Tenth Circuit Update

(cases updated since December 22, 2009)

by

James L. Hankins[1]

United States v. Sayad, No. 08-1366 (10th Cir., December 22, 2009) (Published) (Kelly, Brorby & Murphy): **Federal Sentencing Guidelines; Reasonableness**: Sayad was subject to a traffic stop, drug dog search, and subsequent detection of 11.04 kilograms of cocaine. He was charged with, and plead guilty to, a single count of Interstate Travel in Aid of Racketeering. The statutory maximum was 60 months. At sentencing, Sayad presented evidence that he had no prior criminal history, was a son of Iranian Christian parents who came to the U.S. and worked hard to open a restaurant where he had worked for years, and that he was naive and under pressure to get money. The District Court sentenced him to 60 months straight probation. The Government appealed the sentence as unreasonable, but the panel AFFIRMED based on *Gall*.

United States v. Villa, No. 08-8100 (10th Cir., December 29, 2009) (Published) (Tacha, Gorsuch & Stamp, Senior District Judge): **Searches and Seizures; Traffic Stops**: Traffic stop. Questions by the trooper about travel plans. Inconsistent answers. Driver and passenger detained for eleven minutes while drug dog called. It alerted. Car searched. Drugs and gun found (although the gun was actually found by the trooper two months later in the back of his patrol car). AFFIRMED over her claims regarding the traffic stop (reasonable suspicion supported), the sufficiency of the evidence supporting the conviction for possessing the firearm in furtherance of a drug trafficking crime, and the sentence for the firearm running consecutive to the drug conviction.

United States v. Caldwell, No. 08-6143 (10th Cir., December 29, 2009) (Published) (Lucero, Anderson & Ebel): **Conspiracy**: In this conspiracy case, the evidence showed that Caldwell was involved in two separate conspiracies, but did not show that he was involved in a "tripartite" conspiracy as alleged in the indictment (he conspired with two others, but there was not an overarching conspiracy among all three). This fatal variance was error, but not reversible as to the conviction. However, the case was remanded for re-sentencing since some drug quantities were attributed to Caldwell that should not have been.

United States v. Rivera-Oros, No. 08-2035 (10th Cir., December 29, 2009) (Published) (O'Brien, Tymkovich & Holmes): **Federal Sentencing Guidelines; Crime of Violence**: In this illegal re-entry case, a sixteen-level enhancement because of a prior conviction for second degree felony burglary

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is AFFIRMED because it counts as a "crime of violence" under Arizona law. The panel concluded that generic burglary of a dwelling is not limited to permanent, immovable structures. NOTE: The panel followed the Fifth Circuit on this issue and disagreed with the Ninth Circuit. There might be a circuit split brewing.

United States v. Jordan, No. 08-1431 (10th Cir., December 29, 2009) (Published) (Tacha, Lucero & Hartz): **DNA**: Federal inmate convicted of a prison stabbing death sought DNA testing of some evidence pursuant to the Innocence Protection Act of 2005. The panel affirmed the denial of his motion for testing (basically because such testing, even if performed with results in Jordan's favor, would not exonerate him). Good discussion of this law.

United States v. Ruiz, No. 08-2252 (10th Cir., December 29, 2009) (Published) (Tacha, McKay & Lucero): **"Honest Services" Statute**: Ruiz was the Deputy Insurance Superintendent of New Mexico and was convicted of several counts of fraud and corruption as a result of a scheme to divert state funds to two charities with which he and his superior were closely affiliated. Basically, he would detect licensing violations by an insurer and then threaten the maximum fine. Then he would inform the insurers that they could avoid the fine if they contributed ten to twenty percent of the fine amount to two specific charities. Ruiz argued that state law authorized this conduct and thus he could not be convicted under federal law. There is a circuit split on this issue that is going to be resolved by the Supreme Court, but alas it does not assist Ruiz because the panel found that his conduct was not authorized by state law. AFFIRMED.

United States v. Cruz-Garcia, No. 08-2298 (10th Cir., January 5, 2010) (Published) (Tacha, Lucero & Hartz): **Federal Sentencing Guidelines; Crime of Violence**: A Colorado conviction for Attempted Sexual Assault on a Child counts as a "crime of violence" under the Guidelines (good for a 16-level enhancement). "We conclude that the crime described by the Colorado statute at issue constitutes 'sexual abuse of a minor' and is therefore a "crime of violence.'"

United States v. Farr, No. 09-6024 (10th Cir., January 11, 2010) (Published) (Kelly, Siler, Senior Circuit Judge from the Sixth Circuit, & Tymkovich): **Double Jeopardy/21 O.S. 11**: Farr was convicted previously by jury for evading taxes. However, that conviction was reversed on the basis that the proof presented at trial and the instructions constructively amended the indictment. She was subsequently indicted for violating the same statute based on the same conduct. In this appeal, she challenged this new indictment on grounds of Double Jeopardy. The panel AFFIRMED, finding that the prior reversal was not a judgment of acquittal.

United States v. Wayne, No. 09-1015 (10th Cir., January 14, 2010) (Published) (Henry, C.J., Seymour & Holmes): **Supervised Release**: Wayne plead guilty to wire fraud and was sentenced to 37-months, followed by supervised release. A special condition of supervised release was that she "participate in a mental health evaluation as directed by the Probation Office for the purpose of determining if mental health counseling is needed while under supervision." At her scheduled evaluation she refused to sign a release authorizing the probation office to receive the evaluation results. The District Court subsequently ordered her to comply and sign. The panel AFFIRMED

the order of the District Court, analyzing the issue under the statute governing conditions of supervised release and also holding that the District Court did not delegate improperly to the probation officer.

United States v. Taylor, No. 09-6052 (10th Cir., January 21, 2010) (Published) (Kelly, Briscoe & Tymkovich): **Searches and Seizures; Inventory**: Although Taylor was convicted of carjacking in Oklahoma, his case started in Houston when police inventoried items from the car he was driving and found evidence against him. His main argument on appeal is that the District Court erred in denying his motion to suppress because the officers in Houston had discretion whether to impound the car. The panel held that such discretion is permissible "so long as officers exercise that discretion according to standardized criteria, and not 'in bad faith or for the sole purpose of investigation.'"

United States v. Brown, No. 09-6079 (10th Cir., January 22, 2010) (Published) (Kelly, Siler & Tymkovich): **Discovery**: This case was decided by unpublished order on December 18, 2009. The Government moved to publish the opinion and the panel granted the motion. Brown was charged with Attempted Armed Robbery. Part of the Government's evidence was a partial fingerprint. Per Rule 16, the Government provided a summary of testimony by its fingerprint expert. At trial, before cross-examination, defense counsel objected on the basis that the summary was insufficient because he expected her to testify that she just ran the print through the computer database, rather than her testimony which consisted of the 14-point comparison of the actual print. The District Court held that the Government's summary was sufficient and the panel affirmed (and also chastised trial counsel for waiting until trial to object).

United States v. James, No. 08-1115 (10th Cir., January 22, 2010) (Published) (Tacha, Baldock & Lucero): **Federal Sentencing Guidelines**: In this mortgage fraud case, James entered a plea of guilty but objected to his sentence, specifically that the District Court erred in applying the "organizer or leader" enhancement, and also error in calculating loss. The panel affirmed the "organizer or leader" enhancement but reversed the loss calculation and remanded. This is a complicated process and is made more so by the fact that the mortgages were packaged and resold several times. The District Court calculated the loss by subtracting the foreclosure sales prices from the original loan amounts, but the problem was that the loans had been sold to secondary lenders, thus the original lender never received the foreclosure money. Pay special attention to Judge Lucero's concurrence which states that the District Court used the correct rule to calculate actual loss, and this method should be used in future cases (he concurred because of a factual finding by the District Court that loss to secondary lenders was not foreseeable pecuniary harm).

United States v. Osborne, No. 08-7121 (10th Cir., January 26, 2010) (Published) (Henry, C.J., Seymour & Holmes): **Federal Sentencing Guidelines; Flight**: When Osborne's wife identified him as a bank robber from surveillance photos, police tried to apprehend him. Rather than go gently into the night, Osborne led police on a long car chase, during which he ran six or seven stop signs and ended up driving erratically through the parking lot of a Wal-Mart. He was eventually arrested and ended up pleading guilty to bank robbery. In this appeal, his only complaint is that the District Court

enhanced his sentence by two levels on the basis that his flight from the law posed a "substantial risk of death or bodily injury" provision of U.S.S.G. sec. 3C1.2. The panel disagreed with language by the District Court to the effect that all high-speed car chases were covered under this enhancement, but agreed that the facts of Osborne's case were more than adequate for the District Court's enhancement to be affirmed.

Peterson et al. v. Grisham, et al., No. 08-7100 (10th Cir., February 1, 2010) (Published) (Kelly, McKay & Lucero): **Defamation**: This is the civil lawsuit brought by District Attorney William Peterson, former Shawnee police officer Gary Rogers, and former Oklahoma state criminologist Melvin Hett against author John Grisham and others for alleged defamation for *The Innocent Man* and other books. The District Court dismissed for failure to state a claim and the panel AFFIRMED.

United States v. Prince, No. 09-3208 (10th Cir., February 1, 2010) (Published) (Tacha, Anderson & Briscoe): **Searches and Seizures; Mistake of Law**: This case arose out of an BATF investigation wherein a "metal flat" was mailed to Prince in Kansas which supported a search warrant affidavit and subsequent warrant. The District Court ultimately held that the "flat" was not a "firearm" under federal law and suppressed all evidence in the case, even from the inception of the investigation. The panel reversed on the basis that an officer's mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter (as opposed to a detention or arrest). In this case, the agents went to Prince's house and there was some consensual contact.

United States v. Speakman, No. 08-1332 (10th Cir., February 2, 2010) (Published) (Tymkovich, Alarcon, from the Ninth Circuit sitting by designation & Ebel): **Restitution**: Speakman plead guilty to one count of Wire Fraud and was sentenced to 47-months and nearly $1.5 million in restitution. On appeal, Speakman challenged the restitution orders to Merrill Lynch and to the Crime Victim's Fund. In an in-depth analysis of what constitutes a crime "victim" for purposes of restitution, the panel noted that both "but for" and "proximate" causation is required; and because the District Court found "but for" causation but then stopped there, it remanded for further fact-finding as to whether Speakman proximately caused Merrill Lynch's harm. Second, the victim in the case (in addition to arguably Merrill Lynch) was Speakman's wife, who refused restitution under the MVRA. Nevertheless, the District Court ordered it anyway, construing the act as requiring it even though the victim refuses compensation. The panel disagreed, holding that "courts are not required to order restitution if the victim declines the restitution without assigning her interest to the Fund." **NOTE**: The panel recognized that its interpretation of the MVRA is in conflict with the Second Circuit.

Gautier v. Jones, No. 09-6123 (10th Cir., February 2, 2010) (unpublished) (Kelly, Porfilio & O'Brien): **Sex Offender Registration**: This unpublished order snuck in under the radar, but it is important to Oklahoma sex offender registration cases. Judge Cauthron had held that Due Process requires a hearing on actual dangerousness before an offender could be assigned to one of the risk levels. The panel here REVERSED that holding, concluding that current dangerousness is not relevant to the registration requirement because the numeric risk level is the minimum based on the offense of conviction. Apparently, the panel believes that this is enough. Take note of this opinion if you have one of these cases.

United States v. Headman, No. 09-1033 (10th Cir., February 4, 2010) (Published) (Lucero, McKay & Hartz): **1. Prosecutorial Misconduct; Brady Issues; 2. Jury Instructions**: Headman was convicted of First-Degree Premeditated Murder in Colorado. AFFIRMED over his claims regarding: 1) a *Brady* violation where two key Government witnesses shared a cell prior to and during trial (they denied discussing the case); the panel held that no *Brady* claim was raised in the District Court thus review was for plain error only, and in any event the evidence was not material; 2) instructional error because the jury was not informed that intoxication could be a defense to aiding and abetting (no plain error). The panel did find error (as conceded by the Government) concerning his convictions for felony murder and Kidnapping and remanded to the District Court to vacate one or the other.

United States v. Schneider, No. 09-3028 (10th Cir., February 8, 2010) (Published) (Tacha, O'Brien & Gorsuch): **Trial Procedure**: Interesting opinion in a case out of Kansas where the Government is prosecuting a doctor and his wife for dispensing drugs that led to deaths. The trial Court limited the presentation by the Government to ten days and excluded the bulk of the evidence in one of the counts (under Rule 403). In this interlocutory appeal, the Government claimed error and the panel agreed, holding that the trial Court overstepped its authority.

United States v. Miller, No. 09-6153 (10th Cir., February 9, 2010) (Published) (Kelly, Briscoe & Holmes): **Concurrent/Consecutive Sentences**: This is a *pro se* appeal where a state prisoner in Oklahoma must serve a federal sentence consecutively. He filed something called a "Petition for a Writ of *Nunc Pro Tunc*" seeking an order from the District Court to designate his state facility as the facility where he will also serve his federal sentence. The District Court denied the Petition with prejudice and the panel affirmed.

United States v. Parker, No. 09-1229 (10th Cir., February 9, 2010) (Published) (Tymkovich, Alarcon & Ebel): **Federal Sentencing Guidelines; Obstruction of Justice**: This one is articulated nicely by the panel: "The sole issue raised in this appeal is whether the district court clearly erred in enhancing Tyrone Parker's sentence based on its finding that Parker had obstructed justice....We affirm because we concluded that the district court did not clearly err in determining that Parker obstructed justice when he falsely testified at the suppression hearing that he did not consent to the entry of his apartment."

United States v. Porter, No. 07-4158 (10th Cir., February 9, 2010) (Published) (O'Brien, Tymkovich & Holmes): **Searches and Seizures; Exigent Circumstances**: Police searched Porter's home without a warrant while responding to a 911 call indicating that he had pointed a gun at the female caller while she was visiting his home. HELD: The warrantless search was lawful under *Michigan v. Fisher*, _ U.S. _ (December 7, 2009), since there was a reasonable belief by the police that an occupant of the home was in danger.

Lambert v. Workman, No. 09-5108 (10th Cir., February 10, 2010) (Published) (Gorsuch, Anderson & Brorby): **Habeas Corpus**: This habeas case illustrates the power of the AEDPA. Lambert was convicted on a general verdict encompassing both malice-murder and felony-murder, and also of Armed Robbery (the predicate for the felony-murder). The murder conviction was reversed, but the Armed Robbery conviction stood. On remand the state elected to charge Lambert with both forms of murder and he was again convicted. He argued that Double Jeopardy barred his trial on felony-murder because he had already been convicted of the lesser-included offense of Armed Robbery. The case thus presents issues concerning which rule applies here: the rule that a defendant cannot be prosecuted for a greater offense following his conviction for a lesser-included offense; or the rule of "continuing jeopardy" which allows re-trial when a conviction has been reversed for trial error. The panel held that the since the Supreme Court has not decided the issue, no relief is available under the AEDPA.

United States v. Jordan, No. 08-1431 (10th Cir., February 11, 2010) (Published) (Tacha, Lucero & Hartz): **DNA**: Motion for DNA testing in a prison-murder is denied because Jordan failed to show that: 1) the DNA testing method he requested is substantially more probative than the prior DNA testing method used in the case; and 2) that the proposed DNA testing may produce new material evidence that would raise a reasonable probability that he did not commit the offense.

United States v. Middagh, No. 09-2123 (10th Cir., February 12, 2010) (Published) (Briscoe, Baldock & Hartz): **Federal Sentencing Guidelines; Reasonableness**: Imposition of 240 hours of community service (along with 2 years' probation) is not unreasonable for a conviction of Theft of Public Money.

United States v. Lewis, No. 08-1170 (10th Cir., February 12, 2010) (Published) (Hartz, Baldock & Tymkovich): **Sufficiency of the Evidence**: Complicated ponzi scheme resulted in conspiracy and fraud convictions. AFFIRMED for the most part except for a few counts that were reversed based upon insufficiency of the evidence.

United States v. Patillar, No. 09-5067 (10th Cir., February 16, 2010) (Published) (Hartz, Seymour & Ebel): **Federal Sentencing Guidelines; Crime of Violence**: Sentence as a career offender for an Oklahoma prisoner is affirmed over claims that a prior offense of larceny from the person was not "violent"; and that a prior robbery offense was too stale to be a crime of violence because he would have served his entire term of imprisonment for that offense more than 15 years before committing his federal offenses had Oklahoma acted with the requisite diligence in revoking his probation.

Alverson v. Workman, No. 09-5000 (10th Cir., February 16, 2010) (Published) (Kelly, Briscoe & Tymkovich): **Habeas Corpus; Capital Habeas Cases**: Oklahoma capital habeas in which denial of relief is AFFIRMED over claims of: 1) Denial of funding for neuropsychological examination under *Ake*; 2) sufficiency of the HAC aggravator; 3) IAC for failing to investigate head trauma; 4) Cumulative error; and 5) failure of the District Court to hold an evidentiary hearing. **NOTE**: Judge Tymkovich concurred, noting that the *Ake* claim should have been procedurally barred.

NOTE: Judge Kelly concurred in part/dissented in part, concluding: "To execute a person because he could not come up with the $2,050 to employ an appropriate mental health expert plainly violates due process."

United States v. Solon, No. 09-8018 (10th Cir., February 17, 2010) (Published) (Tacha, Seymour & Lucero): **1. Criminal Justice Act; 2. Trial Procedure**: Possession of child porn conviction is AFFIRMED over claims of: 1) denial of the right to present a complete defense (good discussion of how CJA works with experts); 2) a six-minute absence by the trial judge constituted structural error; and 3) denial of speedy trial. **NOTE**: Judge Lucero dissented and would grant relief on the six-minute absence issue. The facts are bizarre. The trial judge, out of Wyoming, abruptly left the bench during defense counsel's closing argument because his secretary went to play canasta and he had to "get some letters out." Judge Lucero made a compelling argument that under the circumstances the six-minute absence prejudiced the defense.

United States v. Seltzer, No. 08-1469 (10th Cir., February 17, 2010) (Published) (Henry, C.J., Seymour & Holmes): **Speedy Trial**: The panel affirmed a dismissal with prejudice of a superseding indictment on a speedy trial claim under the Sixth Amendment, not the Speedy Trial Act. Excellent analysis and a terrific case on this issue.

United States v. Henderson, No. 09-8015 (10th Cir., February 17, 2010) (Published) (Tacha, Seymour & Lucero): **Searches and Seizures; Search Warrants**: Conviction for possession of child porn is affirmed over a single search issue: whether the PC was sufficient for the warrant. It was not because the affiant officer did not identify who informed him that the relevant IP address had transferred child porn, or the method used in this case to establish that a computer at the specified IP address transferred videos with child porn associated SHA (Secure Hash Algorithm) values. However, this lack of PC did not result in suppression because of *Leon*.

United States v. Lopez-Medina, No. 08-4055 (10th Cir., February 19, 2010) (Published) (Henry, C.J., Hartz & O'Brien): **Confrontation/Cross-Examination**: Conviction for possession of meth with intent to distribute is AFFIRMED over claims of: 1) Confrontation Clause violation by the introduction of hearsay statements by a confidential informant (the defense opened the door and thus it was invited error); 2) restriction on questioning a Government witness about the nature of the witness's recent conviction; and 3) the prosecution committed prosecutorial misconduct.

United States v. Ramos-Arenas, No. 09-2165 (10th Cir., February 23, 2010) (Published) (Kelly, Baldock & Holmes): **Statutory Construction (Impersonating Officer)**: Conviction for falsely impersonating an officer or employee of the United States is affirmed over a claim of insufficiency of the evidence. Ramos-Arenas was a passenger in a car driven by his girlfriend when it was stopped for speeding. He told the officer that he was a Border Patrol Agent and the officer reduced the ticket. Ramos-Arenas had entered the United States Border Patrol Academy in 2007, but had failed to graduate. The real issue was the construction of the element that the defendant had to demand or obtain anything of value. The panel read the requirement broadly.

United States v. Washington, No. 09-3091 (10th Cir., February 23, 2010) (Published) (Tacha, Anderson & Briscoe): **1. Interstate Agreement on Detainers; 2. Possession of Firearm by Felon**: Conviction for felon in possession of a firearm is affirmed over claims based upon: 1) denial of motion to dismiss the indictment based on a violation of the Interstate Agreement on Detainers; 2) refusal of the District Court to instruct the jury on "fleeting possession"; and 3) permitting the Government to send certain prior testimony to the jury during deliberation.

United States v. Garcia, No. 08-5090 (10th Cir., February 23, 2010) (Published) (Tacha, McWilliams & Tymkovich): **1. Sufficiency of the Evidence; 2. Verdict Forms**: Drug conviction at jury trial is AFFIRMED over claims of: 1) insufficiency of the evidence; 2) confusing jury verdict form; and 3) cumulative error. NOTE: This is a case out of the Northern District (Tulsa) and if you practice there you might want to take note of the jury verdict form which the panel agreed should have been worded differently, but there was no plain error in this case.

United States v. Gonzalez, No. 09-6069 (10th Cir., March 2, 2010) (Published) (Briscoe, Seymour & Lucero): **Ineffective Assistance of Counsel**: 2255 appeal is affirmed over claims of IAC that trial counsel failed to accept the trial court's proposed jury instruction on the defense of withdrawal from the conspiracy and for conceding guilt on the conspiracy count.

United States v. Chavez-Suarez, No. 09-1005 (10th Cir., March 8, 2010) (Published) (Briscoe, McKay & Hartz): **Federal Sentencing Guidelines; Reasonableness**: The sentence in this case was enhanced by a prior drug conviction which occurred back in 1997, and the defendant had stayed out of trouble during that time. He challenged the substantive reasonableness of the sentence on the basis the sentence of 41-months for the crime of Illegal Re-entry was unreasonably long in light of the age of the underlying drug conviction, his essentially clear conduct prior to and following that conviction, and the relatively benign nature of his attempted distribution of marijuana in comparison to the other offenses that trigger the 16-level enhancement (plus, he was only discovered to be in the United States illegally in 2008 because he complied with the law by remaining at the scene of an accident that had been caused by another driver). Although the panel felt his pain, it AFFIRMED the sentence finding no abuse of discretion, even though it adopted a Ninth Circuit case that held that the staleness of an underlying conviction may warrant a below-Guidelines sentence.

United States v. Wise, No. 08-4033 (10th Cir., March 9, 2010) (Published) (Briscoe, Ebel & Gorsuch): **Federal Sentencing Guidelines; Crime of Violence**: Sentence for Felon in Possession of a Firearm is affirmed over claims of: 1) a 2006 Utah conviction for failure to stop at the command of a police officer was not a crime of violence; and 2) since the PSR did not assign him criminal history points for his 2006 conviction, the District Court was precluded from doing so.

United States v. Fisher, No. 09-6142 (10th Cir., March 10, 2010) (Published) (Hartz, McKay & Anderson): **Searches and Seizures; Warrantless**: Fisher was convicted of Felon in Possession of a Firearm after police responded to an emergency "shots-fired" call and found him at the scene armed with a .44 revolver and ammunition. Fisher argued that the *Terry* stop was unlawful but the panel had no problem finding that it was.

United States v. Frownfelter, No. 10-4016 (10th Cir., March 11, 2010) (unpublished) (Kelly, Ebel & Gorsuch): **Bail; Federal (Pending Appeal)**: This is an unpublished order REVERSING a denial of a motion for release pending appeal under 18 U.S.C. sec. 3143(b). The underlying conviction on a plea of guilty dealt with stealing government funds when Frownfelter failed to notify the government to stop sending him checks for his special needs child when the child went to live with Frownfelter's ex-wife. The issue was whether the indictment charged a felony or a misdemeanor (which is sometimes difficult to determine in federal court). Frownfelter was sentenced to one year and one day, and sought release pending appeal. In this Order, the panel found that Frownfelter' s appeals "raises a substantial question of law that is likely to result in a reduced sentence as set forth in section 3143(b)(1)(B)." The case was remanded for the District Court to set appropriate conditions for release pending appeal.

United States v. Livesay, No. 09-5080 (10th Cir., March 16, 2010) (Published): **Insanity/Competency**: Unusual federal jury trial on gun charges where the jury found Livesay not guilty by reason of insanity, however the District Court (Judge Payne in N.D. Okla.) committed Livesay to the custody of the Attorney General but leaving open the possibility of release at a later date. In this opinion, the panel affirmed, holding that the statute does not provide for pre-commitment conditional release. This is a good case on this issue that explains the legal steps that occur after an insanity verdict.

United States v. Fox, No. 09-5131 (10th Cir., March 22, 2010) (Published) (Briscoe, Seymour & Lucero): **Searches and Seizures; Consent**: Interesting search and seizure case where police had a house under surveillance and one of them stopped a woman who had been in the house but drove away. She stopped in the middle of the street and asked what was wrong and the Tulsa cop showed his badge and just jumped into her and directed her to a convenience store parking lot where he subsequently questioned her and got her permission to search the house. HELD: The initial seizure of the woman in the car was unlawful and not consensual; and her subsequent consent was not "purged of the taint of her unlawful seizure."

United States v. Bergman, No. 08-1472 (10th Cir., March 25, 2010) (Published) (Holmes, Baldock & Siler, sitting by designation from the Sixth Circuit): **Right to Counsel**: This is an oddball case where Bergman was found incompetent to stand trial. At a subsequent competency hearing, Bargman was declared competent and was convicted at a bench trial, but the lawyer she had hired had never been a licensed attorney. Before sentencing, this fraud was uncovered by the District Court and new counsel was appointed for her sentencing. HELD: Because Bergman was not represented by counsel when the court declared her competent, we REMAND for the district court to consider whether it can make a retrospective competency determination. NOTE: Judge Homes penned a lengthy separate opinion in which he concurred as to the constitutional violation, but dissented on the remedy of a remand regarding restrospective competency, which he viewed as a "disfavored remedy" (he would simply remand for a new trial, assuming she is competent to participate in one.

Richie v. Workman, No. 08-5091 (10th Cir., March 25, 2010) (Published) (Tacha, Lucero & Hartz): **Habeas Corpus; Capital Habeas Cases**: In this capital habeas case out of Oklahoma, the N.D. Okla., the district court granted new-trial relief on a *Beck* claim where the jury should have been instructed on second-degree murder. In this appeal, the panel affirmed, finding that writ should issue on the Murder One charge but not the other counts.

United States v. Ferrel, No. 09-1002 (10th Cir., March 29, 2010) (Published) (Tacha, Anderson & Briscoe): **Guilty Pleas; Federal**: Guilty plea in a drug case is AFFIRMED over several Rule 11 claims involving failure to inform Ferrel of the drug-quantity element of the crime (error but not rising to the level of plain error warranting relief); misinforming Ferrel of the statutory maximum sentence (no objection and no plain error); and failing to submit to a jury the question of the quantity and purity of the meth ("A defendant has no right to plead guilty to some elements of an offense but have a jury decide others. If a defendant wants a jury to decide an element, he must go to trial.").

United States v. Torre, No. 09-3029 (10th Cir., March 30, 2010) (Published) (Murphy, McWilliams & Gorsuch): **1. Federal Sentencing Guidelines; Safety Valve; 2. Interrogations; Pre-Trial Services**: Torre was convicted by a jury of drug counts involving both meth and marijuana. On appeal, he challenged only the meth conviction and sentence. The panel AFFIRMED the conviction over his claims of error involving: 1) a jury instruction that stated that the Government did not have to prove beyond a reasonable doubt that he knew the precise nature of all contraband substances he possessed (no error since the Government must prove simply that the Defendant knew that he possessed a controlled substance); 2) admission of a statement made by Torre to Pre-Trial Services that he used meth in 2007. Concerning the statement, the panel noted that the statement was used against Torre for impeachment, rather than direct evidence of guilt, and affirmed the use of such statements for ***impeachment*** purposes (citing other circuit court decisions). Finally, Torre made an enterprising argument regarding the "safety valve" provision to the effect that his trial testimony about the crime, in which he admitted that he knew he possessed marijuana but denied knowingly possessing meth, met the requirements of the safety valve statute. The District Court categorically rejected the idea that trial testimony alone could qualify under the statute, but the panel disagreed. The panel noted that it might be a rare case in which it would happen, but the statute simply mandates that the accused tell all he knows about the crime before the sentencing hearing and that is what Torre did. The panel remanded to the District Court in order to determine in the first instance whether the safety valve statute applied. **NOTE**: The panel's ruling on the use of statements made to Pre-Trial Services for impeachment purposes is significant. The statutes governing such statements indicate no exceptions but of course since it helps the Government convict the accused the court will approve it.

United States v. Cook, No. 08-2297 (10th Cir., April 5, 2010) (Published) (Briscoe, McWilliams & Murphy): **Interrogations/Fifth Amendment**: The Government sought interlocutory review of a suppression order. Cook was an inmate suspected in an inmate murder. He was questioned by state authorities, invoked his right to counsel, and the interview ceased. Later the FBI took over and, without knowledge of the prior invocation of the right to counsel, planted an informant in the cell to whom Cook made statements. The panel held that since there was no custodial interrogation

based upon the fact that Cook did not know that the informant/cell mate was working for law enforcement, *Miranda* and its progeny do not apply, and the prior invocation makes no difference.

United States v. Begay, No. 09-2163 (10th Cir., April 12, 2010) (Published) (Briscoe, McWilliams & Tymkovich): **Superseding Indictments**: This is a shameful opinion where Begay was indicted on a single count of child sexual abuse, but the Government sought to introduce multiple instances of abuse of the same complaining witness under Rule 414. The District Court denied this as too prejudicial and, on interlocutory appeal, the Tenth Circuit affirmed. The Government then sought to get around this ruling by obtaining a superseding indictment which simply alleged as separate counts the original "bad act" evidence that the District Court deemed unfairly prejudicial. The District Court dismissed the superseding indictment with prejudice, but the panel reversed, finding an abuse of discretion. Ugh.

United States v. Martinez, No. 09-1140 (10th Cir., April 12, 2010) (Published) (Tymkovich, Alarcon, Senior Circuit Judge for the Ninth Circuit sitting by designation, & Ebel): **Federal Sentencing Guidelines; Threat of Death**: In this bank robbery case, a "threat of death" enhancement is affirmed where everyone was ordered to the ground but one woman was paralyzed with fear and stood where she was, thereafter a co-defendant thrust a hard object into her side and told her to get down. The case stands for the proposition that "threat of death" does not have to be an overt threat, only one where a reasonable person would perceive a threat of death.

United States v. McCalister, No. 09-5101 (10th Cir., April 16, 2010) (Published) (Murphy, Gorsuch & Holmes): **Rule 60**: McCalister tried to avoid some procedural hurdles by using Rule 60(b) of the Rules of Civil Procedure to challenge his sentence under section 3582(c)(2). The panel held that since Rule 60 is a civil rule, it cannot be used to challenge a section 3582(c) motion because that motion is a criminal proceeding.

United States v. Martinez, No. 09-6049 (10th Cir., April 19, 2010) (Published) (Hartz, Seymour & Gorsuch): **Federal Sentencing Guidelines; Crime of Violence**: The Armed Career Criminal Act punishes defendants who commit crimes after having been convicted previously of a "violent felony." Also, the Guidelines punish offenders who have been convicted previously of "crimes of violence." Although similar, these are not the same and the panel in this case clarifies the point by holding that the prior convictions of Martinez for Attempted Second-Degree Burglary qualify as "crimes of violence" under the Guidelines enhancement provision, but are nonetheless not "violent felonies" under the ACCA.

United States v. Batton, No. 09-8079 (10th Cir., April 23, 2010) (Published) (Lucero, Baldock & Tymkovich): **1. "Bad Acts"; 2. Experts**: Batton was convicted of sexually assaulting a 14-year-old family friend while transporting the youth to Chicago. He was sentenced to 360 months. Affirmed over his claims of: 1) admission of another, strikingly similar sexual assault of another 14-year-old boy; 2) the jury instructions regarding the prior sexual assault; and admission of expert testimony regarding the methods sex offenders use to recruit and groom victims.

United States v. Burkhart, No. 09-7091 (10th Cir., April 23, 2010) (Published) (Tacha, Kelly & Holmes): **Searches and Seizures; Search Warrants; Staleness**: In this Possession of Child Porn case, the search of a home is constitutional under the Fourth Amendment because probable cause existed to search Mr. Burkhart's home and, in any case, the good faith exception applies. The investigation started in Europe ("Europol") where Italian authorities arrested a person who ran a child porn web site. During the search of that persons home, e-mails to U.S. citizens were turned over to the FBI which led them to McAlester, Oklahoma and then to Mr. Burkhart and his cache of DVDs. Burkhart attacked the search warrants on the basis that the info rmation was stale, that there was no nexus between his home and the suspected child porn, and warrants for two different addresses undermined each other.

United States v. Steele, No. 09-7108 (10th Cir., April 26, 2010) (Tacha, Briscoe & O'Brien)(Published): **Standards of Review**: 18-month sentence for a second violation of supervised release is affirmed over procedural and substantive reasonableness claims (the Guidelines range was only 4-10 months). The reason why this case is published is because of the novel argument regarding the standard of review. When the District Court imposed sentence, it asked if there was anything further. The defense did not object to the sentence at that time. However, the Eleventh and Sixth Circuits have a rule whereby simply asking if there is anything else is inadequate to solicit objections to the sentence. The Third and Ninth Circuits have rejected such a rule. In this case, Steele presents the issue to the panel and it sided with the Third and Ninth Circuits (against the defendant) "in concluding a trial judge is not required to specifically elicit objections after announcing a sentence." Applying plain error to Steele, the panel affirmed.

United States v. Silva-Arzeta, No. 07-5140 (10th Cir., April 27, 2010) (Briscoe, Holloway & Hartz) (Published): **Searches and Seizures; Consent**: Drug/Firearm convictions are affirmed in this case over claims: 1) that Silva-Arzeta did not give consent to search his apartment; 2) that his right to Due Process was violated when a police officer questioned him in Spanish without using an interpreter; 3) and that he was entitled to discovery regarding alleged evidence tampering between his first trial (which ended in a mistrial) and the trial at which he was convicted. This opinion is noteworthy for the dissent of Judge Holloway who found no legal error in the analysis of the majority, but would nonetheless reverse under the circumstances of the case because there appeared to be evidence tampering by law enforcement between the first and second trials (the majority gave the issue short-shrift on a technicality).

United States v. Campbell, No. 09-3212 (10th Cir., May 10, 2010) (Published) (Hartz, Baldock & Gorsuch): **Searches and Seizures; Search Warrants; Good Faith**: Lengthy opinion affirming the denial of a motion to suppress where the District Court held that the search warrant was supported by probable cause, the officers who prepared the affidavit did not deliberately mislead or act with reckless indifference to the truth, and that in any event law enforcement relied in objective good faith upon the warrant. This case appears to be published because it applies an aspect of the Supreme Court's decision in *United States v. Herring*, 129 S.Ct. 697 (2009) which "appears to have described another situation in which Leon would not apply---when the warrant's flaw results from recurring or systematic police negligence." However, the Court found no such negligence in this case.

Phillips v. Workman, No. 08-7043 (10th Cir., May 12, 2010) (Published) (Henry, Murphy & O'Brien): 1. **Jury Instructions; Lesser-Included Instructions; 2. Habeas Corpus; Capital Habeas Cases**: Oklahoma death row inmate Ernest Eugene Phillips gets habeas relief on a *Beck* claim when the lower court refused to instruct on Second Degree depraved mind murder.

United States v. McConnell, No. 09-3036 (10th Cir., May 19, 2010) (Published) (Henry, Anderson & Tymkovich): **Federal Sentencing Guidelines; Crime of Violence**: In this Felon in Possession of a Firearm case, McConnell pleaded guilty. In calculating the sentence under the Guidelines, the District Court determined that his prior Kansas conviction for Fleeing and Eluding police under Kansas law constituted a "crime of violence" for sentencing purposes. Although the circuit had held a similar Utah statute to be a "crime of violence" in a prior case, McConnell argued that the Supreme Court's subsequent decision in *Chambers v. United States*, 129 S.Ct. 687 (2009) overruled circuit precedent. The panel was not persuaded and affirmed the sentence.

Bunton v. Atherton, No. 09-1152 (10th Cir., May 25, 2010) (Published) (Briscoe, Hawkins & O'Brien): **Habeas Corpus**: Federal habeas relief is denied on claims of IAC for failing to call a defense witness and failing to impeach a State witness on his purported vantage point when he claimed to have witnessed the murder (this claim was procedurally barred), and a cumulative error claim.

Hooks v. Workman, No. 07-6152 (10th Cir., May 25, 2010) (Published) (Lucero, Murphy & O'Brien): **Jury Instructions; *Allen* Charge**: Oklahoma capital habeas corpus case is affirmed on first-stage issues, but the death sentences are vacated based upon a claim that an *Allen* charge to the deliberating jury during the second stage coerced the jury into returning verdicts of death. NOTE: This was a 2-1 opinion with judge O'Brien penning a strong dissent.

THE END