ORAL ARGUMENT IS REQUESTED

# No. 01-2147

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DARREN HOWELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE C. LeROY HANSEN

## BRIEF FOR THE UNITED STATES AS APPELLEE


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## STATEMENT OF RELATED CASES

The United States is not aware of any prior or related appeals in this case.

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

On September 9, 1999, the grand jury returned a superseding indictment in the United States District Court for the District of New Mexico charging defendant-appellant Darren Howell, a sergeant at a New Mexico prison facility, with two counts of violating of 18 U.S.C. 242, a federal civil rights criminal statute (Doc. 25).[1] The district court had jurisdiction over the case pursuant to 18 U.S.C. 3231.

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[1] "Doc. __" refers to a document in the record on appeal; "Tr. __" refers to the trial transcript; "8/14/00 Tr. __" refers to the transcript of the pretrial hearing on the motions in limine; "8/21/00 Tr. __" refers to the Partial Transcript of Proceedings on August 21, 2000; "Br. __" refers to Howell's Brief as appellant.

A jury found Howell guilty on both counts, and the district court entered judgment on May 1, 2001 (Doc. 154). Howell filed a timely notice of appeal of his conviction on May 11, 2001 (Doc. 155). This Court has jurisdiction over his appeal pursuant to 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES

I. Whether the district court properly excluded evidence of the nature of the felonies of which witnesses for the United States and defendant had been convicted.

II. Whether the prosecutor engaged in prosecutorial misconduct by misrepresenting the evidence.

III. Whether the district court properly admitted evidence of an attack by defendant against another inmate.

IV. Whether the district court properly admitted into evidence a grievance that an inmate filed against defendant complaining of an attack by defendant against the inmate.

V. Whether the district court properly administered an *Allen* jury instruction.

VI. Whether the district court committed two or more otherwise harmless errors that, when considered cumulatively, necessitate a new trial.

VII. Whether the district court properly denied defendant's motion for a new trial based on newly discovered evidence.

## STATEMENT OF THE CASE

On August 6, 1999, a federal grand jury returned an indictment against Darren Howell charging him with depriving Elizabeth Stallings of her right under the Constitution to be free from the infliction of cruel and unusual punishment, by one acting under color of law, in violation of 18 U.S.C. 242 (Doc. 1).[2] On September 9, 1999, the grand jury returned a superseding indictment setting forth two counts. The first count restated the charge in the first indictment. The second count charged Howell with depriving Randy Gilmore of his right under the Constitution to be free from the infliction of cruel and unusual punishment, by one acting under color of law, in violation of 18 U.S.C. 242 (Doc. 25). Trial was held August 15-22, 2000, and on August 22, 2000, the jury found Howell guilty on both counts (Doc. 103).

On January 19, 2001, Howell filed a motion for new trial based on newly discovered evidence (Doc. 108). The court denied the motion for new trial on March 9, 2001 (Doc. 118), and entered judgment on May 1, 2001 (Doc. 154). Howell filed a timely notice of appeal of this judgment on May 11, 2001 (Doc. 155).

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[2] Section 242 makes it unlawful for a person acting under color of law to deprive any person of federally protected rights, privileges, or immunities. When, as in this case, the deprivation results in bodily injury to the victim, violation of this statute is a felony punishable by imprisonment of not more than ten years.

## STATEMENT OF FACTS

A. *Count I - Deprivation Of Civil Rights Of Elizabeth Stallings*

On October 25, 1997, Elizabeth Stallings was arrested and taken to the San Juan County Detention Center in Aztec, New Mexico (San Juan or the jail) (Tr. 76-77, 91, 136, 164). Defendant Darren Howell worked as a sergeant in San Juan (Tr. at 76, 91). Because Stallings was being rowdy at booking, she was first placed in a holding cell (Tr. 78, 92). She eventually was moved to the old work release cell with a number of other female prisoners (Tr. 136).

Inmate Sandra Lucero testified that after Stallings was transferred to the old work release cell, Howell approached and asked Lucero to start a fight with Stallings. Lucero declined to do so (Tr. 107-108).

Inmate Belinda Serrano testified that Howell asked her to start a fight with Stallings because Stallings was giving the guards a hard time (Tr. 136-137, 145). Serrano carried out Howell's request "[b]ecause Darren made our lives a lot easier in there" (Tr. 142-143). Serrano first took Stallings's pillow and bed, but Stallings did not resist (Tr. 137). When Stallings resisted Serrano's attempt to take her T-shirt, Serrano hit her twice on the jaw, once with her fist and once with her elbow (Tr. 108, 132, 137-138). Serrano stated that her blows stunned Stallings (Tr. 138).

Elizabeth Stallings testified that she may have been placed in a holding cell, then transferred to old work release. She was sucker punched by Serrano (Tr. 164). As a result of the blows, she lost some of her hearing, "excess bone from my jaw has gone in the gums of my teeth," and that she feels pain (Tr. 165).

Inmate Linda Sease testified that she was housed in San Juan in 1998 and shared a cell with Stallings. She and Stallings had a disagreement about ear plugs. When she mentioned this to Howell, Howell stated that he understood and that "he had had some difficulties with [Stallings] himself, and * * * she's already been taken care" (Tr. 204). (See (Tr. 208-209)).

Inmate Delora Neal testified that she was in San Juan on the day Serrano beat Stallings. She testified that Serrano was called out into the hall by a female guard. Neal did not see the person to whom Serrano was speaking. When Serrano returned to the cell, she started the fight with Stallings. After Stallings was removed from the cell, Howell and Serrano had a conversation that Neal could not hear, but she could see that they were laughing and smirking (Tr. 211-213).

B. *Count II - Deprivation Of Civil Rights Of Randy Gilmore*

Inmate Levester Steen testified that he was incarcerated in San Juan in the first week of December 1997 (Tr. 218). Howell told Steen that "him and [Randy] Gilmore had a problem previously with a dope deal, and he got mad about it" (Tr. 220). Howell wanted Steen to beat up Gilmore (Tr. 226-227), so he approached Steen and told him that Gilmore was a snitch (Tr. 220). When Steen asked Howell to show him proof that Gilmore was a snitch, Howell brought Steen a statement of probable cause setting forth information that Gilmore had supplied to support a search warrant (Tr. 225-226, Exh. 6). Gilmore was in an adjoining cell, so Steen could not inflict the beating himself. Steen held the probable cause statement up to a window so inmates in the other cell could read it (Tr. 227, 232).

The other inmates then assaulted Gilmore (Tr. 227, 232-233). Gilmore was hurt "real bad" by the attack (Tr. 227). Howell rewarded Steen with a bag containing cigarettes, marijuana, and methamphetamine (Tr. 228, 243) that Steen passed on to the inmates who beat Gilmore (Tr. 240-243). Steen testified that an inmate named Paul Collette owed Howell money for cigarettes and drugs that Howell had given him. Howell asked inmate Steen to beat Collette. When Steen declined, Howell paid other inmates to beat Collette (Tr. 228-229, 237).

Inmate Mitchell Westbrook testified that he was in a cell with Steen in December 1997 (Tr. 256). Westbrook overheard parts of a conversation that Howell had with Steen about Randy Gilmore (Tr. 256). Westbrook heard Howell say that Gilmore had ratted on someone and that he wanted something done about it (Tr. 256-257). Steen said that he would not do anything until he saw the paperwork (Tr. 257). The next day, Howell returned with some papers. Westbrook read the papers, which set forth statements that were used for a search warrant (Tr. 257). After they read the papers, Steen showed them to Brad Wasson and David Major, inmates in the other cell, who participated in Gilmore's beating (Tr. 258-259). Howell gave Steen cigarettes (Tr. 262, 276).

Inmate David Major testified that he was in San Juan in December 1997 in a cell with Brad Wasson or Clyde Weathers. He remembered Randy Gilmore (Tr. 278). Major testified that although he did not read it, several inmates looked at a paper that was put up to the window of his cell (Tr. 280-281, 287). Major had his own reasons for wanting to beat Gilmore (Tr. 280, 281). Right after the paper

was displayed, Gilmore "got beat down" (Tr. 280-281). After the beating, Brad Wasson took Gilmore to the window and showed him the paper (Tr. 287).

Inmate Brad Wasson testified that he was at San Juan in the same cell block when Gilmore was beaten (Tr. 291). Steen and Westbrook were in another cell block (Tr. 291). Wasson testified that Westbrook held a paper up to the window that described Gilmore as a snitch. The inmates then beat up Gilmore (Tr. 292). After the attack, Wasson slammed Gilmore's head on the window so he could read the paper (Tr. 293).

Randy Gilmore testified that he was incarcerated in San Juan in December 1977 in a cell with Major and Wasson. Steen and Westbrook were housed right next to them (Tr. 300-301). Gilmore was attacked by other inmates. After the beating, Wasson took him to the window where Gilmore saw the paper that indicated he had given information to law enforcement officers (Tr. 301-302, Exh. 6). He was taken to the hospital after the beating. At the time of trial, Gilmore continued to suffer from headaches and numbness resulting from the beating (Tr. 302).

Inmate Tim Schulte testified that he had a relationship with Howell that involved drugs (Tr. 307). After the Gilmore beating, Howell told Schulte that Howell had "dropped a dime on [Gilmore]" (Tr. 307).

Vickie Smith testified that she was a nurse at San Juan (Tr. 324). She testified that she examined Gilmore after the beating and that his injuries included "contusions and bruises all over his head and face, * * * [and] subconjunctival

hematoma of his * * * eye * * * where it had burst the blood vessels from the trauma of the beating" (Tr. 326- 327, Exh. 4).

C. *Other Bad Acts By Howell*

The United States presented evidence that there were other inmates at San Juan whom Howell either assaulted himself or solicited inmates to beat, or both. Mitchell Westbrook testified that he was called out of his cell to talk with two drug officers. When he returned to the cell block after this meeting, his cellmate told him that Howell had told the inmates that Westbrook had been meeting with detectives. Four inmates then attacked Westbrook (Tr. 259-262).

Two incidents involved inmate Kris Reimers. Howell had been accused of stealing $5,000 in bond money and had been placed on administrative leave (Tr. 314-315). Reimers testified that when Howell walked by Reimers's cell, Reimers identified Howell as "the $5,000 man" (Tr. 313). Howell reached through the food slot, grabbed Reimers from behind by the shirt, jerked him back into the cell door, and said that he should kick Reimers's ass. Reimers's shirt was ripped and his head was cut. Reimers told the lieutenant that he wanted to file charges against Howell. He was told that he could not file charges, so Reimers submitted a Resident Grievance form about the incident (Tr. 313-314, 319-320, 330-331 (testimony of Bobby Yates, the administrator of the prison), Exh. 15). After reviewing the grievance, the prison administrator ordered Howell to apologize to Reimers and replace the shirt (Tr. 320-322, 335 (testimony of Bobby Yates)).

Vickie Smith, the nurse, testified that she overheard Howell tell an inmate named Chris Crouch that Howell would like to beat Reimers because Reimers was a snitch. When inmates learn that a fellow inmate is a snitch, a beating customarily results (Tr. 324-326, 328-329). Howell's comment to the inmate did not result in a beating of Reimers.

D. *Evidence Presented By Howell*

Jose M. Gonzales, a guard at San Juan, testified that he was present when Howell attacked Reimers. Reimers said something that Gonzales "didn't quite catch" (Tr. 360). Howell became upset and reached through the food slot "just to grab [Reimers's] attention," and grabbed and ripped Reimers's shirt (Tr. 360). Gonzales was not aware of any injuries suffered by Reimers (Tr. 361).

Doug Maples, another guard, testified that Reimers had "parked a chair" by the cell door and would yell and cuss at anyone who walked by. He did not see the incident when Howell attacked Reimers, but was present when Howell apologized and gave Reimers a new T-shirt (Tr. 363-365).

Tamara Howell, Howell's wife, testified that she is employed at a beauty salon. She hired Brenda Serrano, but things did not work out. Serrano was angry when she left and told Tamara that "what goes around comes around" (Tr. 366-369).

Richard Brewer, a sergeant at San Juan, testified that Elizabeth Stallings was belligerent and uncooperative when she was booked into the jail. The guards

placed Stallings in a holding cell. Brewer did not hear about an altercation or fight that night (Tr. 370-373).

Clyde Weathers testified that he was incarcerated with Randy Gilmore in December 1997. Weathers stated that he started the fight against Gilmore. He punched Gilmore a couple of times because Gilmore owed him some money. Other inmates then beat Gilmore. He heard inmates calling Gilmore a snitch while they were beating him. While Weathers did not see any paperwork about Gilmore, he did see that a paper had been placed at the window. He did not read the paper (Tr. 390-396).

Pervis Price testified that he witnessed a fight between Rocky Pearson and Mitchell Westbrook. Price testified Pearson said he beat Westbrook because Westbrook was a snitch. He also stated Howell was not on shift when this beating took place (Tr. 397-399).

Theresa Williams testified that she was incarcerated at San Juan and witnessed the fight between Serrano and Stallings. Serrano approached Stallings and grabbed a sweatshirt. An argument started, and Serrano hit Stallings twice. There was no blood. Williams observed that fights often occur at the jail (Tr. 400-403).

Denise Winjum testified that she was incarcerated with Serrano and Stallings at the time of the fight. Winjum did not know how the fight started, but Serrano walked over to Stallings and hit her two or three times. Two guards had

come in just before that and said they were upset with a girl who had been brought into booking (Tr. 403-404).

Dorothy Swan testified that she was incarcerated in San Juan in October 1997. She was asleep and did not see Serrano hit Stallings. Swan woke up to hear Serrano and Stallings arguing. Two female officers took Stallings out of the cell (Tr. 405-406).

Estevan Rodriguez, a guard at San Juan, testified that fights were common at the jail in 1997, but that a 24-hour camera system and more officers had changed the situation. Rodriguez was in charge of the section of the jail in which Gilmore was incarcerated. Rodriguez was returning with mail when juvenile officers informed him that they heard banging. He went to Gilmore's cell block and found him standing by the door with all of his belongings. Gilmore had blood on his face (Tr. 407-415).

## SUMMARY OF ARGUMENT

This Court should affirm Howell's conviction.

I. The district court properly excluded the nature of the felonies committed by witnesses for both the prosecution and the defense. Seventeen of the 27 witnesses had been convicted of felonies. It was within the discretion of the district court to exclude this evidence to prevent confusion of the issues or misleading the jury.

II. Defendant's allegations of prosecutorial misconduct are totally baseless. Review of the record clearly demonstrates that government counsel did not misrepresent the evidence.

III. The district court properly admitted evidence of Howell's attack on inmate Reimers. The evidence of this attack was admitted to show motive and intent under Federal Rule of Evidence 404(b). Defendant failed to demonstrate that the evidence was not relevant or that its probative value was substantially outweighed by any undue prejudice, and the jury was properly instructed as to the use it could make of the evidence.

IV. The district court properly admitted the Resident Grievance form that inmate Reimers filed against Howell. The document was not offered to prove the truth of the matter asserted therein; therefore, it was not hearsay.

V. The district court properly administered an *Allen* charge to the jury. Howell made no specific objection that would have given the district court a basis for declining to give the charge.

VI. The district court did not commit two or more errors in the trial that, when viewed cumulatively, warrant reversal.

VII. The district court properly denied Howell's motion for a new trial based on newly discovered evidence. The proffered evidence would not directly refute Howell's guilt.

# ARGUMENT

## I

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED EVIDENCE OF THE NATURE OF FELONIES FOR WHICH WITNESSES HAD BEEN CONVICTED

### A. *Standard Of Review*

This Court reviews decisions to admit or exclude evidence of prior convictions for abuse of discretion and affords substantial deference when the district court has engaged in the balancing required by Federal Rule of Evidence 609. *United States* v. *Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998).

### B. *The Court Properly Excluded Evidence Of The Nature Of Witnesses' Convictions*

The district court conducted a hearing on August 14, 2000, the day before trial began, on a number of evidentiary issues raised by two motions in limine filed by Howell (Doc. 91, 96). The issue of impeachment of witnesses by prior convictions pursuant Federal Rule of Evidence 609 was not directly raised by either motion.[3] Early in the discussion of the motion to exclude evidence of Howell's alleged drug use, the prosecutor asked if Howell intended "to put drug use into evidence with respect to the inmate[s] to impeach them" (8/14/00 Tr. 4), which began a discussion of admissibility of convictions of witnesses under Rule

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[3] Document 91 sought exclusion of evidence of other acts committed by Howell. See Issue III, *infra*. Document 96 sought exclusion of evidence regarding Howell's alleged drug use. The motions were denied by written orders (Doc. 98, 99).

609. Howell argued that the court should admit evidence of the nature of the every conviction for each witness (8/14/00 Tr. 12). The prosecutor pointed out that both the prosecution and the defense would be making extensive use of witnesses who had felony convictions. She noted that excluding the nature of the felonies would

> avoid the tit for tat, well, he's convicted for drug trafficking, but she was convicted for forging checks, or whatever. * * * The nature of those prior convictions, other than for truth telling, have no pertinence to the issues being tried here, which is a civil rights violation. And Mr. Gandert cannot point to how he would use the fact that a witness was – whether it be Mr. Gandert's witness or the United States' witness, how their drug trafficking conviction is relevant to their ability to testify in a civil rights case.

(8/14/00 Tr. 15-16). She also noted that if the nature of the felonies were admitted, they would be "battling out who's got the worst witness; this one's a burglar, this one's a drug trafficker, and so forth, back and forth. It doesn't serve a purpose that I can see for either side to be doing that, other than to muddy up the waters of this trial" (8/14/00 Tr. 17-18). Over Howell's objection, the court ruled that, with the exception of those convictions that are based upon fraud or dishonesty, it would "limit the testimony with respect to impeachment based upon convictions to the fact of conviction, and if you want the date of conviction, number of convictions" (8/14/00 Tr. 50). While it is not clear from Howell's brief, this limitation applied to witnesses who testified for the defense as well as those

who testified for the prosecution. At trial, 12 witnesses for the United States and five witnesses for the defense testified to felony convictions.[4]

Rule 609 provides that, for the purpose of attacking the credibility of a witness, "evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year." Fed. R. Evid. 609(a)(1). This rule gives the district court the discretion, in proper circumstances, to exclude *all* reference to a felony conviction of a witness. See *United States* v. *Begay*, 144 F.3d at 1338. In this case, the court stopped short of excluding all reference to felony convictions and permitted the parties to admit evidence of the fact and number of felony convictions, excluding only the evidence of the nature of the felonies.[5] The court did not abuse its discretion in so ruling.

Prior to the pretrial hearing, the United States gave Howell's counsel access to the criminal jackets of all of the witnesses (8/14/00 Tr. 4). Nevertheless, Howell made only a general reference to the types of felonies committed by the

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[4] While Howell focuses on the exclusion of the nature of the convictions of the witnesses presented by the United States (Br. 20), he does not appear to argue that the nature of the convictions of the government witnesses should have been admitted while the nature of the convictions of the defense witnesses should have been excluded.

[5] Pursuant to Federal Rule of Evidence 609(a)(2), the court did permit admission of the nature of felonies involving dishonesty or false statement. See, *e.g.*, Tr. 263 (forgery and embezzlement convictions of inmate Westbrook, a prosecution witness).

government's witnesses: aggravated battery, intimidation of witness, battery on a police officer, possession of methamphetamine, felon in possession of a firearm, burglary (8/14/00 Tr. 8-9). He made no proffer, either at the hearing or at trial, that linked any witness with any particular crime. Nor did he even attempt a "showing of the value of establishing [the] conviction[s]." *United States* v. *Begay*, 144 F.3d at 1338. At least some of the convictions were for drug possession, "not necessarily relevant to credibility and * * * potentially prejudicial in arousing sentiment against a witness." *Ibid.*

Howell argues that the court abused its discretion when it refused to admit evidence of the nature of the convictions. Howell identifies a number of cases decided by this Court that address admission under Rule 609 of evidence of convictions of non-party witnesses or of criminal defendants that approved admission of the nature of the conviction (Br. 11-21). The United States does not dispute the proposition that the court has the discretion to admit the nature of the convictions. None of these cases, however, held that on *all* occasions when evidence of a conviction is admitted to impeach a witness, the nature of the crime must also be admitted. See *United States* v. *Albers*, 93 F.3d 1469, 1479-1480 (10th Cir. 1996) (where defendant testified that he had been convicted of grand theft, it was error to permit the prosecution to go into the underlying facts of the conviction); *United States* v. *Sides*, 944 F.2d 1554, 1560-1561 (10th Cir.) (it was not plain error to admit the defendant's prior conviction for armed robbery in a felony murder trial), cert. denied, 502 U.S. 989 (1991); *United States* v. *Jefferson*,

925 F.2d 1242, 1256 (10th Cir.) (district court did not abuse its discretion by admitting evidence of aggravated robbery conviction more than ten years old), cert. denied, 502 U.S. 884 (1991); *United States* v. *Seamster*, 568 F.2d 188, 191 (10th Cir. 1978) (while evidence of burglary convictions is not automatically admissible under 602(a)(2), trial court did not err when it admitted evidence of two burglary convictions); *United States* v. *Wolf*, 561 F.2d 1376, 1380-1382 (10th Cir. 1977) (where defendant testified that he had pleaded guilty to making false claims to the government, a crime involving dishonesty or false statements,[6] then attempted to explain away his part in making the false claims and to deny his guilt, it was not error to permit the government to cross-examine the defendant as to the details of the crime and other counts that were dismissed as part of the guilty plea).[7] More particularly, Howell cites no case holding that it was error for the district court to exclude the nature of the convictions in an unusual situation

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[6] The crime to which Wolf had pleaded guilty involved dishonesty or false statement, so it was admissible under Rule 609(a)(2). As noted, n.5, *supra*, Howell was permitted to identify the nature of the crime when he impeached Westbrook.

[7] Howell cites *United States* v. *Burston*, 159 F.3d 1328 (11th Cir. 1998), which held that "Rule 609(a)(1) requires a district court to admit evidence of the nature and number of a non-defendant witness' prior felony convictions." *Id.* at 1336. The holding in *Burston* conflicts with this Court's holding in *United States* v. *Begay*, *supra*, that it was not error for the district court to exclude evidence of the felony conviction of a government witness.

similar to that faced by the court below when most of the witnesses for the prosecution and the defense had felony convictions.[8]

In his argument, Howell focuses on the provision of Rule 403 providing for a balancing of probative value and prejudicial effect. He ignores the rest of Rule 403, which permits a court to exclude relevant evidence if its probative value is outweighed by the danger of "confusion of the issues, or misleading the jury." Fed. R. Evid. 403. As noted above, the prosecutor argued that the nature of the convictions should be excluded to avoid "tit for tat" arguments (8/14/00 Tr. 15-16, 17-18). Had the nature of the crimes of each witness been admitted, the attorneys would have been spent a good portion of their arguments to the jury addressing the nature and relative iniquity of the felonies of witnesses presented by one side as compared to the felonies of the witnesses presented by the other side. Rather than focusing on the issue before it – Howell's guilt or innocence – the jury would have been diverted by this unnecessary evaluation of the witnesses. It was within the discretion of the district court to avoid this situation. This Court is free to affirm

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[8] In *United States* v. *Smith*, 521 F.2d 374 (10th Cir. 1975), a case in which the defendant and many of the witnesses had felony convictions, the district court denied the defendant's pretrial motion to exclude cross-examination of the defendant regarding his prior convictions. At trial, the defendant and witnesses for the prosecution and the defense were cross-examined about the nature of their convictions. *Id.* at 375-376. There is no indication that the district court or the court of appeals considered limiting the evidence as the district court did here: excluding the nature of the convictions of *all* the witnesses. The court of appeals issued its opinion on August 22, 1975, one and one-half months after the Federal Rules of Evidence took effect, and did not discuss Rule 609.

on grounds not articulated by the district court. *United States* v. *Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994). Therefore, it should hold that exclusion of the nature of the convictions of the witnesses was not error.

If this Court should determine that the court abused its discretion by excluding the nature of the convictions, the error was harmless. "[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *K-B Trucking Co.* v. *Riss Int'l. Corp.*, 763 F.2d 1148, 1156 ( 10th Cir. 1985).

The court's ruling did not deprive Howell of his right "to show that the government's witnesses had numerous past convictions which adversely reflected on their integrity and thereby increased the likelihood that they would give false testimony" (Br. 19). The jury knew that each inmate who testified for the United States had been convicted of a number of felonies: Lucero, three (Tr. 106, 119-122); Serrano, two (Tr. 157); Stallings, three (Tr. 164); Sease, one (Tr. 203); Neal, three (Tr. 210-211); Steen, three (Tr. 218); Westbrook, at least ten, including three counts of forgery, aggravated assault, and embezzlement (Tr. 263); Major, three (Tr. 278); Wasson, nine, including two counts of false imprisonment and two counts of intimidation of a witness (Tr. 299); Gilmore, four (Tr. 300); Schulte, four or five (Tr. 308); and Reimers, one (Tr. 312).

Furthermore, the jury heard a great deal of other impeachment evidence. In *United States* v. *Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998), the Eleventh

Circuit held that even though the court erred by excluding evidence of the nature of a witness's felony, the error was harmless when "the witness' credibility was sufficiently impeached by other evidence." *United States* v. *Burston*, 159 F.2d at 1336. A guard who testified for the prosecution stated on cross-examination that Serrano and Lucero, the two witnesses linking Howell to the Stallings beating, were probably not truthful (Tr. 88). Two guards who testified for the defense stated that Steen, the main witness linking Howell to the Gilmore beating, was not truthful (Tr. 362, 366). The jury learned that several inmates had been granted immunity for their testimony against Howell, including Stallings (Tr. 138-141), Steen (Tr. 222-225, Exh. 19), Major (Tr. 278-280, Exh. 20), Wasson (Tr. 292), and Schulte (immunity offered, but Schulte refused to sign the letter (Tr. 307, Exh. 21)). Over the objection of the United States (Tr. 52-55), the jury learned that Lucero (Tr. 119-122), Serrano (Tr. 159) and Westbrook (Tr. 271) had used aliases. It learned that Westbrook had spent a year and a half on escape from the penitentiary (Tr. 271).

Howell was not prevented from arguing that the witnesses lacked credibility based on their convictions, and he had abundant other evidence with which to impeach the witnesses for the United States. Much of his closing argument focused on this evidence. (See. *e.g.*, Tr. 456-457 (Lucero's three or four felony convictions and six aliases); Tr. 460-461 (Serrano's immunity agreement); Tr. 464 (Steen's immunity agreement); Tr. 471 (Steen cannot be believed)). Therefore, he

was not deprived of any substantial right and the exclusion of the nature of the convictions, if error, was harmless.

II

THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT

A. *Standard Of Review*

Howell did not object at trial to the statements that he now claims demonstrate prosecutorial misconduct. Therefore, this Court reviews for plain error. "Plain error is *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *United States* v. *Lonedog*, 929 F.2d 568, 570 (10th Cir.), cert. denied, 502 U.S. 854 (1991) (citations and internal quotation marks omitted) (emphasis in original).[9]

B. *Defendant's Claim Of Prosecutorial Misconduct Is Based On A Misreading Of The Record*

Prior to trial, the United States notified Howell that it intended to present evidence of Howell's bad acts, including two distinct incidents involving Reimers: (1) Howell's own attack on Reimers after Reimers referred to him as "the $5,000 man;" and (2) Howell's comment to inmate Crouch overheard by Nurse Smith that

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[9] Howell correctly recognizes (Br. 21) that since he did not object to any of the claimed misrepresentations at trial, the standard of review is plain error. He then improperly argues (Br. 25) that "[a] two-step analysis applies in determining whether the prosecutor's behavior constituted prosecutorial misconduct". The two-step analysis is used only when a defendant objects at trial to claimed prosecutorial misconduct. *United States* v. *Ellzey*, 936 F.2d 492, 497-498 (10th Cir.), cert. denied, 502 U.S. 950 (1991). Therefore, it is inapplicable in this case.

Reimers was a snitch and that Howell would like to kick Reimers's ass (Br. Att. C). Howell's claim of prosecutorial misconduct and misrepresentation of the evidence relates to the testimony of inmate Kris Reimers and Nurse Vickie Smith (Br. 21-27). Howell's specific contention is that five times during the trial, "[t]he prosecutor * * * falsely and repeatedly represented to the court and to the jury that Mr. Howell ordered the beating of Kris Reimers" (Br. 22). A review of the record reveals that at no time did the prosecutor represent that Howell's order resulted in a beating of Reimers by other inmates. Therefore, there was no misrepresentation and no prosecutorial misconduct.

The first claimed misrepresentation occurred in the pretrial hearing on the motions in limine. Howell claims that the prosecutor's statements are inconsistent with the information set forth in the prosecutor's letter attached to Howell's brief as Attachment C (Br. 22-23). The prosecutor described her purpose in using the evidence of the events set forth in the letter as follows:

> The United States would offer into evidence these other acts under 404(b) to show *the motive of the defendant, that is, his tendency to retaliate and to exercise dominance over the inmates in a violent manner, with excessive force, of course. His opportunity to do so, it shows* that he expects inmates to follow his orders and that they do follow his order when he wishes to have someone beaten.

(8/14/00 Tr. 42 (emphasis added)).[10] At no point in this hearing did the prosecutor say that Howell's comment to Crouch resulted in a beating of Reimers. The fact

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[10] The italicized portion of this quotation was omitted by use of an ellipsis on page 22 of Howell's brief .

that identification of Reimers as a snitch did not result in a beating (that is, Howell was unsuccessful in his attempt to have Reimers punished for filing the grievance) does not mean that it is not an example of Howell's method of operation or that the prosecutor misrepresented the evidence. Furthermore, Howell's attorney heard the statements that Howell now claims to be misrepresentations of the evidence, but did not object because he was "[u]nsure of whether the government would present the evidence it indicated" (Br. 23). Rather than take the opportunity to clarify the prosecutor's comments that he now says confuse him, he remained silent and did not object.

The second claimed misrepresentation occurred during the prosecutor's opening statement (Br. 23). By this point, the jury had been instructed that the "opening statements are not evidence" (Tr. 57-58). The prosecutor told the jury that in addition to Gilmore, the victim of the assault in Count II of the indictment, there would be evidence of two other occasions on which Howell identified an inmate as a snitch to incite or attempt to incite a beating: "when he learned someone was a snitch, he *tried* to get them beaten up" (Tr. 69 (emphasis added)). This is not a misrepresentation of the evidence as there were two other occasions. Howell successfully caused Westbrook to receive a beating, but was unsuccessful with Reimers. The prosecutor did not claim that Howell's comment to Crouch resulted in a beating of Reimers and did not misrepresent the evidence in her opening. Again, Howell's attorney remained silent in the face of what Howell now claims was a misrepresentation and did not object.

The third claimed misrepresentation occurred during the direct examination of nurse Vickie Smith (Br. 23-24). Smith had already testified that Howell had told Crouch "he'd like to beat [Reimers] up himself if he could" (Tr. 325). When government counsel asked whether Howell said *why* he would like Reimers beaten up, Howell objected on the ground that the question was based on facts not in evidence. The court noted that Smith had just testified that Howell said he would like to beat Reimers up himself and overruled the objection (Tr. 325). The prosecutor did not seek to have the question answered, but instead asked Smith to review her interview statement. Smith then testified that Howell told Crouch that Reimers was a snitch (Tr. 326), and that inmates often beat inmates known to be snitches (Tr. 326). At no time during this questioning did the prosecutor state that inmates carried out Howell's order that Reimers be beaten. For the third time, despite what is now claimed to be a misrepresentation by the prosecutor, Howell's attorney held his tongue and did not object.

The fourth claimed misrepresentation occurred when the prosecutor sought admission of the grievance that Reimers filed against Howell (Br. 24). The prosecutor argued for admission on the grounds that the document "explains the ordering of a beating of Kris Reimers for being a snitch" (Tr. 318). The "order" to which she referred was the one implicit in Howell's comment to Crouch that Reimers was a snitch coupled with the evidence that snitches in prison are beaten; therefore, there was evidence that Howell ordered a beating of Reimers. At no time did the prosecutor claim Howell's order was carried out and that an inmate or

inmates beat Reimers. Once again, despite this fourth claimed misrepresentation, Howell's attorney kept his own counsel and did not object.

The fifth claimed misrepresentation occurred during closing when the prosecutor argued, "Yes, he ordered beatings of those who did cause him problems, but he also did this to those he thought might. And that also again is Kris Reimers because Kris Reimers turned him in" (Br. 24-25, quoting Tr. 451). The prosecutor did not tell the jury that Howell's order resulted in Reimers being beaten by inmates. For the fifth time, despite what is now claimed to be a misrepresentation, Howell's attorney remained mute.

At *no* time during the pretrial argument on the motions in limine or during the three days of presentation of evidence and argument to the jury did the prosecutor tell the court or the jury that Howell's statement to Crouch resulted in Reimers's beating. The allegations that the prosecutor misrepresented the evidence are baseless. There was no prosecutorial misconduct and no denial of due process.

## III

## THE COURT PROPERLY ADMITTED EVIDENCE THAT HOWELL ATTACKED INMATE KRIS REIMERS

### A. *Standard Of Review*

This Court reviews admission of evidence under Rule 404(b) for abuse of discretion. *United States* v. *Arney*, 248 F.3d 984, 991 (10th Cir. 2001).

B. *Evidence Of The Reimers's Incident Was Properly Admitted Under Federal Rule of Evidence 404(b)*

The United States notified Howell by letter that it intended to present, pursuant to Federal Rule of Evidence 404(b), evidence of other acts committed by Howell. The other acts included evidence that "[o]n June 22, 1999, Defendant Howell slammed inmate Kris Reimers's head against cell bars because Reimers had taunted the Defendant regarding a $5,000 theft supposedly committed at the San Juan County Detention Center" (Br. Att. C). Howell filed a motion in limine challenging admission of evidence of the events described in the letter, and the district court conducted a hearing on August 14, 2000 (8/14/00 Tr. 40-49).

As this Court has held:

> Evidence of other bad acts is properly admitted if four requirements are met: (1) the evidence is offered for a proper purpose under Fed. R. Evid. 404(b); (2) the evidence is relevant under Fed. R. Evid. 401; (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403; and (4) the district court, upon request, instructs the jury to consider the evidence only for the purpose for which it was admitted.

*United States* v. *Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001). "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988). If the evidence is probative of a material issue, the district court has the discretion to admit evidence of other acts. *United States* v. *Arney*, 248 F.3d at 991. The court properly considered these factors at the pretrial hearing.

The prosecutor articulated grounds supporting admission under Rule 404(b) of the events described in the letter, including the beating that Howell administered to Reimers (8/14/00 Tr. 42-44).[11] The prosecutor stated that the evidence was admissible for several reasons, including showing the motive of the defendant, his tendency to retaliate and to exercise dominance over the inmates in a violent manner, his identity, and his intent or willfulness to deprive the inmates of their constitutional rights (8/14/00 Tr. 42-44), grounds supporting admission under Rule 404(b) that the court thought were stated "fairly precisely" (8/14/00 Tr. 44). Howell did not contest the prosecutor's assertions regarding the 404(b) grounds for which the evidence was offered or its relevance. With the exception of a passing reference to confusion, he focused his argument solely on the third factor set forth in *United States* v. *Tan*, stating that "primarily the argument hinges on a 404(b) balancing test. And clearly this would be – the prejudice would substantially outweigh any probative value" (8/14/00 Tr. 44-45)

The court found that the prosecutor's description of the evidence as proof of motive and intent were "precise statements of purpose here under rule 404(b)" (8/14/00 Tr. 48). Section 242 is a specific intent statute; therefore, the government must prove that defendant acted with the intent to deprive his victims of their

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[11] The other incidents were: (1) Howell's identification of inmate Westbrook as a snitch followed by Westbrook's beating by inmates; and (2) Howell's statement to inmate Crouch overheard by Nurse Smith that Reimers was a snitch. Howell does not contest admission of evidence of these two events.

rights. *United States* v. *Brown*, 250 F.3d 580, 584 (7th Cir. 2001).[12] Evidence of Howell's assault on Reimers was admissible to show his intent to abuse the power that he, as a prison guard, possessed over prisoners and, thereby, to inflict cruel of Howell's motive to retaliate against inmates who displease him. The court cautioned that the other acts evidence should not become the focus of the case and that if the testimony became prolonged, he would curtail it, but denied the motion in limine (8/14/00 Tr. 49, Br. Att. E).

The court noted that before admitting the evidence, it would have to determine that the evidence was not unfairly prejudicial (8/14/00 Tr. 41). The court did not make a final ruling on admission, stating, "The Court will grant – *if it permits this testimony, Mr. Keefe*, it will grant an instruction to make sure that the jury doesn't get confused" (8/14/00 Tr. 48 (emphasis added)).[13] As Howell notes, he did not object at trial to the admission of the evidence regarding Reimers's beating (Br. 29-30). His failure to object deprived the district court of any opportunity to consider its decision in the context of the evidence presented to

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[12] Howell's statement that intent was not an issue since his "defense was that the charged acts did not occur" (Br. 33-34) does not eliminate the government's obligation to prove intent as an element of the crime.

[13] At trial, the court instructed the jury regarding the use it could make of the other acts (Tr. 436-437, Doc. 101 Inst.19). Howell did not object to the instruction (Br. 29), and did not seek a limiting instruction at the time the evidence was admitted.

balance its probative value with its prejudicial effect. *United States* v. *Tan*, 254 F.3d at 1211. The court did not abuse its discretion in admitting the other act evidence.

## IV

## THE DISTRICT COURT PROPERLY ADMITTED THE RESIDENT GRIEVANCE FORM THAT REIMERS FILED AGAINST HOWELL

### A. *Standard Of Review*

"Evidentiary rulings are committed to the discretion of the trial court, and we review them only for abuse of discretion. Our review is even more deferential where the evidentiary ruling concerns the admissibility of what is claimed to be hearsay evidence." *United States* v. *Cestnik*, 36 F.3d 904, 906-907 (10th Cir. 1994), cert. denied, 513 U.S. 1175 (1995) (citations omitted).

### B. *The District Court Properly Admitted Into Evidence The Form That Reimers Filed Against Howell*

As discussed above in Section III, the district court properly admitted evidence of the beating that Howell administered to Reimers. The United States also sought admission of the "Resident Grievance" form that Reimers filed against Howell (Br. Att. H). The form contains a written statement by Reimers regarding the beating and a written statement by Bobby Yates, the administrator of San Juan, who ordered Howell to apologize and replace the T-shirt as a result of the grievance. Howell objected to admission of the form on the grounds that it was hearsay (Tr. 316, 331). The court properly admitted the form.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Reimers testified to the facts of the beating he suffered at Howell's hands and that he filed a grievance against Howell because of the beating (Tr. 313-321). Yates testified that he spoke to Howell about the grievance and that Howell was aware Reimers had filed the grievance (Tr. 331). The United States did not offer the form to prove the truth of their testimony, but as further proof that a grievance was filed. Therefore, the form is not hearsay.

If this Court determines that the form was hearsay and was erroneously admitted, it must determine whether the error was harmless under Federal Rule of Criminal Procedure 52(a).[14] If the evidence determined to be hearsay is cumulative to other properly admitted evidence, its admission is harmless. *United States* v. *Cestnik*, 36 F.3d at 910-911 (holding that erroneous admission of evidence under a well-established exception to the hearsay rule, is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect).

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[14] "The harmless error inquiry in these circumstances focuses on whether the erroneously admitted evidence had a substantial influence on the jury's verdict or leaves this court in grave doubt about whether it did. This court reviews the record as a whole *de novo* to evaluate whether the error is harmless, examining the context, timing and use of the erroneously admitted evidence at trial and how it compares to properly admitted evidence." *United States* v. *Hanzlicek*, 187 F.3d 1228, 1237 (10th Cir. 1999) (citations omitted).

Here, Reimers and Yates both testified at the trial about the statements contained in the grievance. Reimers testified that Howell had beaten him (Tr. 313-321). Yates testified that he spoke to Howell and made Howell aware that the grievance had been filed and Reimers had complained about Howell (Tr. 331). Even if the form is considered to be hearsay, its evidence is cumulative to properly admitted evidence and could not have had a substantial influence on the outcome of the trial. Therefore, its admission, if error, is harmless.

## V

## THE DISTRICT COURT PROPERLY ADMINISTERED AN *ALLEN* CHARGE TO THE JURY

### A. *Standard Of Review*

When a defendant fails to state objections with sufficient particularity to a jury charge given pursuant to *Allen* v. *United States*, 164 U.S. 492 (1896), this Court reviews for plain error. *United States* v. *Ellzey*, 936 F.2d 492, 500 (10th Cir.), cert. denied, 502 U.S. 950 (1991).

### B. *The District Court Properly Gave The Jury An* Allen *Instruction*

Presentation of the evidence and argument to the jury concluded on Thursday, August 17, 2000, at approximately 2:45 p.m. The jury deliberated all day Friday and Monday (8/21/00 Tr. 3). On Monday afternoon, the district court notified counsel that it had received a note from the jury foreman stating, "We are unable to come to an agreement of us all on both Counts I and II against Darren Howell" (8/21/00 Tr. 3).

The prosecutor requested an *Allen* charge. Counsel for Howell responded, "Your Honor, we would object to the Allen charge. They have been in deliberations, as the Court indicates, since – almost 18 hours now" (8/21/00 Tr. 3) He then stated, "Your Honor, perhaps the Court could ask if there's any possibility of – * * * Right. And if there's no possibility, I don't see – I mean it's just the way the –" (8/21/00 Tr. 4-5). The district court then questioned several jurors who expressed concern about their ability to reach a verdict (8/21/00 Tr. 5-7). Juror Arenberg then stated, "Is there a possibility that – we've been at this for so long today that we've deadlocked ourselves. Is there any possibility that we could let this rest until tomorrow morning and meet again tomorrow morning to see if there's any other way we could reach a decision?" (8/21/00 Tr. 7). The district court dismissed the jury for the day with instructions to return the next morning (8/21/00 Tr. 7-8).

Court reconvened on August 22 at 9:14 a.m. When the court notified counsel that he would proceed with the Allen instruction, Howell's counsel responded, "Your Honor, we would indicate that we continue our objection" (Tr. 494). The court then gave the *Allen* instruction (Tr. 494-495, Doc. 102). The jury deliberated from 9:19 to 10:55, when it returned its verdict of guilty on both counts (Tr. 496-497).

"No party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of

the objection." Fed. R. Crim. P. 30. This rule applies to an *Allen* charge. *United States* v. *Ellzey*, 936 F.2d at 500.

The sum total of Howell's comments regarding the Allen charge as set forth above can *at best* be characterized as a general objection to giving the charge. While his brief to this Court sets forth a number of specific arguments regarding the substance of the charge,[15] these arguments were not made in the district court.

> Had these specific concerns been raised at trial and the offensive language pointed out, the judge may have excised or edited the challenged portions. * * * Since the trial court did not have an opportunity to rule on or remedy the concerns of defense counsel, we can reverse only if the giving of the instruction amounted to plain error.

*United States* v. *Ellzey*, 936 F.2d at 500. Therefore, this Court should review this issue for plain error.

"Plain error is error that affects the defendant's fundamental right to a fair and impartial trial." *United States* v. *Ellzey*, 936 F.2d at 500 (internal quotation marks and citation omitted). The *Allen* charge did not affect Howell's fundamental right to a fair and impartial trial.

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[15] "The district court emphasized to the jury three times the considerable financial expense of a trial" (Br. 44); "[t]he district court here informed jurors twice that the case would have to be retried if it failed to reach a verdict" (Br. 45); the *Allen* charge did not reemphasize "the original instruction on the presumption of innocence and the government's burden to prove guilt beyond a reasonable doubt" (Br. 45); the instruction was unduly coercive on minority jurors (Br. 46-47). These arguments are identical or similar to arguments rejected by this Court in similar circumstances. *United States* v. *Ellzey*, 936 F.2d at 501 and n.2.

Each of the statements in the *Allen* charge are appropriate. See Tr. 494-495. Cf. *United States* v. *Arney*, 248 F.3d at 988-990 & n.3; *United States* v. *Ellzey*, 936 F.2d at 499 n.1. Neither the giving of it nor its substance affected Howell's fundamental right to a fair and impartial trial. Therefore, this Court should reject this argument.

## VI

## THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS DOES NOT WARRANT REVERSAL

### A. *Standard Of Review*

"Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *United States* v. *Nichols*, 169 F.3d 1255, 1269 (10th Cir.), cert. denied, 528 U.S. 934 (1999), (quoting *Moore* v. *Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998), cert. denied, 526 U.S. 1025 (1999)). If this Court finds that there were two or more actual errors, it should evaluate "whether cumulative errors were harmless by determining whether defendant's substantial rights were affected." *United States* v. *McNeely*, 69 F.3d 1067, 1079 (10th Cir. 1995).

### B. *The District Court Committed No Errors*

As set forth above, Howell's claims of errors by the district court are not supported by the record; therefore, Howell's argument that the cumulative effect of the errors he claims warrants reversal has no merit. If this Court should find that the district court committed at least two errors that do not in themselves

warrant reversal, those errors considered together did not affect Howell's substantial rights; therefore, this argument is without merit.

## VII

## THE DISTRICT COURT PROPERLY DENIED HOWELL'S MOTION FOR A NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE

### A. *Standard Of Review*

This Court reviews the denial of a motion for new trial for an abuse of discretion. *United States* v. *Pearson*, 203 F.3d 1243, 1274 (10th Cir.), cert. denied, 530 U.S. 1268 (2000).

### B. *The District Court Properly Denied Howell's Motion For New Trial*

> Courts do not view motions for a new trial with favor and only grant such motions with great caution. A defendant may win a new trial based on newly discovered evidence only if he shows that: (1) the evidence was discovered after trial; (2) the failure to discover the evidence was not caused by the defendant's lack of diligence; (3) the new evidence is not merely impeaching; (4) the new evidence is material to the principal issues involved; and (5) the new evidence would probably produce an acquittal in a new trial.

*United States* v. *Pearson*, 203 F.3d at 1274 (citation omitted).

The indictment charged that Howell committed two violations of 18 U.S.C. 242 by depriving inmates of their civil rights. The events charged in the indictment occurred in October 1997 and December 1997, respectively. Howell was tried and convicted in August 2000.

Howell filed a motion for new trial based on alleged newly discovered evidence on January 19, 2001 (Doc. 108). On February 22, 2001, he filed a supporting affidavit signed by Virgil Troy Crouch. Crouch's affidavit states that

he was an inmate at San Juan County Detention Center from December 1998 to September 1999. Crouch states that at some point during that period, he overheard a discussion between inmate Steen, who testified in this case, and James Nelson regarding an attempt to "set up" Howell in a drug deal. The affidavit states absolutely nothing about the beatings of Stallings and Gilmore, both of which occurred a year or more before Crouch was incarcerated at San Juan. It also states nothing about any of the other witnesses who testified at trial.

To justify a new trial, a defendant must show that newly discovered evidence is not merely impeaching. If it were believed by the jury, Crouch's testimony could at best suggest that Steen may have harbored a bias against Howell; and, therefore, Steen's testimony that Howell instigated Gilmore's beating should not be believed. This is classic impeachment evidence. And even if it cast doubt on Steen's testimony, it would have no bearing on the testimony of the remaining witnesses who testified against Howell. Since Steen did not provide any evidence with regard to the assault against Stallings, Crouch's testimony would have no bearing on Count I.

Furthermore, the evidence that Crouch would present is not material to the principal issues involved in this case. *United States* v. *Garland*, 991 F.2d 328 (6th Cir. 1993), a case cited by Howell (Br. 53), is an example of newly discovered evidence that is material to a principal issue in the case. Garland was charged with interstate fraud in obtaining a loan for a transaction involving the importation of cocoa beans from Ghana. At trial, Garland testified about his trips to Ghana and

his meetings with persons whom he believed were selling cocoa beans on behalf of the Ghana Cocoa Board. The beans were not shipped and Garland lost the money. The prosecutor argued that Garland's story was a complete fabrication and that Garland instead was trying to hide a gold transaction. The jury believed the prosecutor and convicted Garland.

While his appeal was pending, a court in Ghana convicted two Ghanians of defrauding Garland by making false representations concerning the cocoa bean transaction. The facts found by that court corroborated Garland's trial testimony. The court of appeals found that Ghanian judgment

> is prima facie evidence that Garland made a cocoa deal [with two men who] were convicted in Ghana of defrauding him in connection with that cocoa deal. * * * It is clearly material to the issue of Garland's intent, and would likely have produced an acquittal had the jury been aware of it.

*Id.* at 335. Since this evidence corroborated Garland's testimony about his intention for the money and contradicted the government's argument that the cocoa bean transaction was a fabrication, it was material to a principal issue in the case and justified a new trial.

In contrast, the principal issues in this case were whether Howell violated Section 242 by instigating the beatings of Stallings and Gilmore in 1997. Howell claims that Crouch would testify that more than one year after these events occurred, he overheard Steen and James Nelson, someone who did not testify in this case, concocting a scheme to make it appear that Howell was involved in a

drug deal. No evidence about this alleged drug deal was presented at Howell's trial, and its existence or non-existence is immaterial to this case.

Therefore, the newly discovered evidence set forth in Crouch's affidavit does not warrant a new trial.

## CONCLUSION

Howell's conviction on two counts of violating 18 U.S.C. 242 should be affirmed.

## STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument because it believes argument would be helpful to the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(b)

I, Clay G. Guthridge, counsel for appellee United States, certify that this brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 9924 words and has been prepared in proportionally spaced typeface using WordPerfect 9 software in Times New Roman typeface, 14 point type. I relied on my word processor to count the words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2001, two copies of the Brief For The United States As Appellee were sent by Federal Express, overnight delivery, to the following counsel of record:

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