only has been the understanding of every commentator on the case. *See* authorities cited note 2 *supra*.

[47] 395 U.S. 752 (1969).

[48] *Id.* at 763. The *Nevarez-Alcantar* court credits this rule of law to *Robinson*. 495 F.2d at 682. Recall that the district court in *Nevarez-Alcantar* specifically found that Alcantar could not reach into his suitcase for weapons or destructible evidence. 495 F.2d 680.

[49] It is argued . . . that it is "reasonable" to search a man's house when

Although *Chimel* would seem to be a more likely precedent to apply in the present case, it is clear that *Chimel* cannot serve to uphold the search either because of the issue of "control" over the suitcase. In the first place, it was locked. Although the *Nevarez-Alcantar* court stated that Nevarez-Alcantar had "possession" of his bag, it fails to define "possession" in any way which indicates the amount of "control" he exercised over it. Once Agent Ashton and the Lordsburg police officers took the bag away from Nevarez-Alcantar so that they could open it, the bag was no longer in Nevarez-Alcantar's "control" at all. And since Ashton had reasonable grounds to detain Nevarez-Alcantar, there were no exigent circumstances requiring immediate opening of the suitcase.

Other circuits have dealt with the question of when a suitcase may be opened without a warrant pursuant to a valid arrest. The Sixth Circuit upheld a search of a suitcase in *United States v. Kaye*,[50] even though Kaye was subdued and his suitcase was under the control of the police. The court emphasized that the bag was still within the area from which the suspect might gain possession of a weapon or destructible evidence; this was buttressed by the fact that the suitcase was *unlocked*, making access to its contents easier for the suspect. Although the court cited *Robinson*, it primarily relied upon *Chimel* to uphold the search.

The same court reached a similar result in *United States v. Crane*,[51] upholding the seizure of a paper bag found between the feet of an armed robbery suspect; again, stress was placed on the bag's being within the area of the suspect's immediate control.[52]

The Fifth Circuit has also been confronted with warrantless searches of luggage. But that circuit, even in the light of *Robinson*, has shown reluctance to allow such searches, absent

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> he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not in considerations relevant to Fourth Amendment interests. Under such unconfined analyses, Fourth Amendment protection in this area would approach the evaporation point.

395 U.S. at 764-65.

[50] 492 F.2d 744 (6th Cir. 1974).

[51] 499 F.2d 1385 (6th Cir. 1974).

[52] *Id.* at 1388. *Compare* both *Kaye* and *Crane with* United States v. Cupps, 503 F.2d 277 (6th Cir. 1974). *See also* United States v. Marshall, 499 F.2d 76 (5th Cir. 1974) (per curiam); United States v. Artieri, 491 F.2d 440 (2d Cir. 1974), both citing *Robinson* and *Chimel* together, but placing heavy emphasis on the immediate control which the defendant exercised over the contraband seized.

exigent circumstances. In the pre-*Robinson* case of *United States v. Garay*,[53] the Fifth Circuit stated that a warrant must be obtained to search the luggage when a defendant is restrained, when police officers have effective control over his luggage, and when there is no significant probability that the luggage could escape a search. Two recent cases, one decided after *Robinson*, have reaffirmed this position. In *United States v. Lonabaugh*,[54] federal narcotics agents, acting on a tip from a reliable informant that the defendant would drive his car to the airport and send his accomplice to another city with illegal drugs, followed him to the airport. The defendant and his companion checked two suitcases, then proceeded to the coffee shop. The agents went to the baggage area, separated the suitcases from the other luggage, and accosted the defendant after his companion had boarded his flight. The defendant identified the suitcase as his, but claimed he did not have the key. The agents then forcibly opened the suitcase and found narcotics. Citing *Garay*, the Fifth Circuit invalidated the search. In *United States v. Anderson*,[55] a post-*Robinson* case, the Fifth Circuit again invalidated a search of luggage over which the defendant had no control, stating,

> *Lonabaugh* and *Garay* make it quite clear that when officers, through their possession of baggage checks or in *some other manner*, have effective control over the movement of checked luggage . . . there is a lack of exigent circumstances upon which to justify a warrantless search, *probable cause notwithstanding*.[56]

One other Fifth Circuit case deserves some scrutiny. *United States v. Soriano*[57] also involved the search of luggage. Federal agents were pursuing persons whom they had probable cause to believe were carrying narcotics. The agents stopped the cab in which the suspects were riding, opened the trunk, and removed luggage from it. They then immediately opened the luggage and found drugs. The Fifth Circuit, en banc, upheld the search of the suitcase as incident to a search of the car, citing *Robinson* in

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[53] 477 F.2d 1306 (5th Cir. 1973) (per curiam).

[54] 494 F.2d 1257 (5th Cir. 1973).

[55] 500 F.2d 1311 (5th Cir. 1974).

[56] *Id.* at 1318 (emphasis supplied). Compare these cases and *Nevarez-Alcantar* with United States v. Coll, 357 F. Supp. 333 (D.P.R. 1973), where immigration authorities took the defendant into custody as an illegal alien and found on his person a large sum of money, a suitcase key, and baggage claim checks. The defendant denied any knowledge of the claim checks. The court upheld the subsequent warrantless search of the luggage for identification, but stated that had the defendant acknowledged the suitcase as his, a warrant would have been needed to search them. *Id.* at 336.

[57] 497 F.2d 147 (5th Cir. 1974), *rev'g* 482 F.2d 469 (5th Cir. 1973).

dictum. But in a footnote the court indicated that had the bags been removed from the area to be searched later a warrant might well have been required.[58] The important part of *Soriano* for purpose of this discussion is the concurring opinion of Judge Godbold, for himself and Judges Thornberry and Goldberg. They upheld the search of the suitcases, but as a *Chimel* search, not a *Robinson* search. They recognized that the search of moveable personal property disassociated from the person falls within the confines of *Chimel*, not *Robinson*.[59] They speculated as to whether the Supreme Court intended *Robinson* and *Gustafson* to encompass *Chimel* situations, or whether the two cases are to stand as equals, each covering different types of searches.

The *Soriano* concurrence points up the most severe problem with the Tenth Circuit's opinion in *Nevarez-Alcantar*. The court acts as if *Robinson* has indeed absorbed *Chimel*, without recognizing that *Chimel* and *Robinson* are founded on very different premises. *Chimel* requires that the search of an area be for weapons or easily destructible evidence; *Robinson* specifically disavows those criteria when a search of the *person* pursuant to a lawful arrest is involved.[60] To apply *Robinson* and *Chimel* together in justifying a search of the person and of items in his immediate control, while recognizing the distinction between the decisions, as the Sixth Circuit has done, would seem to be acceptable. But to justify searches of the person *and* of items, whether in control of the defendant or not, as the Tenth Circuit does in *Nevarez-Alcantar* is to expand *Robinson* and to effectively negate *Chimel*. Justice Stewart's opinion in *Chimel* was a lengthy one, with a solid foundation in the theory behind the fourth amendment. If *Chimel* is to be regarded as enveloped by *Robinson*, or indeed as no longer viable in light of *Robinson*, such a pronouncement can only come from the U.S. Supreme Court. Failure to recognize the distinctions and to adequately analyze the implications of each case can only lead to the type of judicial confusion and unrest that followed in *Robinson*'s wake.[61]

V. *United States v. Edwards*

Although the court made no reference to it, does the case of

[58] *Id.* at 150 n.6.

[59] *Id.* at 151.

[60] 414 U.S. at 234-35.

[61] A perfect example of such conflict can be found in two recent decisions by state appellate courts within the Tenth Circuit. In People v. Grana, 527 P.2d 543 (Colo. 1974)

United States v. Edwards[62] serve to support the conclusion reached in *Nevarez-Alcantar*?[63] *Edwards* involved the search of a suspect's clothing some 10 hours after his arrest; the clothing was taken from the already jailed suspect because police had probable cause to believe that the clothing itself would be material evidence. The U.S. Supreme Court upheld the search as one made pursuant to a valid arrest, holding that the delay in conducting the search was not improper. Justice Stewart, for himself and Justices Douglas, Brennan, and Marshall, dissented, stating that this was neither a proper search of the person under *Robinson*, nor was it a valid *Chimel* search.[64]

It should be noted that *Edwards* involved evidence which was under the defendant's control, and since paint chips were involved, the evidence was easily destructible. Furthermore, the Court placed some small emphasis on protection of the police and prevention of escape.[65] Finally, the high Court pointed out that the clothing was searchable as part of normal jail check-in procedures—an inventory search.[66] However, the time factor relative to the search seems to be the most important aspect of the decision.[67]

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and State v. Vigil, 524 P.2d 1004 (N. Mex. Ct. App.), *cert. denied*, 86 N.M. 372, 524 P.2d 988 (1974), the courts of Colorado and New Mexico were faced with cases which were almost identical to each other on their facts. The Colorado Supreme Court invalidated the search in *Grana*; the New Mexico Court of Appeals upheld the search in *Vigil*.

[62] 94 S. Ct. 1234 (1974).

[63] In United States v. Roe, 495 F.2d 600 (10th Cir. 1974), decided 3 days after *Nevarez-Alcantar*, the court used *Edwards* to validate entry into a lawfully impounded car. The court was not sure if the entry was a search at all, but stated that if it was, it was justified under *Edwards* and Chambers v. Maroney, 399 U.S. 42 (1970).

Edwards appears to be aimed at the *time* the search is made, rather than its *scope*. Erickson, *U.S. Supreme Court Criminal Decisions: 1973 - 1974 Term*, 3 COLO. LAWYER 465, 468 (Sept. 1974). Although this aspect of *Edwards* is mentioned in *Roe*, it is only in passing. Note also that *Roe* appears to contain the same blurring and intermingling of *Chimel* and *Robinson* as does *Nevarez-Alcantar*.

[64] 94 S. Ct. at 1240-42 (Stewart, J., dissenting). "[T]he mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographic or temporal scope." *Id.* at 1240.

[65] *Id.* at 1237. If these factors are important in *Edwards*, how can the Supreme Court consistently cite *Robinson* as justification for the search? As discussed above, *Robinson* seems to require only a valid arrest for a full search of the person; subjective factors such as those relied upon in *Edwards* are of lesser or no importance. Query: Is *Edwards* the Supreme Court case which begins the dismantling and eventual abandonment of *Chimel*? Note that Justice White's majority opinion links *Robinson* and *Chimel* together without distinguishing between the two. *Id.* at 1236.

[66] *Compare* United States v. Gardner, 480 F.2d 929 (10th Cir.), *cert. denied*, 414 U.S. 977 (1973) (wallet searched as inventory of effects of already incarcerated person). *See* United States v. Grill, 484 F.2d 990 (5th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974).

[67] *Edwards* has been analyzed in the following manner:

Nevarez-Alcantar does not fit the *Edwards* mold. As the district court recognized, Nevarez-Alcantar did not have access to the interior of his suitcase; hence there was no weapon or evidence which he could easily reach. And, as discussed above, it is debatable if the suitcase could have been opened contemporaneously with Nevarez-Alcantar's arrest.[68]

Edwards might arguably have offered a viable justification for the search in *Nevarez-Alcantar*. But enough significant factual differences exist between the two cases to render *Edwards* inapposite.

CONCLUSION

United States v. Nevarez-Alcantar offered the Tenth Circuit an opportunity for a detailed analysis of fourth amendment problems, both at the border and incident to arrest. Given the fluid nature of the legal questions involved, such an analysis was in order, so that the Tenth Circuit could lend the force of its reasoning and the perceptive comments of its judges to the resolution of those questions. Yet the Tenth Circuit, perhaps due to the pressures of a crowded docket, has written a brief opinion lacking in-depth consideration of the legal issues presented, as many courts too often do. The precedents chosen by the *Nevarez-Alcantar* court and the use to which they were put may well compound the problem and result in confusion as to the law of search and seizure within the Tenth Circuit. Conflict has also been created with other circuits.

Nevarez-Alcantar does not consider the question of functional equivalency, tacitly ignores the majority opinion in *Almeida-Sanchez*, blurs the distinction between investigative stops and searches incident to valid arrests, and eschews exclusionary rules in favor of testing the reasonableness of the search. It is hoped that the near future will bring a clarification of the perplexing opinion in *Nevarez-Alcantar*.

> That case held only that a search otherwise proper under the "incident to a lawful arrest" exception would not be invalidated simply because it was postponed until after arrest or processing, or until the next morning.

Cabbler v. Superintendent, 374 F. Supp. 690, 701 (D. Va. 1974).

[68] *See* text accompanying notes 39-58 *supra*. For cases discussing the circumstances in which luggage may be opened without a warrant see Draper v. United States, 358 U.S. 307 (1959); United States v. Valen, 479 F.2d 467 (3d Cir. 1973), *cert. denied*, 95 S.Ct. 185 (1974); United States v. Mehciz, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971); United States v. Issod, 370 F. Supp. 1110 (D. Wis. 1974).

II. SEARCH AND SEIZURE: PROBABLE CAUSE

The fourth amendment to the Constitution protects against unreasonable searches and seizures. The Supreme Court held in *Carroll v. United States*[1] that searches and seizures which are based on probable cause are not unreasonable and hence not violative of the fourth amendment.[2] The term "probable cause" is not defined in the Constitution, but has been variously defined as "reasonable ground for belief in guilt"[3] or as something more than bare suspicion but less than that quantum of evidence necessary to justify conviction.[4]

No matter how probable cause is defined, the determination of its existence necessarily entails a close examination by the court of the facts in each case. The Tenth Circuit made such an examination in four cases involving a warrantless search of a vehicle[5] with a subsequent seizure of contraband: *United States v. Bowman*,[6] *United States v. Newman*,[7] *United States v. Cage*,[8] and *United States v. Sigal*.[9] In each case the lower court had found probable cause and convicted; only in *Newman* did the Tenth Circuit disagree with the finding of probable cause and reverse.

I. Odor and Probable Cause

The Tenth Circuit has joined the Ninth Circuit in holding that the detection of the distinctive odor of marijuana by trained officers can by itself satisfy the probable cause requirement for searches and seizures.[10] In *United States v. Bowman*,[11] the defen-

[1] 267 U.S. 132 (1925).

[2] *Id.* at 149.

[3] *Id.* at 161, *citing* McCarthy v. DeArmit, 99 Pa. 63, 69 (1881).

[4] Brinegar v. United States, 338 U.S. 160, 175 (1949). For a recent general discussion by the Tenth Circuit of what probable cause is, see United States v. Neal, 500 F.2d 305 (10th Cir. 1974).

[5] Warrantless searches of vehicles are considered reasonable if based upon probable cause and exigent circumstances. This exception to the warrant requirement exists because of the impracticality of obtaining a warrant; *see, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). In order to justify the search as reasonable, there must be an actual danger that the vehicle might be moved and evidence lost. Where such exigent circumstances do not exist and obtaining a warrant is practicable, a warrantless search is unreasonable and hence illegal. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[6] 487 F.2d 1229 (10th Cir. 1973) (marijuana).

[7] 490 F.2d 993 (10th Cir. 1974) (marijuana).

[8] 494 F.2d 740 (10th Cir. 1974) (unregistered sawed-off shotgun).

[9] 500 F.2d 1118 (10th Cir.), *cert. denied*, 95 S. Ct. 216 (1974) (marijuana).

[10] *See, e.g.*, United States v. Barron, 472 F.2d 1215 (9th Cir. 1973), *cert. denied*, 413

dant's car was stopped for a routine nationality check by the United States Border Patrol at a checkpoint near Truth or Consequences, New Mexico. While a Border Patrol agent was talking with Bowman, the agent detected the odor of marijuana.[12] A search revealed 48 pounds of marijuana inside the car. Bowman was then arrested for possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (1970) and subsequently convicted.[13]

The Tenth Circuit had previously held that the odor of marijuana was *one* valid factor in determining probable cause.[14] In these earlier cases other factors in addition to odor were present, so the court had not been faced squarely with the issue of whether

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U.S. 920 (1973); United States v. Campos, 471 F.2d 296 (9th Cir. 1972); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963). It is interesting to note that the Hon. Talbot Smith, District Judge for the Eastern District of Michigan, was sitting by designation in both the *Barron* and *Bowman* cases.

A Third Circuit case recently held that a trained agent's independent detection of the odor of marijuana after being alerted by an air freight employee who detected the odor first was sufficient basis for probable cause to search for marijuana. Valen v. United States, 479 F.2d 467 (3d Cir. 1973), *cert. denied*, 95 S.Ct. 185 (1974).

[11] 487 F.2d 1229 (10th Cir. 1973).

[12] There is nothing in *Bowman* or the other marijuana cases to indicate that marijuana was being smoked. Rather, the indications are that the marijuana was packaged in some unspecified manner and in transport. The writer contacted local police agencies to ascertain how odorous packaged marijuana is. One agency allowed the writer to enter a vault in which packaged marijuana seized in recent drug arrests was stored. There was a definite, distinctive odor to the writer's untrained nose. However, it should be noted that the quality of packaging, quantity and quality of marijuana, and other physical factors make the possibilities of human detection of the odor highly variable.

In most cases the existence of the odor will be proved entirely by the testimony of the officer conducting the search. With the *Bowman* holding that smell alone can sustain a finding of probable cause, the possibility of police abuse arises. That policemen have resorted on occasion to using unsavory testimony was well documented in the "dropsy" cases so common after the federal exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). Following *Mapp*'s holding that evidence obtained as a result of an illegal search was not admissible, there appeared to be an increased reliance upon the plain view doctrine to justify searches and to circumvent the strictures of *Mapp*. The increase in these "dropsy" cases was noted by Younger in his article *The Perjury Routine*, THE NATION, May 8, 1967, at 596. More formal studies followed: Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549 (1968); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971). *See also* People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (N.Y. City Crim. Ct. 1970).

Police abuse of the "furtive gesture" basis for probable cause has also been assailed judicially; *see* People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).

[13] The facts are more fully set out in 487 F.2d at 1230.

[14] United States v. Anderson, 468 F.2d 1280 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); United States v. McCormick, 468 F.2d 68 (10th Cir. 1972); United States v. Miller, 460 F.2d 582 (10th Cir. 1972).

odor alone was sufficient to support a finding of probable cause.[15] The only basis for probable cause in *Bowman* was the odor of marijuana, and the court held that that was sufficient. The court noted that the Border Patrol agent had smelled marijuana many times in the past and was familiar with its distinctive odor.[16]

The odor of marijuana also played a role in *United States v. Newman*.[17] The court distinguished *Bowman* on the pivotal fact that in *Bowman* the detection of the odor preceded and in fact precipitated the search, but in *Newman* a search for illegal aliens had already begun when the odor of marijuana was detected.

Newman and Coldwell were driving a pickup truck with camper through a Border Patrol checkpoint in northeast Oklahoma, some 700 miles from the Mexican border. Because the camper was large enough to conceal illegal aliens, an agent wanted to inspect it and ordered the truck stopped. When the camper door was opened by Coldwell, the agent smelled marijuana. Coldwell returned to the front of the truck on a pretext and

[15] There are also some earlier Supreme Court cases indicating that detection of the odor of a contraband substance may be a valid factor in determining probable cause; *see, e.g.*, Johnson v. United States, 333 U.S. 10 (1948) (burning opium); Taylor v. United States, 286 U.S. 1 (1932) (fermenting mash). An older Fifth Circuit case, McBride v. United States, 284 F. 416 (5th Cir. 1922), explained that odor alone was, in appropriate circumstances, enough to meet the probable cause requirement, since a crime (possession of contraband) was being committed in the officer's presence.

Arguably, detection of an odor could be viewed as the olfactory equivalent of the "plain view" doctrine. The Fourth Circuit rejected this thesis recently in United States v. Bradshaw, 490 F.2d 1097, 1101 (4th Cir.), *cert. denied*, 95 S. Ct. 173 (1974), where an agent smelled moonshine whiskey and then searched for and found it in a truck:

> The liquor was certainly not in "plain view," within the ordinary meaning of that phrase, when [the agent] first detected the odor emanating from the truck. Nor did he, at that point, have any basis upon which to conclude, with certainty, that liquor was actually present in the truck. An alternative explanation of the smell was equally probable—that liquor had once been present in the truck but had since been removed leaving the truck permeated with its vapors. [The agent] thus had no more than a reasonable ground to infer the presence of liquor at this point. A further visual observation was necessary to confirm the hypothesis.

Although detection of the odor did not justify the search under the plain view doctrine, the majority did say however that that was sufficient basis for probable cause. *Id.* However, the search was invalidated on the ground that exigent circumstances were not present to justify a warrantless search. Judge Widener dissented "on the ground that the evidence was lawfully seized under the plain view exception." *Id.* at 1104.

The Supreme Court apparently has no objection to basing probable cause to search on the detection of the odor of contraband, as it denied certiorari on the same day in *Bradshaw*, *Sigal*, and Valen v. United States, 479 F.2d 467 (3d Cir. 1973), *cert. denied*, 95 S. Ct. 185 (1974). *See* discussion of *Valen*, *supra* note 10.

[16] 487 F.2d at 1231.

[17] 490 F.2d 993 (10th Cir. 1974).

rode off quickly with Newman. The truck was found abandoned a short while later. A search of its contents disclosed 741 pounds of marijuana. Newman and Coldwell were later arrested and convicted of possession with intent to distribute marijuana.[18]

The Tenth Circuit found no probable cause to justify the search at its inception and reversed the conviction. The court concluded that the search began when the door to the camper was opened and that at that time there was no probable cause to search for illegal aliens.[19] Thus the subsequent detection of the odor of marijuana was irrelevant, because "a search in violation of the constitution [*i.e.*, not based on probable cause] is not made lawful by what it brings to light . . . ."[20] Further, the seizure of the marijuana was tainted by the initial illegal intrusion into the camper and thus the marijuana was inadmissible as evidence against Newman and Coldwell under the "fruit of the poisonous tree" doctrine.[21]

The odor of marijuana was also a significant factor in the determination of probable cause in *United States v. Sigal*.[22] It is surprising, however, that the Tenth Circuit made no reference to its clear statement on the matter of odor in *Bowman*, which had appeared almost 8 months earlier.[23]

As Sigal crossed the Mexican border into the United States at El Paso, Texas, a customs inspector noticed that Sigal tried to conceal an aircraft key. An aircraft with a registration number matching that on Sigal's key was located and followed on a 13-day series of flights through the Southwest. A customs agent finally had the opportunity in New Mexico to inspect the aircraft

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[18] The facts are more fully set out *id.* at 994.

[19] *Id.* at 995.

[20] Harris v. United States, 151 F.2d 837, 841 (10th Cir. 1945), *aff'd*, 331 U.S. 145 (1947), *citing* Byars v. United States, 273 U.S. 28, 29 (1927). *See also* Carr v. United States, 59 F.2d 991, 993 (2d Cir. 1932): "[One cannot] lawfully be subjected to a search, illegal because not based on probable cause at its inception, on any theory that the finding of contraband justifies the means employed to find it."

The Tenth Circuit recently considered a case where a search ultimately disclosed an unregistered sawed-off shotgun. United States v. Omalza, 484 F.2d 1191 (10th Cir. 1973). Although the court concluded the search was valid, arguably its validity rested upon what was found *after* the search had begun.

[21] *See* Wong Sun v. United States, 371 U.S. 471 (1963).

[22] 500 F.2d 1118 (10th Cir.), *cert. denied*, 95 S. Ct. 216 (1974).

[23] As support for the thesis that the odor of marijuana is a valid factor in determining probable cause, the court cited two cases which *Bowman* had cited: United States v. McCormick, 468 F.2d 68 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); United States v. Miller, 460 F.2d 582 (10th Cir. 1972).

from the outside. He detected the odor of marijuana while inspecting around the air vents and then searched one of several boxes being transported in the aircraft and found marijuana. Sigal returned several hours later and flew on to Kansas, where agents following him from New Mexico arrested him on a charge of possession with intent to distribute marijuana.[24]

In examining the search in New Mexico, the court found that the detection of the odor of marijuana was the deciding factor in finding probable cause to search.[25] Furthermore, the court stressed that in determining the existence of exigent circumstances justifying a warrantless search, the *mobility* of the vehicle searched was more significant than the *type* of vehicle searched, and hence the search of a highly mobile aircraft fell within the exigent circumstances exception to the warrant requirement.[26]

Sigal claimed that there were no exigent circumstances since his aircraft was on the ground for some 15 hours in New Mexico and the agents thus had time to obtain a warrant. The court rebutted this contention by stating that the proper test to be applied is how the facts appeared to the agents at the time the search was initiated. The court noted that the agents had no way of knowing when Sigal or another might return and take off; only in hindsight did it appear that there was sufficient time to obtain a warrant from the United States magistrate located 90 miles from the airport.[27]

The defendants in *Bowman*, *Newman*, and *Sigal* were all charged with possession with intent to distribute marijuana in violation of section 841(a)(1). The distribution charge was based in each case on the quantity of marijuana possessed: in *Bowman*, 48 pounds; in *Newman*, 741 pounds; and in *Sigal*, 445 pounds. Without specifying a minimum amount, the court obviously has

[24] The facts are more fully set out in 500 F.2d at 1120-21.

[25] *Id.* at 1122.

[26] *Id.* at 1121. *Sigal* mentioned, *inter alia*, as support for a search of a vehicle with probable cause but without a warrant, Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). Both involved searches of an automobile.

[27] 500 F.2d at 1122-23. The court cited Cardwell v. Lewis, 417 U.S. 583 (1974), for the proposition that although the agents might have obtained a warrant before conducting the search, the fact that they did not obtain a warrant at the earliest possible time was not necessarily fatal to the legality of the search. *Id.* at 2472. United States v. Miller, 460 F.2d 582 (10th Cir. 1972), involved a similar situation where there was no activity on the part of the defendants for 3 hours; in hindsight, there would have been time to obtain a search warrant, but the waiting officers at the time had no way of knowing when the defendants would leave. Thus the uncertainty of the defendants' movements vitiated the warrant requirement.

concluded that quantities in excess of purely personal needs support the inference that distribution is intended.[28]

II. BORDER SEARCHES

The searches in *Bowman* and *Newman* were conducted by the Border Patrol at distances of about 98 and 700 miles from the border respectively. The Supreme Court in *Almeida-Sanchez v. United States*[29] severely limited roving warrantless "border" searches by the Border Patrol, where such searches were actually made some distance from the border.[30] In *Almeida-Sanchez* the Border Patrol stopped a car about 25 miles from the border in order to look for illegal aliens. The defendant's car was stopped on a purely random and indiscriminate basis without regard for probable cause.[31] The search resulted in the discovery of 161 pounds of marijuana under the back seat. The Supreme Court reversed the subsequent conviction in a 5-4 decision, holding that a search of a particular car had to be justified by probable cause.[32]

Almeida-Sanchez figured prominently in both *Bowman* and *Newman*.[33] *Bowman* was distinguished from *Almeida-Sanchez* on the sole basis that the detection of the odor of marijuana provided probable cause to search Bowman's car. Absent probable cause, the *Bowman* search would have been illegal.[34]

On the other hand, the reversal in *Newman* followed

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[28] The court made the same point in United States v. King, 485 F.2d 353 (10th Cir. 1973), where 602 pounds of marijuana supported the inference that defendant intended to distribute.

[29] 413 U.S. 266 (1973).

[30] Searches at the border are of a special type not requiring a warrant or even probable cause, because of an overriding national security interest inherent in any sovereign nation. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 154 (1925); United States v. King, 485 F.2d 353 (10th Cir. 1973).

[31] 413 U.S. at 268.

[32] *Id.* at 269.

[33] Two cases were heard in the Tenth Circuit between *Almeida-Sanchez* and *Bowman*, with facts much as in *Almeida-Sanchez* (*i.e.*, an inland search of a car conducted by the Border Patrol without warrant or probable cause): United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973). Upon remand to the U.S. District Court in New Mexico, that court found that the Truth or Consequences, N.M. checkpoint 98 miles from the border was not the "functional equivalent" of a border search and overturned King's and Maddox's convictions. The government appealed and was then granted a postponement (*King*, No. 74-1744, and *Maddox*, No. 74-1839, 10th Cir.) until the U.S. Supreme Court decides similar cases coming from the Ninth Circuit on which certiorari was recently granted, 95 S.Ct. 40 (1974): United States v. Ortiz, ___ F.2d ___ (9th Cir. June 19, 1974), 15 CRIM. L. RPTR. 4132; United States v. Bowen, 500 F.2d 960 (9th Cir. 1974); United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974).

[34] 487 F.2d at 1231.

Almeida-Sanchez in two respects: there was no true border search because the search took place over 700 miles from the border, and because there was no probable cause prior to the search. The government attempted to claim that probable cause existed based on these facts: the camper had Texas license plates; containers large enough to conceal illegal aliens were in the camper; the agent was experienced; and, many illegal aliens had been captured at this particular checkpoint. These facts, according to the court, were not sufficient to point specifically to Newman and his companion Coldwell as transporters of illegal aliens.[35]

The court set out the policy rationale for requiring a firm basis for probable cause in such so-called "border searches" as follows:

> To uphold a finding of probable cause on the facts presented would effectively authorize the search of each and every vehicle passing through this checkpoint with a border state license plate and sufficient capacity to conceal a human body; the inherent potential for abuse under such a rationale is virtually unlimited. It is significant to note in this respect that [the agent] admitted that he was "just indiscriminately stopping vehicles." This type of activity is not prohibited per se but cannot be escalated to frustrate the fourth amendment.[36]

It should be noted, however, that the Tenth Circuit considers *Almeida-Sanchez* to have no effect on the authority of the Border Patrol to *stop* vehicles for the restricted purpose of ascertaining nationality.[37]

III. Transferability of Information

The extent to which information furnished by another may be used in determinations of probable cause is an issue frequently confronted by the courts.[38] The Tenth Circuit was confronted

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[35] The court distinguished *Newman* from United States v. Saldana, 453 F.2d 352 (10th Cir. 1972). In *Saldana* the riders were of Mexican descent, had no nationality papers when asked in the routine citizenship inquiry, and when asked where they came from replied that they had "swum the river." Those facts were sufficient to sustain a finding of probable cause.

The validity of using Mexican descent in determinations of probable cause has been questioned in two other circuits. United States v. Guana-Sanchez, 484 F.2d 590, 592 (7th Cir. 1973), *citing* United States v. Mallides, 473 F.2d 859, 860 (9th Cir. 1973).

[36] 490 F.2d at 995.

[37] *Id.*; 487 F.2d at 1231. Thus Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969), decided before *Almeida-Sanchez*, appears to remain valid for this point. *Contra* United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir.), *cert. granted*, 95 S.Ct. 40 (1974).

[38] *See, e.g.*, Whiteley v. Warden, 401 U.S. 560 (1971) (information from a police radio bulletin may be used, provided it has a valid basis in probable cause); United States v.

with this issue in *United States v. Cage*,[39] where police acted on the basis of a radio bulletin.

Two police officers received a radioed pickup order on a car driven by the alleged perpetrators of an assault. The message described the car, and also described the occupants by sex and ethnic background, adding that they might be armed with a sawed-off shotgun. The officers found the car with occupants matching the radioed descriptions. The occupants were given their *Miranda* rights but were not arrested. Then the officers saw a bloody towel in the car. Cage was asked to open the trunk; when he complied, the officers saw a sawed-off shotgun. Cage was arrested on state charges and later a federal charge of possession of an unregistered sawed-off shotgun.[40] The Tenth Circuit upheld the subsequent conviction and justified the search on the two separate grounds of probable cause and consent.

In discussing the probable cause issue, the court first held that police may act on the basis of a radio bulletin.[41] Then the court said that seeing the bloody towel "gave sufficient support to the radio bulletin to sustain probable cause for the search."[42] On the facts of this case, it was necessary to have both the bulletin and the bloody towel in order to sustain probable cause.

The court apparently analyzed the radio bulletin both as a message and as a medium for transmitting the message. The court relied on *Whiteley v. Warden*[43] for the proposition that radio, as a medium, is a permissible means of transmitting information.[44] In analyzing the message contained in the bulletin, the

Ventresca, 380 U.S. 102 (1965) (information received from fellow officers may be used by officer-affiant to justify issuance of warrant); United States v. Harris, 403 U.S. 573 (1971) and Jones v. United States, 362 U.S. 257 (1960) (under the proper circumstances, hearsay may be used to justify issuance of warrant). If the information comes from an informant, there is a requirement that the underlying circumstances be furnished to the neutral magistrate so that he can decide whether a warrant should issue by judging the credibility of the informant and the reliability of the information. *E.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *But see* United States v. McCoy, 478 F.2d 176 (10th Cir. 1973), *cert. denied*, 414 U.S. 828 (1973) and United States v. Bell, 457 F.2d 1231 (5th Cir. 1972), where the credibility of eyewitness victims needs not be shown the magistrate to justify issuance of a warrant.

[39] 494 F.2d 740 (10th Cir. 1974).

[40] The facts are more fully set out *id.* at 741.

[41] *Id.* at 742, relying on Whiteley v. Warden, 401 U.S. 560, 568 (1971).

[42] 494 F.2d at 742.

[43] 401 U.S. 560 (1971).

[44] In *Whiteley*, radio was used to transmit an arrest warrant. Subsequently it was determined that the warrant was not based on probable cause and hence the arrest was invalid. However, the Court clearly left the inference that if the warrant had been valid,

court noted that it contained a report of a street crime.[45] Whether the report was made by the victim, an eyewitness, or an informant was not stated. In holding that the police could reasonably respond to such a report of a street crime, the court relied on language in *Adams v. Williams*:[46]

> But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.[47]

In *Cage* the court seemed to say that the particular report initially received by the police and subsequently transmitted by them could be used as a factor in determining probable cause, but it was not sufficient by itself to support probable cause. The court analogized the report to an informant's tip, which the Supreme Court discussed in *Whiteley*. The Court stated that information gathered by the arresting officers can be used to sustain a probable cause finding not adequately supportable by the tip alone.[48] Thus the sight of the bloody towel was "information gathered" by the officers, and this, when added to the report of the street crime, was sufficient to sustain probable cause.

The second basis for justifying the *Cage* search was consent, which the trial court and the Tenth Circuit found to be voluntary. Cage argued that the consent was not voluntary since he had not been told that he could withhold his consent. In *Schneckloth v. Bustamonte*[49] the Supreme Court recently reaffirmed the general rule that consent is a valid exception to the fourth amendment warrant and probable cause requirements.[50] On the issue of voluntariness, the Supreme Court stated that "[v]oluntariness is a question of fact to be determined from all the circumstances . . . ."[51] Thus lack of knowledge on the defendant's part of the right to withhold consent, or failure on the government's part to

its transmission by radio would have been entirely neutral and permissible, as radio is merely one modern, valid means of transferring information between police units.

[45] 494 F.2d at 742.

[46] 407 U.S. 143 (1972).

[47] *Id.* at 147.

[48] 401 U.S. at 567.

[49] 412 U.S. 218 (1973).

[50] In *Bustamonte* the Court relied upon two cases in support of the consent exception: Davis v. United States, 328 U.S. 582, 593-94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946). 412 U.S. at 219.

[51] 412 U.S. at 248-49.

inform the defendant of such a right, is only one of many factors to be considered. The trial court, acting as trier of fact, found that Cage had given his consent; this finding and the language in *Bustamonte* convinced the Tenth Circuit that the consent had been validly given.[52]

IV. CONCLUSION

The Tenth Circuit's approach to issues involving probable cause to search and seize without a warrant in exigent circumstances is traditional and correct. It should be noted that the judges apparently agree upon what probable cause is, as there were no concurring or dissenting opinions in the four cases discussed above. There are no surprises or radical departures from accepted views of the probable cause requirement for searches and seizures. In examining a search and seizure case, the court carefully scrutinizes the facts to ascertain: if there were reasonable grounds to believe a crime had been committed; if these reasonable grounds existed prior to the commencement of the search; and if exigent circumstances existed. If all three criteria are met, then the warrantless search is valid.

Richard F. Currey

III. GOVERNMENT INFORMERS

I. DEFINITION OF "INFORMER"

The Tenth Circuit in *United States v. Miller*[1] considered the definition of the term "informer." Miller was charged with assault with intent to commit murder,[2] and subsequent to the offense a witness voluntarily contacted the FBI to give information. The defendant, claiming the witness was an "informer," demanded reversal because the government had failed to identify the witness as an informer. The defendant moved to strike the witness' testimony, requesting that the court define an "informer" as:

[52] The result in *Cage* appears to bear out the prediction voiced in Tribe, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 221 (1973): "[T]he net result of *Bustamonte* may be that in practice a lack of knowledge of the right to refuse will rarely if ever be a significant factor in a decision about the voluntariness of consent." *Bustamonte* was affirmed in the 1973 term in United States v. Matlock, 415 U.S. 164 (1974).

[1] 499 F.2d 736 (10th Cir. 1974).

[2] 18 U.S.C. § 113(a) (1970).

> [A] person who voluntarily furnishes information to authorities as contrasted to persons who merely supply information after being interviewed and after a request for the information has been made.[3]

The court, denying Miller's appeal, held:

> The voluntary submission of information . . . does not, without more, make an individual an informer, in the absence of *some connection between the individual and the government agency*. To be an informer the individual supplying the information generally is either paid for his services or, having been a participant in the unlawful transaction, is granted immunity for his testimony.[4]

A requirement that the relationship between the informer and the government precede the criminal activity can be inferred from the Tenth Circuit case of *United States v. Harris*.[5] Harris' partners in a bank robbery testified against him at trial in exchange for leniency. The issue on appeal was whether informer or accomplice jury instructions should have been given.[6] The court held that the witnesses testified as accomplices and not as informers.[7] Seemingly, the missing element in *Harris* was a connection or relationship between the witnesses and the government *prior* to the criminal activity.

Construing these cases, an "informer" can probably be defined as one who, pursuant to a relationship existing with the government prior to the crime charged, discovers and gives the government information concerning criminal activity. That the informant is paid or granted immunity for his services is a good indication of the existence of the requisite relationship.[8]

II. Pretrial Identification of Government Informers

The government enjoys a privilege to withhold the identity of its informers from the defendant.[9] The purpose of the privilege is to encourage the free flow of information concerning criminal activity from the public to authorities, thus protecting the public interest in effective law enforcement.[10] However, this privilege

[3] 499 F.2d at 741; *accord*, Gordon v. United States, 438 F.2d 858, 875 (5th Cir. 1971).

[4] 499 F.2d at 742 (footnote omitted) (emphasis supplied).

[5] 494 F.2d 1273 (10th Cir. 1974). The Ninth Circuit, distinguishing between an "informer" and an ordinary witness, has limited "informers" to those who were "purposely used by the government to obtain evidence." United States v. Walton, 411 F.2d 283, 288 (9th Cir. 1969).

[6] *See* text accompanying notes 47-51 *infra*.

[7] 494 F.2d at 1274.

[8] 499 F.2d at 742.

[9] Roviaro v. United States, 353 U.S. 53, 59 (1957).

[10] *Id.* Courts in creating and perpetuating this privilege have taken notice of the high

must give way when disclosure of the informer's identity is necessary to insure the defendant a fair trial and an adequate opportunity to prepare his defense.[11]

In *United States v. Martinez*[12] the defendant appealed his conviction on the grounds of the trial court's denial of his request for disclosure of the identity of an informer. The informer was a government-sanctioned participant in the transaction which resulted in the charge. He did not testify at trial. The evidence implicating Martinez in the transaction was conflicting, and the informer, an eyewitness, potentially could have been helpful to the defendant. Before and during the trial, defense counsel requested the informer's identity, but each time the request was denied by the trial court. The Tenth Circuit, basing its holding on *Roviaro v. United States*,[13] reversed the convictions.[14]

Factually, *Roviaro* was almost identical to *Martinez*. In *Roviaro*, the U.S. Supreme Court stated that despite the strong underlying policy to protect the public interest in effective law enforcement, the "informer privilege" is not without limitation:

> Where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[15]

The Court set forth what has been characterized as a "balancing test" to determine the applicability of the "informer privilege." The basic opposing interests are, on the one side, the public interest in effective law enforcement and, on the other, the individual's right to prepare his defense. Whether or not the government must disclose the identity of its informer is determined by the particular facts in each case. In making the proper balance, courts should consider all relevant factors, specifically including "the crime charged, the possible defenses, [and] the possible

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mortality rate of identified informers. "Dead men tell no tales." *Id.* at 67 (Clark, J., dissenting); United States v. Pennick, 500 F.2d 184 (10th Cir. 1974).

[11] 353 U.S. at 60-61.

[12] 487 F.2d 973 (10th Cir. 1973).

[13] 353 U.S. 53 (1957).

[14] 487 F.2d at 977. The case was remanded to the district court with the instruction that the government identify the informer or the case should be dismissed. In the event the informer was disclosed, the possible relevance of his testimony was to be determined at an evidentiary hearing. Should the court find his testimony favorable to the defendant, a new trial was to be conducted; otherwise, the conviction was to be reinstated. *Id.*

[15] 353 U.S. at 60-61 (footnotes omitted).

significance of the informer's testimony."[16] Committing the facts of *Roviaro* to the balance, the Court noted that the informer was the sole participant with the accused in the criminal transaction and was the only witness in a position to dispute or amplify the testimony of the government agents. Furthermore, the evidence showed that the informer denied having known the defendant before the incident in question. The Court concluded that under these circumstances denying the defendant the disclosure of the identity of the informer was prejudicial error.[17]

The primary issue in *Roviaro* was disclosure of identity *at trial.* One of two counts on which Roviaro was convicted was sale of illegal narcotics. Because the informer "was a participant in and a material witness to that sale,"[18] the Court held that the government should have been required to make pretrial disclosure of the informer's identity in its bill of particulars, at pain of dismissal of that count. *Roviaro* has therefore become the leading case for the defendant's right to pretrial disclosure of the identity of an informer.

III. LIMITS OF THE *Roviaro* EXCEPTION[19]

Subsequent cases have in effect limited *Roviaro* to its facts, making them weighty determinants in the "balancing test." The *Roviaro* exception was intended to protect an individual's right to prepare his defense,[20] and, therefore, the identity of the informer must be essential to that defense before it will be disclosed.[21] The burden of proof is on the defendant to demonstrate a valid need for disclosure, beyond mere speculation.[22]

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[16] *Id.* at 62.

[17] *Id.* at 64-65.

[18] *Id.* at 65 n.15.

[19] Note that this discussion is not intended to deal with disclosure of an informer's identity for purposes of challenging probable cause. The law of disclosure at a suppression hearing is different from that herein discussed. McCray v. Illinois, 386 U.S. 300 (1967); Rugendorf v. United States, 376 U.S. 528 (1964); Gutterman, *The Informer Privilege*, 58 J. CRIM. L.C. & P.S. 32 (1967); Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege*, 45 DENVER L.J. 399 (1968).

[20] 353 U.S. at 60-61.

[21] *E.g.*, United States v. Guzman, 482 F.2d 272 (9th Cir. 1972), *cert. denied*, 414 U.S. 911 (1973); United States v. Hurse, 453 F.2d 128 (8th Cir. 1971), *cert. denied*, 414 U.S. 908 (1973); United States v. Roberts, 388 F.2d 646 (2d Cir. 1968); United States v. Hannah, 341 F.2d 906 (6th Cir. 1965); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960).

[22] *See, e.g.*, United States v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971); United States v. Kelly, 449 F.2d 329 (9th Cir. 1969); United States v. Pitt, 382 F.2d 322 (4th Cir. 1967).

To meet this burden, the defendant must show that the informer's testimony could be relevant and material.[23] The informer must have been present at the criminal activity, although he need not have been an actual participant.[24]

Another factor in determining the need for disclosure is whether the defendant actually knew the identity of the informer before the trial or otherwise had sufficient information to subpoena him.[25] Some cases have extended this reasoning to affirm nondisclosure when the informer was actually identified at trial through the testimony of another witness or by the appearance of the informer himself.[26]

IV. THE TESTIFYING INFORMER-WITNESS

In two cases this year, the Tenth Circuit considered the testifying informer-witness.[27] In *United States v. Baca*[28] the defendant prior to trial requested that the government disclose the name of its informer. This request was denied. The informer had witnessed and participated in the transactions for which the defendant was indicted. Given these facts alone, *Roviaro* would have required disclosure of the informer's identity, but here, unlike *Roviaro*, the informer testified at trial. The court never considered the applicability of *Roviaro*. Instead, it reasoned:

> It is settled law in this circuit that, in the absence of a statutory or constitutional requirement, the government is not required to . . . disclose its witnesses in any manner, except in a case where trial is for treason or other capital offense.[29]

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[23] Roviaro v. United States, 353 U.S. 53, 62 (1957); United States v. Baca, 444 F.2d 1292 (10th Cir.), *cert. denied*, 404 U.S. 979 (1971); Garcia v. United States, 373 F.2d 806 (10th Cir. 1967); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21 (10th Cir. 1957).

[24] *E.g.*, United States v. Picard, 464 F.2d 215 (1st Cir. 1972); United States v. Zito, 451 F.2d 361 (9th Cir. 1971); United States v. Turchick, 451 F.2d 333 (8th Cir. 1971); United States v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971); United States v. Gibbs, 435 F.2d 621 (9th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); Miller v. United States, 273 F.2d 279 (5th Cir.), *cert. denied*, 362 U.S. 928 (1960).

[25] *E.g.*, United States v. Casiano, 440 F.2d 1203 (2d Cir.), *cert. denied*, 404 U.S. 836 (1971); United States v. Escobedo, 430 F.2d 603 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971); Glass v. United States, 371 F.2d 418 (7th Cir. 1966), *cert. denied*, 386 U.S. 968 (1967); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960).

[26] The theory is that no prejudice is done the defendant. *See* Smith v. United States, 273 F.2d 462 (10th Cir. 1959); United States v. Weinberg, 345 F. Supp. 824 (E.D. Pa. 1972), *aff'd in part, rev'd in part on other grounds*, 478 F.2d 1351 (3d Cir. 1973). *But see* United States v. Pennick, 500 F.2d 184, 188 (10th Cir. 1974) (dissent).

[27] United States v. Pennick, 500 F.2d 184 (10th Cir. 1974); United States v. Baca, 494 F.2d 424 (10th Cir. 1974).

[28] 494 F.2d 424 (10th Cir. 1974).

[29] *Id.* at 427. *Accord*, United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970); United

Since this was not a capital case, the court held that the defendant was not entitled to a list of government witnesses before trial and that refusing to disclose the informer's identity was not error.[30]

Baca was followed by *United States v. Pennick*.[31] In *Pennick* a government informer who had bought illicit drugs from the defendant testified against him at trial. The defendant sought and was denied pretrial disclosure of the informer's identity. In reviewing the denial, the Tenth Circuit initially considered 18 U.S.C. § 3432 (1970), which "has been construed as meaning that in a noncapital case a defendant is *not* entitled as a matter of right to a list of the government's witnesses in advance of trial."[32] *Baca* would seemingly have disposed of the case at this point, but instead the court considered the applicability of *Roviaro* and approved the trial court's denial of disclosure on the basis of the balancing test. The court reasoned that because the informer had testified for the government there was no possibility that his testimony could have been helpful to the defendant.[33] Furthermore, the court found that the defendant had ample opportunity to cross-examine the informer[34] and the record showed neither surprise nor prejudice to the defendant.[35] In this situation the Tenth Circuit ruled there was no reason to require disclosure of the witness' identity.

The dissent, stressing the need for fairness, disagreed with the application of the balancing test, but not with its applicability.[36] Noting that the defense was limited to an unprepared cross-examination of the informer and that the government's case was wholly dependent upon the credibility of the informer, Chief

States v. Hughes, 429 F.2d 1293 (10th Cir. 1970); Nipp v. United States, 422 F.2d 509 (10th Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970); Edmondson v. United States, 402 F.2d 809 (10th Cir. 1968); Thompson v. United States, 381 F.2d 664 (10th Cir. 1967). The court's language stems from 18 U.S.C. § 3432 (1970), which provides that in a capital case a defendant shall be furnished with a list of the witnesses to be produced by the prosecution. Conversely, the defendant in a noncapital case is not entitled to such a list. 494 F.2d at 427.

[30] 494 F.2d at 427; *see* United States v. Pennick, 500 F.2d 184 (10th Cir. 1974); United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969); United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969); Edmondson v. United States, 402 F.2d 809 (10th Cir. 1968).

[31] 500 F.2d 184 (10th Cir. 1974).

[32] *Id.* at 186.

[33] *Id.* at 187.

[34] *Id. Cf.* United States v. Miller, 499 F.2d 736 (10th Cir. 1974) (dictum); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960).

[35] 500 F.2d at 187.

[36] *Id.* at 188 (Lewis, C.J., dissenting).

Judge Lewis pointed out that *Roviaro* is not limited to witnesses potentially favorable to the defense and that, under the circumstances here, the demands of a fair trial required disclosure of the informer-witness' identity.[37]

V. PRODUCTION OF INFORMERS AT TRIAL

In *United States v. Williams*[38] an informer was present though not a participant in the illegal transactions for which the defendant was convicted. The informer did not testify at trial. The defendant alleged entrapment and demanded that the government produce its informer at trial. On appeal the defendant contended that the information should have been dismissed for failure to produce the informer.

The Tenth Circuit described the modern trend to require the prosecution to produce an informer at trial upon the defendant's demands[39] but then, quoting from *United States v. Hayes*,[40] held:

> The government is not the guarantor of the appearance of its informant at trial, but is required to accord reasonable cooperation in securing his appearance where a timely request is made and his testimony might substantiate a claim of the defense.[41]

The court noted that even upon the showing of due diligence by the government to locate the informer the demands of due process may require dismissal of charges if by this absence of the informer, the defendant could not obtain a fair trial.[42] Here, where the informer's activity was limited to introducing the government agents to the defendant, and where he took no further part in the transactions, the facts were not such as would deprive the defendant of a fair trial without the presence of the informer.[43]

Analogous to *Williams* is *United States v. Johnson*.[44] The defendant alleged entrapment and demanded that the government produce its informer.[45] Prior to trial the defendant and the government agreed not to call the informer since the defense was unable to interview him. At trial the defendant demanded pro-

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[37] *Id.*

[38] 488 F.2d 788 (10th Cir. 1973).

[39] *Id.* at 790.

[40] 477 F.2d 868 (10th Cir. 1973).

[41] 488 F.2d at 790; United States v. Hayes, 477 F.2d 868, 871 (10th Cir. 1973).

[42] 488 F.2d at 790.

[43] *Id.*

[44] 495 F.2d 242 (10th Cir. 1974).

[45] Johnson's entrapment defense was stronger than Williams'; the court itself lamented the informer's absence. *Id.* at 245.

duction, and the court granted a continuance while the government issued a subpoena for the missing informer. In the light of this tardy and inconsistent request, the Tenth Circuit held that the government had made a reasonable effort to locate the informer and therefore their duty was fulfilled. In so doing, the court held that by failing to exercise due diligence to obtain the informer's presence, the defendant could not appeal his absence.[46]

VI. THE INFORMER AND JURY INSTRUCTIONS

United States v. Harris[47] presented the question of jury instructions available to a defendant against whom an informer has testified. When an informer testifies for the government the defendant is entitled to a special, cautionary jury instruction.[48] Harris appealed because the trial court gave accomplice instructions instead of informer instructions.[49] The appeal was denied on the grounds that the accomplice instructions were more appropriate[50] and that the instructions as a whole were adequate.[51]

In *United States v. Anderson*[52] the informer was not present at trial. The defendant requested the following "missing witness" instruction be given:

> If a witness whose testimony would have been material on an issue in this case was peculiarly available to the government and was not introduced by the government and the absence of that witness

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[46] *Id.* The defendant is obligated to make a timely request either for disclosure or production, and failure to do so will reduce or eliminate the government's duty to make a reasonable effort to find its informer. United States v. Hayes, 477 F.2d 868 (10th Cir. 1973); United States v. Smart, 448 F.2d 931 (2d Cir. 1971). *But see* Lopez-Hernandez v. United States, 394 F.2d 820 (9th Cir. 1968) (at trial request for disclosure not in bad faith or for dilatory purposes).

[47] 494 F.2d 1273 (9th Cir. 1974).

[48] Todd v. United States, 345 F.2d 299 (10th Cir. 1965); *cf.* On Lee v. United States, 343 U.S. 747 (1952). For an example of an informer instruction, see United States v. Miller, 499 F.2d 736, 742 n.3 (10th Cir. 1973). Where the informer's testimony is "very substantially" corroborated, the cautionary instructions can be omitted without error. Todd v. United States, *supra* at 300-01.

[49] Accomplice and informer instructions differ only in title, not in substance. *See* C. WRIGHT, 2 FEDERAL PRACTICE AND PROCEDURE ¶ 490 (2d ed. 1969). Wright treats the informer and accomplice instructions in the same paragraph. The jury is told that the testimony of the informer or accomplice should be considered "with close and searching scrutiny and caution." United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

[50] *See* text accompanying notes 6-8 *supra*.

[51] 494 F.2d at 1274; *see* United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973); United States v. Beitscher, 467 F.2d 269 (10th Cir. 1972); Devine v. United States, 403 F.2d 93 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969); Beck v. United States, 305 F.2d 595 (10th Cir. 1962).

[52] 484 F.2d 746 (10th Cir. 1973).

> has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony by that witness would have been unfavorable to the government and favorable to the accused.[53]

As indicated by the requested instruction, the "missing witness" instruction permits the jury to make a presumption in favor of the defendant when the government is either capable of finding the witness or incapable of demonstrating a reasonable effort to do so.[54] The court here found that since the officer had not seen the informer for "some time" and had given defense counsel the informer's last known address, the "missing witness" instructions were not required.[55]

Alex Halpern

IV. THE CONSTITUTIONALITY OF DENVER'S HOLD AND TREAT ORDINANCE

Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973)

INTRODUCTION

In *Reynolds v. McNichols*[1] the Tenth Circuit upheld the constitutionality of a Denver ordinance aimed at controlling venereal disease. The plaintiff, Roxanne Reynolds, an admitted prostitute,[2] sued the City and County of Denver, its mayor, and several other city officials under sections 1983 and 1985 of the Civil Rights Act.[3] Miss Reynolds alleged that her civil rights had been violated by Denver's hold and treat health ordinance, section 735 of the Revised Municipal Code of Denver.[4]

The Denver ordinance attempts to protect the public from the spread of venereal disease by two separate methods—jail quarantine[5] and mandatory health examination.[6] The ordinance

[53] *Id.* at 747.

[54] *See* United States v. Fancutt, 491 F.2d 312 (10th Cir. 1974); *accord,* United States v. Pollard, 483 F.2d 929 (8th Cir. 1973); United States v. Pugh, 436 F.2d 222 (D.C. Cir. 1970) (and cases cited therein); United States v. Peterson, 424 F.2d 1357 (7th Cir. 1970) (no presumption where witness equally available to both sides).

[55] 484 F.2d at 747.

[1] 488 F.2d 1378 (10th Cir. 1973).

[2] *Id.* at 1382.

[3] 42 U.S.C. §§ 1983, 1985 (1964).

[4] REV. MUNICIPAL CODE OF DENVER § 735 (1950).

[5] *Id.* § 735.1-2.

[6] *Id.* § 735.1-5.

empowers police to detain in jail any individual "reasonably suspected" of having venereal disease. Section 735.1-1(1) defines those "reasonably suspected" as any persons arrested and charged with prostitution, vagrancy (a non-sex offense), rape, or "another offense related to sex."[7] Such persons may be detained in jail without bond, examined, and treated for venereal disease; the detention continues for "such time as is reasonably necessary to examine and render treatment."[8]

The ordinance also gives the police authority to issue "walk-in" orders, which require individuals to report to the department of health and hospitals for examinations and treatment. Section 735.1-1(2) outlines those persons who may be required to undergo such an examination—those "reasonably suspected to have had a contact with another individual reasonably believed to have had a communicable venereal disease at the time of such contact . . . ."[9]

Reynolds was subjected to the ordinance's walk-in and quarantine provisions a number of times. In 1970 upon her initial arrest for prostitution she was taken to the city jail for quarantine and, as provided in the Denver ordinance, was given a blood test, treated with an injection of penicillin, and then released on bond. Twice in 1971 the plaintiff was issued walk-in orders to report to the Department of Health and Hospitals for tests and possible treatment. In the first of these examinations she was found infected with venereal disease and treated. However, in May of 1972, when she was served with another walk-in order, she reported to the Department of Health and Hospitals with her attorney and refused to submit to any examination. Finally, in June of 1972 she was arrested again for prostitution. Once in the city jail, she was given the choice between quarantine for 48 hours during which time she would be examined and treated for venereal disease, or a penicillin injection without a prior examination, followed by immediate release. The plaintiff chose the latter alternative.

Upon her release, Reynolds filed suit, alleging that Denver's hold and treat ordinance was unconstitutional on its face, and, in the alternative, that it had been unconstitutionally applied to her. The plaintiff based her constitutional attack on several

[7] *Id.* § 735.1-1(1).
[8] *Id.* § 735.1-2.
[9] *Id.* § 735.1-1(2).

grounds: (1) that the ordinance authorizes involuntary detention without bail, and involuntary examination and treatment in violation of the fourth amendment right to be secure in one's person; (2) the ordinance is unconstitutionally vague as to the class of persons who can be forced to submit to examination and treatment; (3) the ordinance authorizes an unconstitutional coercion of persons in forcing them to choose between detention without bail for examination or immediate treatment and release without an examination;[10] and (4) the ordinance is applied only to females.[11]

The Tenth Circuit upheld the constitutionality of the Denver legislation, noting that the purpose of the ordinance was to control the spread of communicable venereal disease and that prostitutes were the logical source.[12] It concluded that quarantine to examine and treat those suspected of having venereal disease is a valid exercise of the police power. The court dismissed two of the plaintiff's constitutional allegations, finding the selective enforcement ground "unavailing"[13] and holding that no evidence of unconstitutional coercion existed.[14] The court never addressed itself to the plaintiff's bail and vagueness arguments.

The *Reynolds* decision failed to deal with many issues which clearly expose the ordinance's unconstitutionality. However, the court had little choice but to uphold the legislation, for the plaintiff never raised the proper constitutional issues and never explored in the proper depth those arguments which were made. Courts have held that a strong presumption of legislative validity exists, and a statute will not be struck down unless those challenging the legislation adequately rebut this presumption.[15] Here the plaintiff failed to overcome the presumption and the court was forced to confirm the ordinance's validity.

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[10] 488 F.2d at 1380. This comment does not discuss the unconstitutional conditions issue, since the court did not deal with it broadly, but limited the holding to the facts of the case. The court implied that given a different factual situation and a different record, it might have reached another conclusion. "According to the record, there was no particular risk involved in the taking of a penicillin shot . . . . On this state of the record, we find no unconstitutional coercion of the plaintiff." *See generally* Note, *Another Look at Unconstitutional Conditions*, 117 U. OF PA. L. REV. 144 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[11] 488 F.2d at 1382.

[12] *Id.* at 1382-83.

[13] *Id.* at 1383.

[14] *Id.*

[15] Gitlow v. New York, 268 U.S. 652 (1925); Mugler v. Kansas, 123 U.S. 623 (1887).

There are a number of attacks the plaintiff should have made which, arguably, would have convinced the court to strike down the ordinance. When more substantive challenges to a similar San Francisco hold and treat ordinance were presented to a California Superior Court, the court invalidated the legislation.[16] This plaintiff should have explored the police power and search issues more thoroughly. In addition, equal protection, due process, and bail analyses clearly expose the ordinance's constitutional flaws. This comment begins where the plaintiff left off and assesses the validity of the ordinance in light of these arguments.

I. POLICE POWER

Denver's hold and treat ordinance was ostensibly passed under the city's police power, the inherent power of all sovereign governments to legislate, to maintain order, and to promote the public good—to govern in the broadest sense of that term.[17] It is considered a power reserved to each state[18] by virtue of the state's sovereignty, rather than an enumerated power which the states surrendered to the Federal Government when creating the Constitution.[19] States traditionally utilize the police power to create legislation which promotes and protects the health, safety, welfare, and morals of its citizens.[20]

Under the auspices of the police power, then, Colorado has the authority to pass legislation whose end is to control venereal disease.[21] Moreover, the City and County of Denver shares concurrent powers with the state to legislate for the public health.[22] Both the Colorado constitution[23] and the Denver municipal charter[24] recognize this police power of the city. The Denver hold

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[16] Griggs v. Scott, No. 669-690 (Cal. Super. Ct. Feb. 7, 1974), slip op. at 2.

[17] People v. Brazee, 183 Mich. 259, 149 N.W. 1053 (1914), *aff'd*, 241 U.S. 340 (1916); Mugler v. Kansas, 123 U.S. 623 (1887).

[18] Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935).

[19] *Id.*

[20] California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).

[21] Colorado has exercised its power by enacting COLO. REV. STAT. ANN. § 66-9-1 to -7 (1963).

[22] Denver is a "home-rule" city and, therefore, has exclusive jurisdiction to regulate purely local matters. When a state statute conflicts with a municipal ordinance, if the matter is of "local" concern, the state statute is without effect. What is of a "local" nature has been determined by the courts. *See* Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971); Vick v. People, 166 Colo. 565, 445 P.2d 220 (1968) (dictum); Woolverton v. City & County of Denver, 146 Colo. 247, 254, 361 P.2d 982, 985 (1961); Spears Free Clinic & Hospital v. State Bd. of Health, 122 Colo. 147, 149, 220 P.2d 872, 874 (1950).

[23] COLO. CONST. art. XX, § 6.

[24] Denver City Charter ch. B, art. I, para. B1.1 (1968).

and treat ordinance is an exercise of these municipal police powers.

Courts have had difficulty defining and limiting the police power[25] and generally allow states wide discretion in their exercise of this power.[26] Although the police power has been described as "one of the least limitable of government powers,"[27] courts have fashioned some general guidelines for its exercise.[28] Legislation must be "reasonably related" to the protection of the public health, safety, welfare, or morals[29] or else will be invalidated.[30] The test of what is reasonable is to determine whether the means of legislation further its end.[31] When considering whether the means used are reasonable, courts look to whether they are "unduly oppressive"[32] or go beyond what is reasonably required for the protection of the public.[33] However, there is no consensus as to what constitutes reasonableness, since courts determine the issue on an ad hoc basis, evaluating and weighing the facts and circumstances of each case.[34]

Because the public health is viewed as essential to the well being of any society,[35] the legislature has been given great discretion in the area of health regulation. The state has great latitude both in determining what constitutes a danger to public health and what means are appropriate to cope with the problem.[36] For example, states can regulate anything from contagious disease to the method of garbage disposal.[37]

Courts have often upheld legislation similar to the Denver hold and treat ordinance.[38] These decisions have stressed the ob-

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[25] *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

[26] All of the tests which apply to a state's police powers apply to municipalities also.

[27] Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).

[28] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Meyer v. Nebraska, 262 U.S. 390 (1923); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Atkin v. Kansas, 191 U.S. 207 (1903).

[29] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Meyer v. Nebraska, 262 U.S. 390 (1923); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Mugler v. Kansas, 123 U.S. 623 (1887).

[30] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[31] *Id.*; Lawton v. Steele, 152 U.S. 133 (1894).

[32] Lawton v. Steele, 152 U.S. 133, 137 (1894).

[33] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[34] State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938). *See generally* cases cited note 29 *supra*.

[35] California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).

[36] *Ex parte* Fowler, 85 Okla. Crim. 64, 184 P.2d 814 (1947).

[37] California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).

[38] Welch v. Shepard, 165 Kan. 394, 196 P.2d 235 (1948); *Ex. parte* Fowler, 85 Okla.

ject of the legislation, that is, the need to protect the public health. On the other hand, some courts have invalidated this same type of legislation and usually have emphasized the unreasonableness of the means employed.[39] For example, in *Ex parte Dillon*[40] a California court invalidated a health department order which authorized the police to quarantine individuals arrested for "any . . . offense involving sexual immoralities" and to examine and treat them for venereal disease. The court decided that the ordinance was an inappropriate use of the police power because it went beyond what was needed to protect the public health since not all of the individuals arrested under it had venereal disease. This result was reached even though "90% of the women so arrested and charged . . . [were] found to be afflicted with contagious . . . venereal disease."[41]

Although a state has broad powers in the field of health, the Denver ordinance goes far beyond what is a reasonable means of controlling venereal disease. The ordinance requires that individuals who refuse treatment are to be detained in jail without bond "for such time as is reasonably necessary to examine such person and render treatment."[42] Since these individuals are being "detained for health,"[43] the proper place for them is a hospital, not a penal institution.[44] These means, then, are extreme and an inappropriate use of the police power.

The means are also unreasonable since the quarantine fails to promote the control of venereal disease. The ordinance allows individuals detained under its provisions to receive a penicillin injection in lieu of quarantine;[45] once they have received this shot, they are immediately eligible for release. However, the penicillin does not take effect and destroy an infection until 24 to 48 hours

Crim. 64, 184 P.2d 814 (1947); People *ex rel.* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944); Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943); City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942).

[39] *Ex parte* Dillon, 44 Cal. App. 239, 186 P. 170 (1919); State v. Kirby, 120 Iowa 26, 94 N.W. 254 (1903).

[40] 44 Cal. App. 239, 186 P. 170 (1919).

[41] *Id.* at 171. However, this statistic was compiled in a 1908 study and no longer reflects the current incidence of venereal disease in prostitutes.

[42] REV. MUNICIPAL CODE OF DENVER § 735.1-2 (1950).

[43] *Id.*

[44] Dowling v. Harden, 18 Ala. App. 63, 88 So. 217 (1921). *See generally* Jackson v. Indiana, 406 U.S. 715, 738 (1972): "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

[45] 488 F.2d at 1383.

after the time of the injection.[46] During this period an individual remains fully capable of spreading the disease. A quarantine, then, for less than 48 hours is a completely ineffective method of controlling venereal disease.

A primary limitation on the police power are the rights guaranteed to individuals by the U.S. Constitution.[47] A federal district court has remarked that "the police power . . . is not a sanctuary from which constitutionally protected rights of citizens may be violated with impunity."[48] A state may clearly have the power to legislate in a given area, but even if the legislation utilizes reasonable means, it must not invade other constitutionally protected rights. As the following analyses will demonstrate, the exercise of the police power contained in the Denver ordinance is subject to challenge on fourth, eighth, and fourteenth amendment grounds.

II. EQUAL PROTECTION

Although the plaintiff did not utilize the fourteenth amendment's equal protection provisions to evaluate the constitutionality of the Denver ordinance,[49] such analyses clearly reveal its constitutional defects. The fourteenth amendment prohibits a state from denying any person equal protection of the laws.[50] While a state can statutorily classify individuals into different groupings for various purposes, those classifications must be reasonable.[51] Courts have adopted two tests to determine whether

[46] Brief for Plaintiff at 41, Griggs v. Scott, No. 669-690 (Cal. Super., Feb. 7, 1974).

[47] Mugler v. Kansas, 123 U.S. 623 (1887).

[48] Lewis v. City of Grand Rapids, 222 F. Supp. 349, 383 (W.D. Mich. 1963), *rev'd in part on other grounds*, 356 F.2d 276 (6th Cir.), *cert. denied*, 385 U.S. 838 (1966).

[49] The plaintiff alluded to the equal protection issue of discriminatory enforcement, but failed to explore or argue it in depth. Brief for Appellant at 6, Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973). Reynolds offered as proof of such selectivity only two instances both of which occurred when she was arrested and quarantined while her "patron" was not. To successfully argue and prove selective enforcement, one must show systematic, deliberate, or intentional discrimination. Oyler v. Boles, 368 U.S. 448, 456 (1962); Edelman v. California, 344 U.S. 357, 359 (1959); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963). Since the government is allowed some discretion in enforcement, mere laxity or failure to prosecute all offenders is not sufficient to prove a denial of equal protection. McKay Tel. & Cable Co. v. City of Little Rock, 250 U.S. 94 (1919); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. OF ILL. L. FORUM 88 (1973); Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, AM. CRIM. L. REV., 373, 403-11 (1973). The *Reynolds* court quite correctly found plaintiff's claim "unavailing," for the plaintiff failed to offer enough instances which would indicate any pattern of deliberateness on the part of the Denver Police Department. 488 F.2d at 1383.

[50] U.S. CONST. amend. XIV, § 1.

[51] Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 172 (1972); Reed v. Reed, 404 U.S. 71, 75-76 (1971); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Skinner v. Oklahoma, 316

legislation violates equal protection—a rational relationship test and a compelling interest test.[52]

Under the traditional rational relationship scheme, a presumption exists in favor of a statute's constitutionality.[53] A court will uphold any classifications which reasonably promote a legitimate government end, provided no fundamental rights or suspect classes are involved.[54] However, when legislation adversely affects fundamental rights, such as the right to vote,[55] the right to procreate,[56] or criminal procedure guarantees,[57] or is based upon the suspect classifications[58] of race,[59] or lineage,[60] a court will utilize a strict scrutiny standard. The state has the burden of demonstrating that the challenged legislation is not only rationally related to the legislative end, but is necessary to promote a "compelling" state interest and that no alternative means of effecting that purpose exist.[61]

A. *Rational Relationship*

A rational relationship analysis reveals that the classifications which the ordinance creates by its quarantine section do little to promote the legislative end of controlling venereal disease. As the Tenth Circuit repeatedly emphasized, the purpose of the ordinance is "to bring under control, and lessen, the incidence of venereal disease . . . by determining and treating the *source* of [the] infection."[62] The ordinance distinguishes three

U.S. 535, 540 (1942); Lamb v. Brown, 456 F.2d 18, 19 (10th Cir. 1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342 (1949); *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

[52] Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 172 (1972); *Developments*, *supra* note 51, at 1076-87.

[53] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[54] Independent Dairyman's Ass'n v. Denver, 142 F.2d 940, 942 (10th Cir. 1944); *Developments*, *supra* note 51, at 1082, 1087-1132.

[55] Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

[56] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[57] Griffin v. Illinois, 351 U.S. 12 (1956).

[58] The Supreme Court has not designated sex as a suspect classification, though at least one court has. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529 (1971); Rosenbleet & Pariente, *supra* note 49, at 392-393.

[59] McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483 (1954).

[60] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[61] Roe v. Wade, 410 U.S. 113, 155-56 (1973); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Rosenbleet & Pariente, *supra* note 49, at 381; Tussman & tenBroek, *supra* note 51, at 353-65.

[62] 488 F.2d at 1381 (emphasis added).

classes of those who may have venereal disease: 1) those falling within section 735.1-1(1), who may be quarantined; 2) those falling within section 735.1-1(2), who may be given "walk-in" orders to appear at the department of health; and impliedly, 3) those of the general public not included within the ordinance.[63]

The special burden of quarantine is imposed on only those persons arrested and charged with vagrancy, prostitution, rape, or another "offense related to sex."[64] Section 822 of the Denver Municipal Code delineates the "offenses relating to sex" referred to in the health ordinance. These offenses include: prostitution; public indecency; exposing the breasts or lower torso; unlawfully registering under a fictitious name; use of transient accomodations for immoral purposes; bestiality; patronizing a prostitute; solicitation of drinks.[65] Quarantining this class of individuals only

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[63] REV. MUNICIPAL CODE OF DENVER § 735.1-1(1), (2) (1950).

[64] *Id.* § 735.1-1(1).

[65] REV. MUNICIPAL CODE OF DENVER § 822 (1950), "Offenses Relating to Sex":

822-OFFENSES RELATING TO SEX

.1. **Prostitution; Public Indecency; Deviate Sexual Intercourse.**

.1-1. It shall be unlawful for any person:

.1-1(1). To solicit another for the purpose of prostitution;

.1-1(2). To arrange or offer to arrange a meeting of persons for the purpose of prostitution;

.1-1(3). To direct another person to a place knowing such direction is for the purpose of prostitution;

.1-1(4). Knowingly to arrange or offer to arrange a situation in which a person may practice prostitution;

.1-1(5). To have or exercise or control the use of any facility, and:

.1-1(5) (a). Knowingly to grant or permit the use of such facility for the purpose of prostitution; or

.1-1(5) (b). Knowingly to permit the continued use of such facility for the purpose of prostitution, after becoming aware of facts or circumstances from which such person should reasonably know that such facility is being used for purposes of prostitution;

.1-1(6). By word, gesture, or action, to endeavor to further the practice of prostitution in any place which is public in nature or within public view;

.1-1(7). To perform, offer, or agree to perform any act of prostitution; or

.1-1(8). To perform an act of public indecency. (Ord. 836, Series 1973)

.2. **Prostitute, Pimp, Panderer, or Procurer Loitering.**

.2-1. It shall be unlawful for:

.2-1(1). Any person to loiter or stroll in, about, or upon any way, place, or building, either public or private, accosting or soliciting any other person or persons for the purpose of prostitution; or

.2-1(2). Any pimp, panderer, or procurer to loiter or stroll in, about, or upon any way, place, or building, either public or private, accosting or soliciting any other person or persons for the purpose of prostitution. (Ord. 836, Series 1973)

.3. **Exposing the Breasts or Lower Torso.**

.3-1. It shall be unlawful:

.3-1(1). For any female person who has reached her twelfth birthday to

marginally furthers the legislative purpose. Venereal disease can be spread only by sexual contact;[66] yet the ordinance singles out people arrested and charged with offenses that do not include such contact. Of all the offenses enumerated in the ordinance, only bestiality, rape, and some acts within the prostitution section specifically include sexual intercourse as a necessary element.[67] The statutory net, then, sweeps too wide and if it catches those infected with venereal disease does so more by accident than design.

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appear in any place which is public in nature clothed or costumed in such a manner that the portion of her breast or breasts consisting of the nipple and the pigmented area adjacent thereto, otherwise defined as the aureola, is not fully covered with a completely opaque covering; or

.3-1(2). For any person to appear in any place which is public in nature with any part of his or her lower torso uncovered so as to expose the cleft of the buttocks or genital organs. (Ord. 836, Series 1973)

.4. **Unlawful to Register Fictitious Name.**

.4-1. It will be unlawful for any person to write or cause to be written, or knowingly to permit to be written, in any register in any hotel, motor hotel, lodging house, rooming house, or other place whatsoever where transients are accommodated, any other or different name or designation than the true name of the person so registered therein, or the name by which such person is generally known, for the purpose of committing an offense relating to sex, as provided in this article 822. (Ord. 836, Series 1973)

.5. **Use of Transient Accommodations for Immoral Purposes.**

.5-1. It shall be unlawful for any person knowingly to permit the use of or to use any hotel, motor hotel, lodging house, rooming house, or other place whatsoever, where transients are accommodated, for the purpose of committing an offense relating to sex, as provided in this article 822. (Ord. 836, Series 1973)

.6. **Bestiality.**

.6-1. It shall be unlawful for any person to have sexual intercourse with an animal other than a human being. (Ord. 836, Series 1973)

.7. **Patronizing a Prostitute.**

.7-1. It shall be unlawful for any person to engage in or offer or agree to engage in an act of sexual intercourse or deviate sexual conduct with a prostitute or to enter or remain in a place of prostitution with the intent to engage in an act of prostitution or deviate sexual conduct. (Ord. 836, Series 1973)

.8. **Solicitation of Drinks.**

.8-1. It shall be unlawful for any person to frequent or loiter in any tavern, cabaret, nightclub, or other establishment where intoxicants are sold for the purpose of engaging in the practice of or with the purpose of soliciting another person to purchase drinks.

.8-2. It shall be unlawful for the proprietor or operator of any such establishment to allow the presence in such establishment of any person who violates the provisions of this Section 822.8 (Ord. 836, Series 1973)

[66] Brief for Plaintiff at 41, Griggs v. Scott, No. 669-690 (Cal. Super., Feb. 7, 1974).

[67] In the Denver Code, even the offense of prostitution does not contain "contact" as a necessary element; one need only "solicit" to be arrested for the offense. Similarly, one arrested as a panderer need only loiter and solicit for prostitution.

While a legislature may deal with a problem in a piecemeal manner, regulating only that harm which it thinks is most acute,[68] even piecemeal legislation must have a factual, logical basis.[69] Here, the drafters of the Denver ordinance apparently presumed that those arrested for the enumerated offenses would be more likely to maintain contacts with carriers of venereal disease. However, there is no rationale for assuming that one picked up on charges of vagrancy or allowing others to register under a ficticious name is more likely to have venereal disease or have had contact with a carrier than anyone else in the general public. The ordinance, then, irrationally regulates a very small group of individuals more because they are highly visible than because they pose a major health threat.

Even the assumption repeatedly made by the *Reynolds* court, that prostitutes are a major source of venereal disease, is erroneous. The court implies that although the ordinance requires quarantine of persons charged with varied offenses, the primary health hazard is the prostitute.[70] Recent studies, though, indicate that prostitutes are not a major source of venereal disease. In a 3-year study of venereal disease in Seattle, Washington, all women arrested as prostitutes were examined and fewer than 6 percent were found to be infected with gonorrea.[71] A 1972 California study yielded similar results. Only 8 percent of those prostitutes subjected to a quarantine similar to that provided for in the Colorado ordinance were found to be infected with venereal disease.[72] The Seattle study also indicated that while the highest rate of venereal disease is found among people aged 15-30, the age group which most frequently visits prostitutes ranges from 30-60.[73] These findings support the general conclusion that prosti-

[68] Schilb v. Kuebel, 404 U.S. 357, 364 (1971); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); *Developments, supra* note 51, at 1084.

[69] *See* authorities cited note 68 *supra*.

[70] 488 F.2d at 1382-83.

[71] The court in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super., Nov. 3, 1972), slip op. at 14, took judicial notice of this study and of others which reached the same conclusion:

> Over a decade ago, it was remarked in a United Nations publication that "(T)he prostitute ceases to be the major factor in the spread of venereal disease in the United States today." This general conclusion has been firmly ratified by knowledgeable physicians and investigators in the field of public health.

See also Rosenbleet & Pariente, *supra* note 49, at 417.

[72] Brief for Plaintiff at 40, Griggs v. Scott, No. 669-690 (Cal. Super., Feb. 7, 1974).

[73] United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super., Nov. 3, 1972), slip. op. at 16; Rosenbleet & Pariente, *supra* note 49, at 417.

tutes no longer account for a significant spread of venereal disease.[74] Thus, the State of Colorado is at best marginally controlling venereal disease by singling out prostitutes for quarantine.

Courts also assess whether legislation is overbroad or underinclusive to determine if it meets the rational relationship test.[75] The Denver ordinance suffers from both overbreadth and underinclusiveness. Equal protection prevents a state from enacting "overbroad" legislation which regulates and burdens those who do not possess the characteristics forbidden by the legislature.[76] A classic example of overbreadth is the ordinance struck down by the Supreme Court in *Papachristou v. City of Jacksonville*.[77] That ordinance deemed vagrants those who are

> [r]ogues and vagabonds . . . common gamblers, persons who use juggling or unlawful games . . . common drunkards . . . lewd, wanton and lascivious persons . . . persons wandering or strolling around from place to place without any lawful purpose or object . . . habitual loafers. . . .[78]

While this ordinance purported to regulate only vagrants, it clearly affected perfectly innocent behavior. Similarly, the Denver ordinance regulates both those who may have venereal disease and those who clearly do not. It lumps together individuals arrested for both noncontact and contact offenses and imposes the burden of quarantine on all of them. It therefore sweeps too broadly and fails to promote logically the legislative intent. It aims at too large a group, in hopes of hitting its target.

At the same time, the ordinance is underinclusive, because it imposes quarantine and mandatory treatment on only a small portion of those possibly infected with venereal disease: " 'Probably ninety per cent (90%) of venereal disease is unrelated to prostitution.' "[79] While there is a recognized epidemic of venereal disease among high school students[80] no quarantine or examination

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[74] *See generally* Note, *The Principle of Harm and Its Application to Laws Criminalizing Prostitution*, 51 DENVER L.J. 235 (1974).

[75] For a discussion of legislative underinclusiveness and overbreadth, *see* Tussman & tenBroeck, *supra* note 51, at 344-53.

[76] Eisenstadt v. Baird, 405 U.S. 438, 451, 454-55 (1972); *see* Stanley v. Illinois, 405 U.S. 645, 654-57 (1972); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[77] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[78] *Id.* at 156-57.

[79] United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972) slip op. at 15, *citing* Dr. R. Palmer Beasley of the University of Washington School of Public Health and Community Medicine.

[80] Brief for Plaintiff at 43, Griggs v. Scott, No. 669-690 (Calif. Super. Ct., Feb. 7,

procedure has been created for them. The ordinance deals with the problem in an ineffectual, discriminatory manner.[81] The ordinance's classifications, then, as to prostitutes and the other groups subjected to quarantine is unreasonable, and therefore, fails the equal protection rational relationship test.

B. *Fundamental Interests*

Because the ordinance also affects two fundamental interests—liberty and privacy—it must be evaluated by a compelling state interest standard. Courts have stated that liberty is a fundamental right protected by the Constitution.[82] Pretrial imprisonment is viewed as an infringement of liberty because it imposes a punishment prior to conviction and therefore erodes the presumption of innocence.[83] The Denver ordinance curtails an individual's liberty by detention in jail before it is determined that a quarantine is even necessary. Although the ordinance states that such detention has no punitive overtones,[84] its effect is in fact punitive in that individuals are detained in a jail and prevented from leaving or posting bail.[85] In addition, the conditions of this pretrial imprisonment are traditionally poor—overcrowding, inadequate recreational facilities, and low-quality food.[86]

The quarantine ordinance also deprives individuals of their right to privacy. Privacy has long been recognized as a fundamental constitutionally protected interest.[87] The Supreme Court has recently enunciated the right as a separate guarantee, which has its roots in the "penumbras" (literally "shadows") of various constitutional rights, such as those of the first, fourth, ninth, and fourteenth amendments.[88] The right is not confined to marital

1974). A recent World Health Organization study indicated that in "the world as a whole the rate of venereal disease among teenagers aged 15 to 19 is twice the rate for the entire population." Rocky Mountain News, Nov. 16, 1974, at 116, col. 1.

[81] *See generally* Tussman & tenBroeck, *supra* note 51.

[82] Gardner v. Illinois, 393 U.S. 367 (1969); Griffin v. Illinois, 351 U.S. 12 (1956).

[83] Stack v. Boyle, 342 U.S. 1, 4 (1951); United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 16 (D. Conn. 1968); United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 38.

[84] Section 735.1-2 of the ordinance states that "The provisions hereof shall not be utilized as, nor construed to be, a penalty or punishment."

[85] For a discussion of the bail issue, *see* text accompanying notes 137-46 *infra*.

[86] Conditions in city jails are so poor that "when an accused is convicted and sentenced to imprisonment, his standard of living is almost certain to rise." Foote, *The Coming Constitutional Crisis in Bail:* II, 113 U. PA. L. REV. 1125, 1144 (1965).

[87] Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

[88] Roe v. Wade, 410 U.S. 113, 152-53 (1973). *See generally* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Rhoades & Patula, *The Ninth Amendment: A Survey of Theory*

relationships, but extends to all individuals.[89] The Supreme Court has protected this right from unwarranted governmental intrusions in activities relating to procreation,[90] contraception,[91] family relationships,[92] and the decision to have an abortion.[93] The Court has not yet established the boundaries of this right. The privacy right infringed upon by the Denver ordinance is, arguably, a logical extension of the privacy rights enunciated by the Court. Individuals quarantined are deprived of their right to body integrity through extractions of blood, pelvic and rectal examinations, and unwarranted penicillin injections under threat of incarceration.[94] In the area of fourth amendment rights, the Court has noted that intrusions such as these beyond the body's surface are related to interests of privacy and human dignity and can be invaded by the State only in the most unusual of circumstances.[95] The intrusions under the Denver ordinance are particulary severe since individuals can be given shots of penicillin prior to any determination that they are, in fact, infected.

Equal protection requires that a state justify legislation which affects fundamental rights by demonstrating a "compelling interest."[96] Here, the state has no compelling interest which can justify the Denver ordinance's invasions, particularly since control of venereal disease can be accomplished through less intrusive and more effective means. Quarantine is not essential to controlling venereal disease. Examinations and treatment for those infected could easily and successfully be performed at a health clinic, on a voluntary basis, during regular hours.[97] The state could widely advertise these out patient services, offer them free, and provide some form of transportation to clinics. Cash bonuses could also be offered. The state could even legalize pros-

and Practice in the Federal Courts Since Griswold v. Connecticut, 50 DENVER L.J. 153 (1973).

[89] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[90] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[91] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[92] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

[93] Roe v. Wade, 410 U.S. 113 (1973).

[94] Reynolds was given an injection of penicillin prior to a determination as to whether or not she actually was infected with venereal disease. *See* Brief for Plaintiff at 35, Griggs v. Scott, No. 669-690 (Cal. Super. Ct., Feb. 7, 1974); Erickson v. Dilgard, 252 N.Y.S.2d 705 (1962) (right to refuse treatment); Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293, 296 (1966).

[95] Schmerber v. California, 384 U.S. 757, 770 (1966).

[96] *See* cases cited note 61 *supra*.

[97] Brief for Plaintiff at 36, Appendix I, Griggs v. Scott, No. 669-690, (Cal. Super. Ct. Feb. 7, 1974).

titution and regulate venereal disease in that sector through licensing of prostitutes. High schools and colleges could require annual examinations for students and businesses might require the same for employees. Such alternatives are feasible, and would neither curtail an individual's liberty nor infringe on one's privacy by coerced examinations or unwarranted injections of penicillin prior to determination of infection. The Denver ordinance, then, violates equal protection on a number of grounds.

III. DUE PROCESS

The ordinance also violates the due process clause of the fourteenth amendment. The quarantine section creates a conclusive presumption, while the milder walk-in section suffers from unconstitutional vagueness.

The conclusive presumption doctrine is often applied to legislation similar to the Denver ordinance which is considered overbroad under an equal protection analysis.[98] The doctrine falls within the purview of the due process clause and can be utilized only in situations which create deprivations of "life, liberty, or property."[99]

A statute creates a conclusive presumption when it imposes a burden on a class of individuals and gives them no opportunity to refute or overcome the legislative presumption on which the burden is based.[100] Such presumptions are particularly suspect when the class of those burdened includes individuals who should not be affected by the legislation. Legislative schemes based on irrebuttable presumptions are viewed as arbitrary and unreasonable, and violative of due process because due process requires that an individual have an opportunity to be heard and refute such presumptions.[101]

The Supreme Court has revitalized and applied this doctrine in its 1972 term to invalidate legislation which creates presumptions "not necessarily or universally true."[102] For example, in

[98] Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800, 829-30 (1974).

[99] *Id.* at 824; *see* Gideon v. Wainwright, 372 U.S. 335 (1963).

[100] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

[101] *See* cases cited note 100 *supra*.

[102] Vlandis v. Kline, 412 U.S. 441, 452 (1973); *accord* United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Note, *Irrebuttable Statutory Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L.J. 1173 (1974).

Cleveland Board of Education v. La Fleur,[103] the Supreme Court struck down a rule which provided for mandatory maternity leave of pregnant teachers. The court noted that the rule conclusively presumed that every teacher in the fifth month of pregnancy was physically incapable of teaching. This presumption applied even if medical evidence to the contrary existed. The Court found the school's goal of preventing unfit teachers from working legitimate, but held that the state must find less arbitrary means of effecting the end.[104]

The Denver ordinance, like the Cleveland school regulation, creates an irrebuttable or conclusive presumption. The detention section conclusively presumes that anyone arrested for the enumerated offenses has venereal disease and should be quarantined. There is no examination prior to detention, nor any opportunity to rebut this presumption. While quarantine of individuals prior to examination or to a determination of whether probable cause exists to believe that one should be examined may be an efficient state procedure, courts will not uphold conclusive statutory schemes based on a state's need for efficiency, particularly where other methods exist.[105]

As noted above, Colorado has other reasonable means of determining whether or not one has venereal disease and should be treated. Even a quarantine or walk-in procedure could be utilized if preceded by a hearing. A hearing procedure is particularly useful to cure the ordinance's due process defects, since it provides an individual with a fair opportunity to rebut the legislative assumption and to prevent unwarranted detention, examination, and treatment.[106] Prior to quarantine (or even to a walk-in order), an individual could request a hearing which would only occur if asked for. At the hearing, the state would have to demonstrate that probable cause exists to believe that the person is infected and in need of examination or treatment. The probable cause standard could be based on "trace-back" evidence; that is, the state would have to prove that the individual had been in physical contact with a known venereal disease carrier.

Although the walk-in section of the ordinance is much milder and less restrictive than the quarantine section, it too, violates

[103] 414 U.S. 632 (1974).

[104] *Id.* at 647.

[105] Vlandis v. Kline, 412 U.S. 441, 453-54 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1971).

[106] *See* cases cited note 100 *supra*.

due process. Due process requires that legislation be drawn with definite, ascertainable standards which give the public fair notice of what is forbidden by the statute.[107] Courts consistently strike down legislation which lacks such fixed standards and which instead gives a judge or a police officer the discretion to determine what is prohibited.[108] Vague laws are particularly objectionable because they give rise to arbitrary enforcement and can be used as tools for harassment.[109]

Section 735.1-1(2) of the Denver ordinance outlines categories of persons "reasonably suspected" of having venereal disease.[110] Police are empowered to authorize walk-in orders to such people, which require them to report to the department of health for an examination. Failure to obey such an order is a violation of the law.[111] This section clearly lacks general guidelines and fixed standards as to what behavior gives rise to a policeman's "reason to believe" that one should be issued a walk-in order. Is "reason to believe" based on a probable cause standard or merely a vague unsubstantiated suspicion?[112] The purpose of this section may have been to "trace-back" partners of those found to be infected with venereal disease; however, its wording is so vague and unclear as to standards for "reason to believe" that it gives a police officer the complete discretion to determine who shall be issued a walk-in order.

IV. FOURTH AMENDMENT

The plaintiff argued that the Denver ordinance violates the fourth amendment because it authorizes an invasion of the body without a warrant and absent any emergency situation.[113] The plaintiff never fully developed the search analysis and the court dealt with it rather cursorily. A more thorough analysis of the fourth amendment issue indicates that the plaintiff's rights were indeed violated.

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[107] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938); United States v. Reese, 92 U.S. 214, 221 (1875); Hines v. Baker, 422 F.2d 1002, 1005 (10th Cir. 1970); Goldman v. Knecht, 295 F. Supp. 897, 903 (D. Colo. 1969); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[108] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Martin v. United States, 100 F.2d 490, 493-94 (10th Cir. 1939).

[109] Note, *Arbitrary Enforcement and Overbreadth of Vagrancy Ordinance Violative of Due Process Clause*, 19 N.Y.L.F. 191, 196 (1974).

[110] REV. MUNICIPAL CODE OF DENVER § 735.1-1 (1950).

[111] *Id.* § 735.1-6.

[112] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

[113] Brief for Appellant at 11, Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973).

The Supreme Court has specifically extended fourth amendment protections to the field of health regulation.[114] The fourth amendment, which requires that searches of individuals, their homes, papers, and effects be reasonable,[115] is enforceable against the states through the fourteenth amendment.[116] Ordinarily, searches must be authorized by a warrant which is based upon probable cause to believe a specific item will be found in a particular place.[117] These protections apply regardless of whether the person is suspected of criminal behavior or whether the purpose of the search is to obtain evidence for criminal proceedings.[118] The Supreme Court has recognized exceptions to the warrant requirement in searches following a lawful custodial arrest[119] or in an emergency situation.[120]

Emergencies have been found to exist in a variety of instances. Warrantless searches have been upheld when the police are in "hot pursuit"[121] of an offender as well as when an immediate search is required to prohibit destruction of evidence.[122] In these cases the court has sanctioned warrantless searches because the lives of policemen or others would be endangered by any delay. In addition, warrantless searches of autos have been upheld on the grounds that, were there a delay, the evidence could be easily moved out of the jurisdiction.[123] In assessing the need for search warrants in the area of public health, courts have looked to whether or not the public will be exposed to the dangerous person or object if there is a delay for the warrant.[124]

The Tenth Circuit dismissed the plaintiff's fourth amendment argument by holding that an emergency situation did exist, and, therefore, there was no need to obtain a search warrant.[125] However, there is little in the facts to support the argument that

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[114] Camara v. Municipal Court, 387 U.S. 523 (1967).

[115] U.S. CONST. amend. IV.

[116] Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); *cf.* Mapp v. Ohio, 367 U.S. 643, 648 (1961).

[117] Camara v. Municipal Court, 387 U.S. 523, 535 (1967).

[118] *Id.* at 530-31.

[119] United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969).

[120] Camara v. Municipal Court, 387 U.S. 523 (1967).

[121] *See* Katz v. United States, 389 U.S. 347, 358 (1967), *citing* Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

[122] Schmerber v. California, 384 U.S. 757 (1966).

[123] Carroll v. United States, 267 U.S. 132, 151 (1925).

[124] North Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 315 (1908).

[125] 488 F.2d at 1383.

an emergency existed. Since the defendant was already in jail when examined, there was no danger that she might communicate the disease, if, in fact, she had it. Also, it is difficult to justify the examination on the grounds that an immediate cure of the disease was necessary to protect the defendant's health. Gonorrhea is neither extremely harmful to an individual's health nor extremely hard to cure.[126] Syphilis, while a more dangerous disease, develops slowly and usually a substantial time passes before any harm to the individual occurs.[127]

Reynolds was apparently placed under a lawful custodial arrest before she was searched; her arrest, then, can serve as a justification for a warrantless search. However, the question remains as to the proper limits of that search.

The Supreme Court has never determined whether searches made incident to a lawful arrest may extend to the body cavity. However, in *United States v. Robinson*[128] the Court held that any custodial search, regardless of its purpose, is reasonable by fourth amendment standards:

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.[129]

Robinson though, still leaves open the question of whether the body cavity is included within the term "full search of the person" and, therefore, a valid object of a warrantless search.

In *Robinson* the respondent was arrested for driving while his license was revoked. Immediately following the arrest, the police officer fully searched him. While patting him down, the officer discovered a crumpled up cigarette package in the respondent's shirt pocket. The officer opened the pack and found what was later analyzed as heroin. The Court upheld this search as valid, noting that it

> partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin v. California* . . . .[130]

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[126] *See* Brief for Plaintiff at 39, Griggs v. Scott, No. 669-690 (Cal. Super. Ct. Feb. 7, 1974).

[127] *See id.* at 45.

[128] 414 U.S. 218 (1973).

[129] *Id.* at 235.

[130] *Id.* at 236.

By this reference to the *Rochin* case, the Court may have carved out an exception to *Robinson*, preserving the greater protections it had previously afforded individuals from body cavity searches.

In *Rochin* the police extracted the contents of a man's stomach by forcing a tube down his throat.[131] The *Reynolds* examination—an extraction of blood for venereal disease analysis—clearly does not approach the "brutal conduct" of *Rochin*. However, courts have held that a more stringent probable cause standard exists for any search of the body cavity:

> [a] strip or skin search of appellant was justified by "a real suspicion directed specifically to appellant" . . . . [T]he search of a body cavity, however, must satisfy a more stringent test. . . .[132]

In *Schmerber v. California*[133] the Supreme Court distinguished searches of "the person of the accused"[134] for evidence or concealed weapons from searches involving "intrusions beyond the body's surface."[135] The Court held that considerations which go to a warrantless search following a lawful arrest

> have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[136]

Searches going beyond the body's surface, then, are held to a higher probable cause requirement. They are arguably, like *Rochin*, not within the scope of the *Robinson* exception to the warrant requirement. Since *Reynolds* involved instrusions beyond the body's surface, the higher probable cause standard is applicable. Unless the police had some "clear indication" that Reynolds actually was infected with venereal disease, they should not have searched her without first securing a warrant.

V. BAIL

In choosing to challenge the Denver hold and treat ordinance in federal court, the plaintiff denied herself the argument that the

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[131] Rochin v. California, 342 U.S. 165, 172 (1952).

[132] United States v. Shields, 453 F.2d 1235, 1236 (9th Cir. 1972).

[133] 384 U.S. 757 (1966).

[134] *Id.* at 769, *citing* Weeks v. United States, 232 U.S. 383, 392 (1914).

[135] *Id.*

[136] *Id.* at 769-70.

ordinance deprives one of the right to bail[137] under state law. While the majority of federal courts have not acknowledged an absolute right to bail in non-capital offenses,[138] in Colorado the issue is settled. Thus, if the ordinance were challenged on this basis in a state court, it would likely be declared unconstitutional. The State constitution provides that "all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."[139] This has been interpreted by the Colorado Supreme Court to mean that "persons charged with offenses are bailable with the one exception mentioned."[140]

The Denver hold and treat ordinance attempts to skirt this constitutional infirmity with language to the effect that this is a detention "for health" and not a denial of bail subsequent to an arrest.[141] This distinction seems to run directly opposite to prevailing Colorado law. In *Palmer v. District Court*[142] the Colorado Supreme Court held that an individual may not be denied bail because of a plea of not guilty by reason of insanity. The court referred to the Colorado constitution's bail provision as a basis for its decision and said, "the mention of one exception excludes other exceptions."[143] To emphasize this, the court then quoted extensively from a California case[144] which it said was "applicable

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[137] REV. MUNICIPAL CODE OF DENVER § 735.1-2 (1950):

> No person detained for health under the provisions hereof shall be released from such detention even if he or she is otherwise eligible for release on bond. . . .

[138] Cases which acknowledge a constitutional right to bail: United States v. Motlow, 10 F.2d 657 (7th Cir. 1926); Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954); United States v. Fiala, 102 F. Supp. 899 (W.D. Wash. 1951). Cases which deny a constitutional right to bail: Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498, 39 N.Y.S.2d 526 (1943); Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906). The U.S. Supreme Court has never reached the issue of whether or not there is a constitutional right to bail in criminal proceedings. In Carlson v. Landon, 342 U.S. 524 (1952), the Court upheld the denial of bail in deportation proceedings and stated that the eighth amendment does not apply to such civil proceedings. In Stack v. Boyle, 342 U.S. 1 (1951), the Court decided that there is a right to bail in criminal cases but based the holding on statutory grounds. *See also* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

[139] COLO. CONST. art. II, § 19.

[140] Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965). *See also* Shanks v. District Court, 153 Colo. 332, 385 P.2d 990 (1963); *In re* Losasso, 15 Colo. 163, 24 P. 1080 (1890).

[141] REV. MUNICIPAL CODE OF DENVER § 735.1-2 (1950).

[142] 156 Colo. 248, 398 P.2d 435 (1965).

[143] *Id.* at 287, 398 P.2d at 437.

[144] *Ex parte* Keddy, 233 P.2d 159 (Cal. 1951).

to the case herein":[145]

> The people of the State of California through their Constitution have provided . . . that "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great . . . ."
>
> *"This mandate of the people cannot be legally set aside by the civil, legislative, or judicial branch of the government."*[146]

Denver Municipal Ordinance Section 735 seeks to do exactly what is prohibited by the court in *Palmer*, that is to legislate another exception to the right to bail. Thus, a strong case can be made that the ordinance violates the State constitution because of its denial of bail.

CONCLUSION

The Denver ordinance is clearly unconstitutional on a number of grounds. Had the plaintiffs thoroughly researched and raised the police power, equal protection and fourth amendment issues, the Tenth Circuit arguably would have been compelled to void the law. On the other hand if the plaintiff had challenged the ordinance in a state court rather than a federal one, she could have made a persuasive bail argument. However, any decision to attack the ordinance in a state tribunal would have precluded her from bringing her claims under sections 1983 and 1985 of the Civil Rights Act.

As the above analyses illustrate, until this ordinance is either invalidated by a court or revised by the city government, individuals subjected to it will be deprived of their constitutional rights.

Ronna I. Wineberg
John V. Works

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[145] Palmer v. District Court, 156 Colo. 284, 287, 398 P.2d 435, 437 (1965).

[146] *Id.* (emphasis added).

APPENDIX

REV. MUNICIPAL CODE OF DENVER § 735

.1. *Protection of Public Health.* In order to protect persons in the City and County of Denver from the spread of communicable venereal disease the department of health and hospitals is empowered and authorized and the manager of health and hospitals is directed to use every available means to ascertain the existence of and to investigate immediately all suspected cases of communicable venereal disease and to determine the sources of such infections. Certain persons reasonably suspected to be infected with a communicable venereal disease may be detained in jail, examined, and if determined to be so infected, treated, in accordance with the provisions of this section. The manager of health and hospitals or his authorized representative shall order other persons reasonably suspected to be infected with a communicable venereal disease to be examined at the department of health and hospitals on an in-patient or out-patient basis, or, with the consent of the manager or his representative, by a person licensed to practice medicine, and to be treated medically for such disease, if necessary. (Sec. 1, Ord. 423, Series 1955)

.1-1. *Categories of Suspected Persons.* A person in any of the following categories may be reasonably suspected to have venereal disease: (Sec. 1, Ord. 423, Series 1955)

.1-1(1). Any person who is arrested and charged in the municipal court of the city and county or any other court in the city and county with an offense in the nature of or involving vagrancy, prostitution, rape, a violation of this article, or another offense related to sex and any person convicted of any such offense in the city and county. (Sec. 1, Ord. 423, Series 1955)

.1-1(2). Any person reasonably suspected to have had a contact with another individual reasonably believed to have had a communicable venereal disease at the time of such contact and any person who is reasonably believed to have transmitted any such disease to another individual. Any person who has had any such disease or who has been convicted of any offense of the kinds herein specified within twelve months next past, and who is reasonably believed to be engaged in any activity which might have occasioned exposure to a communicable venereal disease. (Sec. 1, Ord. 423, Series 1955)

.1-2. *Detention in Jail.* Suspected persons in the categories enumerated in Section 735.1-1(1) may be detained in jail. When any person so detained is determined not to have venereal disease in communicable form the manager shall release the individual from detention for health purposes. The detention of any person in jail under the provisions hereof shall continue only for such time as is reasonably necessary to examine such person and render treatment if such person is found to have a venereal disease in a communicable form. The provisions hereof shall not be utilized as, nor construed to be, a penalty or punishment. No person detained for health under the provisions hereof shall be released from such detention even if he or she is otherwise eligible for release on bond or by reason of payment of fine, or termination of sentence imposed. (Sec. 1, Ord. 423, Series 1955)

.1-3. *Examination in Jail.* Every suspected person detained in jail under the provisions of Section 735.1-2 shall be examined by the department of health and hospitals for the purpose of determining whether or not such person is, in fact, infected with a communicable venereal disease. Every such person shall submit to such examinations as are necessary and permit specimens to be taken for laboratory analyses. The detention of each suspected person shall continue until the results of such examinations are known and the person found to be free from any such disease, or, if infected, until the disease is no longer communicable. (Sec. 1, Ord. 423, Series 1955)

.1-4. *Treatment in Jail.* The department of health and hospitals shall treat every person suspected to have venereal disease who has been detained and examined in jail and found to have any such disease. The treatment shall continue until the disease is no longer communicable. (Sec. 1, Ord. 423, Series 1955)

.1-5. *Examination and Treatment at Department or by Private Physician.* Every suspected person in the categories enumerated in Section 735.1-1(2), and in the categories enumerated in Section 735.1-1(1), who is not detained in jail shall be examined at the department of health and hospitals on an in-patient or out-patient basis as determined

in individual instances by the manager of health and hospitals or his authorized representative. Each such person shall submit to examinations as necessary and permit specimens to be taken for laboratory analyses and shall comply with the directions of the manager or his authorized representative with relation to hospitalization on an in-patient basis or attendance at clinic on an out-patient basis, as the case may be. Each such person shall continue to follow these directions until the results of his or her examination are known and the person determined to be free from any such disease, or, if infected, until the disease is no longer communicable. With the consent of the manager or his authorized representative a suspected person may be at his or her expense examined by a doctor licensed to practice medicine and treated medically for such disease, if necessary. In these latter instances, the manager or his authorized representative shall receive reports of examinations and treatment and other information relative to the problems involved from the medical doctor selected. (Sec. 1, Ord. 423, Series 1955)

.1-6. *Violations.* It shall be unlawful to refuse to submit to examination or treatment provisions hereof or to violate any order of detention. It shall be unlawful to refuse to obey any order of the manager of health and hospitals or his authorized representative requiring examinations and treatment, if necessary, for such disease, or any other order issued hereunder. (Sec. 1, Ord. 423, Series 1955)

.2. *Duties of Manager of Safety and Excise and Police Officers.* The manager of safety and excise and the officers of the police department of the city and county are hereby authorized, empowered, and directed to implement the purposes of Section 735.1 in accordance with the provisions of this section. (Sec. 2, Ord. 423, Series 1955)

.2-1. *Manager of Safety and Excise.* The manager of safety and excise shall cause to be furnished to the department of health and hospitals information pertinent to the enforcement of Section 735.1 with relation to persons who are arrested and charged or otherwise imprisoned in any jail administered by the department of safety and excise. The manager of safety and excise is directed to make available in such jails an area, room, or place which may be used as a detention for health facility and for examinations. The manager of safety and excise, officers of the police department, and employees of the department of safety and excise shall co-operate in the execution of such detention procedures as may be necessary, and shall assume custodial supervision of persons detained under the provisions of Section 735.1-2 and shall supply such personal restraints as may be necessary to effectuate the purposes thereof. (Sec. 2, Ord. 423, Series 1955)

.2-2. *Police Department.* Officers of the police department of the city and county shall furnish to the department of health and hospitals information pertinent to the enforcement of the provisions of Section 735.1. Police officers shall have the authority to detain suspected persons in the categories enumerated in Section 735.1-1(1) for health purposes in jail in accordance with the procedure set forth in Section 735.1-2 for examination and treatment by the department of health and hospitals under the provisions of Sections 735.1-3 and .1-4. Police officers shall have authority to order suspected persons in the categories enumerated in Section 735.1-1(2) and in the categories enumerated in Section 735.1-1(1) who are not detained in jail to report to the department of health and hospitals for examination and treatment at the direction of the manager of health and hospitals or his authorized representative in accordance with the provisions of Section 735.1-5. They shall also have authority to order persons to report to the department of health and hospitals for examination and treatment, as aforesaid, who have been held for investigation of offenses of the types enumerated in Section 735.1-1(1) and who have been released without charges having been filed and similarly persons who have been acquitted of any such charges and other suspected persons who have been released on bond. (Sec. 2, Ord. 423, Series 1955)

.2-3. *Violations.* It shall be unlawful to refuse to submit to examination or treatment under an order as hereinabove provided or to violate any order of detention or to refuse to obey any order requiring submittal to examination and treatment at the department of health and hospitals. (Sec. 2, Ord. 423, Series 1955)