

# Summaries of Published Opinions

**No. 17-2146. United States v. Dalton.** 03/21/2019. D.N.M. Judge Ebel. *Fourth Amendment—Probable Cause.*

Police officers responded to a domestic disturbance call that possibly involved gunshots at a residence (the residence) where defendant was located. Officers called for defendant to exit the house, which he eventually did. Based on the report of gunshots and aware that defendant was not allowed to possess firearms due to a previous felony conviction, police obtained a search warrant for the house and executed the warrant soon after defendant exited. They discovered firearms and ammunition. Defendant was charged with being a felon in possession of firearms.

Eight months after defendant's arrest, but before his trial, an officer attempted to stop a car he knew belonged to defendant, but the vehicle sped away. A short while later, the officer found the car parked in the alley behind the residence. The officer observed an AK-47 rifle in the front seat. Other officers arrived on the scene, surrounded the house, and called the people inside to come out. Defendant exited the house and said he was not driving the car that evening and did not know who had his vehicle. An officer ran a background check on defendant and learned he was a convicted felon who could not legally possess firearms. As a result, officers obtained a warrant to search the house for weapons.

Before the second warrant was executed, officers discovered another man, Wheeler, in the backyard of the residence. They recognized Wheeler had a warrant out for his arrest for murder. At that point the officers determined that Wheeler had been driving defendant's car that evening. Although officers had no reason to believe that Wheeler had been in

the residence that day, and the warrant did not include any information about Wheeler, they executed the warrant and discovered bullets. Defendant was not charged with a crime based on this ammunition evidence, but the bullets were used at defendant's trial to prove he knowingly possessed the firearms and ammunition found during the first search. A jury convicted defendant of being a felon in possession of a firearm.

On appeal, defendant argued that the district court erred by admitting the evidence discovered during the second search, because that search was not supported by probable cause. Here, at the time officers executed the warrant, they lacked probable cause to believe that defendant possessed the gun in his vehicle or that he was illegally harboring firearms inside the house to be searched. Thus, the second search was unlawful. However, the district court's error in permitting the government to introduce the evidence discovered in the second search was harmless. Apart from the evidence from the second search, the government presented strong evidence to show that defendant lived at the house and knew about the guns that were discovered during the first search. Further, the prosecution made limited use of the unlawfully obtained ammunition evidence, and the district court gave the jury a limiting instruction.

Defendant also argued that a prospective witness for him had invalidly asserted her Fifth Amendment privilege. However, the government did not coerce the witness into invoking the privilege; the district court did not err by accepting the witness's decision not to testify; and the government was not required to offer the witness immunity to testify.

Defendant further contended that the district court abused its discretion by allowing the

government to show the jury 20 minutes of an hour-long body-worn video of events leading to defendant's arrest and admitting the tape into evidence. The district court did not abuse its discretion in ruling that the probative value was not outweighed by prejudice.

Defendant next argued that the district court erred by allowing the government to call four expert witnesses to testify to the same conclusion—that they did not find any physical evidence connecting defendant to the firearms in the house. This evidence was relevant and was not needlessly cumulative. Thus, the district court did not err.

Finally, defendant argued that the district court abused its discretion by refusing to admit the transcript of a witness interview under the residual exception to the hearsay rule. The record supports the district court's conclusion that the out-of-court statements were not sufficiently trustworthy, and the district court did not err.

The conviction was affirmed.

**No. 17-4103. United States v. Walker.** 03/25/2019. D.Utah. Judge Holmes. *Resentencing—Scope of Remand.*

Defendant pleaded guilty to two counts of bank robbery. Notwithstanding his extensive criminal record, the district court originally sentenced him to time served (33 days) to be followed by three years of supervised release. The government appealed, and in a prior decision, the Tenth Circuit reversed the sentence as substantively unreasonable and remanded for resentencing. On remand, the district court received new arguments and evidence and resentenced defendant to 10 years of probation, two years of home confinement, and 500 hours of community service.

On appeal, the government argued that the district court violated the mandate in the prior appeal by not sentencing defendant to a term of imprisonment. Although the prior opinion sent a message to the district court that a harsher sentence would be appropriate, the mandate did not limit the district court's resentencing authority by requiring a prison sentence, nor did it require the district court to reach a particular sentencing outcome. Rather, it required the district court to consider the

statutory sentencing factors in resentencing defendant. On remand, the district court obtained an updated presentence report, which showed defendant had complied with the conditions of his supervision, maintained employment, and was living a modest life. Defendant's probation officer testified that he had made positive changes in his life and a custody sentence would not be beneficial in his case, and defendant presented a significant amount of other evidence attesting to his rehabilitation. In its order, the district court made extensive findings applying the statutory sentencing factors to defendant's case. Accordingly, the district court did not violate the mandate when it declined to sentence defendant to a prison term.

The government's additional argument that the sentence after remand was substantively unreasonable was inadequately developed in the government's opening brief and was therefore waived.

The order was affirmed.

**No. 18-4027. Sacchi v. IHC Health Services, Inc.** 3/26/2019. D.Utah. Judge Kelly. *Unpaid Internship—Federal Antidiscrimination Statutes—Threshold-Remuneration Test—Employee—Attenuated and Speculative Benefits.*

Plaintiff worked as an unpaid intern for IHC Health Services, Inc. (the hospital), but the internship was terminated before it was scheduled to finish. Plaintiff sued, alleging associational discrimination and retaliation under the Americans with Disabilities Act; sex, religious, and age discrimination under the Age Discrimination in Employment Act; breach of contract; and defamation. The district court concluded that plaintiff was not an employee and dismissed the federal claims. The district court declined to exercise supplemental jurisdiction over the state-law claims.

On appeal, plaintiff argued that access to professional certification, a path to employment, or both, in an internship setting, can constitute indirect, job-related benefits and thus satisfy the applicable threshold-remuneration test to determine whether a person is an employee for purposes of the employment discrimination statutes. Here, the claimed benefits were not provided directly by the hospital and they did

not resemble traditional employment benefits such as insurance. Moreover, the benefits would only be realized if subsequent events occurred independently of the internship relationship, such as passing an exam to receive professional certification. Therefore, the benefits claimed were too attenuated and speculative to constitute sufficient remuneration to satisfy the threshold-remuneration test. The alleged facts did not establish that plaintiff was plausibly an employee, and the district court properly dismissed her complaint.

The judgment was affirmed.

**No. 18-1012. Butler v. Board of County Commissioners.** 3/29/2019. D.Colo. Judge Ebel. *Government Employee—First Amendment—Speech Involving a Matter of Public Concern—Sworn Testimony in a Judicial Proceeding—Case-By-Case Approach.*

Butler was employed by a county road and bridge department. He testified as a character witness on behalf of his sister-in-law in a child custody hearing involving her ex-husband, who was also an employee of the county road and bridge department. Butler alleged that after he testified, his employer demoted him. He sued, alleging that the demotion violated his First Amendment right to free speech. The district court dismissed the case because Butler's testimony was not on a matter of public concern.

On appeal, Butler asserted that the district court erred in concluding his testimony was not a matter of public concern because any testimony given by a public employee should always be a matter of public concern. This argument for a per se rule is contrary to Supreme Court precedent, which mandates a case-by-case approach that considers the content, form, and context of the testimony in light of the record as a whole.



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Butler further argued that his testimony was on a matter of public concern, given the state's general interest in child welfare and custody proceedings. Butler testified for his sister-in-law in her personal dispute with her ex-husband over the custody of their child regarding the sister-in-law's character and the hours of operation for the county's road and bridge department. There is no indication that this testimony was of interest or concern to the community at large. While Butler's testimony may have been relevant to the custody determination, this does not bring the testimony on an otherwise personal dispute into the realm of public concern. Accordingly, the district court did not err in determining that the testimony was not a matter of public concern.

The judgment was affirmed.

**No. 17-2199. Nelson v. City of Albuquerque.** 4/16/2019. D.N.M. Judge Bacharach. *Subsequent Motion to Alter or Amend a Civil Judgment—Different Judges—Fed. R. Civ. P. 50(b) Motion Construed as Fed. R. Civ. P. 59(e) Motion—Reasserting Arguments in Prior Rule 59(e) Motion.*

Plaintiff brought claims for excessive force against the Board of County Commissioners of the County of Bernalillo and various government officials (collectively, defendants). A jury returned a verdict in defendants' favor, and plaintiff filed a motion for judgment as a matter of law. The district court granted the motion, holding that no reasonable jury could find for defendants. Defendants responded with a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment, contending that the trial evidence supported the defense verdict. The district court denied defendants' motion and entered judgment for plaintiff. After entry of judgment, defendants filed a Fed. R. Civ. P. 50(b) motion seeking reinstatement of the verdict, again arguing that the evidence favored defendants. Before this motion was ruled on, the case was reassigned to a different judge who construed the post-judgment Rule 50(b) motion as a second Rule 59(e) motion, and granted it. Accordingly, the district court amended the judgment to deny relief to plaintiff.

On appeal, the parties did not dispute the characterization of the first motion as a Rule 59(e) motion. Plaintiff contended the grant of

defendants' second Rule 59(e) motion was erroneous. Rule 59(e) may not be used to re-litigate old matters or to raise arguments that could have been raised earlier. Here, the second Rule 59(e) motion merely reasserted the arguments presented in the first Rule 59(e) motion. The district court abused its discretion when granting defendants' second Rule 59(e) motion.

The order was reversed and the matter was remanded with instructions to reinstate the prior judgment in plaintiff's favor.

**No. 18-2129. United States v. Jones.** 04/16/2019. D.N.M. Judge McHugh. *Sentencing—Harmless Error—Minimum State Law Sentence Under Indian Major Crimes Act.*

Defendant is Native American. He pleaded guilty in tribal court to child abuse for driving on a reservation while intoxicated with his minor son in the car and served a one-year sentence in tribal custody. The federal government then brought charges against him and he pleaded guilty to one count of child abuse; the federal crime was defined by incorporating the New Mexico state crime of child abuse into the federal criminal law under the Indian Major Crimes Act (the IMCA). At sentencing, the district court concluded that defendant should serve an additional nine months beyond the time he had already served. It then sentenced him to 42 months, which it reduced to 40 months based on equivalent good-time credits he would have received if he had spent his first 12 months in federal custody. The parties agreed the district court's calculation was flawed because it double-counted the 12 months defendant had served in tribal prison, which resulted in a sentence longer than the court intended to impose.

On appeal, the parties agreed that the district court made a mathematical error resulting in a sentence different than the one it intended to impose. The government argued the error was harmless, contending that defendant was subject to a minimum six-year sentence under New Mexico law. The IMCA requires that the federal court crime be defined and punished in accordance with state law. New Mexico law contains a broad scheme that permits a sentencing court to impose a basic sentence,

impose a sentence one-third lower than the basic sentence, suspend all or part of the sentence imposed, or defer the imposition of the sentence entirely. Further, the New Mexico legislature has not established a minimum mandatory sentence for defendant's crime. Thus, under the New Mexico scheme, defendant would not be required to serve six years; he would not be required to serve any period of incarceration, or to receive any sentence at all. The district court could have sentenced defendant according to the federal sentencing Guidelines generally, and the alleged error was not harmless.

The sentence was vacated and the case was remanded to resentence defendant. 

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.

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