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## Criminal Procedure

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## Criminal Procedure

## CRIMINAL PROCEDURE

*United States v. Allen*, 892 F.2d 66

Author: Judge McKay

Defendant, Allen, used a false name on his financial affidavit in order to seek court-appointed counsel in another criminal proceeding under 18 U.S.C. § 1542. The district court granted Allen's application and appointed counsel to represent him during plea negotiations and sentencing. In a subsequent arrest, Allen's true name was learned. As a result, Allen was prosecuted in the present proceeding and found guilty of perjury under 18 U.S.C. § 1621(2). Allen appealed, asserting that: (1) his use of an alias in the financial affidavit did not constitute a materially false statement in violation of section 1621(2); and (2) the government breached its plea agreement.

The Tenth Circuit reversed on the first issue, holding that the government failed to prove materiality, an essential element in establishing perjury. The court explained that the test for materiality is whether the false statement has a natural tendency to influence, or is capable of influencing the decision required to be made. Materiality must be measured against the purpose for which the allegedly false statement was made. The purpose here was limited to Allen's indigence and not extended to simultaneous inquiries for bail and other factors. The materiality inquiry was thus limited solely to the impact of the false name on the determination of indigence. The court held that materiality was not shown. The government failed to prove that the determination of indigence would have changed had the Allen used his true name. Absent evidence of an adverse effect on indigence, materiality failed. In addition, the court failed to address the breach of agreement claim.

*Archuleta v. Kerby*, 864 F.2d 709

Author: Judge Ebel

Defendant, Archuleta, appealed his conviction of automobile burglary and larceny. Archuleta claimed that the victims' identification of him while he was sitting handcuffed in the police car was unnecessarily suggestive and prejudiced his right to a fair trial.

The Tenth Circuit stated that even though the district court found the procedure unnecessarily suggestive, the appropriate analysis for constitutionality involves balancing the reliability of the identification itself against the "corruptive effect" of the identification procedure. After weighing the totality of circumstances surrounding the identification, the court held that the evidence was admissible because: (1) the victims had ample opportunity to view the defendant at the time of the crime; (2) the victims' attention was focused on the defendant; (3) the victims were accurate and unequivocal in their description of the defendant; and

(4) the identification occurred only thirty minutes after the crime. The court affirmed dismissal of the *habeas corpus* petition.

*United States v. Baggett*, 890 F.2d 1095

Author: Judge Seymour

Defendant, Baggett, was convicted of simple possession of heroin under 21 U.S.C. § 844(a) and of three counts of using a telephone to facilitate the distribution of heroin under 21 U.S.C. § 843(b). Baggett appealed on the basis that there was insufficient evidence to support the jury's verdict on the possession count, and that section 843(b) does not apply to individuals who use the telephone to arrange drug purchases for their own personal use.

The Tenth Circuit held that to support a conviction for possession where there is no direct evidence of possession, circumstantial evidence must be presented which is strong enough to support an inference that a defendant actually possessed the drug in question. The circumstantial evidence must include testimony linking the defendant to an observed substance that a jury can infer to be a narcotic. Here, there was no evidence that Baggett possessed a substance and that the substance was a narcotic. Neither the detective nor the narcotics agent in the case saw money or narcotics exchanged between Baggett and the suspected drug dealer. The court found that because illegal possession of controlled drugs by individuals for their own personal use is a misdemeanor rather than a felony, Baggett could not be convicted for facilitation under section 843(b). The court reasoned that Congress, in enacting the statute, intended to distinguish between distributors and simple possessors. Baggett's conviction was reversed.

*United States v. Berryhill*, 880 F.2d 275

Author: Judge Barrett

Concurrence: Judge Seymour

Defendant, Berryhill, appealed an order of the district court. Berryhill argued that the district court erred in: (1) sentencing him to 300 years with a minimum term of 99 years before eligibility for parole; (2) failing to conduct adequate voir dire; (3) denying his motion for mistrial; and (4) failing to grant his motion to suppress in-court identification evidence.

The Tenth Circuit upheld the 300-year sentence and minimum term of 99 years before eligibility for parole because it was within the prescribed statutory limits of 18 U.S.C. sections 1201 and 4205(b)(1). The court further upheld the district court's *voir dire* and its ruling denying Berryhill's motion for mistrial. The court stated that the decision on both issues was within the sound discretion of the district court and would not be disturbed absent clear abuse of discretion. In addition, the court affirmed the district court's denial of Berryhill's motion to suppress in-court identification evidence of Berryhill by witnesses who had

previously viewed photographic displays. The court found that the photographic displays were not impermissibly suggestive.

*United States v. Bishop*, 890 F.2d 212

Author: Judge Ebel

Defendant, Bishop, appealed his conviction, claiming the district court improperly denied: (1) his motion to suppress evidence because the warrant used to retrieve it had been obtained without probable cause; (2) his motion for new trial because of the prosecution's late disclosure of impeachment evidence; and (3) his motion to acquit for insufficient evidence.

The Tenth Circuit declined to resolve whether there was probable cause supporting the warrant, finding that the F.B.I. agents' conduct fell within the "good faith exception" to the probable cause rule. With regard to the impeachment evidence, the court held that there was no violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to turn over material evidence favorable to a defendant when requested. There is no due process violation where the impeachment evidence is disclosed to the defense during the trial and the defendant makes a tactical decision not to use it. The court also affirmed the district court's denial of Bishop's motion for acquittal, holding that a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The case was remanded for resentencing under the new Federal Sentencing Guidelines.

*United States v. Bryant*, 892 F.2d 1466

Author: Chief Judge Holloway

Defendant, Bryant, appealed his conviction for involuntary manslaughter. Bryant argued that the district court abused its discretion by failing to define "wanton and reckless disregard for human life" as an element of involuntary manslaughter. Bryant also contended that the district court violated his rights under the double jeopardy clause when it based its sentence on the trial judge's view of the evidence which was contrary to that of the jury.

The Tenth Circuit held that the district court did not abuse its discretion by allowing the jury to apply the common understanding of "wanton and reckless." The court reasoned that this gave the jurors sufficient guidance without Bryant's proposed jury instruction on the meaning of the term. The court also stated that there is no substantial authority for the proposition that Bryant's proposed instruction on a "right to arm" bore a material relationship to the issue of guilt or innocence. In addition, the court found that Bryant's double jeopardy rights were not violated even though the sentencing judge disagreed with the jury's determination. The court explained that there was no suggestion that the trial judge considered non-existent or constitutionally invalid prior convictions. The trial court, therefore, acted within its discretion in sentencing Bryant to the statutory maximum period of incarceration al-

lowable for involuntary manslaughter. The judgment and sentence were affirmed.

*United States v. Buchanan*, 891 F.2d 1436

Author: Judge Baldock

Defendant, Buchanan, was convicted of conspiracy and manufacturing and possessing an unregistered firearm. The convictions were affirmed on appeal. Buchanan sought collateral relief under 28 U.S.C. § 2255, alleging that failure of the United States to disclose a personal relationship between an investigator from the Bureau of Alcohol, Tobacco and Firearms, ("Tilley"), and Buchanan's former wife, Whitten, was prejudicial error in violation of the *Brady* rule. The district court granted Buchanan a new trial, and the United States appealed.

The Tenth Circuit, on *de novo* review, held that failure to disclose the Tilley-Whitten relationship did not violate the *Brady* rule. The *Brady* rule states that suppression of evidence by the prosecution favorable to an accused, when it has been requested, violates due process when the evidence is material either to guilt or punishment regardless of whether the prosecution acted in good faith. Buchanan requested, in discovery, "any evidence which might be used for impeachment of any witness for the prosecution at the time of trial." The court determined that since neither Tilley nor Whitten was a chief witness, the failure to disclose impeachment evidence did not warrant granting of a new trial. Moreover, the court reasoned that neither Tilley's nor Whitten's credibility was material to the question of Buchanan's guilt. The district court's decision to grant a new trial was reversed.

*Buck v. Maschner*, 878 F.2d 344

Author: Judge Seth

Defendant, Buck, petitioned for a writ of *habeas corpus*, alleging improper introduction of evidence from a prior alleged molestation of children charge for which he had been tried and acquitted. The district court denied Buck's petition. Buck appealed, asserting violation of his constitutional rights.

The Tenth Circuit held that the collateral estoppel requirement of the fifth amendment's double jeopardy clause barred the evidence from admission in the instant case since the State impermissibly sought to prove exactly what it failed to prove in the previous trial. The court reversed and remanded with instructions to issue the writ of *habeas corpus*.

*United States v. Burton*, 888 F.2d 682

Per Curiam

Defendant, Burton, was convicted for distributing handbills without a permit on property leased by the federal government. Burton admitted committing the acts in violation of 41 C.F.R. § 101-20.309 (1986); however, she argued that pursuant to 40 U.S.C. § 318, the government

was without jurisdiction to prosecute her for such acts since the property was leased, and thus not owned, by the federal government. The district court denied Burton's motion to dismiss.

The Tenth Circuit held that the government had jurisdiction to prosecute. The court stated that the jurisdiction restriction of 40 U.S.C. § 318 was amended by an appropriations act, which expanded the government's jurisdiction to areas under its charge and control. Consequently, the government could enforce regulations on property merely leased by the United States. The court further held that the appropriations act which expanded the government's jurisdiction constituted a proper exercise of power under the necessary and proper clause of the United States Constitution. The act has a legitimate end, is within the scope of the Constitution, and is plainly adapted to achieve its end. The decision of the district court was, therefore, affirmed.

*United States v. Carreon*, 872 F.2d 1436

Author: Judge Barrett

The United States appealed the district court's order granting defendant Carreon's motion to suppress evidence. A United States Customs Inspector ("the Inspector") found approximately fifty kilograms of marijuana in Carreon's truck during a search at the United States-Mexico border. At issue was whether the search and seizure violated Carreon's fourth amendment rights.

The Tenth Circuit stated that a border search is an exception to the fourth amendment probable-cause warrant requirement. Extension of a routine border search is warranted if it is based on "reasonable suspicion" justified by a particularized and objective basis. The court held that the facts did establish a "reasonable suspicion" justifying the Inspector's search and, therefore, the district court's order granting the motion to suppress was clearly erroneous. The order was reversed and the case was remanded for trial.

*Case v. Mondragon*, 887 F.2d 1388

Author: Judge Anderson

Following his conviction, petitioner Case sought federal *habeas* relief. The district court conditionally granted Case's petition on the ground of jury misconduct, finding that Case's constitutional rights were violated when he was precluded from a post-verdict *voir dire* of the jury. The district court, however, denied relief on a second issue, finding that Case was properly denied a continuance which, if granted, would have enabled him to introduce a newly-discovered witness. Respondent, Mondragon, appealed the juror misconduct issue, and Case appealed the continuance issue.

The Tenth Circuit reversed on the jury misconduct issue and affirmed on the continuance issue. The court held that a presumption of correctness should be accorded to trial court findings on basic and pri-

mary facts. Whether or not jurors made or heard improper comments is a basic and primary fact and, therefore, the district court's findings should have been given full deference. The district court should have presumed insufficient proof of juror misconduct and denied Case relief. The court further held that the district court failed to fulfill a requirement when it did not explain its reasons for avoiding the presumption. Affirming the district court's decision to deny a continuance, the court stated that Case did not prove whether the denial violated constitutional principles of due process. Thus, the denial of the continuance was neither arbitrary nor unreasonable.

*Davis v. Reynolds*, 890 F.2d 1105

Author: Judge Anderson

Defendant, Davis, appealed from the district court's dismissal of his petition for a writ of *habeas corpus*. He contended that his sixth amendment right to a public trial was violated by the improper exclusion of the general public and the press from his trial during which he was convicted of raping three sixteen-year-old girls. On request by the prosecution, the district court excluded the public and press during a complaining witness' testimony without requiring evidence of the witness' condition and without interviewing the witness or her parents. The district court reasoned that the victim's age required closure, that Davis would still have the right to confrontation, and that the jury would be present during the witness' testimony.

The Tenth Circuit reversed, finding that the district court had improperly violated Davis's sixth amendment right to a public trial by failing to articulate specific, reviewable findings adequate to support the closure. The court stated that the overriding interest standard was not met because the district court did not: (1) inquire into the factual basis for the prosecution's assertion that the witness would be harmed unless the press and public were excluded; and (2) narrowly tailor its order since no alternatives to the blanket exclusion were considered. The case was remanded for entry of judgment granting habeas relief and vacating Davis's conviction if the state does not retry Davis within a reasonable time.

*Demarest v. Manspeaker*, 884 F.2d 1343

Author: Judge Logan

Dissent: Judge Ebel

Various prisoners in state and federal institutions testified as witnesses in separate criminal proceedings before federal tribunals. The prisoners contended that the plain language of 28 U.S.C. § 1821(a)(1) and (b) (1978) mandated the payment of attendance fees to witnesses regardless of whether they were incarcerated. The district court denied the fees.

The Tenth Circuit affirmed, holding that Congress never intended section 1821 to apply to those incarcerated for criminal acts. Nowhere in

the express language of the 1978 revision of section 1821 nor in its legislative history did Congress indicate criminal inmates were entitled to a fee. Additionally, prisoners do not incur financial loss serving as witnesses. Allowing such fees could lead to abuses since inmates could file suits and subpoena prison friends solely for the purpose of allowing the witnesses to gain profit and free trips outside prison.

*United States v. Dennison*, 891 F.2d 255

Author: Judge McWilliams

Plaintiff, United States (“government”), appealed from the district court’s dismissal of three indictments on the ground that the government failed to comply with the district court’s discovery orders. Defendants were indicted for conspiring to defraud a savings and loan association. Before and during trial the district court entered discovery orders requiring the government to make available to defense counsel exculpatory evidence.

In reversing the district court’s decision, the Tenth Circuit found that the prosecutor’s failure to comply with the discovery orders was the result of the prosecutor’s inexperience rather than bad faith and that the defendants had not been prejudiced by the prosecutor’s actions. The court noted that where a defendant moves in mid-trial for a mistrial or dismissal on grounds unrelated to his guilt or innocence, as was the case here, the government may appeal a ruling in favor of the defendant without offending the double jeopardy clause.

*United States v. Erwin*, 875 F.2d 268

Author: Judge Logan

Defendant, Erwin, asserted on appeal that: (1) the district court erred in holding that he lacked standing to challenge the stop and search of a car in which he was a passenger; (2) the traffic stop was a pretext to conduct an illegal drug search; and (3) his consent to the search was involuntary.

The Tenth Circuit affirmed the district court’s decision. First, the court held that Erwin, a passenger, had sufficient fourth amendment interest to challenge the traffic stop. The court reasoned that passengers also have interests against unreasonable seizure of their persons. Second, the court held that Erwin lacked standing to challenge the search because he failed to establish a legitimate expectation of privacy in the automobile. Thus, his fourth amendment rights were not violated by the search. Third, the court held that the traffic stop was legal and not pretextual: under identical circumstances, a reasonable officer would have stopped a vehicle exceeding the speed limit by twelve miles solely for the traffic violation. Based on the foregoing conclusions, the court found it unnecessary to consider whether consent to the search was voluntary.

*First National Bank of Tulsa v. United States*, 865 F.2d 217

Author: Judge Barrett

The Freeman Educational Association ("FEA"), appealed the district court's denial of its motions both to quash grand jury subpoenas requesting bank account information and for return of property seized by criminal investigators of the Internal Revenue Service ("IRS").

The Tenth Circuit affirmed. The court held that since a presumption of regularity attaches to grand jury subpoenas and since the FEA did not meet its burden of showing irregularity, the district court possessed subject matter jurisdiction to issue the subpoenas. Further, the government's need for the seized records in order to investigate criminal tax evasion charges was held to be compelling, and thus outweighed the FEA's first amendment rights. Finally, the court held that since the FEA was neither under arrest nor indictment, its case was not *in esse*. Consequently, the district court's order denying FEA's motion for return of property was a final appealable order, properly heard by this court.

*United States v. Garcia*, 879 F.2d 803

Author: Judge Anderson

Defendant, Garcia, pleaded guilty to possessing and distributing a controlled substance of less than one kilogram in 1986. The district court subsequently sentenced Garcia, requiring him to serve a term of special parole. Garcia appealed, arguing that the term of special parole was illegal.

The Tenth Circuit upheld the district court's decision. The court explained that the applicable penalty provision for Garcia's offense was 18 U.S.C. § 1841 (b)(1)(A). This provision required offenders to serve a term of special parole. In 1984, however, congress deleted the special parole term. Congress stated that the deletion of special parole would become effective November 1, 1987, for offenses involving under one kilogram. For offenses involving over one kilogram, the deletion of special parole would become effective in 1984. Following Congress' guidelines, the court held that Garcia must serve a term of special parole. The court reasoned that Garcia's offense involved under one kilogram, and further, Garcia committed the offense in 1986.

*Hopkinson v. Shillinger*, 866 F.2d 1185

Author: Judge Conway, sitting by designation

Dissent: Judge Logan

Defendant, Hopkinson, who was sentenced to death for first degree murder, petitioned the district court for a writ of *habeas corpus*. The district court dismissed the petition, and Hopkinson appealed.

The Tenth Circuit affirmed in part and remanded in part, staying Hopkinson's death warrant until the district court issued further orders. The court held that prosecutor Shillinger's introduction of evidence of

prior crimes, wrongs, or acts was properly admitted because it illustrated Hopkinson's motive. In addition, the court held that the confrontation clause was not violated when Shillinger introduced the murder victims' out-of-court statements, which included threats by Hopkinson. Also, the court stated that Shillinger's closing comments declaring that he thought Hopkinson, rather than the hired killer, was morally responsible for the victim's death, was an improper statement. The court held, however, that such a comment did not affect the fairness of the trial, considering the overwhelming amount of proof against Hopkinson.

*Hopkinson v. Shillinger*, 888 F.2d 1286

Author: Judge Anderson

Dissent: Judge Logan, with whom Chief Judge Holloway and Judges McKay and Seymour join

Defendant, Hopkinson, was convicted on four counts of first degree murder and two counts of conspiracy to commit first degree murder. Hopkinson's appeal to the district court was summarily dismissed. A panel of the Tenth Circuit unanimously affirmed on virtually all issues, and affirmed with one dissent on the subject matter of this *en banc* review. *Hopkinson v. Shillinger*, 866 F.2d 1185 (10th Cir. 1989), *reh'g granted*, March 23, 1989. The Tenth Circuit thereafter agreed to consider *en banc* whether remarks by the State in the death sentencing proceeding violated the rule set out in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Court held that it is constitutionally impermissible to mislead the jury into thinking the ultimate determination of death rests with someone else.

The Tenth Circuit held that the *Caldwell* decision, which was decided after Hopkinson's death sentence became final, announced a "new rule." The court stated that this "new rule" could only be applied retroactively to Hopkinson if it fell within one of two exceptions. The court held that the "new rule" fell within the second exception and therefore could be retroactively applied to Hopkinson. This exception requires observance of "procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague v. Lane*, 109 S.Ct. 1060, 1075 (1989). The court reasoned that the jury's understanding of its function in a death sentence proceeding is related to the concept of ordered liberty. Even though the "new rule" applied to Hopkinson, the court was equally divided as to whether the State's remarks violated the "new rule." In particular, the court was split as to whether the remarks shifted "the responsibility for the sentencing decision away from the jury." *Parks v. Brown*, 860 F.2d 1545, 1549 (10th Cir. 1988) (*en banc*), *cert. granted*, 109 S.Ct. 1930 (1989). The court ruled that its equal division had the effect of affirming the district court's denial of Hopkinson's petition on this issue. The court also added that Hopkinson's death sentence must not be vacated because there was not a substantial possibility that the State's remarks affected the jury's sentencing decision.

*United States v. Jenkins*, 866 F.2d 331

Author: Judge Moore

The Government sought a *writ of mandamus* to compel Respondent, Jenkins, to impose the mandatory enhanced sentence of 21 U.S.C. § 841(b)(1)(B) against defendant, Mendes, following his conviction for possession with intent to distribute controlled substances. The district court based its refusal to apply the enhanced sentence provision on the lack of a jury finding on the quantity of narcotics possessed.

The Tenth Circuit held that the district court's refusal to apply the minimum enhanced sentence was a usurpation of judicial authority and resulted in an illegal sentence. The court reasoned that since the quantity requirement of section 841(b)(1)(B) applies only to sentencing and is not an element of the substantive offense, the Government need not prove essential quantities beyond a reasonable doubt, and the defendant has no right to a finding by the jury that the fact has been established. There was evidence that Mendes had immediate and constructive possession of sufficient quantities of narcotics to satisfy the requirements of the enhanced sentencing provision.

The court found that issuance of a writ was proper because the crime was committed prior to the effective date of a statute providing for direct appeal of sentences imposed in violation of law, and a motion to correct the sentence under Fed. R. Crim. P. 35(a) would have been fruitless since the district court had already rejected the Government's position.

*Kaiser v. Lief*, 874 F.2d 732

Author: Judge O'Conner, sitting by designation

Plaintiff, Kaiser, appealed the district court's order granting summary judgment in favor of defendant, Lief. Kaiser appealed and argued that: (1) the search of his home was conducted pursuant to an invalid warrant; (2) furs were improperly seized during a search for drugs; and (3) the district court improperly instructed the jury regarding Lief's liability for the acts of others while a detective lieutenant.

The Tenth Circuit held that the search warrant was valid. The court found that the affidavit underlying the search warrant and the complaint on which the arrest warrant was based provided sufficient indications that the confidential informant was reliable. Together, the facts gave the magistrate a substantial basis to conclude that probable cause existed. On *de novo* review, the court held that seizure of the furs was proper under the plain view doctrine. The doctrine applied because: (1) the compartment searched could have contained the drugs sought; (2) Lief did not intend to seize the furs when he applied for the warrant; and (3) there was immediate probable cause to believe that the furs were stolen. Finally, the court held that the district court's refusal of Kaiser's proposed instruction was proper even though the instruction could have resulted in Lief's liability for the acts of others.

*United States v. Keiswetter*, 860 F.2d 992

Author: Judge Moore

Dissent: Judge Baldock

Defendant, Keiswetter, sought to vacate his original guilty plea. The district court denied the motion concluding that Keiswetter had not stated a fair and just reason to allow withdrawal.

On appeal, the Tenth Circuit concluded that the record did not contain the required factual basis for the plea pursuant to Fed. R. Crim. P. 11(f). The Tenth Circuit reversed the district court and held that a guilty plea improvidently accepted by the district court without sufficient factual basis for the plea must be vacated.

*Klein v. United States*, 880 F.2d 250

Author: Judge Holloway

Plaintiff, Klein, appealed the district court's denial of both a petition for a writ of *coram nobis* and a FED. R. CIV. P. 60(b)(5) motion for a new trial.

The petition for *coram nobis* relief was based upon new evidence which showed that the government withheld its belief that Klein was financing narcotics deals. Moreover, the evidence showed that Klein had a mental condition in the Navy which would have assisted him in proving he was not able to form an intent to evade taxes. The burden of proof was on Klein to show that the errors to be corrected resulted in a complete miscarriage of justice and that the new evidence would have resulted in his acquittal.

The Tenth Circuit upheld the district court's denial on procedural grounds. On the merits, the court held Klein was not denied a fair trial since the narcotics related evidence would have hindered his case. In addition, Klein's history of mental incapacity was known to Klein prior to trial. Klein's psychiatric witness indicated his testimony would be unchanged even in light of that evidence. The court affirmed the district court.

The court also affirmed the district court's denial of Klein's Rule 60(b)(5) motion for a new trial. Klein was disbarred prior to the tax evasion trial and in 1988 was reinstated to the practice of law when it was determined that his mental health was restored. Although the disbarment was introduced at the tax evasion trial, there was also other strong evidence that Klein intended to evade taxes. The court upheld the district court's ruling that the 1988 reinstatement did not affect the criminal case verdict. The court denied equitable relief under Rule 60(b)(6) since Klein had not demonstrated that this was an extraordinary case calling for relief under the rule.

*United States v. Koonce*, 885 F.2d 720

Author: Judge Ebel

Dissent: Judge McKay

Defendant, Koonce, appealed the district court's denial of his motion to dismiss a federal indictment against him in Utah on the grounds that some of the alleged criminal misconduct underlying the Utah prosecution was used to enhance Koonce's sentence for a prior conviction in South Dakota.

The Tenth Circuit affirmed, and found no violation of the fifth amendment double jeopardy ban on multiple prosecutions or the federal sentencing guidelines because the Utah offense was different from the one Koonce was convicted for in South Dakota. Though the South Dakota district court inquired into the Utah offense during sentencing, the court ruled that Koonce was never put in jeopardy for the Utah offense during the South Dakota sentencing hearing. As for Koonce's argument that he was subject to multiple punishments in violation of the double jeopardy clause, the Tenth Circuit ruled that the issue was not ripe for review, unless or until Koonce was convicted in Utah.

*United States v. Kornegay*, 885 F.2d 713

Author: Judge Bratton, sitting by designation

Dissent: Judge McKay

Defendant, Kornegay, appealed his conviction for interstate transportation and sale of a stolen farm tractor. Kornegay based his appeal on the failure of the court to suppress evidence allegedly seized during an illegal search, and the failure to grant his motion for a mistrial, based on intentional misconduct by the prosecutor.

The first argument revolved around whether the impounding and inventory search of Kornegay's vehicle was proper. The Tenth Circuit ruled that simply because Kornegay's car was legally parked did not mean impoundment was unnecessary, and that the facts supported that the impounding of the car was proper and reasonable. The court also ruled that since the evidence in question resulted from an initial routine inventory, to secure the vehicle and protect Kornegay's property, the evidence was obtained in a proper and reasonable manner. The court summarily disposed of the second claim because though there was prosecutorial misconduct, it was harmless beyond a reasonable doubt.

*Laycock v. New Mexico*, 880 F.2d 1184

Author: Judge Wright, sitting by designation

Defendant, Laycock, plead guilty to armed robbery with a firearm enhancement in exchange for dismissal of another charge. Laycock appealed the district court's denial of his petition for *habeas corpus* relief, claiming ineffective assistance of counsel and entry of an involuntary guilty plea, because his attorney misrepresented the consequences of the plea agreement.

The Tenth Circuit held that Laycock failed to prove that his attorney materially misrepresented the consequences of the plea agreement. Laycock signed the agreement, following an explanation by the trial judge, and he denied that any other promises had been made in exchange for his plea. To prove ineffective assistance of counsel, Laycock needed to establish that his attorney's performance was deficient and that, but for counsel's errors, Laycock would have insisted on going to trial. The court held that Laycock had failed to prove either of these elements. Among its findings, the court concluded that the attorney's advice to accept the plea bargain was reasonable, given that Laycock admitted committing the crimes charged, was identified by witnesses, and had a prior record. The court also rejected Laycock's claims that his sentence exceeded the statutory maximum and that he received an inadequate sentencing hearing. The court affirmed dismissal of the *habeas corpus* petition.

*United States v. Maez*, 872 F.2d 1444

Author: Judge Holloway

Dissent: Judge Brorby

Defendant, Maez, was suspected of being involved in a bank robbery. Maez and his wife voluntarily left their home and surrendered to the authorities when they realized their home was surrounded by police officers. Maez was then placed under arrest. The police did not have an arrest warrant, nor did they have a warrant to search his trailer and truck. Rather, the police contended that Maez's wife consented to a search of the trailer and truck. Maez motioned to suppress evidence seized during the search, but it was denied. Maez subsequently appealed, arguing: (1) the warrantless arrest violated his fourth amendment rights; and (2) the consent to search his trailer was not voluntary.

First, the Tenth Circuit stated that without consent police officers cannot enter a home to make a warrantless routine felony arrest, even with probable cause, in the absence of exigent circumstances. Even though the officers did not enter Maez's home, the court reasoned that Maez was coerced into leaving his home. The court found no exigent circumstances to justify the warrantless arrest. Second, the court stated that Mrs. Maez's consent to search the trailer was an act of free will only if there was a break in the causal connection between the illegality and the evidence obtained. The court found no intervening events between the time of Maez's arrest and the signing of the consent form. Consequently, the court held that Mrs. Maez's consent to search the trailer was not an act of free will. In addition, the court considered three factors in determining whether Mrs. Maez consented to a search of their truck: (1) the proximity of Maez's arrest and consent given; (2) the effect of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Based on these three factors, the court held the consent was not sufficiently an act of free will.

*United States v. Mann*, 884 F.2d 532

Author: Judge Baldock

Defendant, Mann, appealed conviction of four counts of mail fraud, one count of wire fraud and three counts of willful failure to file income tax returns, challenging the sufficiency of evidence on all counts.

The Tenth Circuit affirmed Mann's mail fraud conviction, holding that substantial evidence existed whereby the jury could conclude that Mann made false representations with knowledge of or indifference to the possibility of their falsity. The court reversed the wire fraud conviction, finding that the circumstantial evidence used to prove criminal intent was too attenuated. The court reversed and remanded the willful failure to file conviction because although there was sufficient evidence to convict, Mann was prejudiced by the district court's failure to instruct the jury regarding Mann's "good-faith" defense.

The Tenth Circuit further ruled that the district court did not improperly refuse to admit magazines that supported Mann's legal position, nor did it erroneously admit testimony of a summary witness for the government. Moreover, Mann's prosecution was not impermissively selective, and there was no evidence that governmental misconduct prevented Mann from receiving a fair trial.

*United States v. Martinez*, 877 F.2d 1480

Author: Judge McWilliams

Dissent: Judge McKay

Defendant, Martinez, was convicted of conspiracy to distribute heroin and to possess heroin with an intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and use of a telephone to facilitate the possession and distribution of heroin in violation of 21 U.S.C. § 3(b) and 18 U.S.C. § 2. Martinez appealed both counts.

The government conceded that because of faulty jury instructions the conviction under the second count had to be reversed and the sentence vacated.

The Tenth Circuit addressed the conspiracy conviction, holding that the jury did not convict Martinez on a guilt-by-association basis, due to her joint trial with other codefendants. The government's evidence, both from testimony and recorded telephone conversations, was held sufficient to establish Martinez's participation in the conspiracy. The conduct of a fellow defendant was not adequately prejudicial or irregular to justify a separate retrial and the court affirmed Martinez's conviction of conspiracy.

*United States v. Martinez*, 890 F.2d 1088

Author: Judge Baldock

Defendant, Martinez, appealed from a conviction for failure to appear after being released on bail in violation of 18 U.S.C. § 3146(a)(2). Martinez was convicted of conspiring to possess and distribute cocaine.

After sentencing, Martinez was granted an appeal bond. His conviction was later affirmed and the district court informed Martinez by letter of his surrender date. Martinez failed to surrender and was later arrested.

The Tenth Circuit affirmed, holding that failure to appear is a continuing offense which need not be complete on the surrender date. Therefore, the prosecutor was not required to prove an exact date for the offense. The court concluded that Martinez knowingly failed to appear since notice of his surrender date had been mailed to him by both the district court and his attorney. Evidence of Martinez's prior conviction for conspiring to possess and distribute cocaine and his pending indictment for new cocaine charges was properly admitted by the district court to show motive to commit the offense of bail jumping. The potential prejudice of this evidence to Martinez did not substantially outweigh its probative value. Finally, the court considered two comments made by the prosecutor during his closing argument and concluded that neither remark was improper when reviewed in the context of the entire record.

*United States v. McKinnell*, 888 F.2d 669

Author: Judge Tacha

Defendant, McKinnell, was convicted for using a firearm during or in relation to a drug trafficking crime and for possession of cocaine with intent to distribute. McKinnell appealed, arguing that: (1) the district court erred in failing to suppress evidence obtained during a search of his automobile in violation of his fourth amendment rights; (2) possession with intent to distribute is not a felony pursuant to 18 U.S.C. § 924(c)(2)(amended 1988) because it does not involve the actual distribution, manufacture, or importation of drugs; (3) the mere presence of a firearm constituted insufficient evidence to sustain his conviction under 18 U.S.C. § 924(c)(1) because the statute penalizes a person who "uses or carries" a firearm during or in relation to a drug trafficking crime; and (4) the district court erred in admitting a prior criminal act into evidence for the purpose of showing intent.

Affirming the district court's decision, the Tenth Circuit held that the search of McKinnell's car was valid because it occurred pursuant to a lawful custodial arrest. Therefore, it was also proper for the police to examine the passenger compartment and any containers found within. The court further held that possession of a controlled substance with intent to distribute that substance is a valid predicate offense for the purposes of the section 924(c)(1). Furthermore, the court stated that the "uses" element of section 924(c)(1) was satisfied because McKinnell had "ready access" to the firearm and it was an integral part of the criminal undertaking. Finally, the court held that there was no error in admitting a prior criminal act committed by McKinnell. Since intent was at issue, testimony concerning McKinnell's recent and similar criminal activity was probative of his intent.

*United States v. McNeal*, 865 F.2d 1167

Author: Judge McWilliams

Defendant, McNeal, was convicted of violating 18 U.S.C. § 2113 which makes it a crime to take money by force from a “[s]tate-chartered credit union the *accounts* of which are insured by the . . . National Credit Union Administration [“NCUA”].” (emphasis added).

The Tenth Circuit held that use of the term “deposits” instead of “accounts” in the indictment was not sufficient cause to grant a motion to dismiss for failing to charge a crime. The court also held that proof of federal insurance of the institution, in order to qualify for federal jurisdiction of the case, was adequately shown by an insurance certificate from the NCUA to the credit union’s predecessor, evidence that insurance premiums were paid each year even though no updated certificate was issued, and testimony from a senior vice-president that the institution was federally insured on the date of the robbery. In addition, an instruction to the jury that if McNeal was found guilty of the robbery he must also be found guilty of assault with a handgun was not plain error, as is required on appeal when the objection was not first raised at trial. Finally, the court held that the district court properly rejected as unnecessary an instruction regarding the possible infirmities of eyewitness testimony where the case was supported by testimony of multiple witnesses and other corroborating evidence.

*United States v. McNeal*, 865 F.2d 1173

Author: Judge McWilliams

Defendant, McNeal, and his brother were both convicted of armed robbery of a state-chartered credit union which had federally insured deposits. McNeal appealed, asserting that: (1) the district court’s failure to sever his trial from his brother’s trial was reversible error; and (2) the district court erred in denying his post-trial motion for permission to query the jurors.

The Tenth Circuit held that the district court’s denial of McNeal’s motion to sever was not reversible error. The court stated that as a general rule joint participants in a criminal act can expect to be tried together and indicted together. This holds true even if the joint participants are brothers. The court further held that the district court did not err in denying McNeal’s motion to query the jury without holding a hearing. The court stated that pursuant to local rule, a hearing need not be held when such a motion is insufficient on its face. The court addressed additional matters in its opinion for the appeal of McNeal’s brother at 865 F.2d 1167.

*United States v. Miller*, 869 F.2d 1418

Author: Judge Brorby

Plaintiff, the United States, appealed from an order of the district court granting defendant Miller’s motion for a new trial under Fed. R.

Crim. P. 33. Miller, convicted of violating 18 U.S.C. § 1001, filed a motion for reconsideration twenty-one months after the final judgment, asking the district court to reconsider its prior denial of a motion for a new trial. Believing Miller had received ineffective assistance of counsel, the district court granted the motion.

On appeal, the Tenth Circuit reversed the order and held that pursuant to Fed. R. Crim. P. 33, Miller was required to file a petition to reconsider the denial of a motion for a new trial within ten days of entry of the judgment or order, absent a showing that evidence of the alleged ineffectiveness was not available to Miller at the time of trial. Finding that the facts showing the adequacy of trial preparation were available to Miller at the time of trial, the court found the motion defective for lack of jurisdiction.

*United States v. Mobile Materials, Inc.*, 881 F.2d 866  
Per Curiam

Defendants, Mobile Materials, Inc. ("Mobile"), Mobile Materials Co. ("Partnership"), and Philpot, were indicted on seven counts for conspiracy to submit rigged bids to, or withhold from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority, in violation of the Sherman Act. The district court dismissed the indictment against Mobile and the Partnership on the ground that they were dissolved more than two years prior. After appeal to the Tenth Circuit, contesting the dismissal, the district court was ordered to conduct further proceedings in the prosecution of Mobile, the Partnership, and Philpot. Philpot and Mobile were subsequently convicted of violating the Sherman Act, and were convicted of one count of making false and fraudulent statements to the United States Department of Transportation. Philpot and Mobile raised four issues on appeal: (1) whether the case should have been submitted to the jury on a theory of grand conspiracy to rig bids; (2) whether the Speedy Trial Act, 18 U.S.C. §§ 161-317(e), was violated by the protracted length of the prosecution; (3) whether the trial judge's attitude and demeanor convinced the jury that the judge thought the defendants were guilty; and (4) whether the sentences were grossly disproportionate.

First, the Tenth Circuit found that all of the essential elements of a conspiracy under sections 1 and 2 of the Sherman Act were established to allege an antitrust violation. Second, the court examined the course of the proceedings prior to trial, tracking the excludable and non-excludable days under the Speedy Trial Act. The court explained that judicial economy and procedural fairness permitted Philpot, based on his relationship with Mobile and the Partnership, a joint trial. Moreover, the delay in prosecution was held to be both reasonable and mathematically correct (50 elapsed days of the 70 limit). Third, in absence of a complete transcript, the court was not able to rule on the allegations of judicial misconduct. Finally, in a review of the severity of the sentence imposed, the court found no abuse of the district court's discretion in meting out

punishment, finding the sanctions all within contemplation of statutory provisions of the Sherman Act. The district court's decision was, therefore, affirmed.

*Nieto v. Sullivan*, 879 F.2d 743

Author: Chief Judge Holloway

Defendant, Nieto, appealed the district court's order dismissing his petition for a writ of *habeas corpus* challenging his conviction for assault, battery, and armed robbery.

The Tenth Circuit affirmed, holding that testimony by the arresting officer which made reference to mug shots did not deny Nieto of a fair trial in light of his own testimony that he had been previously arrested and was presently incarcerated. The prosecutor's statements regarding an "object focus" phenomenon did not deprive Nieto of due process because his counsel disavowed any objection to the phenomenon and used it to defendant's advantage. Additionally, the prosecutor's references to another alleged victim who did not testify did not deny Nieto a fair trial because the prosecutor's comments were in response to defense counsel's closing remarks, the jury was properly instructed, and an objection was properly sustained by the trial court. The trial judge had a substantial reason for partial closure, and properly conducted a hearing where the circumstances were discussed. Therefore, the court held that the closure of the court to Nieto's relatives during the testimony of the victim did not deny Nieto a fair trial.

*United States v. Nunez*, 877 F.2d 1470

Author: Judge McWilliams

Dissent: Judge McKay

Defendant, Nunez, was convicted for conspiracy to possess and distribute heroin and for using the telephone to facilitate the crime. Nunez appealed, arguing: (1) the district court erred in denying his motion to suppress evidence from a wiretap on his brother's phone; (2) the evidence showed two conspiracies, entitling Nunez to two separate trials; (3) the court erred in denying his motion for mistrial.

The Tenth Circuit stated that wiretap authorizations are presumed proper, and the defendant has the burden of overcoming the presumption. Nunez was unable to prove that there was no probable cause, nor any need for the wiretap. Second, the court rejected Nunez's claim that the evidence showed two conspiracies. The court held that there was a single conspiracy based on the finding that all participants shared a common goal: to possess and distribute heroin for profit. Third, the court upheld the district court's denial of Nunez's motion for mistrial. The court held that the ousting of Nunez's brother from the courtroom for improper behavior was not prejudicial to his case. The court found no abuse of discretion by the district court. Finally, the court found that there was sufficient evidence to support Nunez's conviction.

*United States v. Nunez*, 877 F.2d 1475

Author: Judge McWilliams

Dissent: Judge McKay

Defendant, Nunez, argued that the district court violated his fifth amendment rights when he was removed from trial for disruptive conduct. Nunez also argued that his sixth amendment rights were violated when the district court refused to remove appointed counsel, and precluded Nunez from appearing *pro se*.

The Tenth Circuit held that Nunez's fifth amendment rights were not violated. The court reasoned that a defendant in a criminal proceeding can waive his right to be present at trial if his disruptive behavior continues following a judge's warning. The court also found that it was too late to appoint new counsel. Moreover, had Nunez been allowed to proceed *pro se* and been removed, he would have been unrepresented. The district court's decision was, therefore, affirmed.

*Peters v. Egnor*, 888 F.2d 713

Author: Judge Anderson

Plaintiff, Peters, was arrested in Colorado on a British warrant alleging theft by deception and forgery. The United States Magistrate ordered his extradition and the district court denied Peters' petition for writ of *habeas corpus*. Peters appealed the denial, and argued that there was not probable cause to extradite him, and that the doctrine of dual criminality was not satisfied.

In determining the sufficiency of the evidence, the committing magistrate must decide whether there is competent evidence to justify holding the accused to await trial. The magistrate need not determine whether the evidence is sufficient to justify a conviction. The *habeas corpus* review of the magistrate's finding of probable cause is narrow: appeal must fail if there is any evidence of probable cause.

The Tenth Circuit held there was sufficient evidence to establish probable cause for both charges. The court also upheld the lower courts' finding that the theft by deception statute was substantially analogous to federal securities laws.

*United States v. Peveto*, 881 F.2d 844

Author: Judge Holloway

Dissent: Judge Saffels, sitting by designation

Three appeals were consolidated for argument. First, defendant, Hines, appealed his five-count conviction for violating and conspiring to violate narcotics laws and traveling in interstate commerce to promote narcotics manufacturing. Hines argued that the district court's failure to declare a mistrial was prejudicial because the jury heard evidence of his prior felony conviction. In addition, Hines claimed that there was insufficient evidence to establish that he violated 18 U.S.C. § 1952 (the "Travel Act"). Moreover, Hines argued that the district court abused its

discretion after granting a continuance as a sanction for the government's violation of discovery orders, rather than imposing a more extreme sanction.

The Tenth Circuit held that the district court's denial of Hines' motion for mistrial was not an abuse of discretion. The court reasoned that the jury was given a cautionary instruction. Moreover, Hines gave testimony regarding his record. The court concluded that there was sufficient evidence for the jury to find Hines guilty of violating the Travel Act. Finally, the court ruled that the district court's use of the less extreme sanction of continuance was not an abuse of discretion, where there was no evidence of prejudice to Hines.

Second, defendant, Peveto, appealed his conviction for conspiracy. Peveto claimed that evidence found in a search of his apartment should have been suppressed because the affidavit in support of the warrant was insufficient to establish probable cause. Moreover, Peveto contended that the executing officers used excessive force. Peveto also challenged the admission of testimony by a co-conspirator and the admission of a traffic ticket which tied him to the conspiracy. Peveto argued that there was insufficient evidence to establish that he was a member of the conspiracy.

The Tenth Circuit held that the district court properly denied Peveto's motion to dismiss. The court found that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. Also, there was a substantial basis for concluding that the police did not use excessive force. The court ruled that the co-conspirator testimony was properly admitted. The court reasoned that the testimony at issue may be considered in making the determination to admit, subject to being connected up later. The court concluded that the evidence, although circumstantial, was sufficient for the jury to find that Peveto knowingly joined the conspiracy. The court found that the traffic ticket, offered as circumstantial evidence of the conspiracy, and not to prove the truth of the facts asserted, was not hearsay.

Third, defendant, Rodgers, appealed his four-count conviction for violating and conspiring to violate narcotics laws. Rodgers claimed that the district court abused its discretion in denying his motion to sever under FED. R. CRIM. P. 14. The court found that Hines' and Rodgers' defenses were so antagonistic as to be mutually exclusive, and that the district court's failure to grant a severance denied Rodgers a fair trial. The court concluded that this was prejudicial error.

Finally, all three defendants challenged the sufficiency of proof as to the existence of a single conspiracy. The court ruled, however, that the jury could reasonably have found that the evidence established a single conspiracy. The convictions of Hines and Peveto were affirmed. Rodgers' conviction was reversed and remanded for a new trial.

*United States v. Pogue*, 865 F.2d 226  
Per Curiam

Defendant, Pogue, appealed the denial without hearing of his motion to vacate conviction or correct sentence. Pogue's sentence imposed restitution far in excess of the maximum fine of which he was informed during the plea-bargaining stage. Pogue insisted he would not have pled guilty if he had been warned by the district court prior to sentencing that he could be required to pay restitution. Further, Pogue claimed he did not withdraw his guilty plea because he believed a change of plea was impermissible.

The Tenth Circuit held that Pogue was entitled to an explanation of the possibility of restitution prior to entering his guilty plea, and that he had demonstrated a substantial violation of Fed. R. Crim. P. 11. Therefore, the court vacated the denial of Pogue's motion and remanded this issue to the district court. The court held, however, that the district court's imposition of restitution was not a breach of the plea agreement, which provided that the government would bring no further charges but contained no provision regarding sentencing. In addition, the district court did not abuse its discretion in calculating restitution since Pogue had stipulated on record to the amount imposed.

*United States v. Prichard*, 875 F.2d 789  
Per Curiam

Defendant, Prichard, moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Prichard alleged: (1) a violation of FED. R. CRIM. P. 23(A), which resulted in his nonvoluntary waiver of a jury trial; (2) the application of "attempt" was unconstitutionally vague as applied; and (3) a misapplication of the relevant legal standards in determining his guilt. The district court denied Prichard's motion to vacate, set aside or correct his sentence. Prichard subsequently appealed and reasserted the same grounds for relief. Prichard further asked for recusal of the district judge.

First, the Tenth Circuit held that the lack of a document memorializing Prichard's waiver of a jury trial did not result in anything less than a knowing, intelligent waiver. The court also held that Prichard's second and third issues on appeal were fairly encompassed in his direct appeal. Absent an intervening change in the law of a circuit, issues disposed of on direct appeal generally will not be considered on a collateral attack by a motion pursuant to 28 U.S.C. § 2255. Moreover, the court held that Prichard's allegations of bias and prejudice, because of the judge's prior judicial contacts with Prichard, were insufficient to support recusal. The judgment of the district court was, therefore, affirmed.

*United States v. Rising*, 867 F.2d 1255  
Author: Judge McWilliams

Defendant, Rising, was convicted of murder with premeditation and

malice aforethought and unlawful possession of a knife in a penitentiary. Rising appealed the convictions, presenting twelve various grounds for reversal. Rising's major contention was that the district court judge committed reversible error by refusing to allow two fellow inmates to testify as to threats made by the victim against Rising. The purpose of this testimony was to establish Rising's claim of self-defense.

The Tenth Circuit ruled that since the district court had allowed other inmates to testify as to communicated threats by the victim on Rising's life, the evidence would have been cumulative. The court held that the district court had not abused its discretion to exclude the cumulative evidence. Finding no reversible error, the court affirmed the district court's judgment.

*United States v. Rivera*, 867 F.2d 1261

Author: Judge A. Anderson, sitting by designation

Defendant, Rivera, appealed his conviction for possession of cocaine with intent to distribute, alleging that: (1) the police officer stopped the vehicle as a pretext, without probable cause for the stop or highway search; and (2) the search was invalid for failing to meet the legal standards for a search incident to an arrest.

Affirming the district court's denial of Rivera's motion to suppress evidence obtained from the highway search, the Tenth Circuit held that the initial stop and investigation for a traffic violation was lawfully made. This stop occurred after a truck driver notified the officer that a car was tailgating him. During the stop the officer noticed a smell associated with cocaine. The officer then asked for and received consent to search the car. The search turned up several packages of cocaine. The court concluded that this highway search could not be upheld as a search incident to an arrest because probable cause was not present until the search and seizure produced evidence of drugs. However, the highway search was properly performed following Rivera's voluntary verbal consent. The court also held that the district court was not clearly erroneous in denying suppression of evidence from the highway search even though written consent for a subsequent gas station search was found to be invalid.

*United States v. Shunk*, 881 F.2d 917

Per Curiam

Defendant, Shunk, was convicted of possession of a firearm by a felon. On appeal, Shunk argued: (1) that the district court erred in admitting into evidence a videotape of his admissions before the government's establishment of the *corpus delicti*, and (2) that the videotape of the sting officer's conversation with Shunk's brother, even if not inadmissible hearsay, failed to corroborate Shunk's admissions.

In upholding the conviction, the Tenth Circuit ruled that the *corpus delicti* issue was irrelevant because of the nature of the crime: there was

no tangible injury or loss and the occurrence of the crime was inseparable from the identity of the specific defendant. The court instead applied the corroboration rule, requiring the prosecution to present evidence establishing the trustworthiness of the extrajudicial statements, but not requiring that the corroborating evidence be sufficient independently to establish the *corpus delicti*. The court held that the government had presented sufficient corroborating evidence.

Affirming the conviction, the court ruled that a reasonable jury could find that Shunk had knowingly possessed a firearm and that Shunk's brother's statements were admissible as statements offered against a party which are made by the party's agent.

*United States v. Silkwood*, 893 F.2d 245

Author: Judge Moore

Trooper Moore stopped defendant, Silkwood, for speeding and then saw a loaded gun in Silkwood's glove compartment. The district court denied Silkwood's motion to suppress the gun, and Silkwood appealed. Silkwood also appealed the district court's decision to prevent him from examining Moore's personnel file. In addition, Silkwood argued that he did not waive his right to counsel when he decided to appear *pro se* rather than accept appointed counsel.

First, the Tenth Circuit held that the district court did not err in refusing to suppress evidence of the gun. The court stated that the district court's decision was proper under the plain view exception to the fourth amendment. Second, the court upheld the district court's decision to prevent Silkwood from examining Moore's personnel file. Third, the court stated that if a defendant waives his sixth amendment right to counsel, the court must conduct a penetrating and comprehensive inquiry into his reasons for the waiver. Moreover, the court must question the defendant on the record to be certain that waiver of counsel was truly knowing and voluntary. The court found that Silkwood did not knowingly and volutarily waive his right to counsel. The court explained that the district court failed to inquire adequately into Silkwood's understanding of his waiver.

*United States v. Smith*, 888 F.2d 720

Author: Judge Moore

Defendant, Smith, appealed his conviction of bank robbery on the ground that the district court erred by not giving a cautionary jury instruction regarding the testimony of a paid informant. Smith also appealed the sentence imposed by the district court, which departed from the Federal Sentencing Guidelines ("Guidelines"). Smith argued that he did not receive notice of the grounds for departure, and he argued that the departure was unreasonable.

First, the Tenth Circuit upheld Smith's conviction. The court reasoned that even if the rejection of the defendant's instruction was erro-

neous, the error was harmless beyond a reasonable doubt because of the substantial evidence identifying Smith as the bank robber. Second, the court vacated and remanded for resentencing because of the district court's insufficient statement of the reasons for its departure from the Guidelines. The court stated that specificity of reason is mandated by 18 U.S.C. § 3553(c). The court failed to comment on the notice or unreasonableness issues.

*United States v. Thomas*, 884 F.2d 540

Author: Judge Tacha

Defendant, Thomas, convicted of possession with intent to distribute more than fifty kilograms of marijuana, appealed his sentence, claiming the Federal Sentencing Guidelines, 28 U.S.C. § 991 *et. seq.* violated his fifth amendment due process rights.

The Tenth Circuit held that the guidelines did not violate Thomas' rights. First, there is no constitutional right to have a judge make a discretionary individualized sentence determination. Congress has the power to divest the courts of their sentencing discretion and to establish exact mandatory sentences for all sentences. Second, the guidelines do not deprive defendants of meaningful participation in the sentencing process because they allow defendants to appear, offer evidence and challenge the government's evidence. Third, although a prosecutor has the discretion to determine what charges to bring, the guidelines do not grant him improper control of a defendant's sentence simply because the evidence will support conviction under more than one statute. Thomas' sentence was affirmed.

*Tucker v. Makowski*, 883 F.2d 877

Per Curiam

Defendant, Tucker, appealed the denial of a writ of *habeas corpus* after he was convicted of robbery and kidnapping at successive trials. Tucker's appeal raised three principal issues: whether his successive trials arising from the same transaction violated double jeopardy; whether the introduction of "other crimes" evidence violated due process; and whether the decision by the Oklahoma Court of Appeals not to apply remedial state precedent violated a constitutional right.

The Tenth Circuit affirmed in part and reversed in part, holding that successive trials arising from separate crimes stemming from the same transaction may have violated the "fundamental fairness" standards for successive prosecutions. This violated due process and double jeopardy, thereby necessitating a reversal of the district court's findings as to these claims. The court further held that on remand the district court should consider whether evidence of other crimes or wrongs was introduced at Tucker's trials. Finally, the court affirmed the district court decision not to retroactively apply Oklahoma remedial precedent which allows joinder of indictments. The application of this precedent was a state law issue not to be disturbed on review.

*United States v. Walraven*, 892 F.2d 972

Author: Judge Baldock

Defendant, Walraven, pleaded guilty to possession of cocaine with intent to distribute. This plea, however, was conditional. Walraven maintained the right to appeal the district court's denial of his motion to suppress evidence found in a warrantless search of his car. Walraven argued that the initial registration check of his out-of-state vehicle violated the privileges and immunities clause. He also contended that the initial stop of his vehicle, undertaken when the dispatcher mistakenly checked the wrong license plate number, was an unreasonable mistake of fact, or merely support for a pretextual stop. Further, Walraven argued that even if the initial stop of his car was lawful, its continued detention after discovery of the mistake, was not. Finally, Walraven asserted that he did not consent to the search of his car.

The Tenth Circuit held that a random registration check of an out-of-state vehicle does not violate the privileges and immunities clause. The court reasoned that the check neither unreasonably burdens nor restricts interstate travel. The court also found that the initial stop of Walraven's car was not an unlawful seizure in violation of the fourth amendment. The court reasoned that the officer's failure to notice and correct the dispatcher's mistake was objectively reasonable under the circumstances. The court held that the continued detention of Walraven's car was an investigative detention which was reasonable in light of Walraven's suspicious behavior. Governmental interests in crime prevention and detection outweigh the minimally intrusive character of the detention. Finally, the court declined to review the question of whether Walraven consented to the search of his car. The court reasoned that this was a question of fact for the trial judge who heard the witnesses' testimony. The court affirmed the district court's denial of Walraven's motion to suppress.

*United States v. Willis*, 890 F.2d 1099

Author: Judge Henley, sitting by designation

Defendant, Willis, appealed his conviction for conspiracy to possess with intent to distribute cocaine under 21 U.S.C. § 846 and 18 U.S.C. § 2, and his conviction for unlawful use of a telephone to facilitate distribution of cocaine under 21 U.S.C. § 843(b). Willis contended that the district court erred in: (1) denying his motion to suppress a wiretap; (2) denying his motion for acquittal; (3) overruling his objection to the prosecution's introduction of rebuttal evidence; and (4) instructing the jury on the application of complicity law to conspiracy.

The Tenth Circuit upheld the district court's decision in all respects. The use of wiretaps in the case was acceptable because the minimization effort by the government had been reasonable. In considering Willis' motion for acquittal, the court found that Willis had enough knowledge to connect him to part of the conspiracy and that evidence of

his use of the telephone during a specific conversation was sufficient to sustain his conviction for unlawful use of the telephone. The court found that the admission of rebuttal testimony did not constitute an abuse of discretion by the district court. The proper standard of review on jury instructions is whether the jury, considering the instructions as a whole, was misled. The court found no likelihood that the jury was misled, and refused to disturb the district court's determination on the instructions.