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## Criminal Procedure

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## Criminal Procedure

## CRIMINAL PROCEDURE

*United States v. Gattas*, 862 F.2d 1432

Before sentencing, petitioner's trial counsel objected to statements made in the Presentence Investigation Report (PSI). The district judge orally disclaimed reliance on the statements and sentenced petitioner. Petitioner's new counsel filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 claiming the district court failed to comply with Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, which requires a sentencing court to attach a written record of its resolution of contested matters concerning the PSI to the report.

The Tenth Circuit held that the judge failed to include a written statement of his nonreliance on disputed statements to the PSI as required. Because the PSI is important in the correction process of criminal defendants, the court held that the petitioner has a valid § 2255 claim. The court stated that resentencing is not an appropriate remedy when the sentencing judge did not rely on disputed facts in the PSI. Instead, the court remanded for attachment of the proper record to the PSI.

*United States v. Marr*, 856 F.2d 1471

Defendant moved to vacate his conviction pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The district court summarily denied Marr's motion and he appeals asserting that the district court erred in dismissing his motion without conducting an evidentiary hearing on his claim.

The Tenth Circuit held that an evidentiary hearing is not required when the district court finds that the record conclusively shows the defendant is entitled to no relief. However, the district court's order denying relief upon a motion for ineffective assistance of counsel must indicate that the court reviewed the records before concluding that defendant's counsel was competent. The district court judge should enumerate the issues raised by the prisoner and explain the reasons for actions taken. Such reasoned decision provides a basis for appellate review.

Since the order failed to indicate whether the records of the case were reviewed, the court vacated the decision and remanded to allow the district court enter appropriate findings.

*Stines v. Martin*, 849 F.2d 1323

Plaintiff was detained in prison indefinitely for civil contempt when he filed for relief under 28 U.S.C. § 2241. The government responded after the required time for filing, but before the scheduled hearing. The court granted plaintiff's writ and ordered him released.

The government argues on appeal that the court's order is equivalent to a default judgment which should not be permissible in habeas corpus proceedings. The Tenth Circuit declined to decide whether a default judgment could ever be granted in such proceedings. It found that when the actual delay is not sufficiently extensive or egregious so as to violate due process considerations, a default judgment is inappropriate. Reversed and remanded.

*United States v. Fadel*, 844 F.2d 1425

Fadel was indicted by a federal grand jury with conspiracy to possess and distribute cocaine and two counts of distributing cocaine. Fadel filed a motion to dismiss the indictment on the grounds of outrageous governmental misconduct and entrapment, allegedly arising out of the government's undercover investigation. In response, the government stated that Fadel's motion was premature and inappropriate for pretrial consideration. The district court rejected this position. The government presented Hafen's testimony to rebut Fadel's allegations and to create a factual issue for the jury. The government presented the testimony of Hafen, an undercover officer with whom Fadel had discussed future drug dealings. The district court finally dismissed the indictment with prejudice stating that the government had not disputed Fadel's affidavit as to his lack of predisposition to engage in criminal activity. The government contends this decision on appeal.

The Tenth Circuit held that the defense of entrapment is intertwined with the issue of intent and is based on credibility determinations, an area traditionally reserved for the jury. The court held that Fadel's admissions in his motion to dismiss read in conjunction with Hafen's testimony clearly created a factual dispute that precluded pretrial findings of entrapment by the district court as a matter of law.

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

Appellant Keiswetter was charged with a felony of knowingly converting property. He agreed to plead guilty to a misdemeanor of conversion in exchange for a dismissal of the felony charge. The district court accepted the plea. However, Keiswetter later moved to withdraw his guilty plea. The district court denied the motion and sentenced him. Appellant appealed the sentence.

The Tenth Circuit remanded the case for clarification of the district judge's reasons for finding that a factual basis existed for the charge to which appellant pleaded guilty. A guilty plea will not be invalidated when the evidence is clear that a defendant voluntarily and knowingly pled guilty. The court held that there is adequate evidence that Keiswetter understood that a guilty plea was in his best interest. However, it is unclear whether the court found that the evidence on which the judge relied to reach his conclusion was adequate to believe that Keiswetter possessed the requisite intent for the crime of conversion.

*United States v. Jones*, 852 F.2d 1275

After a jury verdict convicting appellant Jones of conspiracy to possess with intent to distribute a controlled substance, Jones unsuccessfully sought a new trial based on ineffective assistance of counsel. He claimed that his attorney had failed to call witnesses who could have substantiated Jones' actual physical and mental need for powerful drugs because of his chronic back problems.

The Tenth Circuit held that Jones received assistance of effective counsel, and although there were some deficiencies, they did not result in prejudicial error. The court held that an error, even if professionally unreasonable, does not warrant setting aside a judgment if the error had no effect.

*United States v. Medlin*, 842 F.2d 1194

Appeal from trial court's order to suppress all evidence seized in a search of appellee's home including evidence specifically described in a valid search warrant. The court found that additional goods seized were beyond the scope of the search warrant and unsupported by the government's claim that the appellee's consent obviated the need for an additional search warrant.

The court held that where a search pursuant to a valid warrant is executed in a manner exhibiting "flagrant disregard" for the terms of the warrant (here, 667 items outside the scope of the warrant were seized) the suppression of all evidence seized under the warrant is required.

*United States v. Guterrez*, 839 F.2d 648

In 1965, Guterrez pleaded guilty to a federal offense. In 1980, he was convicted again under New Mexico law and was given a life sentence due to the prior federal offense. He then filed a motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255, arguing that his 1965 guilty plea was not knowing and voluntary. The United States moved to dismiss the motion stating that Guterrez understood the plea. In the alternative, the government contended that the motion should be dismissed pursuant to Rule 9(a) of the Rules Governing § 2255 Proceeding because the government had been prejudiced in its ability to respond to the motion by the twenty-year delay in bringing it.

A magistrate recommended dismissal of the motion under Rule 9(a), and the district court adopted the recommendation. The Tenth Circuit held that a motion under 28 U.S.C. § 2255 may be filed at any time. However, Rule 9(a) does require that before considering matters outside of the pleadings in dismissing a section 2255 motion, the district court must provide notice to the movant. The district court erred in dismissing Guterrez's motion without giving him notice that it intended to treat the government's motion as a motion for summary judgment and for failing to provide Guterrez with an evidentiary hearing before

summarily denying his motion on the merits. Vacated and remanded in part.

*United States v. Gipson*, 835 F.2d 1323

Following indictment, appellant Gipson sought removal of the trial judge because the judge had been the United States attorney when Gipson had been convicted of an offense similar to that for which he stood charged. The judge claimed impartiality. The trial court denied the motion to recuse. Gipson entered an unconditional guilty plea, was sentenced, and now appeals the denial of his motion to recuse.

The Tenth Circuit held that entry of an unconditional plea of guilty generally constitutes a waiver of all non-jurisdictional defects in the proceeding. When Gipson entered his plea, he waived his right to appeal the denial of recusal based on the judge's appearance of impartiality. The court affirmed Gipson's conviction.

*United State v. Mora*, 845 F.2d 233

Appellants were tried jointly and convicted of distributing cocaine and conspiracy of distributing cocaine. At trial, the prosecutor made statements in his closing argument about appellants' post arrest silence in contrast to another defendant's statement the night of the arrest after being given her *Miranda* rights. Appellants appeal their conviction stating that the prosecutor improperly commented on their post-arrest silence and thus violated their *Miranda* rights.

The Tenth Circuit held that when reviewing a comment about a defendant's right to remain silent, the court must look at the context in which the statement was made to determine its manifest intent and its impact on the jury. Manifest intent will not be found if some other explanation for the prosecutor's remark is plausible. The court held that the statements were neither manifestly intended to be a comment on appellants' silence nor would the jury necessarily take them to be.

*United States v. Friesen*, 853 F.2d 816

Friesen, an attorney, was found not guilty of intentionally manufacturing cocaine. He moved to expunge all records related to his arrest. Without taking evidence, the district court found that the arrest on drug related charges resulted in a stigma that acquittal alone would not resolve. The United States appealed.

The Tenth Circuit held that the trial court could not exercise its discretion to order expunction without a showing of extreme circumstances. Noting lack of any findings of fact, the court remanded the case for an evidentiary hearing.

*United States v. Dunn*, 841 F.2d 1026

Pursuant to an investigation, fifteen people were indicted on various cocaine possession and distribution charges. Six co-conspirators

entered guilty pleas and testified for the government. Dunn was convicted and sentenced. He appealed following denials of his motions for judgment of acquittal and a new trial. Dunn contended that the district court's denial of his pre-trial motion for a bill of particulars caused prejudicial surprise and impeded his ability to present a defense.

The Tenth Circuit held that the district court did not abuse its discretion when it denied Dunn's motion for a bill of particulars. A defendant must show that he was actually surprised and incurred prejudice. Dunn's counsel failed to make known to the district court what he considered prejudicial surprise until after the verdict. He should have brought the matter to the district court's attention when it occurred.

Additionally, Dunn contends that each time a co-conspirator testified the jury should have been instructed that the testimony could not be used as substantive evidence of another's guilt. The court held that although that instruction is preferable *per se*, plain error cannot be found on this error alone.

*United States v. Wolf*, 839 F.2d 1387

Second degree murder and aiding and abetting second degree murder convictions, resulting from incidents of child abuse, were affirmed. There was no *Brady* violation because the prosecution gave autopsy reports to the defense. There was, therefore, no suppression of material evidence favorable to the defendants. The court also upheld the admission of hearsay evidence under the co-conspirators exception. Declarant was not a member of the conspiracy, but was testifying as to statements the co-conspirator had made. The district court had made sufficient findings of a conspiracy to allow the exception and it was harmless error that one of the statements made was "more narrative" and not in furtherance of the conspiracy.

*United States v. Comosona*, 848 F.2d 1110

The Court of Appeals affirmed defendant's conviction for voluntary manslaughter. An FBI agent handed a business card to the suspect and his subsequent voluntary interview was not held an improper continuation of interrogation. The ultimate confession was not suppressible where the suspect voluntarily waived his right to an attorney.

An accused's invocation of his right to counsel is not a bar to further interrogation as long as the accused himself initiates further conversation and the government carries the burden of proof that he subsequently waived his right to counsel.

*White v. Meachum*, 838 F.2d 1137

An Oklahoma state prisoner initiated a civil rights action challenging on *ex post facto* grounds the state's method of computing good time credits. The district court construed the complaint as a petition for writ of habeas corpus and dismissed it for failure to exhaust administra-

tive remedies. The court of appeals affirmed the holding that White must give the appellate court the opportunity to grant relief.

*Worthen v. Meachum*, 842 F.2d 1179

Worthen claims his guilty plea was involuntary. The district court held he could not challenge his guilty plea because he had not shown cause and prejudice after his failure to raise the issue properly in state court. The Tenth Circuit affirmed, stating a defendant may not appeal from a conviction on a guilty plea if he does not apply to withdraw the plea within ten days of judgment or sentence. The district court applied the wrong test for holding that Worthen could not obtain federal habeas review. The appropriate test is the deliberate bypass test of *Fay*.

A remand was not necessary because the court held that even if he had established sufficient cause for failure to appeal, Worthen had not demonstrated actual prejudice.

*Hannon v. Maschner*, 845 F.2d 1553

Defendant Hannon appeals the denial of his petition to the district court for a writ of habeas corpus some 25 years after being sentenced for murder. The court of appeals held that state allegations that the trial judge and court reporter had died, and that the prosecutor couldn't remember the case were not enough to show prejudice (undue delay) sufficient to bar retrial on the grounds that defendant was denied due process, since his attorney had never perfected his appeal. On remand, the court should make a determination whether equitable considerations mandate substantive review, even if burden of showing prejudice is sustained by the prosecution.

*United States v. Barrera*, 843 F.2d 1576

Appellant Barrera appeals his conviction of manufacturing methamphetamine and possession of the same with intent to distribute. Affirmed.

The grounds of Barrera's appeal was the refusal of the district court to allow an examination of the government's informant, and the existence of misstatements in the affidavit used to secure the search warrant. The court of appeals held that the testimony of the informant in an *in camera* examination gave the district court a sufficient basis on which to deny the motion to examine the informant, and that a search warrant affidavit is not rendered fatally flawed by misstatements when there is ample showing of probable cause in the affidavit despite them.

*United States v. Cook*, 854 F.2d 371

Appellant United States makes an interlocutory appeal of the district court's decision to suppress a quantity of cocaine which was evidence of narcotics laws violations. Reversed.

In deciding to suppress the evidence, the district court held that the



affidavit on which the search warrant was based did not establish sufficient probable cause. The affidavit had been reviewed by an assistant district attorney and a state judge, both of whom approved it. Given these facts, the court of appeals held that a well trained officer would not have known the search was illegal, and that because of this, the good faith exception to the exclusionary rule should apply.

*United States v. Cronin*, 839 F.2d 1401

Appellant Cronin appeals his conviction of mail fraud violations on the grounds of inadequate representation. Reversed and remanded.

In its case, the government alleged mail fraud violations for a "check kiting" scheme. The government based its case on the incorrect belief that writing a check on an account with insufficient funds is automatically fraud. It has long been held, however, that good faith is a complete defense under the mail fraud statutes. Cronin's counsel never discovered this, and instead based his defense on a questionable strategy of "clouding the issues." The court of appeals found this level of incompetence clearly prejudiced the defendant, and that a new trial was warranted.

*United States v. Daniels*, 857 F.2d 1392

Appellant Daniels makes an interlocutory appeal of the district court's denial of his motion to dismiss conspiracy charges on double jeopardy grounds. Affirmed.

Daniels was indicted and charged with conspiracy to manufacture amphetamine. In making his motion to dismiss, he claimed he had earlier pled guilty to another charge of conspiracy to manufacture amphetamine, and the current indictment charged the same offense. The testimony on this issue was conflicting, which presented an issue of fact to the judge. The court of appeals noted that when factual issues such as this are presented, the district judge has a right to resolve issues in a fashion adverse to a defendant.

*United States v. Vap*, 852 F.2d 1249

Defendant appeals conviction in district court of making false declarations under oath before a grand jury. The Tenth Circuit held that the delay of one year between the perjury before the grand jury and the indictment charging perjury did not constitute denial of due process, despite defendant's contention that the perjury related to state illegal kickback charges which the government allegedly knew of several years before the perjury indictment. Perjury to which preindictment delay related had not been committed until the grand jury testimony was given. The court held that defendant's statements before the grand jury were material. For testimony to give rise to perjury under statute, it need not have the actual effect of influencing, misleading or hampering the grand jury; rather, testimony merely must be capable of influencing the grand

jury. Finally, the court held that the trial court error in conducting the materiality hearing in front of the jury was harmless beyond a reasonable doubt. Convincing evidence was presented that defendant, despite his denials in front of the grand jury, was offered and received cash payments. The evidence adduced at the materiality hearing was only a small part of the trial. Affirmed.

*Osborn v. Shillinger*, 861 F.2d 612

Appellants Shillinger and McClintock (the state of Wyoming) appeal a district court's ruling which granted Kevin Osborn's petition for a writ of habeas corpus. Affirmed.

In 1982, Osborn pled guilty to a series of crimes which included felony murder. He was later sentenced to death. Osborn petitioned for post conviction relief at the state district court level, primarily on the basis of ineffectiveness of counsel. This petition, and a later petition for reconsideration, were denied for procedural reasons, and neither was directly appealed. When Osborn later petitioned the federal district court for habeas corpus, the state of Wyoming argued Osborn had not exhausted the state remedies, and that his claims were resolved on independent state procedural grounds. Affirming the district court decision, the Tenth Circuit noted that Osborn's state remedies had been exhausted prior to the district court's decision, the state procedural rules did not bar later federal review where a petitioner is not reasonably aware that a violation of the rules will prevent a court from addressing the merits of his claim, and that the district court's finding of ineffectiveness of counsel was amply supported by the record.

*Reyes v. Quintana*, 853 F.2d 784

Reyes, convicted of second-degree murder, was sentenced to nine years for the homicide, plus three under a New Mexico enhancement provision for aggravating circumstances. Reyes claimed the enhancement provision exposed him to double jeopardy since the trial court improperly injected the issue of premeditation into the sentencing even though the jury had already found to the contrary when it convicted him of only second-degree murder.

Upholding the enhancement provision, the Tenth Circuit ruled that the record contained no indication that the trial court relied on a deliberate intent to kill when applying the enhancement provision. It merely found that Reyes had pursued his victim. Pursuit is not tantamount to a deliberate intent to kill. Such consideration by the trial court did not violate Reyes' rights under the Double Jeopardy Clause. Reyes simply confused the process of proving elements with that of weighing circumstances. Dismissal of the habeas corpus petition affirmed.

*United States v. Billings*, 858 F.2d 617

Defendant Billings appeals the district court's denial of his motion

to suppress observations by two Denver police officers. The district court denied the motion because the defendant had no reasonable expectation of privacy. Affirmed.

In June 1987, two Denver police officers assigned to the narcotics unit, observed Billings disembark from an arriving Miami flight at Denver Stapleton Airport and followed him through the terminal and into a public restroom, whereupon they observed (through the open area between the stall and the floor) him remove a clear bag full of white substance taped to his left ankle. Thereafter, the police officers followed him back into the terminal, identified themselves and asked him for identification. Billings verbally identified himself and permitted the officers to search his baggage where they found two plastic bags of white powder. The defendant then fled the scene but was subdued, and later placed under arrest. A search incident to the arrest revealed two more bags of cocaine taped to his ankles. Billings contended at trial that the request for identification and subsequent search were invalid because they stemmed from the officer's initial sighting of cocaine while the defendant was inside a bathroom stall which violated defendant's reasonable expectation of privacy. The district court concluded that there can be no reasonable expectation of privacy within that area of the bathroom stall observable by the ordinary patron of a public lavatory.

*United States v. Theron*, 849 F.2d 477

Defendant was indicted and pleaded guilty to charges of mail fraud and conspiracy. Although the district court advised him it was not bound by any recommendations, it failed to advise, in violation of the mandatory requirements of Rule 11(e)(2), Fed. R. Crim. P., that in this event defendant would not be permitted to withdraw his guilty plea. Prior to sentencing, defendant unsuccessfully attempted to withdraw his plea. Defendant appeals.

The government argues that defendant failed to raise a Rule 11 claim before the court and that the court's action was harmless error. The Tenth Circuit determined defendant had raised the substance of this claim and that in these circumstances, where defendant was not familiar with procedure, counsel withdrew immediately prior to the hearing, and new counsel was left with inadequate preparation time, defendant's failure was understandable. The Tenth Circuit found that even if defendant and his counsel failed to detect the court's error he could nonetheless be affected by it. The record supports defendant's confusion as to his plea, and indicates defendant believed he could withdraw his plea if recommendations were not followed. The Tenth Circuit held that there was a reasonable possibility defendant was confused and that Rule 11 compliance could have avoided the violation and was therefore not harmless error. Conviction and sentencing vacated; reversed and remanded.

*United States v. Wicker*, 848 F.2d 1059

The government claims abuse of discretion in excluding testimony or the report of its expert due to its failure to comply with a motion to compel discovery. Rule 16(d)(2) of the Federal Rules of Criminal Procedure gives the court broad discretion in imposing sanctions on one who fails to comply with a discovery order, including prohibiting the party from introducing evidence not disclosed. The Tenth Circuit found the three criteria of *United States v. Euceda-Hernandez*, 768 F.2d 1307 (11th Cir. 1985), applies as a guideline when considering sanctions under this rule. Although the district court did not discuss bad faith, the Tenth Circuit found no abuse of discretion in its finding that negligence on the part of the government's expert in not providing the report until immediately prior to trial where only one request for the report was made did not justify delay. The district court also found there would be prejudice to defendants here because the deal in providing the report left defendants' counsel with inadequate time to prepare for trial. Lastly, the Tenth Circuit found the district court was justified in its sanctions where the demands of the court's calendar disfavor a second continuance. Affirmed.

*United States v. Maynes-Ortega*, 857 F.2d 686

This court affirmed a previous decision that evidence of drugs found in plain view in the trunk of a car can be used as evidence even though they were discovered accidentally by officers conducting a search for evidence of a different type of offense; in this case, transportation of illegal aliens. To require prosecutors to use only evidence related to a particular offense of which they had specifically suspected the defendant and had consequently obtained in the course of searches and seizures aimed at that particular crime would be a grotesque parody of efficient law enforcement.

Also at issue was whether newly discovered evidence was sufficient for a new trial. The newly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved and must be such that it would probably produce an acquittal. A new trial is not warranted if the new evidence is such that it could have been discovered and produced with reasonable diligence at the original trial. Since defendant's evidence was merely impeachment on an immaterial issue and could not possibly have resulted in a different verdict, a new trial was denied.

*Johnson v. Riveland*, 855 F.2d 1477

Plaintiff filed an application for post conviction relief requesting credit for the time he had spent in pretrial confinement. The Colorado Court of Appeals reversed, holding that the district court lacked jurisdiction to modify the sentence after it had been commuted by the Governor. The Colorado Supreme Court denied certiorari.

While Johnson's habeas petition was pending in the United States District Court, he was released on parole. On its own motion the court of appeals addressed the issue of mootness. Finding no live controversy because of the parole, the court vacated the district court's judgment and remanded with directions to dismiss for mootness.

*United States v. Stemm*, 847 F.2d 636

Defendant claimed the United States Attorney's office breached a plea agreement through its participation in the preparation of the prosecution's version and the culpability ranking in the presentence investigation report. The Tenth Circuit looked at information the U.S. Attorney's office provided ranking defendants with respect to culpability in the scheme.

Disclosure of information as to the nature of the offense, and each defendant's role, is proper and within the Government's duty to provide despite a premise that the Government would make no recommendation as to sentence. Since the record showed no breach of the plea agreement, this court affirmed the lower court.

Defendant further alleged the presentence report was unreliable, that its preparation violated 32(c)(1) Fed. R. Crim. P., and that there was such bias in the presentencing procedure that his due process rights were violated. The probation officer may include statements by the government as well as those by the defendant; otherwise, critical information concerning such a large-scale scheme, cannot be made available with the result of depriving sentencing judges of information which would undermine modern phenological procedural policies. The judgment and sentence were affirmed. Judge Seymour dissented because he believes when viewed in totality, the government's inclusion of the culpability rankings in the pre-sentence report constituted a breach of the plea agreement.

*Moore v. Dubois*, 848 F.2d 1115

Appellant Moore was sent to prison for armed robbery and then paroled. Parole was revoked after he stabbed a former girl friend with a knife. Paroled for a second time, his parole officer recommended parole revocation after being told by appellant's sister that he had been forcing her to have sex with him for a month, finally culminating in an assault and rape when she refused. At the revocation hearings, however, she testified that she lied to keep her mother from thinking she engaged in sex willingly. The hearing officer, crediting her testimony, recommended no parole violation for sexual harassment or assault. On review the parole commission, concluding that her revised testimony was the result of fear of appellant, revoked parole and Moore appealed.

The Tenth Circuit held that in administrative proceedings, such as parole hearings, decision makers do not violate due process when they reject the findings of hearing examiners without personally hearing and

observing key witnesses. When only conditional liberty interests (such as parole) are at stake, the full procedural rights of criminal trial are not needed (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

*United States v. Leary*, 846 F.2d 592

The government appeals from the district court's decision granting defendant's motion to suppress evidence seized under a search warrant. Affirmed.

Based on an affidavit alleging defendant Kleinberg was attempting to illegally export equipment to the People's Republic of China, a warrant was issued to search the Kleinberg offices and seize certain specified property. After two officers at Kleinberg were subsequently indicted for conspiring to violate the Export Administration Act, the district court granted a motion to suppress all evidence seized by the search, finding that the affidavit was not supported by probable cause and that the warrant did not sufficiently specify the evidence to be seized.

The government contended that because the defendants had no standing to raise a fourth amendment claim, the claimant must show a subjective expectation of privacy in the area searched, and the expectation must be one that society will recognize as reasonable. The court of appeals found that individual defendants have a reasonable expectation of privacy in corporate offices. Absent a statutory scheme authorizing warrantless searches, there is no waiver of constitutional rights by the mere fact that the defendants chose to participate in an activity regulated and licensed by the government. Therefore, the defendants had standing to raise a fourth amendment claim.

The appellate court found the warrant to be facially overbroad because it authorized a general search in conjunction with a federal crime. Reference in their warrant to two export statutes does not sufficiently limit the scope of the warrant. This warrant did not meet even the minimum requirement of allowing executing officers to distinguish between items that may and may not be seized. In addition, while an affidavit may cure an overbroad warrant, it can only do so where the affidavit and the search warrant constitute one document. The Kleinberg warrant did not incorporate the affidavit and there is no reference to the affidavit on the face of the warrant. The Kleinberg warrant was also flawed because information was available to provide a more particular description of the items to be seized. Finally, the scope of the warrant was invalid for failure to contain limitations on its scope, and its extension beyond the scope of the supporting affidavit. The court further held the evidence inadmissible under the "good faith" exception because suppression of the evidence in this case was appropriate to deter government misconduct. The court did not review the probable cause issue.

*Sanchez v. Mondragon*, 858 F.2d 1462

Petitioner Sanchez appeals from the district court order denying

with prejudice his petition for a writ of habeas corpus alleging that the trial court's inquiry into his decision to waive his right to counsel and represent himself was inadequate and a violation of his sixth amendment right to counsel. The district court affirmed that the state judge met the constitutional requirements necessary to comply with sixth amendment dictates. Reversed and remanded.

In June 1984, Sanchez was indicted on several counts related to a residential burglary, and was later convicted of battery and possession of a burglary tool, but acquitted of aggravated burglary and larceny. Prior to the commencement of trial, Sanchez expressed dissatisfaction with his public defender's performance and sought either a new attorney or the opportunity to represent himself. The trial court permitted Sanchez to serve as his own counsel whereupon he pled not guilty and proceeded to trial. Upon conviction, he appealed in state court and lost, then filed a petition for a writ of habeas corpus. Sanchez alleged that the trial court conducted an insufficient inquiry into his request to proceed pro se. The state trial judge failed to ensure that Sanchez's waiver of counsel was not exercised as a means of choosing between incompetent counsel and appearing pro se. Under the *Faretta* standards enumerated in *United States v. Padilla*, 819 F.2d 952 (10th Cir. 1987), two inquiries as to waiver of counsel must be conducted on appeal in a collateral proceeding. First, it must be determined that the defendant voluntarily chose to appear pro se; second, the defendant must knowingly and intelligently have waived his right to counsel. The district court held that the state trial judge did inform Sanchez of his rights under the sixth amendment and adequately advised him of the disadvantages inherent in self-representation, and further that Sanchez waived his right to counsel voluntarily and intelligently. This court reversed on the grounds that the trial judge's inquiry into Sanchez's reasons for waiving his right to counsel was inadequate and there is reasonable doubt that had he been represented by competent counsel, he would not have been found guilty.

*United States v. Hornung*, 848 F.2d 1040

Defendant was indicted in Oklahoma and charged with two counts of assisting in the preparation of a false income tax, one count of conspiracy and one count of perjury. Defendant was found guilty of conspiracy and acquitted on the remaining counts. Defendant appeals on the grounds that he should have been granted a new trial because of juror misconduct and argues the district court impermissibly amended the indictment in its charge to the jury.

The court's questioning of a juror who is the recipient of extraneous information is limited to the circumstances, nature, and extent of the improper contact because Fed. R. Evid. 606(b) precludes the court from delving into the subjective effect of the contact on the juror's decision-making. An objective test should be applied to determine whether the defendant was prejudiced by the extrinsic information.

The Tenth Circuit court agrees with the district court that informa-

tion imparted to a juror pertained to matters before the jury and deem the contact to be presumptively prejudicial. However, the presumption is overcome by the overwhelming evidence of the defendant's guilt on the conspiracy charge. In deleting the year 1981 in its instruction on the conspiracy charge, the district court did not change the meaning of the charge from that presented to the grand jury or alter the government's theory of the case, and did not result in any prejudice to the defendant.

*United States v. Estrada*, 849 F.2d 1304

Defendant, Robert Estrada, was seeking to overturn his conviction, pursuant to a guilty plea was involuntary and that he was denied effective assistance of counsel, was denied by the district court without an evidentiary hearing, and he appealed.

The Tenth Circuit held under 18 U.S.C. § 2255 a prisoner is entitled to a prompt evidentiary hearing to determine the issues and make fact findings unless this motion and the record clearly indicate the prisoner is entitled to no relief.

Since defendant's contentions are not unsupported by specifics or "incredible in the face of the trial record" he has the right to attempt to prove his claims at an evidentiary hearing.

Remanded to district court for an evidentiary hearing on whether Estrada's plea was voluntary.

*Hurd v. Mondragon*, 851 F.2d 324

Plaintiff filed a pro se petition, later amended by the federal public defender, which alleged two causes of action based on violation of his fourth and fourteenth amendment rights. Upon review, the U.S. Magistrate found plaintiff had exhausted his state remedies and therefore was not entitled to collateral relief. Additionally, the Magistrate found plaintiff's trial counsel's decision not to pursue a third cause of action based on impermissible "show-up" was a tactical one not resulting in reversible error. The Magistrate recommended dismissing the petition with prejudice.

After the Magistrate filed his proposed findings and recommendation, the federal public defender filed a motion to withdraw without prejudice, which the district court denied. The Magistrate's recommendation was upheld. Plaintiff appeals this decision, charging the district court erred in dismissing with prejudice since he had not exhausted all state remedies. The Tenth Circuit held that simply because Plaintiff uncovered a third possible ground for relief which had not been litigated did not create error in dismissing with prejudice. Plaintiff also claims a change in law which permits him to withdraw without prejudice. However, the Tenth Circuit found that where, as here, the change in law occurs *prior* rather than *after* the Magistrate's recommendation is filed upholding that recommendation is no abuse of the court's discretion. Affirmed.



*Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244

A minor refused to testify against its parent before a grand jury, asserting parent-child and family privileges. The district court issued a contempt citation against the minor and the minor appealed. The Tenth Circuit affirmed, refusing to expand the scope of testimonial privilege to include the parent-child and family privileges. The court held that these privileges are not fundamental enough to be constitutionally protected on privacy grounds. Furthermore, the court held that the government's compelling interest in investigating crimes and enforcing federal laws outweighs the appellant's free exercise of the Mormon religion, which would prevent the minor from testifying against the parent.

*United States v. Smith*, 838 F.2d 436

Appellants, Smith and Bailey, received a loan from the Stockman's Bank and Trust Company, of Gillette, Wyoming, to finance the construction of a condominium complex. The loan was approved only for preliminary work on the site. Invoices were submitted by the subcontracting companies formed by the appellants, and the money received was then used by the appellants for purposes other than the condominium complex. The federally insured bank lost \$225,000 in the transaction.

A jury convicted the appellants on charges of conspiracy and making false statements. To sustain a conviction under 18 U.S.C. § 1014, the prosecution had to prove that the defendants misrepresented their intentions by the submission of the invoices. The Tenth Circuit held that the prosecution's evidence that the appellants did not use the disbursements for the stated purposes, and the ongoing nature of the invoice submissions, supported the jury's finding of intent to deceive the bank.

The court also found that the jury verdict form which required the jury to find the defendants guilty or not guilty "of making false statements and aiding and abetting" was allowed under *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985). A defendant may be convicted as an aider and abetter even if that same defendant was indicted as a principle for commission of the underlying offense and not as an aider and abettor. However, the underlying offense must be proven in either case.

*United States v. Songer*, 842 F.2d 240

Songer, the appellant, was indicted for his participation in a continuing criminal enterprise. Songer posted bond, then broke off communications with his lawyer, and was assumed to have fled the country. A trial *in absentia* was held in which the jury returned a guilty verdict on all counts, and required forfeiture of Songer's interest in certain real and personal property under 21 U.S.C. § 853. As part of this judgment, the

district court vested title to the forfeited property in the federal government.

Forfeiture of property is considered a sentence under § 853. Appellant's counsel argued that sentencing *in absentia* violates Fed. R. Crim. Proc. 43. The Tenth Circuit vacated the judgment and order of forfeiture and remanded the case with instructions that the sentence could be imposed only when Songer is personally before the court.

*United States v. Steven W.*, 850 F.2d 648

The appellant, Steven W., a juvenile, admitted to a violation before a magistrate on March 20, and was adjudicated delinquent by a district court on May 14. The appellant brought a motion to dismiss under 18 U.S.C. § 5037, asserting a failure to hold a disposition hearing within 20 days after the juvenile delinquency hearing was denied.

The court of appeals affirmed the district court and recognized that the language of the statute clearly provides for the 20-day period to begin to run when the court finds a juvenile to be delinquent in a juvenile delinquency hearing. Therefore, the appeals court held that the judgment and conviction in court, not the tender and acceptance of a plea constitutes the determination of delinquency.

*United States v. Strayer*, 846 F.2d 1262

Appellant Strayer was indicted for conspiracy to possess with intent to possess marijuana with intent to distribute. One month later, before Strayer's arraignment, the government filed for a motion to dismiss the indictment in "the interests of justice." Several months later, another indictment was returned against Strayer. This indictment included three alleged co-conspirators and charged the group with conspiracy and possession with intent to distribute.

Strayer moved to dismiss the second indictment under Federal Rule of Criminal Procedure 48(a), stating that the first indictment was dismissed without good cause. The Tenth Circuit held the dismissal of the first indictment was for good cause since it was defective in not naming the co-conspirators. The facts of this case were less compelling than those in *United States v. Derr*, 726 F.2d 617 (10th Cir. 1984), in which the court dismissed a second indictment when the first indictment was dismissed one day prior to trial over the defendant's objections and a second indictment was not filed for two years. In the Strayer case, the government dismissed the first indictment before Strayer was even arraigned and the reindictment followed closely in time.

Strayer's allegation that the trial court imposed upon him the burden of proving the accuracy of disputed materials in a sentencing report is irrelevant. The court found that under Rule 32, when a defendant alleges factual inaccuracy in a sentencing report, two options are available. The record did not indicate any violation of these options and the

transcript clearly shows the judge stated he would not consider the alleged inaccurate factual statements.

*United States v. Smith*, 857 F.2d 682

Robert Smith, the appellant, was convicted on charges of distribution of controlled substances. Smith appealed based upon the wording of the *Allen* charges, and the denial of the disclosure of a confidential informant.

*Allen* charges have been allowed by the Tenth Circuit. The instructions to the jury in the *Smith* case were objected to because the instructions stated that the parties "will" be put to the expense of another trial if unanimity is not reached. The Tenth Circuit found that the instruction as a whole conveys the possibility that the case might not be retried and therefore upheld the wording of the instructions in this case.

The court also held that the law is clear in its intent to keep the identity of a confidential informant concealed unless the circumstances of the case require disclosure. The court suggested that fairness or a specific need for information by the defendant might allow for disclosure in certain situations.

*United States v. Rodriguez-Pando*, 841 F.2d 1014

Rodriguez-Pando (Pando) was stopped on the highway by a New Mexico law enforcement officer. Pando was weaving erratically, and the officer suspected an intoxicated driver. When Pando was stopped the officer requested his driver's license. Pando opened the glove box and began pulling out a gun. The officer arrested him, searched his vehicle, and found 1100 pounds of cocaine.

The Tenth Circuit affirmed, finding that the initial stopping of Pando's vehicle was justified because of a reasonable suspicion that he was intoxicated. Pando's arrest was lawful as well since he assaulted the officer by pulling out a gun from his glove compartment. The automobile exception to warrantless searches was valid in this case because the preceding events provided probable cause to reasonably believe that the truck contained illegal drugs.

Pando made a tape-recorded statement to police that he had been coerced into transporting the drugs by threats made upon his family. At trial this statement was excluded as hearsay. The Tenth Circuit affirmed the trial court because the statement was not made under oath and was not subject to cross-examination. The tape was hearsay since it was offered to prove that Pando had been threatened. In addition, a search warrant was obtained to conduct a urinalysis examination. In order to attack this warrant for urinalysis, Pando must make a substantial preliminary showing that a false statement knowingly and intentionally was included by the affiant and the false statement was necessary for a showing of probable cause. Pando failed to show these things. Pando's objection to the magistrate's lack of expert knowledge on drugs was rejected, and

the trial court's discretion that the probative value of the urinalysis was greater than the prejudice it created was upheld.

*United States v. Nichols*, 841 F.2d 1485

Appeal from the district court's order to exempt assets otherwise subject to forfeiture under 21 U.S.C. § 853, to the extent necessary to pay reasonable attorney's fees and holding the criminal forfeiture statute invalid. Reversed.

Appellee was charged with a drug felony subject to criminal forfeiture. Nichols asserted that the forfeiture statute violated his right to choice of counsel since application of the statute to him would financially limit his choice. The ownership of the property is not known at the time the restraining order is sought, and freezing the assets may prevent the defendant from using assets in a manner which could prove his/her innocence. Nevertheless, the court determined that Congress acted within its authority in applying a relation back provision to create a governmental interest in the property involved in criminal activity. The defendant does not have a constitutional right to use assets subject to forfeiture and this limitation does not infringe on the defendant's right to counsel. There is no constitutional right to chosen counsel and the possibility of prosecutors using criminal forfeiture to influence a defendant's choice of counsel does not render the statute unconstitutional. If forfeiture results in the defendant not being able to hire counsel then an attorney will be appointed.

*United States v. Savaiano*, 843 F.2d 1280

Law enforcement officers tapped the residential telephone of appellant McPherson. The recordings became the basis of indictments charging McPherson and Savaiano with conspiracy to manufacture amphetamine, using a telephone to further the conspiracy, and attempt to manufacture amphetamine.

The validity of the wiretap was challenged under the Kansas Electronic Surveillance Act, but the court of appeals found no violation which would require suppression and no constitutional rights were infringed. Probable cause existed to issue orders to wiretap as evidenced by surveillance, testimony of officers, and an earlier pen register. Normal investigating techniques were shown not to work in these circumstances since McPherson could not be tailed and no surveillance could take place within one-half block of the residence. Assistant district attorneys conducted proceedings for application of the orders instead of district attorneys as stated in the statute, however the district attorney personally appeared, was sworn, and was available during the proceeding for examination by the judge. Thus, the assistant district attorneys' activities did not violate the requirements of the statute.

The Tenth Circuit also held that a variance between the wiretap order and the indictments concerning the type of drug (amphetamine or

methamphetamine) was not a violation of the Act, nor was the failure to furnish an inventory within 90 days. The statutory requirement of an inventory was fulfilled, by giving timely notice and including all the information that would have been in the inventory to McPherson, despite claimed deficiencies in the service of the inventory. The appellants were properly convicted on both conspiracy and attempt charges since the crimes are separate and contain separate elements. Enough acts in furtherance of the crimes had been taken to fulfill both sets of elements.

*United States v. Murray*, 843 F.2d 1582

Appeal from a denial to sever appellant's trial from that of the two codefendants in prosecution for possession of amphetamines with intent to distribute. Affirmed.

The refusal to sever the trials was a harmless error because the statements made by a codefendant, which tended to incriminate Murray, pertained to matters that were incidental to the case against Murray. The evidence against Murray was so overwhelming that any incriminating statements that might have been made by a codefendant were trivial in comparison.

*United States v. Peterman*, 841 F.2d 1474

Appeal from a conviction for consumer fraud under 18 U.S.C. § 1343 and an enhancement of the sentence at a second trial. Affirmed in part and remanded in part.

Appellant, Peterman, was indicted for various fraudulent practices in the advertising and sale of meat from his store. He was convicted at a 1981 trial but the conviction was reversed for failure to give a good faith instruction. The second trial, from which this appeal was taken, also resulted in a conviction.

Peterman first alleged that the court's jury instructions defining "bait and switch" tactics improperly expanded the scope of the indictment, allowing the jury to reach a guilty verdict on the basis of a theory not relied upon by the grand jury. The Tenth Circuit decided that jury instructions are invalid only if their deviation from the indictment infringes on the defendant's rights. That was not the situation in this case. The court also found that evidence of a codefendant's prior conviction was admissible to impeach the codefendant's testimony in the second trial under F.R.E. 607. This evidence was not unduly prejudicial as the trial court properly limited its use. Finally, Peterman challenged the enhancement of his sentence at the second trial. Even though a court has almost unlimited discretion in determining what information to hear and rely on for sentencing, the court must affirmatively reflect its reasons for enhancing the original sentence. On remand, the trial court must permit Peterman to explain why the report upon which the court relied was incorrect, and then the court must reflect any reasons for enhancing Peterman's sentence.

*United States v. Green*, 847 F.2d 622

Appellant Green appeals the district court's refusal to dismiss his indictment for the armed robbery of a federal savings and loan association on the grounds that the government did not properly alert him to his right to a speedy trial. The government argued that Green's notice of appeal, which was filed after Green's conditional plea of guilty but before sentencing, was premature and thus did not confer jurisdiction upon the court of appeals. The court of appeals initially accepted the government's argument, but upon this rehearing, it decided Green's notice of rehearing, though premature, was an inconsequential irregularity under Fed. R. Crim. P. 52(a) and was sufficient to confer jurisdiction. Earlier judgment withdrawn with orders to parties to brief the merits of the appeal.

*United States v. Orr*, 864 F.2d 1505

Appellant Logan appeals his conviction for conspiracy to file false income tax returns on the grounds the district court failed to suppress illegally obtained evidence, and improperly admitted evidence of prior acts of misconduct. Affirmed.

The court of appeals noted that probable cause does not require certainty, and upheld the district court's finding that a contested search warrant was valid. The court also upheld the district court's admission of evidence of prior misconduct since it helped prove key elements of the conspiracy charge (knowing participation in the scheme). Since this use of the evidence did not make it "extrinsic" to the behavior on trial, it did not have to be admissible under Fed. R. Evid. 404(b).

*United States v. Jimenez*, 864 F.2d 686

Appellant Jimenez appeals the district court's denial of a motion to suppress evidence seized from the trunk of his car, which was involved in a serious traffic accident. Affirmed.

Albuquerque police investigating a traffic accident spotted a sawed-off shotgun in the trunk of Jimenez's car, which had been forced open due to a collision with another automobile. The court of appeals held that the motion to suppress had been properly denied, since the shotgun, though in the trunk, was nonetheless in plain view, and that it would have eventually been discovered by police as they inventoried the items in Jimenez's totalled automobile.

*United States v. Rantz*, 862 F.2d 808

Petitioner was convicted of conspiring to defraud the government by filing fraudulent income tax returns. Petitioner moved to vacate sentence pursuant to 28 U.S.C. § 2255 based on allegations that he was denied effective assistance of counsel and that the trial court committed error in refusing to subpoena additional witnesses for the evidentiary hearing on the allegation of denial of effective assistance of counsel, in

requiring petitioner to testify at the beginning of his case in chief in the event he decided to testify, denying petitioner an opportunity to read the presentence report, and in not resolving objections to the report prior to the imposition of the sentence. Petitioner's motion was denied, and the Tenth Circuit Court of Appeals affirmed.

The court held that petitioner failed in his allegation of denial of effective assistance of counsel to meet his burden of proving that (1) his counsel acted unreasonably; and (2) that such resulted in prejudice to petitioner. The trial court did not abuse its discretion in refusing to subpoena witnesses, since subpoenas need not be issued for witnesses providing mere cumulative evidence. And though it is error for a trial court to permit a defendant to testify only at the beginning of his case in chief, the error was harmless. The evidence also showed that petitioner had, in fact, read the presentence report. Finally, the court held that the trial court did not err in failing to resolve alleged factual inaccuracies in the presentence report, since no objection was raised by petitioner.

