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*“The pursuit of justice is a team effort.”*

## *Newsletter*

*Legal News Briefs for Law Libraries*

# THE SUPREME COURT RESTRICTS GOVERNMENT’S ABILITY TO USE CONFIDENTIAL INFORMANTS

Crawford v. Washington, 124 S.Ct. 1354

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Enshrined in the Sixth Amendment to the United States Constitution is the Confrontation Clause, which states that “in all criminal prosecutions, the accused shall

enjoy the right . . . to be confronted with the witnesses against him.” The main purpose of this clause is to ensure the right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003). The right to confront one’s accusers is a concept that

dates back to Roman times. Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors to the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). This tradition was carried on in English common law, as accused individuals were given the right to face their accusers. See 3 W. Blackstone, Commentaries on the Laws of England, 373-374 (1768). As explained in Pointer v. Texas, 380 U.S. 400, 405 (1985), "there are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation. Cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

The development of the right to confront one's accusers took a drastic turn when the Supreme Court issued its ruling in Ohio v. Roberts, 448 U.S. 56 (1980). In that case, the Court departed from the long held notion that for evidence to satisfy the Confrontation Clause, the accused must have had an opportunity to cross-examine the witness. Instead, the Court turned the question into an evidentiary issue stating that the admissibility of all hearsay evidence, including testimony that was not subject to cross-examination, upon whether the evidence had a particular guarantee of trustworthiness. Id. at 66. The evaluation of trustworthiness was to be a judicial determination. Id. Of course, one was left to wonder, how could reliability be determined if the accused did not have a chance to confront the witness against him with the actual truth of the matter? After

all, without cross-examination, how could a judge know whether a witness was being truthful?

Recently, however, the Supreme Court has corrected this mockery against the Confrontation Clause. In Crawford v. Washington, 124 S.Ct. 1354, 158 L.Ed.2d 177 (March 8, 2004), the Court ruled that testimonial statements could not be admitted without the protections of the Confrontation Clause. Once again, the Court deemed that reliability of evidence was to be determined through the "crucible of cross-examination." Id. at 1370. In doing so, the Court eradicated the "unpardonable vice of the Roberts test. . .its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Id.

The High Court held that "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, [] it is a

procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, 124 S.Ct. at 1370. Thus, the Court held that "[w]here testimonial evidence is at issue, [] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 124 S.Ct. at 1374. Further, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

Importantly, the rights afforded by the Confrontation Clause can

only be called into use when the statements at issue are testimonial in nature. Id. at 1370. When the evidence at issue is non-testimonial, the Court deemed it consistent with the ideals of the Framers that the states deal with such evidence according to their own unique laws of hearsay. Id. at 1374. A key factor, then, is determining whether statements are testimonial in nature. While the term "testimonial statement" does not have a uniform definition, the Court in Crawford noted that such statements are those that consist of a "solemn declaration of affirmation made for the purpose of establishing or proving some fact." Id. at 1364. However, the Crawford court noted that the absence of a sworn oath was not dispositive of the issue. Crawford, 124 S.Ct. at 1364. In fact, the Court gave a very broad definition of testimonial statements, stating that "testimonial statements are those made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id.

The Crawford decision has important implication in criminal trials and appeals. As most of you know, the authorities use cooperating informants (CI) in their investigations. Many of whom are convicted felons or under investigation themselves. These individuals often engage in recorded conversations with other criminal suspects in order to get the suspect to incriminate him or herself on tape. These tape recorded conversations are then admitted at trial against the suspect. However, due to credibility problems, the CI is often not called to testify

for the government. Therefore, the declarant is not subject to cross examination as required under Crawford. To make matters worse, because the individuals engaged in these conversations often use the coded language of the drug culture, the government often calls "experts" to interpret the recorded conversation of the CI and the suspect.

Under Crawford, this common situation is no longer acceptable. Recorded conversations like the example above would not be admissible unless the government calls the CI as a witness so that he or she could be subject to cross examination. If you believe that the Crawford decision could apply to your client, please contact NLPA for research and drafting assistance.

### **WITHDRAWING A GUILTY PLEA - ANOTHER NLPA VICTORY!**

Oftentimes, NLPA is contacted by counsel who represent defendants wishing to withdraw their pleas of guilty because they face a significantly longer sentence than was promised. The case of People v. Caccamo, No. 03-900588 (18<sup>th</sup> Jud. Dist. Mich. 2003) demonstrates how NLPA can assist counsel in the preparation of motions to withdraw a guilty plea and to reinstate a client's right to go to trial. Mr. Caccamo entered a plea of guilty when he was assured by his counsel that he would receive a sentence that would not bar Mr. Caccamo from such activities as gun ownership and law school admission, as counsel told Mr.

Caccamo that a plea of *nolo contendere* did not have the same effects on sentencing as a plea of guilty. Mr. Caccamo continuously maintained his innocence and correctly argued that the government had failed to present the necessary evidence to support a plea of guilt on the charges issued, but decided to enter a plea of guilty due to the perceived risk of receiving a much harsher sentence if convicted at trial. However, after sentencing, Mr. Caccamo discovered that, in fact, he was punished as if he had pleaded guilty. Mr. Caccamo then contacted NLPA and retained Dr. Demosthenes Lorandos, Ph.D. as his new counsel in an effort to withdraw his guilty plea.

Working with Dr. Lorandos, NLPA assisted in preparing an appeal of the trial court's denial of Mr. Caccamo's motion to withdraw his guilty plea arguing that Mr. Caccamo did not enter a knowing and voluntary plea based upon the trial court's errors in taking his plea as well as trial counsel's failure in representing Mr. Caccamo. The Government responded in a factor by factor basis and argued that an analysis of each individual factor did not warrant the withdrawal of the guilty plea. The court of appeals agreed with the arguments presented by NLPA and Dr. Lorandos and ordered Mr. Caccamo's plea withdrawn and his right to proceed to trial reinstated.

Should you find yourself in a similar situation, NLPA stands ready to assist you in the research and preparation of any motions necessary to assist you in the vigorous defense of your client.

### **THE McCARTHY HEARINGS AND THE PATRIOT ACT**

Following the end of World War II and the Korean War, the United States found itself in a contest for survival with the powers of Communism, as symbolized by the Soviet Union. In response to the growing threat of Communism, the United States government passed the Hatch Act, which made it illegal for the federal government to employ Communists. During this time, the junior senator from Wisconsin, Joseph McCarthy, became convinced that Communists had infiltrated the State Department. With the Korean War and the conviction of the Rosenbergs for giving classified material relating to the development of atomic weapons to the Soviet Union, the fear of Communism was boiling over and the stage was set for the "McCarthy Era."

During this time, 169 hearings were held in the Senate where various individuals were charged with being members of the Communist party or having Communist affiliations. Only two of these cases were built on actual and credible evidence. McCarthy attacked individuals from all walks of life, from entertainers to members of the military. Those accused could only sit idly by, as taking the Fifth Amendment on one question meant that the individual had to take such a stand on each question asked by McCarthy. Therefore, the accused could either sit quietly and appear guilty, or challenge McCarthy to a verbal battle of wits, which was also guaranteed to end badly.

By 1954, the country had seen enough of McCarthy's shenanigans. The citizens from Wisconsin whom McCarthy supposedly represented petitioned for his removal from office. Although unsuccessful, the petition drive made it clear that McCarthy's blind witch hunt could not continue unchallenged. Finally, hearings were held in the Senate against McCarthy, in which he was ultimately censured, one of only nine Senators in the history of this country to receive such a punishment. But did the federal government learn its lesson?

While it may seem a thing of the past that the federal government could throw its weight behind a blind witch hunt in response to an undefined and unknown fear, one need only consider the present day Patriot Act. The Patriot Act was allegedly an anti-terrorist bill passed following the attacks on the United States on September 11, 2001. The bill was passed for a good reason—to protect innocent individuals from terrorism. However, the bill was passed as a knee-jerk reaction to September 11<sup>th</sup>. In fact, no debate was held on the Senate floor regarding the legislation.

What are the effects of the Patriot Act? Does the bill do nothing more than stop future terrorist attacks against the United States? Is the Act an attempt by those in power to carefully identify and exclude those who are seen as unfavorable by those that broker power? There can be little doubt that the Patriot Act vastly increased the government's power to conduct searches and surveillance of Americans. The government, via the Patriot Act, now has the

ability to search private records being held by a third party (s. 215); search private property without the owner's consent on a much broader scale (s. 213); The Patriot Act voided the Fourth Amendment's protection against unreasonable searches in matters of "foreign intelligence gathering" (s. 217); and allows for the collection of information regarding the destination and source of communications without fear of violating the Fourth Amendment (s. 214). Suddenly, the government does not need probable cause, as called for by the Fourth Amendment to the United States Constitution to conduct a search of such things as an individual's medical records, financial records, Internet usage, bookstore purchases, or *any activity that leaves a record*.

Even more frightening is the portion of the Patriot Act that allows the government to label a citizen a "domestic terrorist" if an individual engages in "acts dangerous to human life" to "influence the policy of a government by intimidation or coercion." Under the act, individuals can be labeled by the government as "enemy combatants," giving the government the ability to strip American citizens of the most basic guarantees under the Constitution, such as the right to have an attorney and the right to be informed of the charges against them. It is frightening to think that the government can hold these "enemy combatants" indefinitely, without charging them or allowing them an attorney. There is serious danger that the Act will be used to attack any dissent from the government, much as with the McCarthy Hearings. In fact, this article could be alleged to be a form of domestic terrorism. One

has to wonder if a broad reading of the Patriot Act brings defense attorneys within the scope of the Patriot Act.

If you have a client who is subject to the Patriot Act, and you would like research and drafting assistance, please contact NLPA.

### **COMBATING UNRELIABLE EVIDENCE AT SENTENCING - ANOTHER NLPA VICTORY!**

After a defendant has been convicted in federal court, the probation officer is assigned the task of preparing the presentence investigation report (PSI). The PSI is a critical document that is used by the court in determining the defendant's guideline range of imprisonment and potential sentence. Importantly, the government typically makes the job of the probation officer easy and provides probation with all of the information to place in the PSI. Defendant's are often frustrated because the rules of evidence no longer apply at sentencing and the government is often permitted to place information in the PSI that was not permitted to be introduced at trial. The government's goal is often to seek enhancements based on this type of information. However, not all of the information provided by the government is reliable, and sometimes, the information is downright false. In these situations, it is especially critical that objections are filed to the PSI and arguments are made by the defense at sentencing.

In USA v. Robert Edwards, Mr. Edwards came to National Legal Professional Associates (NLPA) after being convicted at trial of federal drug offenses. The PSI included information provided by the government and recommended several sentencing enhancements based on this information. The result of all of the enhancements was an offense level 41 and a recommended guideline range of imprisonment of 324 to 405 months. NLPA provided counsel with research and arguments combating the enhancements in PSI, including: a two-point § 2D1.1(b)(1) weapon enhancement, a three-point § 3B1.1(b) leadership enhancement, a two-point § 3C1.1 obstruction of justice enhancement, and the amount of drugs attributed to Mr. Edwards. The research pointed out the unreliability of the information used to support the enhancements and argued that the government had not sustained their burden of proof regarding the disputed enhancements.

Fortunately, the sentencing court agreed with NLPA's research and determined that much of the information provided by the government was unreliable. Many of the enhancements were removed and the court sentenced Mr. Edwards to 192 months imprisonment, a reduction of 132 to 213 months!

If you or your client are facing sentencing in federal court and would like NLPA's experienced team of attorneys on your side, please contact NLPA.

### **WHEN IS A DRUG DOG MAN'S BEST FRIEND?**

The dog has long been considered man's best friend. A loyal and lovable animal, the dog has a secure place in the hearts of animal lovers nationwide. Is there any possible way that the dog could actually not be our friend? How about if the police used a dog to sniff around your property, looking for any sign from the dog that criminal activity is afoot? Worse yet, how about if the police walk up to you and allow their dog to smell your crotch in an effort to find drugs? These scenarios are occurring everyday in this country, as the police continue to carve out larger avenues of judicially protected searches by trained drug detection canines.

The Fourth Amendment to the United States Constitution provides that

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. Amend. IV. At the expense of the Fourth Amendment, law enforcement officials are using the dog as a tool to maneuver around the protections against unreasonable searches and seizures.

In order to protect the individual from improper government intrusion, a warrant is required before property can be

searched. In limited circumstances, however, a warrantless search is allowed. See Schmerber v. California, 384 U.S. 757 (1966); Washington v. Chrisman, 455 U.S. 1(1982). Of course, the Supreme Court has held that the act of a trained police dog sniffing the exterior of personal belongings is "so limited in both manner in which the information is obtained and in the content of the information revealed" that no search can be deemed to have occurred. United States v. Place, 462 U.S. 696 (1983). Since the courts do not consider a dog sniff a search, no warrant is necessary. While this may seem harmless, consider the situations in which these dogs are used.

In Place, a police dog was used to sniff lawfully detained luggage. The Court ruled that this sniff was not a search for Fourth Amendment purposes. Id. Even if the luggage has not been lawfully detained, the police can still conduct a sniff. They need only approach the third-party common carrier to whom the luggage has been entrusted. United States v. Garcia, 42 F.3d 604 (10<sup>th</sup> Cir. 1994). This virtually leaves the luggage owner with no protection from a sniff by police dogs. Consider, at some point, almost all luggage is entrusted to a third party carrier. In order to open and search luggage, all that is needed is that the police dog signal an "alert."

Not only can the authorities use canines for the unabated search of luggage, consider the expansive opportunities drug sniffing canines give police to search an automobile. The Supreme Court has stated that an exterior sniff of an

automobile is not a search for Fourth Amendment purposes. City of Indianapolis v. Edmond, 121 S.Ct. 447 (2000). Even “random and suspicionless dog sniffs are not searches subject to the Fourth Amendment.” United States v. Ludwig, 10 F.3d 1523, 1527 (10<sup>th</sup> Cir. 1993)

So, an individual is not safe from drug sniffing canines in his automobile. Perhaps, the individual will become a more frequent traveler on buses or trains as a result. These conveyances offer little protection from drug sniffing canines, however. Consider, police may enter a bus after the passengers have disembarked, remove all of the luggage from the overhead storage areas, and allow their dogs to sniff each piece of luggage – without probable cause for a search. United States v. Gant, 112 F.3d 239 (6<sup>th</sup> Cir. 1997). On a train, police may use a dog to sniff public corridors, as well as the exterior of individual passenger rooms. United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989).

While seemingly intrusive, all of the searches discussed above occurred on public property, which is a necessity for a drug sniff to escape Fourth Amendment scrutiny. United States v. Place, 462 U.S. 696, 707 (1983). How much protection is actually afforded by this public property exception, however? In United States v. Ludwig, 10 F.3d 1523, 1527 (10<sup>th</sup> Cir. 1993), the court stated that the use of a drug sniffing dog in a *private* motel parking lot, conducted with the motel owner’s permission, was not a search pursuant to the Fourth Amendment. Apparently, a drug sniff no longer needs to be conducted

on public property, but only on property that is traversed by many people.

The sniff of an individual’s door from an apartment corridor, like that from a hotel corridor, is most likely not a search for Fourth Amendment purposes. United States v. Lingenfelter, 997 F.2d 632, 638 (9<sup>th</sup> Cir. 1993). Furthermore, the use of a trained dog to sniff the exterior of an individual’s home has been ruled to be outside of the scope of protection of the Fourth Amendment. United States v. Tarazon-Silva, 166 F.3d 341 (5<sup>th</sup> Cir. 1998).

In light of these judicial developments, it appears as if the individual is left with little protection from drug sniffing dogs in regards to the possessions and the locations that can be searched. Does this rampant action by police extend to actual sniffs of the individual, however? Currently, a sniff of a person by a trained police dog is considered a search pursuant to the Fourth Amendment. Horton v. Goose Creek Ind. School District, 690 F.2d 470 (5<sup>th</sup> Cir. 1982). The court stated that the “Fourth Amendment protects people, not places.” Id. at 477. However, as you can see, the courts are rapidly hacking away at individual rights.

It is important to remember that many of the sniffs at issue still require the element of reasonable suspicion to conduct the sniff. As of yet, law enforcement officials cannot randomly approach an individual’s residence to conduct a drug sniff - yet. The officer must still show that reasonable suspicion existed to allow the drug sniff. Along these same lines, once a trained drug sniffing canine alerts officers to the possibility that contraband

exists, a warrant will usually be obtained before a further search is conducted, with the alert forming the probable cause necessary to obtain a search warrant. If reasonable suspicion did not exist prior to the dog sniff, or if the reliability of the dog can be impeached, there is still a basis to attack the validity of a dog sniff in a motion to suppress.

After the smoke has cleared, where is the individual left standing? Is he totally without protection from the seemingly ever present drug sniffing canine? Rest assured that the individual is not totally devoid of Fourth Amendment protection regarding the use of trained drug sniffing canines. Absent a warrant, the individual is still secure in his person, free from the threat of having his body sniffed by a police dog. Outside of this scant protection, however, the individual is under the constant threat of having his belongings sniffed, regardless of the location of said sniff. The most important thing to remember is that a drug sniff, in most cases, cannot be instituted absent reasonable suspicion. So, perhaps, for those who avoid suspicious behavior, the dog, even the drug sniffing dog, can retain its place as man’s best friend.

### **CORRECTING CRIMINAL HISTORY SCORES AT SENTENCING - ANOTHER NLPA VICTORY!**

For nearly 20 years, National Legal Professional Associates (NLPA) has worked hard with defense counsel and their clients in providing legal research and drafting assistance in preparation for

sentencing. One important area that NLPA always reviews is the probation officer's calculation of a defendant's criminal history category. As many of you already know, many relatively minor offenses are counted under § 4A1.1. In fact almost any offense can be counted as long as the sentence imposed was at least 12 months probation. However, not all offenses are countable and sometimes the probation officer makes a mistake. The case of USA v Glenn Sanford, is just such a situation.

Mr. Sanford came to NLPA asking to assist his attorney in drafting potential objections and arguments to the presentence investigation report (PSI). NLPA worked closely with Mr. Sanford's attorney, providing him with research and writing assistance. Due to the statutory minimum sentence, it appeared from the initial review of the PSI that Mr. Sanford was subject to a sentence of at least 120 months imprisonment. However, upon closer review, it appeared that Mr. Sanford's criminal history score may have been incorrect. Probation placed Mr. Sanford in a Criminal History Category II based in part on two prior convictions for worthless checks. However, according to U.S.S.G. § 4A1.2©(1), insufficient funds check offenses are only counted if the sentence was a term of probation of at least one year or imprisonment of at least 30 days. Mr. Sanford did not receive a sentence of imprisonment or probation for either offense. Therefore, NLPA prepared research for counsel arguing that the offenses should not have been counsel and that Mr. Sanford's Criminal History Category should have

been I; not II.

This was significant because once the criminal history score was corrected, Mr. Sanford appeared to satisfy U.S.S.G. § 5C1.2, the "Safety Valve." Most important, he would not be subject to the otherwise applicable minimum 120 month sentence listed in the PSI. Therefore, NLPA prepared an argument for counsel that Mr. Sanford qualified for safety valve relief and a sentence below the minimum mandatory 120 months. The sentencing court agreed, and sentenced Mr. Sanford to 54 months incarceration, a savings of 66 months!

If you or your client is facing sentencing in federal court and would like NLPA's experienced team of attorneys on your side, please contact NLPA.

#### CASE LAW UPDATE:

US v. PEREZ-RUIZ 353 F.3d 1 (1<sup>st</sup> Cir. 2003) Because the issue of drug type and quantity was not properly submitted to the jury, the district court committed an Apprendi error when it sentenced the defendant to life imprisonment. In order for the government to seek enhanced penalties based upon drug type and amount, the government must submit the question of drug type and amount to the jury through requesting a special verdict. It is not the duty of the defense to ask for a special verdict, it is the government's. Further, the error was not harmless. Defendant's sentence for conspiracy to distribute narcotics is therefore vacated and remanded.

US v. ROBELES-ORTEGA 348 F.3d 679 (7<sup>th</sup> Cir. 2003) Drug-related conviction reversed where the district court erred in suppressing the motion to exclude evidence. Court of appeals concluded that **the consent to search was not sufficiently voluntary because it was tainted by the agents' illegal entry and show of force upon the illegal entry.** The focus on the voluntariness of the consent should be on the affect the aggressive and violent illegal entry of the agents had on the defendant at the time consent was given, not whether the agents coerced the consent. The critical issue is whether the consent was obtained by means sufficiently distinguishable from that illegal and violent entry so as to be purged of the primary taint.

US v. SANTOS 357 F.3d 136 (1<sup>st</sup> Cir. 2004) District court did not err in applying a § 3B1.3 minimal role adjustment even though the defendant was the courier of 35 kilograms of cocaine.

US v. YAGER 328 F.3d 1008 (8<sup>th</sup> Cir. 2003) **§ 3B1.2 - Minor Role Reduction** The district court erroneously believed that the § 3B1.2 minor-role reduction was ruled out as a matter of law because Ms. Yager was the only person charged, and because the crime charged, possessing and attempting to possess pseudoephedrine, was not a conspiracy, but rather something that occurred "on a single occasion." This view of the law is contrary to United States v. Snoddy, 139 F.3d 1224, 1231 (8<sup>th</sup> Cir. 1998),

holding "that a defendant convicted of a 'sole participant' offense may nonetheless be entitled to a reduction in his or her base offense level for a mitigating role . . ." if he shows that (1) that the 'relevant conduct,' within the meaning of Section 1.B1.3(a)(1), for which the defendant would otherwise be accountable involved more than one participant (as defined in Section 3B1.1, application note 1); and (2) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant or participants.

US v. WALTERS 351 F.3d 159 (5<sup>th</sup> Cir. 2003) Convictions for using a destructive device during and in relation to two crimes of violence, assaulting a federal officer, and damaging a federal building are affirmed, however, the sentences are vacated where punishment cannot be based on multiple section 924©)(1) convictions for a single use of a single firearm to accomplish multiple predicate offenses.

US v. PEYTON 353 F.3d 1080 (9<sup>th</sup> Cir. 2003) Sentence vacated based on **vindictive sentence imposed by the court**. The record does not rebut the presumption that the district judge acted vindictively by applying the two-level obstruction of justice enhancement on re-sentencing after considering, but rejecting, this enhancement at the original sentencing. No explanation was provided as to why the enhancement was appropriate on remand but had not been appropriate previously.

UNITED STATES v. PENA, 314 F.3d 1152 (9<sup>th</sup> Cir. 2003))

**Unenforceable appeal waiver.**

"We reject the government's contention that Pena waived his right to appeal. "[W]aivers of appeal must 'stand or fall with the agreement of which they are a part.'" United States v. Portillo-Cano, 192 F.3d 1246,1250 (9<sup>th</sup> Cir. 1999) (quoting United States v. Wenger, 58 F.3d 280, 282 (7<sup>th</sup> Cir. 1995)). "If the agreement is voluntary, and taken in compliance with Rule 11, then the waiver of appeal must be honored. If the agreement is involuntary or otherwise unenforceable, then the defendant is entitled to appeal." Id. (quoting Wenger, 58 F.3d at 282). Because we conclude that the plea agreement is unenforceable due to the failure to comply with Rule 11, Pena is entitled to appeal. *We note, moreover, that the district court did not inform Pena of his appellate rights and did not verify his intent to forfeit them during the plea colloquy, as it was required to do under Fed. R. Crim. P. 11©)(6). In fact, the waiver of the right to appeal was never mentioned at all during the plea hearing by defense counsel, the prosecutor, or the court.*" (emphasis added)

NUNES v. MUELLER 350 F.3d 1045 (9<sup>th</sup> Cir. 2003) **Counsel failed to inform defendant of plea offer**. Trial counsel was ineffective for incorrectly relaying the favorable plea offered by the prosecution to the defendant causing the defendant to reject the plea offer. As a result, defendant went to trial and was convicted, receiving a much more severe sentence than offered by the prosecution. 2254 petition

granted on that ground, concluding that the state court ruling was (1) erroneous and (2) contrary to federal law as clearly established in Strickland v. Washington, 466 U.S. 688, 690-93 (1984). District court found that defendant had shown both that his counsel's conduct fell outside the range of professional competence and that he had suffered prejudice as a result and ordered the state (1) to vacate his second degree murder conviction and (2) to reinstate the plea offer to voluntary manslaughter.

US v. MCBRIDE 362 F.3d 360 (6<sup>th</sup> Cir. 2004)) **Downward departure .. WOW!** As defendant never received advance payments from the government to which he was not entitled - nor could his action of sending the IRS a bad check have possibly elicited any such payment - he cannot be found to have presented a false claim against the IRS under 18 U.S.C. section 287. As the "intended loss" significantly overstated the seriousness of the actual fraud, the decision of the district court to not sua sponte depart downward was plain error.

US v. FLORES (8<sup>th</sup> Cir. 04/02/04 - No. 03-2116, 03-2118) **Obstruction of Justice - 3C1.1**

As to one defendant, there was sufficient evidence of his control over the methamphetamine as the driver of the car, and of his knowledge that drugs were hidden there. Because the jury's disbelief of his testimony is not the equivalent of a finding that he committed perjury, the obstruction of justice enhancement is vacated and remanded.

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You are important to us and we hope we can commence and maintain a long-term relationship with you. Please know that we are here to assist in all your needs.

If you would like to know more about the services we offer, please contact us at:

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