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COURTS & PROCEDURE

Abels v. Kaiser, 913 F.2d 821

Author: Judge Logan

Defendant, Abels, petitioned the district court for *habeas corpus* relief. In his petition, Abels argued that his constitutional right to appeal his state court conviction was denied for two reasons. First, Abels claimed that his counsel refused to proceed on appeal because Abels was essentially indigent and not able to afford his attorney's legal services. Second, the state refused, after a finding that Abels was not indigent, to provide him with appointed counsel. The district court denied Abels's petition and he subsequently appealed.

The Tenth Circuit first rejected Abels's argument that he was denied his right to appeal because his counsel refused to proceed. The court explained that the record contained insufficient evidence to overturn the district court's ruling that Abels was not indigent at the time of his conviction. Second, the court stated that Abels's constitutional right to effective assistance of counsel was violated. The court explained that Abels's counsel did not properly file a motion to withdraw as counsel. Thus, Abels's counsel was not relieved of his duties to perfect the appeal. Accordingly, the counselor's failure to file an appellate brief violated Abels's constitutional right to effective counsel. Thus, the case was remanded to provide Abels with assistance of counsel.

United States v. Anderson, 906 F.2d 1485

Author: Judge McKay

Defendants are realtors who represent four clients. These clients are allegedly involved in an organization suspected of engaging in illegal drug activity. The realtors were held in contempt of court because they refused to reveal the source of fees incurred during their representation of the clients. The realtors filed an emergency appeal, alleging that the fee information was subject to attorney-client privilege, that it infringed on their sixth amendment right to counsel, and that the government failed to make the necessary showing of need. The realtors also claimed that the district court's proceedings violated their due process rights.

The Tenth Circuit affirmed the decision of the district court, except to the extent that it required the disclosure of the fee contracts. The court explained that the source of payment for legal fees is not generally protected by attorney-client privilege and the three major exceptions to the rule were not applicable. The court further explained that although the clients have a right to counsel on appeal, there is no evidence showing resulting conflict between the realtors and the clients. The court recognized that the government was required only to provide notice to the subpoenaed witnesses and to show that the information is relevant to a legitimate grand jury investigation; the government met that stan-

dard. The court ruled that the procedures used did not violate due process, and that the sentence imposed was not an abuse of discretion.

Becenti v. Vigil, 902 F.2d 777

Author: Judge Anderson

Plaintiff, Becenti, brought suit in tribal court over the handling of a loan by two employees of the Bureau of Indian Affairs. The government removed the action to district court, then sought to dismiss. The district court dismissed the complaint for lack of jurisdiction on sovereign immunity grounds. Becenti appealed, arguing removal under 28 U.S.C. § 1442 was improper since the statute provides for removal only from state courts.

The Tenth Circuit vacated the district court's order and remanded to the district court for remand to tribal court. The court concluded that Congress has always used express language when permitting removal from courts other than state courts. Since § 1442 refers only to "state" courts, it did not apply to actions filed in tribal court.

Bonin v. Tour West, Inc., 896 F.2d 1260

Per Curiam

Plaintiffs, Andrew and Richard Bonin, brought a personal injury action against defendant, Tour West, Inc. ("Tour West"). The district court entered judgment in favor of Tour West based on jury responses to a special verdict. The Bonins appealed, arguing that the district court erred in refusing to grant a new trial when the jury gave inconsistent answers on the special verdicts.

The Tenth Circuit, under an abuse of discretion standard, reversed the decision of the district court. The court reasoned that answers to questions on a special verdict must be read together. On the verdict form, the jury found Tour West not negligent, but also attributed a portion of the negligence to Tour West. Accordingly, when read together, the court found the inconsistencies irreconcilable and ordered a new trial.

United States v. Brian N., 900 F.2d 218

Author: Judge McKay

Plaintiff, United States, appealed the district court's dismissal of its case against two juvenile Indian defendants for the murder of a non-Indian and the assault of an Indian. The district court held that since the government did not provide required documents relating to prior juvenile court proceedings, the government failed to properly invoke jurisdiction under the federal juvenile statute.

The Tenth Circuit affirmed the district court's dismissal without prejudice. The court found that the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. § 5032, clearly states that proceedings begin with the filing of information. Accordingly, since the government failed

to provide the district court with prior juvenile records, the action was properly dismissed.

United States v. Clark, 901 F.2d 855

Author: Judge Baldock

Defendant, Clark, pleaded guilty to embezzlement and was ordered to pay restitution in the amount of \$153,762 pursuant to the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663-64. Clark appealed, claiming that the district court failed to consider her financial status, as required by the VWPA, when imposing restitution.

The Tenth Circuit held that the district court abused its discretion by ordering Clark to pay \$153,762 immediately. A restitution order must be consistent with the defendant's ability to pay. The court found nothing in the record to support the district court's finding. Accordingly, the restitution order was vacated.

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424

Author: Judge Logan

In the original action filed by plaintiff, United Nuclear Corporation, in 1985, the district court entered a protective order regarding discovery. After the parties settled in 1986, the same court sealed the record. Parties in collateral suits against defendant, Cranford Insurance Company ("Cranford"), sought to intervene in 1989, seeking access to the discovery for use in their actions in other courts. The district court granted permissive intervention and modified its prior orders to allow access to the intervenors. Cranford subsequently appealed.

The Tenth Circuit affirmed the decision of the district court. First, the court stated that permissive intervention is a matter within the sound discretion of the district court and will not be overturned without a showing of clear abuse. The correct procedure of non-parties challenging a protective order is through intervention for that purpose. When intervention is sought to gain access to discovery subject to a protective order, no strong nexus of fact or law need exist between the two suits. Second, the court upheld the modification of the protective order. The court compared the confidentiality needs of the parties in the original suit against the need for avoiding duplicative discovery in the collateral case. If denial of litigation would place litigants in a position needing to perform repetitive discovery, then the order could be denied. But, there must be a showing of prejudice to the substantial rights of the party opposing modification. Cranford's desire to make it more burdensome for intervenors to pursue their collateral litigation was not legitimate prejudice.

Dodson v. Zelez, 917 F.2d 1250

Author: Judge McKay

Plaintiff, Dodson, a Marine, appealed the district court's denial of

his petition for *habeas corpus* relief. On appeal, Dodson argued that: (1) the voting procedure of the court martial violated due process; (2) the composition of the court martial violated due process; (3) he was denied a speedy trial; and (4) the exclusion of expert testimony violated due process.

The Tenth Circuit affirmed the district court's refusal to review Dodson's second, third and fourth arguments. The court stated that these claims were fully and fairly considered by the military courts and, therefore, not subject to federal court review. The court reversed the district court's denial of *habeas corpus* relief, however, holding that the writ should be issued because the court-martial's voting procedure violated due process. Specifically, the court held that the court martial failed to require a three-fourths vote in favor of the life sentence imposed. The three-fourths requirement was mandated by the Manual for Courts-Martial.

Stewart v. Donges, 915 F.2d 572

Author: Judge Ebel

After being arrested by defendant, police officer Donges, plaintiff, Stewart, brought a 42 U.S.C. § 1983 action. Donges sought and was denied summary judgment based on qualified immunity. The district court then denied Donges's request for a stay pending appeal of its ruling on the motion. He subsequently filed an interlocutory notice of appeal with the Tenth Circuit. After trial resulted in a jury verdict for Stewart, Donges appealed.

The Tenth Circuit vacated the verdict. The court held that in an interlocutory appeal concerning summary judgment and qualified immunity of a public official, the central issue is the defendant's right not to have to proceed to trial. If the qualified immunity defense is held valid, no part of the trial may continue. Therefore, once Donges filed his interlocutory appeal, and the district court did not certify the appeal as frivolous and without merit, the district court lost jurisdiction to proceed with the action until the appeal was decided. Thus, the resultant trial commenced without jurisdiction. Accordingly, the court vacated the trial, holding it was a nullity.

United States v. Elliott, 915 F.2d 1455

Author: Judge McWilliams

Plaintiff, Elliott, was convicted of willfully taking by force, violence, and intimidation, currency from a bank. He was sentenced to 210 months of imprisonment. Elliott appealed, contending that his conviction should be reversed based on: (1) improper remarks made by the prosecutor in closing argument regarding Elliott's failure to testify; and (2) the in-court identification of Elliott was improper because the bank teller previously saw a photograph of Elliott in the local newspaper. Elliott also appealed his sentence, arguing that the court failed to state its reasons for imposing the maximum term.

The Tenth Circuit affirmed Elliott's conviction. First, the prosecutor's closing argument was appropriate since it was solicited from someone other than Elliott. Second, the bank teller's positive identification of Elliott was not impermissibly influenced by the fact that she saw a fifteen year old photograph in a local newspaper. The court explained that the teller stated the photograph did not resemble Elliott. Moreover, the teller made a positive identification in a recent photo lineup. Furthermore, she assisted in preparing a composite drawing prior to seeing the photographs. Third, the court remanded the case for resentencing. The court reasoned that the district court failed to state its reasons for imposing the maximum sentence. In essence, a sentencing court must state why it imposed a sentence at a particular point within the Sentencing Guidelines range.

Ellis v. Consolidated Diesel Elec. Corp., 894 F.2d 371

Author: Judge Seymour

Plaintiff, Ellis, brought suit alleging personal injury due to a vehicle defectively designed and manufactured by defendants, Consolidated Diesel Electric Corporation, Vought Corporation, and LTV Corporation. The district court granted defendants' motion for summary judgment during a period in which the bankruptcy court issued an automatic stay. This stay prevented all entities from commencing or continuing any judicial proceeding against any of the debtors. Ellis appealed, claiming that the district court lacked jurisdiction to enter summary judgment.

The Tenth Circuit dismissed the appeal, explaining that there was no final judgment from which to appeal. The court held that a stay in judicial proceedings by the bankruptcy court renders a district court's action void, even if judgment were entered in favor of the debtor. The court concluded that once it held the district court opinion void, it no longer had jurisdiction over the appeal.

United States v. Gomez-Olivas, 897 F.2d 500

Author: Judge Logan

Defendant, Gomez-Olivas, was convicted of possessing with intent to distribute and importing a controlled substance. Gomez-Olivas appealed, alleging: (1) that the district court's "no-adverse-inference" jury instruction was insufficient because it did not contain a statement on compulsion; and (2) certain closing argument comments made by the prosecutor were improper.

The Tenth Circuit affirmed the district court's ruling. First, the court stated that the district court did not err in failing to contain a statement on compulsion in the no-adverse-inference instruction. The court explained that Gomez-Olivas did not request the district judge to include the compulsion aspect in the instruction. Instead, at trial Gomez-Olivas only objected to the wording of the instruction. Second, the prosecutor's comments were entirely proper. The court explained that

as long as evidence can be solicited from someone other than the accused, it is proper to comment upon the defense's failure to produce it. Moreover, lack of corroboration is a permissible inference to argue. Finally, Gomez-Olivas's argument that the comments were improper because they were made during rebuttal, when defense counsel could no longer respond, was without merit.

United States v. Harmon, 918 F.2d 115

Author: Judge Seth

Defendant, Harmon, was convicted of aiding and abetting Thomas in the distribution of cocaine. On appeal, Harmon contended that his due process rights were violated when the district court allowed the government to introduce false testimony through Thomas. Harmon also alleged that the district court abused its discretion when it allowed Thomas to testify concerning his prior transportation of cocaine for Harmon. He asserted that the district court failed to balance the probative value of Thomas's uncorroborated testimony against its prejudicial impact.

The Tenth Circuit affirmed the district court's judgment. First, the court stated that the district court did not abuse its discretion in admitting Thomas's testimony. The court explained that Harmon did not prove that the government knowingly presented false testimony to the jury. The government offered both Officer Dyer's and Thomas's testimony. The competing testimony established a factual dispute as to whose story was most credible, and the district court properly presented that issue to the jury for its determination. Second, the court noted that once a court determines that prior crimes or wrong acts are admissible under Fed. R. Evid. 404(b), it is then required to balance the probative value of the evidence against prejudice to the defendant under Fed. R. Evid. 403. The court found that the record supported the district court's procedure and determination that the probative value of Harmon's bad acts outweighed the prejudicial effect.

Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197

Author: Judge Brorby

Dissent: Judge Ebel

Plaintiff, Held, a domiciliary of Colorado, was employed by defendant, Manufacturers Hanover Leasing Corporation ("Hanover"), a New York corporation, for almost ten years. One day he was told that he would not be reassigned. Held, therefore, tendered his resignation, which took effect one month before the vesting date of his pension benefits. Four years later, he brought suit against Hanover, claiming that he was forced to resign so that he would be precluded from obtaining his full pension benefits. Held argued that this was in violation of the Employment Retirement Income Security Act ("ERISA"). The district court granted Hanover summary judgment on the ground that Held's

claim was barred by New York's three-year statute of limitations. Held subsequently appealed.

The Tenth Circuit affirmed the district court's ruling in part, and reversed in part. The court found that Held had two distinct causes of action: an action for injunctive relief for unlawful discharge and an action at law to recover benefits under the terms of his retirement plan. Noting that ERISA provided no applicable statute of limitations, the court ruled that New York law governed the limitation of Held's claims. The court reasoned that New York's relationship to the litigation was more significant than that of the forum state, Colorado. Accordingly, the court ruled that the equitable claim was time-barred because the claim was "most analogous" to an employment discrimination claim under New York state law. Thus, it was subject to a three-year statute of limitations. The court stated that the legal claim under the pension plan was not barred because it was subject to New York's six-year statute of limitations governing contracts.

United States v. Hernandez-Garcia, 901 F.2d 875

Author: Judge McWilliams

Defendant Hernandez-Garcia was convicted on three counts of transporting illegal aliens. At trial, there was confusion regarding a jury instruction. Consequently, the judge gave the jury an *Allen* instruction which stated that if a unanimous verdict was not reached, Hernandez-Garcia must be tried again. Hernandez-Garcia failed to object. After the jury returned a guilty verdict, the court polled the jurors. One juror did not affirm his verdict until asked a fifth time. Hernandez-Garcia appealed, asserting that there was coercion when the district court gave the *Allen* instruction and when it polled the jury.

The Tenth Circuit affirmed the conviction. Trial counsel did not object to the *Allen* instruction, so review was under the plain error standard. The court reasoned that although use of the word "may" instead of "must" would be preferable, use of the latter was not reversible error. The polling of the jurors in the courtroom was also not coercive. If jurors give an uncertain response when polled, the district judge should try to resolve the uncertainty. Here, the district judge conducted what the court considered to be a limited inquiry during which the juror had an opportunity to deny the verdict but did not.

United States v. Hickok, 907 F.2d 983

Author: Judge Brorby

Defendant, Hickok, appealed the district court's order denying his motion to withdraw a plea of guilty to one of three drug charges. Hickok claimed that his plea was entered into as a result of ignorance and fear. Accordingly, Hickok contended that the district court abused its discretion when it refused to allow him to withdraw his guilty plea because: (1) he was entitled to have a jury determine his guilt or innocence; (2) the government would not be prejudiced by a withdrawal of

his plea; and (3) the district court improperly considered evidence of his guilt or innocence in refusing his motion.

The Tenth Circuit affirmed, holding that the district court did not abuse its discretion. First, the court explained that Hickok waived his fundamental right to a jury with his plea of guilty. Second, the court ruled that Hickok bore the burden of persuasion, so the government need not prove prejudice. Third, guilt or innocence of the defendant is not one of the criteria used in determining whether to grant the motion. Moreover, Hickok failed to show "fair and just reason" for withdrawal of his guilty plea.

Hunter v. New Mexico, 916 F.2d 595

Per Curiam

Defendant, Hunter, was convicted on one count of first degree criminal sexual penetration ("CSP") and two counts of second degree CSP. Hunter petitioned the court for *habeas corpus* relief, which was subsequently denied. He appealed, alleging that: (1) his due process rights were violated by a fatal variance between the information filed against him and a jury instruction; (2) a lack of specificity as to the dates of the alleged crimes violated his due process rights; and (3) he was denied effective assistance of counsel.

The Tenth Circuit found a fatal variance between the information filed and the jury instructions. The court explained that the jury was allowed to convict Hunter upon a factual basis that modified an essential element of the offense charged. Specifically, Hunter was charged with CSP between January 1, 1974, and October 23, 1977. But, prior to June 1975, first degree CSP did not exist in New Mexico. Instead, the activities that now give rise to CSP were considered a fourth degree offense from January 1974, through June 1975. Thus, in submitting an erroneous jury instruction, the court allowed the jury to convict Hunter of first degree CSP on evidence of digital penetration prior to June 1975. Because this was not a simple variance but instead a fatal one, the court reversed the district court's determination. Furthermore, the court found unpersuasive Hunter's claim of ineffective assistance of counsel. Also, the court rejected Hunter's argument that his due process rights were violated because the district court failed to specify the dates of the alleged crimes.

United States v. Ibarra, 920 F.2d 702

Author: Judge McKay

Dissent: Judge Baldock

Defendant, Ibarra, was indicted for possession with intent to distribute cocaine. Ibarra moved to suppress statements made after his arrest and evidence obtained in several searches of his automobile. Specifically, Ibarra argued that his consent to the vehicle search was made under duress. The government eventually conceded that Ibarra did not consent to the search. Consequently, the district court granted Ibarra's

motion to suppress. The government subsequently moved for reconsideration of the suppression order. After the district court denied reconsideration, the government filed a notice of appeal. Ibarra contested the Tenth Circuit's jurisdiction to hear the appeal, arguing that the notice of appeal was untimely under rule 4(b) of the Fed. R. App. P. The government contended that its filing for reconsideration tolled the thirty-day statutory limit for filing notice of appeal.

The Tenth Circuit dismissed the appeal, holding that the government's notice was untimely filed and that the court, therefore, lacked jurisdiction to review the district court's order. The court reasoned that a motion for reconsideration of a previously conceded issue is unlikely to succeed. Moreover, it merely serves to prolong the process of litigation. Accordingly, the court concluded that allowing such a motion to toll the time for filing a notice of appeal would subvert the concern for judicial economy. The court, therefore, did not reach the merits of the government's claims.

United States v. Lowden, 900 F.2d 213

Author: Judge Anderson

Defendant, Lowden, was convicted of assault on Indian land. Lowden was subsequently sentenced to thirty months incarceration. He appealed his conviction, contending that the prosecutor's rebuttal and closing argument were improper. Allegedly, certain remarks made by the prosecutor implied that Lowden's defense counsel thought he was guilty. Moreover, Lowden claimed that the prosecutor improperly accused defense counsel of referring to facts not in evidence. In addition, Lowden argued that during sentencing, there should have been a downward departure.

After considering the trial transcripts, the Tenth Circuit concluded that the remarks made by the prosecutor were not prejudicial and did not influence the jury to render the conviction on improper grounds. Second, the court concluded that the district court's reasoning to not depart downward was ambiguous. Accordingly, the court transmitted the opinion to the district court with a request. This request asked the district court to state whether it thought it had the power to depart downward.

Monk v. Zelez, 901 F.2d 885

Per Curiam

Plaintiff, Monk, was convicted in a general court-martial of murdering his wife. He appealed the denial of his petition for a writ of *habeas corpus*, asserting that his conviction was obtained in violation of his constitutional right to due process of law. Monk reasoned that the military judge's reasonable doubt instruction impermissibly lessened the prosecution's burden of proof. In particular, the military judge erred in equating "reasonable doubt" with "substantial doubt." Also, Monk alleged the judge erred in his instructions to the court martial members.

He erred by stating that no reasonable doubt exists if they would be "willing to act" on their belief in Monk's guilt to the same extent as they would be willing to act on a belief concerning an important personal matter.

The Tenth Circuit first stated that its review of military convictions is limited to jurisdictional issues and to determinations of whether the military has given fair consideration to a defendant's constitutional claims. The court found that the Military Court of Appeals considered monk's claim. The court nonetheless stated that Monk's claim was subject to further review because it was substantial and largely free of factual questions. The court next ruled that the military judge's reasonable doubt instruction was defective. The court explained that appellate courts have uniformly criticized and rejected jury instructions equating "reasonable doubt" with "substantial doubt." Moreover, the "willingness to act" language identified by Monk has also been criticized. Thus, the court held this language to be constitutionally defective. The court then ruled that this language so affected Monk's court martial that his conviction violated due process. The court reasoned that the reasonable doubt instruction diluted the burden of proof the prosecution was required to meet. Thus, the court granted his writ for *habeas corpus* relief.

United States v. Morales, 917 F.2d 18

Author: Judge Moore

Defendant, Morales, appealed his conviction. Specifically, Morales claimed that the district court erred in not disclosing a "confidential witness." The Tenth Circuit remanded for findings consistent with the balancing test required by *Rovarro v. United States*, 353 U.S. 53 (1957). On remand, the district court found that: (1) the government demonstrated a need to protect the witness in light of the person's fear of retaliation and physical harm; and (2) the person was a "mere tipster." Morales appealed, reasserting that the person was a potential eyewitness who could aid his defense with exculpatory evidence.

The Tenth Circuit affirmed the district court's order against Morales. The court held that disclosure of the witness was not required because the testimony would be cumulative. Moreover, the person neither participated in nor witnessed the crime.

Nelson v. Carlson, 904 F.2d 560

Per Curiam

Plaintiff, Nelson, argued that detainers placed on him by the state of Arizona violated the Interstate Agreement on Detainers Act ("IADA"). Nelson subsequently motioned for permanent injunctive relief against defendant, Director of the Federal Bureau of Prisons. The district court denied the motion, and Nelson appealed.

The Tenth Circuit held that Nelson's motion for permanent injunc-

tive relief could not be brought under IADA in a federal court. The court found that although some circumstances may allow a federal court to grant relief from a state detainer, such circumstances were not present. The court did not reach the question of whether IADA was violated, but held only that the purpose of IADA and principles of comity required that such a determination be made by the Arizona state courts. The district court's order was vacated insofar as it constituted a ruling on the merits, and the cause was remanded to the district court with instructions to dismiss the proceedings.

United States v. Novak, 918 F.2d 107

Author: Judge Seth

Defendant, Novak, was convicted for possession with intent to distribute cocaine. In opening argument, the government made references to evidence of Novak's intent to distribute and references to the cocaine's purity. The prosecutor failed to introduce evidence at trial supporting these claims. Novak appealed his conviction, alleging that the district court erred in denying his motion for mistrial after the prosecutor failed to substantiate factual statements made during opening argument.

The Tenth Circuit reversed the district court's denial of mistrial and remanded. In determining whether the government's failure to support statements made during opening argument should result in a mistrial, the court examined the prosecutor's good faith and the statement's impact. Finding that the prosecutor should have been aware of hearsay problems in his statements, the court held that the prosecutor exceeded the permissible scope of an opening statement. The court also found that the prosecution's opening statements regarding the cocaine's purity were not supported by the evidence at trial and, thus, exceeded the scope of the opening statement. Absent a showing of prejudice to the defendant, prosecutorial misconduct alone is insufficient to establish that a district court abused its discretion. The court found, however, that since the remainder of the prosecution's case was completely circumstantial, the unsubstantiated opening statements caused extensive prejudice to Novak. Moreover, such prejudice was not cured by the district court's jury instruction that opening statements are not evidence. Accordingly, on this basis the court held that Novak's motion for a mistrial should be granted.

Post Office v. Portec, Inc., 913 F.2d 802

Author: Judge McKay

Plaintiff, the Post Office, brought suit against defendant, Portec Inc. ("Portec") for manufacturing an identical package handling chute. The jury awarded actual damages of \$79,519.40 for the misappropriation of trade secrets and breach of fiduciary duty. The jury also awarded \$1,500,000.00 in punitive damages. Additionally, the district court awarded \$619,315.24 in attorney fees and costs. Portec appealed, argu-

ing that: (1) it was prejudiced by not having the list of trade secrets allegedly misappropriated until trial; (2) the district court failed to submit a jury instruction; (3) the testimony of an expert witness was prejudicial; (4) punitive damages were improper because no actual damages were awarded by the jury for those claims upon which punitive damages would be appropriate; (5) Colorado's punitive damages statute is unconstitutional; (6) the punitive damages award was excessive; (7) the attorney's fees were inappropriate; and (8) the injunction prohibiting future manufacturing of chutes was too broad.

The Tenth Circuit affirmed the district court's judgment with two exceptions. First, the court stated it was precluded from the issue of prejudice because it found no manifest error. Second, its review of the jury instruction was precluded because Portec did not object to it at trial. Third, the expert's testimony was beyond the court's review because Portec, once again, did not object to it at trial. Fourth, the language of the special interrogatories combined with the language of the jury instruction provided a sufficient basis to uphold the jury's punitive damage award. Fifth, Colorado's punitive statute is constitutional. Sixth, the punitive damages award was so excessive that it shocked the judicial conscience. Accordingly, the court ordered a remittitur. The court based its decision on the ratio of punitive to actual damages, Portec's economic status, and the deterrent effect of the award. Seventh, the court remanded to the district court an order to reduce the amount of attorney expenses by twenty percent. The court reasoned that attorney fees should only be apportioned to each claim sustained. Eighth, the district court did not abuse its discretion in prohibiting Portec from selling spiral chutes. Without this prohibition, the court reasoned there would be enforcement problems.

Rainbow Travel Serv., Inc. v. Hilton Hotels Corp., 896 F.2d 1233

Author: Judge Brown, sitting by designation

Plaintiff, Rainbow Travel Service Inc. ("Rainbow") brought suit against defendant, Hilton Hotels, Inc. ("Hilton"), based on breach of contract and fraud. Hilton moved to dismiss for lack of personal jurisdiction, and the district court denied the motion. Hilton subsequently appealed the denial of his motion. Hilton also alleged that the district court erred by admitting certain evidence and by submitting improper jury instructions.

The Tenth Circuit affirmed the district court's assertion of personal jurisdiction over Hilton and its decision to submit the damage and fraud issues to the jury. While the court noted that the formation of an out-of-state contract, in itself, is not enough to establish jurisdiction over an out-of-state party, Hilton previously engaged in activities purposefully directed at Oklahoma residents. This was sufficient to justify the assertion of personal jurisdiction. The activities included soliciting business in Oklahoma, as well as negotiating the contract with Rainbow, and demanding partial performance by Rainbow in Oklahoma. In addition, the

court found sufficient evidence to support the jury's award of damages for goodwill and its verdict on fraud, but not its award of damages for breach of contract. The court found no abuse of discretion in the district court's admission of letters and other testimony by dissatisfied customers.

Reynoldson v. Shillinger, 907 F.2d 124

Author: Judge Seymour

Plaintiff, Reynoldson, a *pro se* prisoner, claimed his due process rights were violated when inmates were: (1) placed into an adjustment block of the Wyoming State Prison without a hearing; and (2) denied access to personal possessions without a hearing. The district court dismissed, with prejudice, Reynoldson's complaint for injunctive relief. The district court reasoned that Reynoldson failed to allege that he, himself, was wronged. Moreover, the court noted that Reynoldson's allegations were overly broad and conclusory. Reynoldson subsequently appealed. He also appealed the district court's ruling that he could not proceed *in forma pauperis*.

The Tenth Circuit stated that Reynoldson's complaint concerned inmates rather than the plaintiff himself. A broad reading of the complaint, however, supported the conclusion that Reynoldson was put into the special block without due process. Thus, the court stated that its permissive interpretation accorded with the well-settled principle that *pro se* prisoner complaints must be construed liberally. Accordingly, the district court erred in dismissing Reynoldson's complaint with prejudice. Moreover, the court took issue with the district court's dismissal on the basis of vagueness. Consequently, the court stated that Reynoldson should be given the opportunity to file an amended complaint. The court, therefore, granted leave to proceed *in forma pauperis*.

United States v. Rivera, 900 F.2d 1462

Author: Judge Ebel

Defendant, Rivera, was convicted of thirteen drug-related offenses. Rivera appealed, contending he did not receive adequate representation. Moreover, he argued that the district court's refusal to grant a continuance constituted cumulative error. A divided Tenth Circuit panel reversed, finding that the combination of Rivera's claims plus the introduction of evidence not specifically presented before the grand jury, constituted reversible error.

The Tenth Circuit, sitting *en banc*, reversed. After reviewing the cumulative-error doctrine, the court found no error in either the performance of Rivera's counsel or the denial of a continuance. The challenge concerning the new evidence was not before the court, having been rejected by a previous *en banc* review. The court remanded with instructions to vacate two lesser-included convictions.

Shafer v. Stratton, 906 F.2d 506

Author: Judge Anderson

Plaintiff, Shafer, was convicted in state court of securities violations under state law. Shafer petitioned for a writ of *habeas corpus* in federal district court, which was denied with prejudice. Shafer appealed, contending that his writ of *habeas corpus* in federal court should have been granted because: (1) the state trial court refusal to instruct the jury regarding his theory of the case was a denial of due process and a fair trial; (2) the state trial court restricted his cross-examination of a prosecution witness, thereby violating his sixth amendment rights; and (3) the prison sentences imposed were excessive, thus violating due process.

The Tenth Circuit affirmed the district court's denial of *habeas corpus*. The court explained that the New Mexico trial court did not err when it refused to give Shafer's jury instructions. The court reasoned that the refusal did not render the trial fundamentally unfair nor did it deny Shafer's right to due process. Since the trial was not fundamentally unfair, *habeas corpus* proceedings could not be used to set aside the judgment. The court also ruled that Shafer failed to show cause and prejudice regarding his failure to cross-examine a prosecution witness. Coupled with procedural default, he was not entitled to federal *habeas corpus* review. Finally, Shafer's sentencing was concerned solely with matters of state law and thus failed to state a claim under 28 U.S.C. § 2254.

Slane v. Jerry Scott Drilling Co., 918 F.2d 123

Author: Judge Barrett

Plaintiffs, Richard and Linda Slane, brought suit against defendant, Jerry Scott Drilling Company ("Scott"), Toney Burger, Inc. ("Burger"), and Toney Bruger, individually. The Slanes initiated the action after Richard was severely burned following an explosion on an oil drilling rig where he was employed. Scott was a drilling contractor, and Burger was its consultant and on-site supervisor. The district court found in favor of the defendants, and the Slanes appealed. Specifically, the Slanes contended that: (1) the sudden emergency instruction misled the jury; (2) the district court erred in giving an assumption of risk instruction; and (3) Burger's counsel committed reversible error by introducing extraneous matters during his closing argument.

The Tenth Circuit ruled that the district court's instruction on sudden emergency was error. The court reasoned that the instruction improperly applied to all defendants when only one of them pleaded it. Moreover, the instruction misstated Oklahoma law because it failed to inform the jury that the defense was not available to a party who created the emergency. Second, the district court did not err in giving an assumption of the risk instruction. The court reasoned that the evidence showed that Richard was imminently aware of the inherent dangers in the oil field and uniquely aware of the dangers of a drill stem test.

Third, although defense counsel's comments during closing arguments were improper, the court declined to reverse. The court explained that the prejudice to the Slanes, if any, was minimal.

United States v. Thompson, 908 F.2d 648

Author: Judge McKay

Defendant, Thompson, was convicted of defrauding the government in real estate purchases financed with mortgages insured by the Federal Housing Administration. Thompson appealed the district court's denial of his motion for a new trial. Thompson argued that the district court erred in expressly refusing to *voir dire* the jury on their exposure to a newspaper article which discussed a previous guilty plea signed by Thompson. This plea was withdrawn before trial.

The Tenth Circuit reversed the decision of the district court and remanded the case for a new trial. The court ruled that the article was prejudicial because it contained information addressing the issue of guilt. Consequently, the district court's refusal to *voir dire* the jury, or at a minimum to ask whether the jurors had read the article, was an abuse of discretion. The court then determined that the error was not harmless. The government did not prove beyond a reasonable doubt that the knowledge of the prior guilty plea did not enter into the jury's evaluation.

Certain Underwriters at Lloyds of London v. Evans, 896 F.2d 1255

Author: Judge Seth

Two related cases were decided. The first case involved a jurisdictional question. Defendant, Hamm, motioned for enlargement of time in order to file a notice of appeal fifty-nine days after the filing deadline. The district court granted a twenty-one day extension. Plaintiff, Certain Underwriters at Lloyds of London ("underwriters"), appealed, asserting that the extension exceeded that allowed by the Federal Rules of Appellate Procedure ("FRAP"). Thus, the underwriters argued that the Tenth Circuit was without jurisdiction.

The Tenth Circuit agreed with the district court and dismissed the appeal. The court reasoned that it lacked jurisdiction because Hamm failed to timely file his notice of appeal. Under FRAP, the maximum extension in this case was ten days, a time limit which the district court did not have the authority to enlarge.

The second case involved a declaratory judgment action on the question of insurance coverage. Defendant, Evans, filed a wrongful death action in state court based upon the decedent's death while riding in an aircraft connected with a fly-in. The underwriters subsequently filed in federal court, seeking a declaratory judgment that the death was not covered by its insurance policy. Summary judgment was issued in favor of the underwriters based upon exclusionary language in the policy. Evans subsequently appealed.

The Tenth Circuit affirmed, holding that the district court properly found that the insurance policy excluded passengers riding in an aircraft used directly in the fly-in. Moreover, the district court correctly found that the decedent was a passenger for purposes of the insurance policy. The court reasoned that the common meaning of the word "passenger" included someone such as the decedent who rode in the rear of the aircraft without access to the controls. Moreover, the aircraft was actively flown as part of the fly-in activities and was, thus, used directly in the event.

United States v. Vidakovich, 911 F.2d 435

Author: Judge McWilliams

Pursuant to a plea bargain, defendant, Vidakovich, owner of Yellowstone State Bank, pleaded guilty to misapplication of monies, making false entries in the books and records for purposes of defrauding the bank, and obstruction of justice. Several months after pleading guilty, Vidakovich filed a motion to withdraw his plea. Vidakovich claimed that: (1) his pleas were involuntary and coerced; (2) he had a valid defense to each of the charges; and (3) the government reached the plea bargain by asking for a restitution order. The district court denied Vidakovich's motion.

On appeal, the Tenth Circuit reviewed the transcript of the plea bargain and determined that the judge who accepted the plea bargain was "careful and cautious." Second, the district court properly rejected Vidakovich's testimony that he had a defense to all the counts after originally pleading guilty. Moreover, there was no evidence that the government breached its plea bargain by entering a restitution order, which was later vacated. Thus, there was no restitution problem which would require the district court to grant Vidakovich's motion to withdraw his plea.

United States v. Walker, 915 F.2d 1463

Author: Judge Tacha

Defendant, Walker, appealed her conviction on six counts of mail fraud in violation of 18 U.S.C. § 1341. On appeal, Walker argued that acquittal was improperly denied because there was insufficient evidence to convict her of mail fraud. The government, on the other hand, argued that: (1) the Tenth Circuit lacked jurisdiction because Walker filed for appeal after her conviction but before sentencing; and (2) Walker failed to reserve her issue for appeal because she only moved for acquittal at the end of the government's case and did not renew her motion at the close of all evidence introduced at trial.

The Tenth Circuit held that it had jurisdiction. The court reasoned that even though Walker's notice of appeal was premature, it was "harmless error." The notice of appeal ripened after sentencing when the judgment was formally finalized. When a defendant moves for acquittal after the government's case, and then presents evidence on de-

fendant's behalf, the motion for judgment of acquittal is deemed withdrawn, and any objection to its denial is waived. A motion for acquittal at the close of the government's case, therefore, must be renewed. If the motion is deemed withdrawn, the court will reverse the district court's judgment only if there is manifest error and only if reversal is necessary to prevent a miscarriage of justice. The court upheld the conviction, finding no manifest error or miscarriage of justice in the jury's decision that the U.S. Mails were incident to the defendant's scheme to defraud her employer.

