# Summaries of Selected Opinions

**No. 17-1086. United States v. Hull.** 6/26/2018. D.Colo. Judge Murphy. *Supervised Release Conditions—Duty to Notify Parties of Risk.*

Defendant pleaded guilty to bank robbery. Over his objection, the district court imposed a standard condition of supervised release requiring defendant to warn third parties of the risks he might pose to them. The condition specifically provided that if a probation officer determines defendant poses a risk to another person, including an organization, the probation officer could require him to notify the person about the risk and could contact the person to confirm that defendant provided the notice.

On appeal, defendant argued that the condition was unconstitutionally vague and violated due process because it was insufficiently clear and specific to fairly guide his conduct and lacked a standard for defining risk. The requirement that defendant notify third parties when instructed to do so by his probation officer was clear and understandable. Further, the district court's comments at sentencing provided clear direction to the probation department in applying the condition, tying it to the risks associated with defendant's criminal history.

Defendant next argued that the condition improperly delegated judicial functions to the probation department. Here, the district court's comments at sentencing confined the probation department's discretion, and the department is not permitted to decide the nature or extent of defendant's punishment. Once a risk is identified, the probation department has merely a ministerial duty to determine the steps that defendant must take to comply. The condition is not an unconstitutional delegation of judicial authority.

Finally, defendant argued that the condition was an unlawful occupational restriction. The condition does not prohibit defendant from engaging in any particular profession, nor does it categorically require him to notify employers of his convictions. The condition is not an occupational restriction.

The sentence was affirmed.

**No. 17-4126. Xlear, Inc. v. Focus Nutrition, LLC.** 6/26/2018. D.Utah. Judge McHugh. *Lanham Act—Utah Truth in Advertising Act—Attorney Fees—Prevailing Party.*

Xlear, Inc. (Xlear) and Focus Nutrition, LLC (Focus) both sell sweeteners containing xylitol. Xlear sued Focus for trade-dress infringement under the Lanham Act and violation of the Utah Truth in Advertising Act (UTIAA), alleging that it copied Xlear's packaging for sweetener products. The parties eventually stipulated to the dismissal of all claims with prejudice, reserving the right to seek attorney fees. The district court granted defendant attorney fees, concluding that it was a prevailing party under the Lanham Act and the UTIAA. The stipulation of dismissal resulted in the clerk of court terminating the case.

On appeal, Xlear contended that Focus was not a prevailing party for purposes of the Lanham Act. To establish that it is a prevailing party, a litigant must show that judicial action altered or modified the rights of the parties. Here, the stipulation of dismissal was voluntary and its filing did not allow for or result in any approval or action by the district court on the merits of the case. In addition, the stipulation of dismissal resulted only in the Clerk of Court terminating the case. Thus, Focus was not a prevailing party and was not entitled to recover attorney fees under the Lanham Act.

Focus argued that even if it was not a prevailing party under the Lanham Act, it was a prevailing party and entitled to recover its attorney fees under the UTIAA. Focus may be a prevailing party for UTIAA purposes; however, the UTIAA cannot support an award of the full requested fees, and the district court did not analyze which of the requested fees were incurred in defense of the UTIAA claim rather than the Lanham Act claim.

The attorney fees award under the Lanham Act was reversed. The attorney fees award under the UTIAA was vacated and the case was remanded with directions.

**No. 17-8059. United States v. Young.** 6/26/2018. D.Wyo. Judge Bacharach. *Guideline Sentencing—"Reckless Endangerment" Enhancement—Threats and Armed Standoff with Officers.*

Defendant stated he would commit suicide in front of his ex-girlfriend and began driving toward her house. A friend alerted police officers, who pursued him. During the chase, he did not speed or otherwise drive recklessly, but he told a police dispatcher that if the police took any action he would return with gunfire, that he had hollow point ammunition, and that he was a good shot. The police deployed spike strips to puncture the tires of defendant's car, and he eventually stopped. But he remained in his car for roughly four-and-a-half hours before surrendering. Defendant was convicted of possessing a firearm as a convicted felon. The district court applied a sentencing enhancement for reckless endangerment.

On appeal, defendant challenged the application of the enhancement. He argued that his verbal threats could not constitute reckless endangerment. The combination of the threat to shoot and the standoff provided sufficient support for application of the reckless endangerment enhancement.

Defendant also contended that the district court should not have considered the circumstances of the armed standoff because it did not occur while he was "fleeing from a law enforcement officer." Although defendant conceded he was fleeing while driving on the highway, he argued he was no longer fleeing once his car stopped. As used in the Sentencing Guidelines, resisting arrest, even without an attempt or preparation to flee, qualifies as flight from law enforcement. Defendant was

therefore fleeing when he refused to surrender and engaged in a standoff with police officers. The district court did not err in applying the sentencing enhancement.

The sentence was affirmed.

**No. 17-1223. Alpenglow Botanicals, LLC v. United States.** 7/3/2018. D.Colo. Judge McHugh. *Marijuana Dispensary—Business Tax Deduction—Controlled Substance Trafficking—Sixteenth Amendment Taxing Authority—Eighth Amendment Penalty.*

Plaintiff is a medical marijuana business. After auditing plaintiff's tax returns, the IRS determined that plaintiff had committed the crime of drug trafficking and denied a variety of plaintiff's claimed business deductions. Plaintiff sued the IRS for a tax refund, asserting that the IRS had improperly denied its business tax deductions. The district court dismissed the complaint and later denied plaintiff's Fed. R. Civ. P. 59(e) motion to alter or amend the judgment.

On appeal, plaintiff argued that the IRS could not deny the deductions in the absence of a criminal conviction, and even if it had such authority, there was insufficient evidence of trafficking. It is within the IRS's authority to determine, as a matter of civil tax law, whether taxpayers have trafficked in controlled substances. Further, the burden was not on the IRS to prove trafficking, but on plaintiff to show error. Plaintiff failed to meet this burden; its argument relied entirely on the IRS's lack of authority to disallow the deductions, rather than on evidence that it was not engaged in marijuana trafficking. The IRS did not exceed its authority in denying the business deductions.

Plaintiff also argued that 26 USC § 280E violates the Sixteenth Amendment by preventing the deduction of expenses that a business could not avoid incurring. Congress's choice to limit or deny deductions under § 280E does not violate the Sixteenth Amendment.

Plaintiff further argued that § 280E is a penalty and enforcing it violates the Eighth Amendment. Section 280E is not a penalty and does not violate the Eighth Amendment.

Finally, the Tenth Circuit held that the district court did not abuse its discretion in denying plaintiff's motion to amend its complaint.

The judgment was affirmed.

**No. 17-2124. United States v. Chavez-Morales.** 7/3/2018. D.N.M. Judge McHugh. *Illegal Reentry—Sentencing—Upward Departure—Adequacy of Findings.*

Defendant pleaded guilty to illegal reentry by a removed alien after deportation subsequent to an aggravated felony conviction. His advisory Guideline range was 21 to 27 months. The district court acknowledged defense counsel's argument that defendant had illegally entered the United States for economic reasons, but stated that given the short time since his last removal, he had not really made an effort to succeed in Mexico. Noting his criminal history and the lack of deterrent effect of his previous sentences, the district court departed upwardly and imposed 36 months' imprisonment. It also imposed a term of supervised release. Defendant did not object to the term of imprisonment or to the term of supervised release.

On appeal, defendant argued that the district court failed to meaningfully consider his argument that his economic motivation mitigated the seriousness of his offense. Reviewing for plain error, the Tenth Circuit determined that the district court satisfied its procedural duty to consider the economic motivation argument and provided sufficient reasons for rejecting the argument.

Defendant also argued that the district court erred by imposing a term of supervised release without considering section 5D1.1(c) of the Sentencing Guidelines, which provides that the court ordinarily should not impose a term of supervised release where supervised release is not required by statute and the defendant is deportable and likely will be deported after imprisonment. But the district court may do so if it would provide an added measure of deterrence and protection. Here, the district

court erred by failing to make the necessary findings concerning the deterrent effect and other relevant factors. But defendant failed to establish that there is a reasonable probability that the sentencing defects altered the result of the proceedings and thus failed to meet his burden of showing plain error.

The judgment was affirmed.

**No. 17-4014. United States ex rel. Polukoff v. St. Mark's Hospital.** 7/9/2018. D.Utah. Judge Briscoe. *Qui Tam—False Claims Act—Medicare Fraud—Reasonable and Necessary Medical Procedures—Fed. R. Civ. P. 9(b)—Fed. R. Civ. P. 12(b)(6).*

Plaintiff, Dr. Polukoff, filed a qui tam action against defendants Dr. Sorensen, St. Marks Hospital, and Intermountain Medical Center, which is part of Intermountain Healthcare, Inc. (collectively, Intermountain). The complaint alleged that Dr. Sorensen violated the False Claims Act (FCA) by performing thousands of unnecessary heart surgeries and received Medicare reimbursement by fraudulently certifying that the surgeries were medically necessary. Dr. Polukoff also alleged that two hospitals where Dr. Sorensen worked, St. Marks and Intermountain, were complicit in and profited from Dr. Sorenson's fraud. Defendants moved to dismiss under Fed. R. Civ. P. 9(b) and 12(b)(6). As to Rule 9(b), the district court concluded that Dr. Polukoff adequately pleaded his claims against Dr. Sorensen and St. Marks Hospital but not against Intermountain. As to Rule 12(b)(6), the district court granted defendants' motion to dismiss.

On appeal, the Tenth Circuit first addressed the dismissal under Rule 12(b)(6), which rested on the district court's conclusion that, absent a specific regulation addressing the necessity of treatment, a physician's medical judgment concerning the necessity of treatment could not be false or fraudulent under the FCA. The FCA applies to the Medicare Act, which states that no payment may be made for services that are not reasonable and necessary. Thus, a doctor's certification to the government that a procedure is "reasonable and necessary" is "false" under the FCA if the procedure was not reasonable and necessary under the government's definition of the phrase. Dr. Polukoff alleged that Dr. Sorenson submitted legally false requests for payment by certifying that the services were medically necessary and thus stated a claim as a matter of law to survive a Rule 12(b)(6) dismissal against Dr. Sorensen. Further, the amended complaint adequately alleged that St. Mark's and Intermountain submitted false claims for reimbursement for Dr. Sorensen's procedures.

Dr. Polukoff argued that his amended complaint pleaded allegations against Intermountain with sufficient particularity to survive a Rule 9(b) motion to dismiss. The Tenth Circuit held that the amended complaint satisfied the pleading requirements of Rule 9(b).

The judgment was reversed and the case was remanded.

**No. 17-1285. McCracken v. Progressive Direct Insurance Co.** 7/24/2018. D.Colo. Judge Moritz. *CRS § 10-4-609(1)(c)—Uninsured/Underinsured Motorist Coverage—MedPay Setoff—Release—Enforceable.*

Plaintiffs in these consolidated cases each settled an uninsured/underinsured motorist (UM/UIM) coverage claim that included a setoff for MedPay benefits, and each signed a release waiving further claims against defendants. Plaintiff Archuleta sued USAA Casualty, alleging it violated CRS § 10-4-609(1)(c) by taking the MedPay setoff. The district court enforced the release Archuleta signed and entered judgment on the pleadings for USAA. Plaintiffs McCracken and Hecht jointly sued Progressive Direct and Progressive Preferred, also alleging a statutory violation based on the MedPay setoffs. The district court ruled that plaintiffs' releases were enforceable and granted summary judgment to the insurers.

On appeal, as a preliminary matter, the Tenth Circuit sua sponte determined that the district court erred in dismissing Archuleta's claims against USAA with prejudice.

Plaintiffs argued that the releases violate Colorado public policy and are therefore void because the releases prevent them from receiving all the UM/UIM benefits they're entitled to. Under *Calderon v. American Family Mutual Insurance Co.*, 383 P.3d 676 (Colo. 2016), plaintiffs had a statutory right to collect their UM/UIM benefits without a setoff. However, plaintiffs were free to waive that right when they settled their claims, and following *Arline v. American Family Mutual Insurance Co.*, 2018 WL 2436839 (Colo.App. 2018), the releases are enforceable and bar plaintiffs' claims.

The judgment in *Archuleta* was reversed insofar as it dismissed Archuleta's claims with prejudice, and the case was remanded with instructions to dismiss those claims without prejudice for lack of jurisdiction. The judgment in *McCracken* was affirmed.

**No. 17-2085. United States v. Roach.** 7/24/2018. D.N.M. Judge Matheson. *Confrontation Clause—Requirement for Preserving Objection—Harmless Error.*

Defendant recruited the victim and prostituted her to clients. The victim eventually contacted an organization offering help to victims of human trafficking, which contacted the police on her behalf. As a result, defendant was arrested. A co-defendant then agreed to testify against defendant in exchange for dismissal of the charge against her. The co-defendant corroborated the victim's account about defendant's controlling and violent behavior. A jury convicted defendant of sex trafficking by means of force, threats, fraud, and coercion.

On appeal, defendant contended that the district court erred by limiting his cross-examination of his co-defendant. To preserve the issue, defendant needed to describe the evidence and the ground to admit it. He failed to describe the evidence in his pretrial motions and failed to describe the ground to admit it at trial. Defendant waived his Confrontation Clause argument by failing to present it to the district court and by failing to argue plain error on appeal.

Defendant argued in the alternative that assuming he did not preserve the cross-examination restrictions as constitutional issues, he preserved them for review under the abuse of discretion standard. Even assuming the district court abused its discretion by limiting cross-examination, such error was harmless because (1) defendant had already challenged his co-defendant's credibility on cross-exam-

ination, including inquiring about her deal with the government; (2) defendant had called two witnesses to impeach her character for truthfulness; and (3) there was ample evidence to convict defendant even without the co-defendant's testimony. Thus, any error in limiting cross-examination did not have a substantial influence in the outcome of the case.

The judgment was affirmed.

**No. 17-3083. United States v. McLinn.** 7/24/2018. D.Kan. Judge Ebel. *Possession of Firearm by Person Adjudicated or Committed as Mentally Ill—Issue of Law or Fact.*

Police responded to a call at a gas station, where they found defendant wandering the premises wrapped only in a shower curtain. Defendant had multiple minor injuries and was taken to a local emergency room. He was assessed with extreme psychosis with visual and auditory hallucinations and paranoia. A state court determined there was probable cause to believe he was suffering from a severe mental disorder. He was detained in a mental health facility for less than a week and discharged after his condition improved. About a year later, city commissioners received a series of bizarre emails, and an investigation led police to obtain a search warrant for defendant's residence, where they recovered firearms. Defendant entered a conditional guilty plea to possession of a firearm by an individual who has been adjudicated as a mental defective and committed to a mental institution. He reserved the right to appeal the denial of his motion to dismiss this count of the indictment.

On appeal, defendant argued that he had neither been adjudicated a mental defective nor committed to a mental institution. The Tenth Circuit held that the issue of whether defendant's adjudication or commitment qualified under the statute was an issue of law to be determined by the court. But the district court had erroneously treated the issue as one of fact and denied defendant's motion to dismiss the indictment, reasoning he could not challenge the sufficiency of the government's evidence through a pretrial motion. The Tenth Circuit declined the government's invitation to resolve this issue of law on appeal because the parties had not briefed the issues of adjudication or commitment; these questions were not fully addressed by the district court; and ancillary charges might be reinstated if defendant prevails in his legal argument.

The denial of the motion to dismiss was vacated and the case was remanded for the district court to determine as a matter of law whether defendant was adjudicated a mental defective or committed to a mental institution.

**No. 17-2117. United States v. Mann.** 8/10/2018. D.N.M. Judge McHugh. *Crime of Violence under 18 USC § 924(c)(1)(A)(iii)—Assault Resulting in Serious Bodily Injury—Recklessness as Sufficient Mens Rea.*

Defendant was charged with knowingly discharging and carrying a firearm during and in relation to a crime of violence in violation of 18 USC § 924(c)(1)(A)(iii). The underlying crime of violence on which the government relied was assault resulting in serious bodily injury. Defendant moved to dismiss the indictment, arguing that assault resulting in serious bodily injury is not a crime of violence. The district court concluded that the offense is not a crime of violence because one can violate the statute with a mens rea of mere recklessness. It dismissed the indictment.

On appeal, the Tenth Circuit applied the categorical approach to determine whether the crime of assault resulting in serious bodily injury included as an element the use, attempted use, or threatened use of physical force against the person or property of another, as required by the definition of a crime of violence in 18 USC § 924(c)(3)(A). The categorical approach requires examining the elements of a crime in the abstract rather than the particular facts underlying the defendant's conviction. The elements of assault resulting in serious bodily injury are (1) the defendant assaulted a victim, and (2) the victim suffered serious bodily injury. Recklessness is a sufficient mens rea for a crime of violence because even reckless conduct involves the volitional use of physical force against the person or property of another. What matters is whether the act was done with at least conscious disregard of a substantial risk that the behavior will cause harm to another. If so, the act will support an increased penalty under § 924(c)(3)(A). The Tenth Circuit held that assault resulting in serious bodily injury is a crime of violence under 18 USC § 924(c)(3)(A).

The judgment was reversed and the case was remanded.

**No. 17-1241. William F. Sandoval Irrevocable Trust v. Taylor (In re Taylor).** 8/14/2018. Bankr. D.Colo. Judge Lucero. *Bankruptcy—Colorado Homestead Exemption—Impairment Amount—Property—One-Half Interest.*

The William F. Sandoval Irrevocable Trust (the Trust) obtained judgments against its former trustee, Taylor, for misappropriating money from the Trust. Taylor owned an undivided 50% interest in residential property (the Residence) with his former wife. The Trust recorded liens on the Residence. Taylor filed for bankruptcy and attempted to avoid the Trust's liens, arguing that the sum of the liens on the Residence and

his homestead exemption exceeded the value of his interest in the property. Taylor's calculation included the total liens on the Residence plus Taylor's homestead exemption, rather than one-half of those liens. The bankruptcy court granted Taylor's motion to avoid the Trust's judgment liens.

The Tenth Circuit construed 11 USC § 522(f), which provides that a debtor may avoid a lien on his interest in property to the extent that such lien impairs an exemption. A lien impairs an exemption to the extent that the total of the liens on the property and the amount of the homestead exemption exceed the value of the debtor's interest in the property in the absence of any liens. The term "property" refers to the debtor's interest, rather than the undivided whole parcel. Based on the plain language of § 522(f) and the structure of the Bankruptcy Code, the impairment calculation must use the value of other liens on the home corresponding to the debtor's percentage of ownership, rather than the full amount of the liens.

The bankruptcy court's ruling on the motion was reversed and the case was remanded.

**No. 17-3095. King v. Fleming.** 8/15/2018. D.Kan. Judge Phillips. *Materially False Email—Rule 11 Sanctions—Dismissal with Prejudice—Attorney Fees*.

A group of Kansans ran an advertisement on a local radio station requesting signatures on a petition to remove several state judges from office. The station soon canceled the ad. King, Muathe, and 16 others (collectively, plaintiffs) then filed suit against the station and two of the judges, asserting three federal claims that the judges had directed the station to cancel the ad in violation of plaintiffs' constitutional rights, and four state-law claims. Plaintiffs later filed an unauthorized second amended complaint attaching as an exhibit an email with superimposed text, allegedly written by defendant Judge Fleming, directing the station to stop running the ad. Based on the facts alleged in the email, the district court granted plaintiff King leave to file an amended complaint.

Soon after the authorized amended complaint was filed, the judges sent plaintiffs' attorney Ogunmeno a safe-harbor letter saying that the email had been altered and was misleading to the point of being fraudulent, and warning that unless the amended complaint was withdrawn, they would file a Fed. R. Civ. P. 11 motion for sanctions. Defendants provided the actual email, which did not include a directive to stop running the ad. King refused to withdraw or dismiss the amended complaint, so the judges filed a motion for sanctions and attorney fees. In response, King and Ogunmeno asserted they had a reasonable basis for believing that they had accurately represented the email's contents to the court, and they provided affidavits of what they had heard and overheard about the email. The district court granted the Rule 11 motion and dismissed all claims with prejudice. It awarded attorney fees and costs against King, Muathe, and Ogunmeno.

On appeal, King argued that the district court abused its discretion in ruling on the sanctions motion before he could submit the original email to forensic examination. However, the presentation of the manipulated document is what justified the sanctions, and no forensic analysis could justify that decision. The district court acted within its discretion in denying King's request for additional discovery.

King, Muathe, and Ogunmeno argued that the district court abused its discretion by imposing Rule 11 sanctions. Here, plaintiffs' attorney (1) did not make any inquiry, let alone a reasonable one, into the veracity of the email he filed, despite indications that it was fraudulent; (2) repeatedly quoted from the email he filed; (3) failed to investigate further when confronted with the safe-harbor letter; and (4) requested that he be allowed to submit the "genuine" email to forensic testing, thus demonstrating that he had failed to make a reasonable inquiry into the manipulated document. The district court acted within its discretion in finding a Rule 11 violation. Further, the district court did not abuse its broad discretion in determining that dismissal, rather than a lesser sanction, was appropriate.

King separately contested the dismissal with prejudice of the state law claims, arguing that after dismissing the federal claims the district court should have declined to exercise jurisdiction over the state-law claims, thus allowing plaintiffs to pursue their state-law claims in state court. It was within the court's discretion to dismiss all the claims with prejudice as a sanction for submitting the materially altered email.

Finally, King, Muathe, and Ogunmeno contested the district court's fee awards, claiming the award to Judge Fleming wasn't reasonable, and the media defendants weren't entitled to a fee award. The district court's analysis of the applicable four-factor test supported the award of fees to Judge Fleming, and the award wasn't an abuse of discretion. Plaintiffs waived the issue of the award to the media defendants by failing to argue for plain error review.

The judgment was affirmed. CL

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.