



FIFTH CIRCUIT

2024 & BEYOND IN REVIEW

Kiger Sigh, R&W Specialist

TOPICS

- Pre-trial
- First Amendment
- Second Amendment
- Third Amendment
- Fourth Amendment
- Fifth Amendment
- Sixth Amendment
- ACCA - *Erlinger*
- Sentencing Enhancements
- Sentencing
- Acceptance of Responsibility
- Privilege



- Substantive Offenses
 - Fraud
 - Child Pornography
 - Escape
 - Bribery
 - Drugs
 - Destructive Devices
 - Illegal Reentry
 - 15 12(c)
- Error Preservation

Cases/issues not being reviewed

- Cases involving only sufficiency challenges
- Cases involving issues not normally litigated (2255 and specific offenses)
- Geofence case – *US v. Smith* , 110 F.4th 817, 820 (5th Cir. 2024)
 - Goodloe, Bill, and Paul are the experts
- Cases with multiple issues, but nothing substantive – cumulative error
 - Unfortunate – *US v. Ashley* is a doozy <https://www.financialplanning.com/news/the-worst-case-scenario> -
 - Financial advisor, nurse, insurance sales, and brewer – killed his client and staged it like a suicide; Ponzi scheme
 - Never give a blood sample for insurance!
- Some cases may have had multiple issues (*Bruen* , sufficiency, jury instructions, etc.), but focus is on the substantive issue only

PRETRIAL



US v. Gordon, 93 F.4294

Speedy Trial Act

- “The Speedy Trial Act of 1974 ... requires that a criminal defendant's trial commence within [seventy] **EXCLUDABLE** days after he is charged or makes an initial appearance, whichever is later, see [18 U.S.C.] **NON -** § 3161(c)(1), and entitles him to dismissal of the charges if that deadline is not met, § 3162(a)(2).”
- Excludable days - 18 U.S.C. § 3161(h).

6th Amendment Speedy Trial

- It will be the unusual case, however, where the time limits under the Speedy Trial Act have been satisfied but the right to a speedy trial under the Sixth Amendment has been violated.
- *Barker* factors (4th prong is most important) - A court evaluates a claimed violation of the constitutional right to a speedy trial by applying a four-factor balancing test examining: (1) the “length of delay,” (2) “the reason for the delay,” (3) “the defendant's assertion of his right,” and (4) “prejudice to the defendant.”
- The court balances the factors by “weigh[ing] the first three *Barker* factors ... against any prejudice suffered by the defendant due to the delay in prosecution.
- Obviously, in this balancing, the less prejudice a defendant experiences, the less likely it is that a denial of a speedy trial right will be found.” *United States v. Serna -Villarreal*, 352 F.3d 225, 230 (5th Cir. 2003). When more than one year has passed between indictment and trial, “this court undertakes a full *Barker* analysis, looking to the first three factors to decide whether prejudice will be presumed.”
- Court went straight to the *Barker* factors – 1 and 2 in favor of defendant; 3 – he failed to file motion to dismiss until day 322; 4 – no prejudice suffered; anxiety and concern and oppressive incarceration – only speculative

US v. Anderson, 93 F.4 859

Facts

- Defendant and friend got drunk and got into a fight with guns; two version of the story – one where defendant shot friend multiple times unprovoked and other where the friend fired first; prosecutor used to represent him and family

Recusal of Prosecutor

- AUSA Kevin Payne (former ACPD) tried the case
- Mr. Payne was also former defense counsel in tribal court and represented the defendant and his family on multiple occasions
- The issue was whether a conflict existed and if MS R of Professional Conduct 1.9 (former client)
- Parties agreed that the test was – ‘substantial relationship?’
 - Confidential information was shared between defendant and Payne
 - Government argued that representation was 15 years ago and not confidential
- Court said there was nothing substantial about prior representations and current federal case

US v. Boswell, 109 F.3d 4368



Facts

- Defendant cleaned and serviced pizza ovens, but made the executive decision to stop reporting income and not pay taxes
- Owed over \$750,000 to IRS
- Indictment was sealed and unsealed 6 months AFTER the SOL period (5 years from date of conduct)

Was the indictment sealed for a legitimate purpose?

- Government argued that it was investigating co-conspirators
 - A pattern of conduct identified in the bankruptcy fraud investigation showed that the potential co-conspirators were a component part of the scheme to defraud and assisted the defendant in creating nominal businesses to hide assets and income obtained by him. Therefore, leaving the indictment unsealed would potentially alert the co-conspirators.
- Defendant argued no legitimate reason because the co-conspirators already testified at the grand jury
 - Defendant argued that because he was kept in the dark about the bankruptcy-fraud indictment, he was unable to instruct his bankruptcy attorney to preserve his client file, which could be destroyed five years after the termination of the representation. The client file was indeed destroyed, erasing evidence that he could have used to establish an absolute defense of good faith reliance on advice of counsel.
- Court – agreed with defendant and vacated that conviction
- Practice pointer – if you have a sealed indictment that is past the SOL period, force the gov to give specific details

1st Amendment



US v. Uhlenbrock, 125 F.4 217

Facts

- Cyberstalking – Defendant indicted for publishing ex-girlfriend's nudes, videos, and fictional stories

Does the First Amendment protect defendant's speech? 18 USC 2261A(2)(B)

- No – defamation, speech integral to criminal conduct, and obscenity; unprotected defamation – as applied challenge
 - It was false and defamatory and published – with her pics and name

What about vague language?

- (2) with the intent to harass, intimidate, uses the internet to engage in a course of conduct that (B) causes, attempts to cause, or would be **reasonably expected to cause substantial emotional distress** to a person
- 'reasonably expected' and 'substantial emotional distress' are easily understood from tort law and 'reasonably expected' = reasonable standard person
- Here – posting nude photos/videos without permission with her face exposed would meet the criteria, but defendant took it a step further – added her real name, real occupation, real state residence, and real employer

2nd Amendment



922 is constitutional (so far)

Bruen and *Rahimi* – historical analogue

- *United States v. Contreras* , 2025 WL 80107 = 922(g)(1) (FIP) – facially and as applied
- *United States v. Bullock* , 123 F.4th 183 = 922(g)(1) – facially and as applied (**dangerousness**) (agg assault and manslaughter)
- *United States v. Isaac* , 2024 WL 4835243 = 922(g)(1) – as applied (**dangerousness**) (agg assault with DW)
- *United States v. Schnur* , 2025 WL 914341 = as applied (**dangerousness**) (agg assault no weapon)
- *United States v. Diaz* , 116 F.4th 458 = 922(g)(1) and commerce clause
- *United States v. Connelly* , 117 F.4th 269 = 922(d)(3) (providing firearms to an unlawful user of controlled substances) and 922(g)(3) – (unlawful user of a controlled substance); “presently using”
- *United States v. Daniels* , 124 F.4th 967 = 922(g)(3) – same as *Connelly* ; no finding about “ **presently using** ”
- *United States v. Rahimi* , 117 F.4th 331 = 922(g)(8) (DV restraining orders) – facially constitutional
- *United States v. Perez -Gallan* , 125 F.4th 204 = 922(g)(8)
- *United States v. Medina -Cantu* , 113 F.4th 537 = 922(g)(5) (illegal alien); upheld *Portillo -Muoz* , 643 F.3d 437
- *United States v. Quiroz* , 2025 WL 79718 = 922(n) (under indictment) and (a)(6) (false statements buying a firearm) – both affirmed
- **United States v. Sealed Juvenile* (oral argument) = 922(o) – glock switches as machineguns

US v. Peterson, 127 F.4 941

Facts

- Defendant charged with possession of an unregistered suppressor
- Challenged that the suppressor -registration requirement burdens his 2nd Am right to bear arms

Does it?

- “Arms” in the Second Amendment sense comprises “weapons of offence,” “armour of defence,” and “anything that a man wears for his defence, ... takes into his hands, or useth in wrath to cast at or strike another.”
- That is, to constitute an “arm,” the object in question must be a weapon.
- Defendant argued suppressors are an ‘integral part of the firearm’; could throw it at intruder? But not really
- Court – NO – it is not a weapon; without being attached to a firearm, it would not be much use in self -defense



US v. Silva, 92 F.4th 547

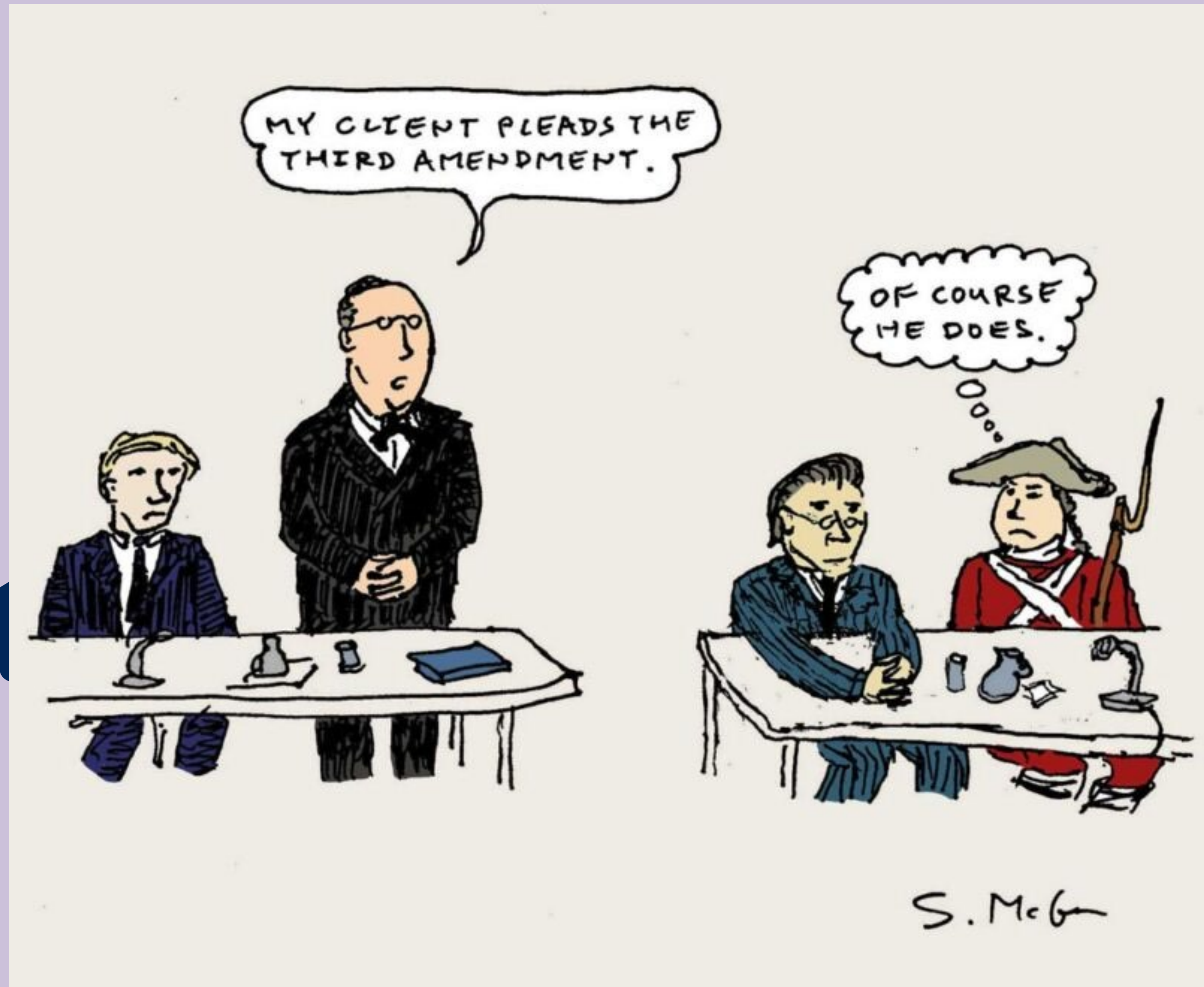
Facts

- Defendant convicted under 922g5 (poss of firearm by illegal alien); Multiple re-entries
- In 2018, he received bond and an I-94 form that stated:
 - You are required to retain this permit in your possession and to surrender it to the transportation line at the time of your departure unless you depart over the land border of the United States in which case you must surrender it to a Canadian immigration officer on the Canadian border, or to a United States immigration officer o[n] the Mexican border.
- Filed numerous applications to become gain legal status; hearing was supposed to be 2023; arrested 2022

Rehaif requires that a defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm = he was an illegal alien or unlawfully present

- Argued that bond and the I-94 form's "permit" language made it unknowingly; but he did receive other documents and notices stating he was not being granted immigration status
- Defendant knew he unlawfully entered, but did not know he was still unlawfully present
- The Court reasoned that "possession of a gun can be entirely innocent It is therefore the defendant's status, and not his conduct alone, that makes the difference." The Court determined that requiring proof of knowledge as to both possession and status under § 922(g) "helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts."
- Court affirmed based on sufficiency; Graves with dissent – I-94 and other factors were enough

3rd Amendment



4th Amendment



US v Clayton, 98 F.4th 256

Facts

- CI had info Defendant was selling drugs; placed GPS on defendant's vehicle
- On day of SW execution – officers observed a burglary of his house (randomly)
- Sought new SW weeks later, but did not renew vehicle SW; warrant included this language: as well as “all other structures, vehicles, and places on the premises where [evidence] may be found.”
- Defendant gets in vehicle and drives one decent tee shot of 250 yards before being stopped

Warrantless vehicle search

- Was 250 yards away from residence part of “immediate vicinity”?
- 3 factors for “immediate vicinity” exception – officer safety (when defendant leaves premises without knowledge of search, there is less risk), facilitating the completion of the search (if defendants are present, they could impeded search, if not there, no impediment), additional intrusiveness (public detention is more similar to arrest)
- Answer?
 - Fifth Circuit declined to define “immediate vicinity” and affirms on automobile exception since there was PC that drugs were being trafficked

Practice pointers – ***4th – look at how far away the stop occurred; 5th – review how the defendant asserts rights

US vGarcia, 99 F.4th 253

Facts

- Defense filed the following 3 line affidavit with motion to suppress:
 - On May 19, 2016, the Defendant was detained at the lobby of a hotel in Harris County, Texas.
 - Agents detained the Defendant and proceeded to search a large black suitcase in his possession. The agents discovered a large amount of cash in the suitcase.
 - The Defendant claims he did not consent to his detention nor to the search of the suitcase.

Insufficient motion

- The district court did not abuse its discretion when it declined to conduct an evidentiary hearing before ruling on the motion to suppress.
- A hearing on a motion to suppress is “not granted as a matter of course” and is required “only when necessary to receive evidence of an issue of fact.” To be entitled to a hearing, the movant must “allege[] sufficient facts which, if proven, would justify relief.”
- This evidence does not suggest that relief was warranted. For example, it does not establish what was happening directly before the search, and it does not even establish that a warrantless search took place.
- First, must show that a government activity intruded upon a reasonable expectation of privacy in such a significant way that the activity can be called a “search.” Second, if a search has in fact occurred, [the movant] must show that the government intrusion was unreasonable given the particular facts of the case.

Practice pointer - ***be sure to assert enough in your motion to suppress (don't have to give away your strategy), but enough to allege a search occurred or seizure and there was a constitutional violation

US v. Martinez, 102 F.4th 677

- Facts

- Defendant smuggling persons in from Mexico and stopped by US Border Patrol
- Bak the K -9 alerted because it had been trained to detect concealed persons
- Defense filed motion to suppress arguing that K -9s could not differentiate between the scents of the driver and the concealed; reliability of credentials

- Was there RS to stop and extend the detention?

- The reliability of a canine's alert is a factual finding reviewed for clear error.
- K-9 sniffs are legal and if a K -9 alerts, then there is PC to search
- *Florida v. Harris* , 568 US 237 - K-9 reliability; allowed to challenge K -9's certifications and training
- Bak was trained and certified to alert to either controlled substances or humans

- Practice pointer - ***challenge a canine's credentials and ask for their certification records; this applies to any canine sniff, not just border patrol



US v Keller, 123 F.4 264



Facts

- Border patrol check – Defendant smuggling persons inside vehicle
- K-9 sniffed and alerted
- K-9 jumped up and placed paws on vehicle

Was placing paws on vehicle a search in violation of 4th Amendment?

- Sniffs are legal (*Illinois v. Cabellas*) and mere touching aka trespass is ok when ‘conjoined with an attempt to find something or obtain info
- Touching the car or dog touching car is not a search
- *most important takeaway was found in a FN
 - A trained and certified dog performing its trained behavior is sufficient by itself to create probable cause for a search. A trained and certified dog exhibiting a distinct behavior that is innate or instinctive but not trained may create probable cause in combination with other evidence or testimony supporting the government's burden of proof.
 - The disparate terminology “indicate,” “alert,” “cast,” “weak,” and “strong” should not be a barrier in applying the Fourth Amendment to canine sniff cases.

US vDevaney, 109 F.4 322

Facts

- Drug deal gone bad – the buyers backed out; defendant and others chased and shot at them, killing bystander; fled in a Corvette, but was arrested the next day; SW for Corvette and cell phones

Was SW defective as “bare bones” and does good faith save the day?

- Defense argued that the SW (1) did not describe a Corvette as one of the vehicles involved in the shooting and (2) lacked the requisite nexus to drug -related crimes. As to cell phones, he avers (1) that it lacked detail on the manner of communications and (2) the affiant did not invoke his “training and experience” as to drug dealers.
- Court found that the arguments were more germane to “the probable -cause determination itself” than to showing the applicability of the bare -bones cutout.
- “Bare -bones affidavits” describes only those affidavits that “contain wholly conclusory statements” —i.e., those that are completely devoid of “the facts and circumstances from which a magistrate can independently determine probable cause.”
- These detailed the “crimes committed, the participants, as well as the location and time of the events.”
- Thus, both affidavits “put all the relevant ‘facts and circumstances’ before the state judge, allowing him to ‘independently determine’ if the ... probable -cause standard had been met.”

Practice pointer - *review the affidavit and facts/circumstances

US v Norman, 129 F.4 874

Facts

- Officers got SW for house and car re drug distribution from CI
- Defendant moved to suppress based on affidavit being bare bones because it did not provide facts showing a nexus between the house and evidence of his drug distribution.
- Gov appealed district court's suppression
- Affidavit was not bare bones – included texts, between defendant and CI; CI drove to house immediately after transaction, travelled to defendant's house multiple times
- Here, defendant presumably had the proceeds from the drug transaction with him at the house that night. Thus, it was reasonable to infer that those proceeds were likely in the house or its garage. It was also reasonable to infer that the "residence" referenced in the texts with Wallace was probably the house at issue.

Not a bare bones affidavit – 5th Cir reversed due to good faith



US v. Turner, 2025 WL 78721

Facts

- Police responded to apartment due to multiple calls about hearing a gunshot
- Police investigated a bullet hole in the neighbor's wall that broke a computer
- Defendant denied consent to search; officers entered based on exigent circumstances, i.e., a “protective sweep”; Defendant had a baby inside
- Guns and drugs in plain view

Was an exigent circumstance present to justify a warrantless search?

- (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the reasonable belief that contraband is about to be removed; (3) the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; (4) the information indicating that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of it and to escape are characteristics in which those trafficking in contraband generally engage.
- 2 and 5 in favor of Defendant; 1, 3, and 4 in favor of warrantless search
- Shots fired/baby inside/bullet into neighbor's wall = exigent circumstance

Good faith applied – defendant failed to prove statements were ‘reckless or false’, even if good faith did not apply, sufficient facts were alleged

Practice pointer – *check your facts and the affidavit if there is one; review warrantless search exceptions; good faith is hard to disprove

US v Barber, 124 F.4th 354

Facts

- Defendant opened fire on 2 vehicles shot a father and his 10 yr old in head
- Arrested at his WIFE'S home; he was hiding in bedroom
- Police officers explained that a young girl had been shot, and that the gun that was used in the shooting was still missing; WIFE eventually consented.

Was WIFE's consent involuntary?

- We use a six -factor test to determine whether consent was voluntary in this context. These factors are: “(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.”
- 2 and 4 at issue – transparency is not coercion; officers informed her of rights

Practice pointer – *dig deep into those 6 factors for voluntary consent – use the record/reports

5th Amendment

Stu's Views

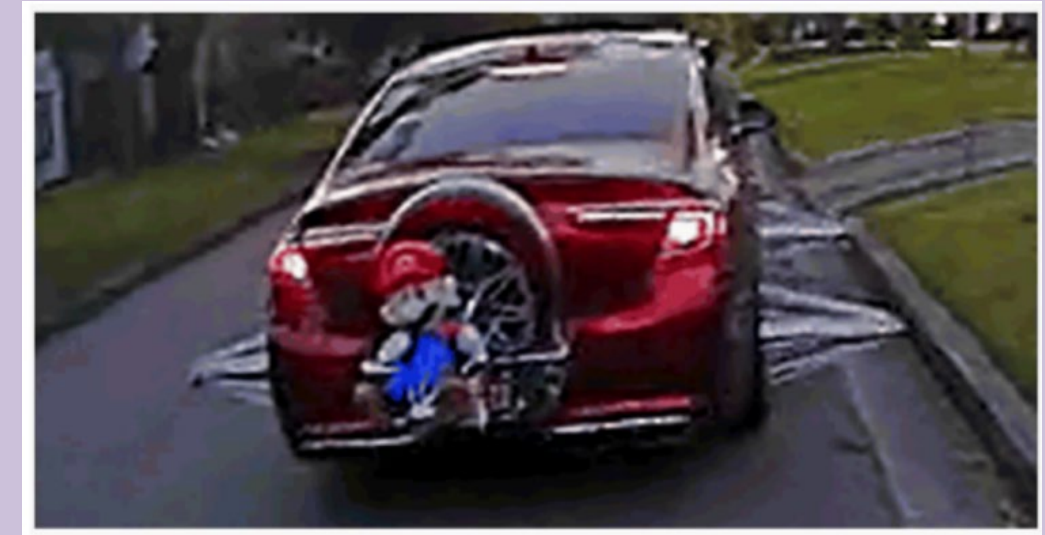
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Miranda warning?
No, this is just a
routine traffic stop.
You don't get *Mirandized*
until after you finish
incriminating yourself.



US vPalmer, 111 F.4588



Back to the Mario stuffy/chariot wheels case...

- After defendant was pulled from vehicle and marijuana was smelled
- Officer placed defendant in handcuffs AFTER he admitted to possession of marijuana

Was defendant entitled to *Miranda* warnings?

- “A suspect is ... ‘in custody’ for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.”
- Defendant does not contend that he was under “formal arrest” when he made the challenged statements, so we must first look to the “freedom -of -movement” test when analyzing whether he was “in custody” for *Miranda* purposes. (for people not arrested and taken to jail)
- This test involves several factors, including: (1) “the length of the questioning”; (2) “the location of the questioning”; (3) “the accusatory, or non -accusatory, nature of the questioning”; (4) “the amount of restraint on the individual's physical movement”; and (5) “statements made by officers regarding the individual's freedom to move or leave.”
- Defendant was handcuffed on side of road and talking to cops (for safety); no accusatory questions, nothing different from at the station, non -threatening, the AR admission was blurted out which confirmed his status as FIP

US v. Rider, 94 F.4th 445

Facts

- Defendant and pastor set up cameras to watch children bathe in the church; police also found videos at different locations – including at home
- Defendant was placed in police vehicle, unlocked doors, no handcuffs, and had a conversation with the officers; he admitted to placing the cameras in church, but said the pastor made him do it and he did not know there was anything sexual about it

Was this a custodial interrogation that required *Miranda* warnings?

- No – this was not a formal interrogation nor was he in custody
- Defendant was in a police car, but it was unlocked and he was free to leave (undisputed); casual conversation and was in view of his family; no coercion

720 months is not substantively unreasonable

- Position of trust and care as church leader; made the kids feel safe; extraordinary steps to cover his tracks

Practice pointer – *review custodial interrogation to see if *Miranda* was necessary and if there was any coercion

US v Garza, 93 F.4 913

Facts

- Officers were executing SW; defendant admitted to gun in bedroom; prosecution admitted it was *un-Mirandized*, but also fell in public -safety exemption
- Court denied suppression of statements; regardless, at trial, defense counsel brought up the statement even though prosecution was not intending to use it

Was there error by introducing *pre -Miranda* statement about the gun?

- Defense opened the door and therefore **invited** error
- Cannot now claim error on appeal

Practice pointer - *don't open the door! And good attempt at reviewing prior guidelines



US v. Kidd, 127 F.4982

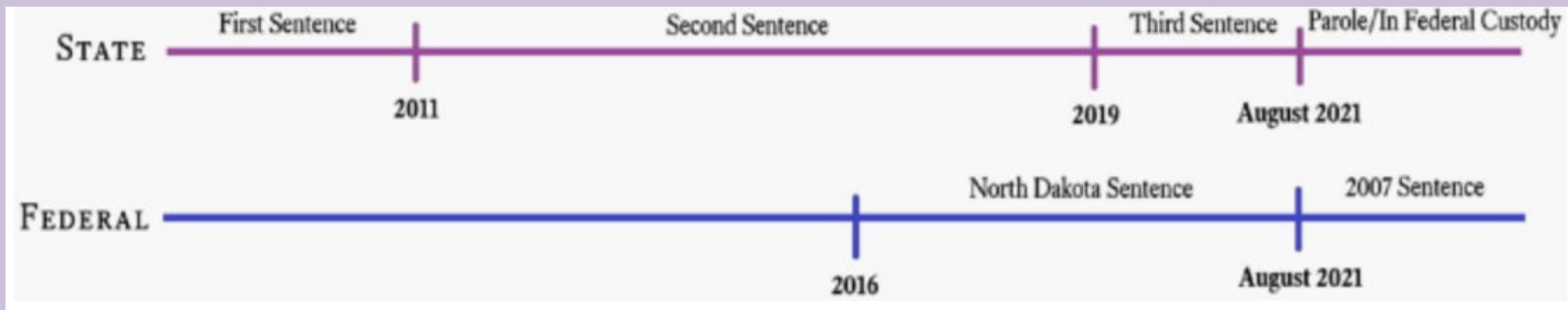
Facts

- Defendant convicted in 2007; sentenced to 60 months; on APPEAL, it was remanded due to miscalculation
- No resentencing ever took place, no one realized – defense, prosecution, or court
- Defendant served unrelated state sentence under the mistaken impression that his 2007 sentence was valid; discovered in 2023
- Lengthy, complex state/federal sentence interplay – defendant was serving numerous state and federal sentences at once (see below w)
- Finally, at resentencing, the district court was amazed, and denied the due process dismissal because he was serving multiple sentences and therefore no prejudice

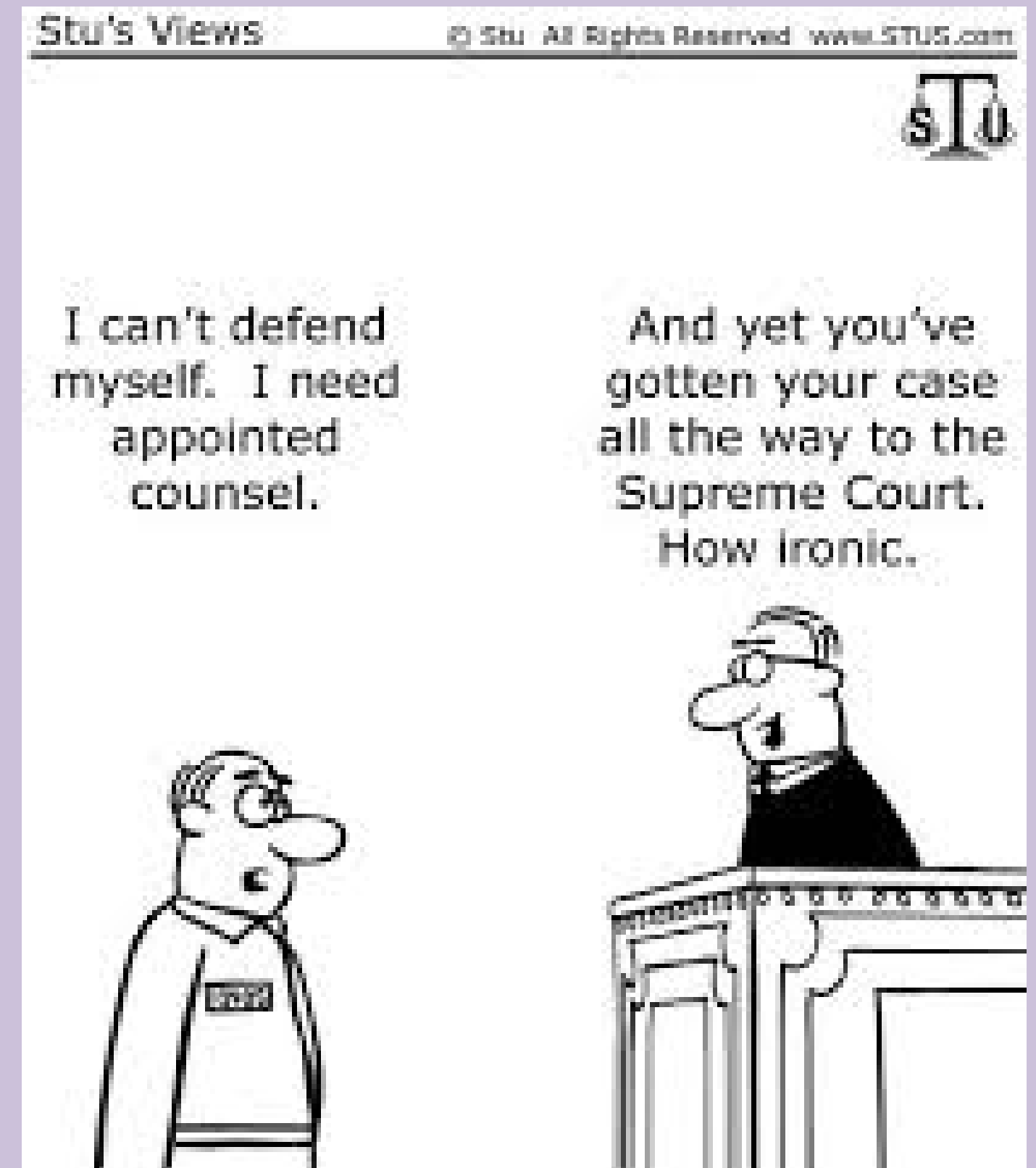
Was this a violation of his due process rights, a 16 year lapse in resentencing?

- Defendant asked for a speedy trial analysis (use *Barker v. Wingo* factors), rather than a due process analysis – length, reason, assertion, prejudice; court reviewed under due process
- 16 years is egregious; plenty of blame to go around on all parties; no assertion bc unaware
- HOWEVER NO Prejudice – defendant cannot show he is worse off now than he would have been; received same 60 month sentence

Practice pointer - *notify the court about any potential resentencing



6th Amendment



US v. Devaney, 109 F.4 322

Facts

- After being arrested for the drug deal gone bad, contends that he requested counsel 4 separate times:
- (1) Defendant mentioned an attorney when officers began asking about the drug deal. But, when officers then asked whether he was invoking his right to counsel, he answered “[n]ot yet ... I'm not asking for an attorney yet.”
- (2) Defendant asked whether the officers would call Brian Poe, stating that he wanted Poe's advice. Defendant then clarified that he wanted merely to call Poe “as a friend” —without hiring him as his attorney —and without ending the interview.
- (3) Defendant asked again whether there was “a way to talk to my attorney without ending the interview.” The officers answered in the negative.
- (4) David asked a third time whether he could call Poe as a friend. The officer responded that he would not allow David to make phone calls at that time. Defendant then indicated that he wanted to continue providing information and consented to searches and forensic testing.

Were any of these statements a valid invocation of the right to counsel?

- 1 and 2 – no – affirmative disclaimer
- 3 – no – contradicting statement – asking to continue interview and talk to attorney; too ambiguous
- 4 – no – as a friend – personal phone call, not a request for counsel

Practice pointer – *make the arguments about invocation of right, but must show an actual request

US v. Sterling, 99 F.4th 783

Facts

- School loan fraud over \$2.7 million which negatively affected 262 students; defendant asked for new counsel and court denied; defendant attempted to proceed *pro se* at trial and his own competency hearing

Should the court have ordered new counsel?

- Court held a hearing and found no conflict – not liking the attorney is not irreconcilable (otherwise some of us may be out of a job)

Did the court err in allowing defendant to proceed *pro se* ?

- For a proper waiver, “[t]he defendant must ‘unequivocally inform the court of his desire to represent himself,’ and the court must determine, through a *Faretta* hearing, whether the defendant is ‘knowingly and intelligently’ choosing to represent himself.”
- Multiple hearings were held and court appointed stand by counsel

Competency hearing *pro se*

- Circuit split – Sixth Circuit does not allow it; 2nd and 8th do allow
- Competency may be overcome at some point later, but in this case, it was not; the facts show defendant validly waived counsel and was competent

Facts

- introverted, autistic, socially challenged, smart 19 year old who enticed a 13 year old to run away
- 4 different mental health professionals evaluated defendant; found he had a ‘factual understanding,’ but not a ‘rational understanding’
- Represented himself *pro se* at trial and decided not to testify (bc it would make him appear schizophrenic); convicted

Did defendant have a sufficient ‘rational understanding’ ?

- Rational understanding does not mean that a defendant must choose the optimal strategy or decision that will benefit him in the proceedings; it does not mean that a defendant must be free from every misconception concerning his case or his chances at trial. Rather, it means that a defendant must be able to perceive the risks and benefits associated with the choices set before him and to make a considered decision based on the facts.
- Yes he did – he understood his rights and what he was facing; he understood he could speak with a lawyer; tried to convince jury it was bc of love

Did court improperly bring up the defendant’s decision to not testify?

- First, when the court directly addressed the jury after defendant expressed that he wanted to testify but was not comfortable doing so in the court's required format; and second, when the court admonished defendant during his closing argument that “This is not a time for you to testify or try to testify. You chose not to.”
- Court gave defendant ample notice about format and notice; defendant understood; also instructed jury that format was required
- As to second – court gave ample leeway to defendant for testifying during closing; it was to prevent anymore

Did court violate Confrontation Clause?

- Court interrupted cross -exam of victim a few times; defendant argues it killed the flow of impeachment
- Record showed that defendant was able to elicit the information he wanted out of victim
- To establish a Confrontation Clause violation, must show that “a reasonable jury might have received a significantly different impression of the witness's credibility had [Boukamp] been permitted to pursue his proposed line of cross-examination If a Confrontation Clause violation is found, it is subject to harmless-error review in light of “the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.”

US v. Crittenden, 115 F.4668

Facts

- PWID meth – defendant and wife; over 10 pounds of meth found
- Defendant's retained defense counsel concurrently represented someone who was in contact with his wife's supplier
- Court held a *Garcia* hearing and told defendant he was entitled to conflict-free counsel – either waivable or non-waivable
- Defendant agreed to waive conflict and go to trial since conflict was only 'tangential' – other person was not a witness nor had info

Did court err by failing to protect defendant's right to conflict free counsel by accepting the waiver?

- The right to conflict-free counsel is not absolute and "can be waived if (1) the waiver is made voluntarily, knowingly, and intelligently, and (2) the conflict is not so severe as to undermine the integrity of the judicial system."
- *Garcia* hearing - to ensure that the defendant (1) is aware that a conflict of interest exists; (2) realizes the potential hazards to his defense by continuing with such counsel under the onus of a conflict; and (3) is aware of his right to obtain other counsel."
- The record showed Crittenden understood and waived the conflict at *Garcia* hearing – hard to think of every potential conflict

Did court err by failing to include a lesser-included jury instruction for simple possession?

- Fed R Crim Pro 31(c) - This rule entitles a defendant to a jury instruction on any lesser included offense whenever two independent prerequisites have been met": Crittenden must have shown that (1) the elements of simple possession were a subset of the elements of possession with intent to distribute, and (2) based on the evidence presented at trial, a rational jury could have found him guilty of simple possession yet acquitted him of possession with intent to distribute
- However, the quantity of meth defendant had was overwhelming – 10.2 pounds of meth is not simple possession and was worth over \$35,000

Practice pointer - *look for lesser included jury instructions – even if you don't win

US v. Kasali, 111 F.3d 137

Facts

- PPP case; submitted 2 loans and misrepresented everything; received over \$4 million
- During the course of the proceedings, defendant went through 5 attorneys; 4th and 5th appointed for trial; she refused to talk with attorneys and at trial refused to change from her jail clothes; judge said change clothes or stay in a holding cell for trial; so she stayed in a cell for 2 days of trial

Did court err by failing to substitute counsel?

- 2 *ex parte* hearings where court heard from defendant; it was merely disagreement about strategy; defendant did not explain what the conflict was or how they were deficient; her unwillingness to cooperate was the lack of communication, not counsel's neglect

Did court err by removing her from trial?

- Rule 43 – right to be present at all stages of trial, but can be waived for disruptive behavior (43c1A) and voluntariness can be implied from defendant's behavior; failing to change clothes, answer the court, protested the appointment of new counsel repeatedly

Did the court err in making defendant pay both restitution and ordering forfeiture?

- Restitution and forfeiture are both allowable in same case – restitution is remedial (make victim whole again) and forfeiture is punitive (disgorge any profits an offender makes from illegal activity); DOJ is in charge of returning restitution

US v. Curry, 2025 WL 80109

Facts

- Defendant sentenced as ACCA
- Argues that *Erlinger* applies and court failed to submit the question of whether his prior crimes occurred on separate occasions
- After the parties filed appellate briefs, SCOTUS issued *Erlinger*

What does *Erlinger* say?

- In *Erlinger v. United States*, the Supreme Court held that the Fifth and Sixth Amendments require a jury, not a judge, to determine unanimously and beyond a reasonable doubt whether a defendant's prior offenses were committed on different occasions for purposes of the Armed Career Criminal Act (ACCA).

Based on *Erlinger*, does defendant get relief?

- On plain error since there was no objection at sentencing – yes there was plain error, but defendant cannot establish that he was prejudiced
- Defendant's convictions were separated by years
- While the Supreme Court has cautioned that “no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones”

Practice pointer - **if there is an ACCA charge, the prosecution is supposed to now be putting notice of the prior convictions to be used in indictment ; check for how much time has lapsed between the offense dates

US v. Butler, 122 F.th 4584

Same as *Curry*

- ACCA case, *Erlinger* appeal

Different factors to consider if you believe you may have an ACCA/ *Erlinger* challenge:

- What was the time span between offenses?
 - Days? Or months and years?
- Who was involved?
 - Different parties - co-defendants or buyers;
- What drugs or contraband was involved?
 - Different forms of illegal substances, i.e., powder cocaine, crack cocaine, marijuana

Sentencing Enhancements



- Guns
- Drugs
- Obstruction of Justice/Loss of Acceptance
- Career Offender
- Substantial Hardship
- CP

US v. Giglio, 2025 WL 274968

Facts

- Mainly a challenge to the constitutionality of 922(g)(1)
- Was a convicted felon; while on SR he went hunting with an AR -15
- At sentencing, the court said it would have imposed the same identical sentence pursuant to any variance or non-guidelines sentence, based on everything it heard at the sentencing hearing and the 3553 factors (Gulfport Guirola case)

Was defendant entitled to the 'lawful sporting' offense level?

- 2K2.1(b)(2) = would have reduced base offense level from 14 to 6 since he was hunting
- EVEN if defendant is correct about the error, it can be harmless error 2 ways:
 - If the district court considered both correct and incorrect ranges and explained it would have given the same sentence;
 - Which is what happened here
 - Saw the original range, heard arguments re objection, requested additional evidence, and then provided justification and explanation

Practice pointer - *this is awful. Hard to overcome – just make a good record at sentencing and show prejudice

US v. Martin, 119 F.4410

Facts

- Defendant caught riding a scooter that had been reported stolen; took a 9mm from his person and chucked it; recovered with 16 rounds of ammo
- The government requested the 2K2.1(a)(4)(B) offense level re “possessed a firearm loaded with a magazine that could accept more than 15 rounds”; an 8 level increase

How does one define “large capacity?” (matter of first impression)

- The Guidelines do not define “large capacity,” but the commentary does:
- For purposes of subsections (a)(1), (a)(3), and (a)(4), a “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm.
- Court followed SCOTUS case *Stinson* which held “commentary is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”
- Defendant insisted that “large” denotes an atypical size, and magazines that hold more than 15 rounds of ammunition are not atypical.
- Court disagreed and that *Stinson* was controlling

US v. Pena, 91 F.3d 4813

US v. Romero, 112 F.3d 409

Pena Facts

- Defendant sold a firearm to an undercover ATF agent; arrested months later
- PSR started him off at a 20 due to the firearm “being capable of accepting a large capacity magazine” pursuant to 2K2.1(a)(4)(B)
- Objection filed – argued that the gun did not have a magazine attached
- Special Agent submitted two results and a video clip of it being able to accept a large capacity magazine

Was this a correct application?

- Yes – the special agent’s reports and videos were sufficient to prove that the firearm could accept a large capacity magazine

Romero – firearm was found near the magazine

- **On second appeal** – first appeal was remanded for resentencing (victory)
- At resentencing – agent provided tests and evidence
- New evidence can be reviewed at resentencing

Practice pointer – *force the government to provide evidence and video of firearm testing

US v. Henry, 119 F.429

Facts

Defendant saw defendant in a BURGLARY in front of a store that was reported stolen, he fled and threw

<14. Application of Subsections (b)(6)(B) and (c)(1).-->

<(A) In General.--Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.>

<(B) Application When Other Offense is Burglary or Drug Offense.--Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.>

facilitated, or had the potential of facilitating, that offense, no presumption is made.

- no evidence of facilitation; no presumption is made when the firearm and illegal items are in 'close proximity' only – must show more

Practice pointer – read 2K2.1(b)(6)(B) carefully – the facilitation only applies for non –drug felonies

US v. Wilson, 111 F.3d 467

Facts

- After setting up controlled buy, defendant was traffic stopped; co-defendant was driving, co-defendant was in passenger seat, defendant was in backseat; defendant admitted to possessing 2 of 3 firearms in car

Was enhancement proper?

- 2K2.1(b)(6)(B) – firearm in connection with another felony (drug trafficking); also 3 or more firearms enhancement
- When the other felony offense involves drug trafficking, the connection between the firearm and the offense is presumed if the “firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia.” The enhancement then applies “automatically,” reflecting the Sentencing Commission's judgment that “ ‘the presence of the firearm has the potential of facilitating these types of offenses.’”
- Over 160 grams of powder cocaine found – amount indicative of distribution
- Firearms are tools of the trade for trafficking
- Even though co-defendant admitted to possession of the third firearm; defendant can still constructively possess

Judge Hay

- Simply because the firearm was in the car. See
- In this case, the firearm was not cited in the offense of conviction. Nor was the defendant charged with possession of the firearm. The Ruggie
- The majority must have found that every gun in the car isn't yours. Indeed, the “mere co-defendant's possession when the

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US v. Cisneros, 2025 WL 719964

Facts

- 2 separate bedrooms; one had ammo and the other had drugs; enhanced with 2K2.1(b)(6)(B) for possessing ammo in connection with another felony

h

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- “For ammunition to have such a deterrent effect to potential threats, it is necessary that it be in plain sight to purchasers involved in the trafficking.”
- Ammunition that is merely stored in close proximity to drugs or drug paraphernalia, even if easily accessible, does not sufficiently facilitate a drug trafficking offense
- Practice pointer - *be aware the standard is different for AMMO and FIREARMS

US v. McNeal, 102 Fth4708

Facts

- Defendant's current 922(g)(1) charge stems from an **agg assault and murder related** to two separate shootings (also crazy long CH)
- PSR included 2K2.1(b)(6)(B) – for using a weapon in connection with another felony offense
- At sentencing, the court found that with or without the enhancement, the guidelines did not accurately reflect his criminal history
- Court declined to rule on objection as unnecessary and enhanced by 60 months based on 3553

Was this procedurally unreasonable? Should court have ruled on objection?

- *Gall* – all sentencings should be correctly calculated based on applicable guidelines range
- Court disagreed that the objection was not considered or calculated; the court did not apply the new guidelines range with enhancement
- Regardless – harmless error; crazy long criminal history and 2 separate shootings

Obstruction of Justice/Loss of Acceptance



“On the charge of obstructing justice,
how do you plead?”

US v. Malmquist, 92 F.4 555

Facts

- Defendant released on bond and then reprimanded for 2 failed drug tests; then arrested for possession of drugs; during this time, entered a plea that included the promise of acceptance of responsibility
- PSR did not include acceptance based on defendant's drug tests and arrest; prosecution agreed with no acceptance credit at sentencing

Was defendant entitled to acceptance of responsibility credit?

- Argued that the prosecution breached the plea agreement by arguing against the acceptance credit; and that **all parties were aware of the positive results and arrest PRIOR to the plea agreement**
- SCOTUS case – *Puckett* is unlike this case because the bad conduct occurred AFTER the plea agreement was entered and the government could choose to deny credit
- Plain error established and prejudice

Practice pointer – *if you run into this scenario, remember *Malmquist* – we had a similar case with this exact dispute and won

US v. Hildreth, 108 F.4 912

Facts

- Defendant was involved in traffic stop and found in possession of a gun; 922g1; on pretrial release, he was arrested for DV assault on his father and ordered to attend inpatient treatment;
- Discharged for possession of a cellphone and makeshift tattoo gun and remanded to custody;
- Pled guilty and released on bond;
- Then was arrested for choking girlfriend and remanded
- The PSR did not include an adjustment for acceptance of responsibility, reasoning that one was unwarranted because Hildreth continued to engage in criminal conduct by assaulting his father and former fiancée. Hildreth objected that this conduct was unproven. The PSR noted that an upward departure might be warranted because the criminal history score underrepresented the seriousness of his criminal conduct —and attendant likelihood of recidivism—as several charges had been dismissed, several offenses were assaultive, and several more involved drug possession.
- No abuse of discretion for denial of adjustment based on acceptance of responsibility due to his conduct on pre-trial supervision; continued criminal conduct both pre-plea and post-plea

Practice pointer - *compare to *Malmquist* – when the continued criminal conduct occurred – here it was post-plea



US v. Bell, 2025 WL 66319

- Facts
 - Defendant lost his acceptance of responsibility credit because he got into a fight with his inmate roommate because the roommate was snoring! Roommate attacked Defendant and fought

Should he have lost acceptance credit?

- (1) “truthfully admitting the conduct”;
“voluntary termination or withdrawal from criminal conduct or associations”;
and (3) the “timeliness” of acceptance of responsibility.
- Court: “an inmate who asks his cellmate to stop snoring can hardly be described as an “aggressor” of criminal conduct when the cellmate escalates the encounter to physical violence”; also self-defense
- Vacated and remanded

(2)

”;

US v. Ortega, 93 F.4 278

Facts

- Defendant charged with CP and had jail phone call with wife:

Ortega: Have you started working on that letter yet?

Rubio: Yeah, it's just that I don't know how to start it off ...

Ortega: What do you mean?

Rubio: Like, I don't know how to start it off. I just put that I wanted to speak today. What do I say after that? Or?

Ortega: Say you wanted to speak today because ... you wanted to make sure the judge knows that this is out of character. This is not something that I do. It's just the drugs had a very ... bad influence on my life and I just made the wrong decision. I don't know, something like that, that you think that I need, like, treatment and that ... if he could show me some type of leniency, so that I could come home with my kids ... say, like you understand the sever[ity] of the charge, but my issue is not what I am being charged with. My issue is the drugs. Like, that I don't remember, like, that it is just not something that I was doing. I don't know, just something like that, but like, in your own words, I guess. Like, and I want you to, like, make sure, like you put in there that I did tell somebody about it, like, when my mind was clear headed. Like, I told somebody, that, you know, that I erased it. That I didn't know it was still on my phone ...

Is this worthy of obstruction of justice 2 level enhancement under 3C1.1?

- This was not threatening, intimidating, or influencing anyone
- Defendant's drug use was extensive and known to wife
- There was no undue influence – everything was supposedly in the record already in the PSR
- Influencing witnesses to tell the truth is not obstruction

US v. Parra, 111 F.3d 451

Facts

- Defendant, an American citizen, tried to enter the Mexico but was turned back; as he was re-entering the US, he was stopped by Border Patrol; he denied having a firearm, but later admitted to having a gun and body armor; during post-arrest interview, denied knowing it was illegal to transport a firearm into Mexico but later admitted he assumed it was illegal
- PSR included 2-level obstruction enhancement for the above statements

Should the obstruction enhancement apply?

- 3C1.1- If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.
- A § 3C1.1 enhancement typically involves 'egregiously wrongful behavior whose execution requires a significant amount of planning and presents an inherently high risk that justice will in fact be obstructed.'
- Making false statements does not always trigger 3C1.1; it can trigger the enhancement if it significantly obstructed or impeded the official investigation or prosecution
- The statements defendant made were false, but did not lead the officers on a 'wild goose chase' – the enhancement was error
- Yes there was prejudice – vacated and remanded

Practice pointer - *check the 3C1.1 language – argue the statements did not significantly impede the investigation or prosecution

US v. Ritchey, 117 F.4762

Facts

- Defendant defrauded VA for medical supplies during COVID; bought a ton of n-95 masks for \$3.49 and regular masks for \$1.16; resold to VA for \$20 -25
- Made over \$2 million and over \$270,000 from the VA alone
- 2B1.1 calculation – PO utilized a pre -pandemic Fair Market Value of the masks – less than \$2.00 for n -95 and \$.0.37 for regular mask; used 3M prices

Was the FMV calculation incorrect?

- Defendant argues it was error to calculate FMV by reference to PPE prices prevailing before the pandemic, as opposed to prices prevailing at the time the goods were sold.
- Supreme Court defined FMV – “[T]he price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of the relevant facts.”
- The FMV prices should have been the pandemic prices at which Defendant purchased, not pre -pandemic prices
- Plain error and prejudice found – reduction in guidelines range; vacated



US v. Day, 117 F.3d 422

Facts

- Defendant defrauded people through a shipping container scam; PSR identified 41 victims and over \$2 million in loss amount
- PSR included a 2B1.1(b)(2)(C)'s 6 -level enhancement for causing substantial hardship to over 25 individuals
- PSR did not analyze the individual victims' financial circumstances

Should 2B1.1(b)(2) enhancement be removed?

In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim —

(i) becoming insolvent; (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code); (iii) suffering substantial loss of a retirement, education, or other savings or investment fund; (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans; (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and (vi) suffering substantial harm to his or her ability to obtain credit.

- U.S.S.G. § 2B1.1(b)(2), substantial financial hardship is “a loss” that “significantly impacts the victim's resources.”
- The record did not support the enhancement — no evidence that the victims suffered from any substantial financial hardship;
- This appears to rest the enhancement on total loss alone. True, \$40,000 is a significant financial loss to many people. It is also true that when many victims each incur a \$40,000 loss, the total loss is sizeable. But the loss table in § 2B1.1(b)(1) already accounts for these concerns. The substantial -hardship enhancement in § 2B1.1(b)(2) captures something different: Rather than punishing the total loss, § 2B1.1(b)(2) punishes the hardships imposed on victims.

Practice pointer - *must be **SUBSTANTIAL**



US v. Wesley, 123 F.423 US v. Le, 2025 WL 209026



Both are drug cases involving 2D1.1(b)(12) – maintaining a premises for purposes of distribution

- *Wesley* – used a residence for the purpose of distribution; had keys to residence, could access it whenever he wanted; but lived in a different city
- *Le* – used a motorcycle shop for distribution; did not have possessory interest, no keys, had to have permission to use transact

When is 2D1.1(b)(12) applicable?

- 2D1.1cmt . n.17. “Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises.” *Id.*
- “Among the factors the court should consider in determining whether the defendant ‘maintained’ the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.” *Id.*
- *Wesley* – yes enhancement applicable; keys and accessibility
- *Le* – vacated and remanded – the motorcycle shop was the place of preference, but no possessory interest at all

Practice pointer – *very fact based – did D have keys or was building in his name, could he access it 24/7, what was purpose of building, any others involved with maintaining property, where was it located?

US v. Minor, 121 F.41085

Facts

- Defendant convicted of fentanyl drug distribution
- PSR calculated him as career offender; two of his convictions were a 2000 and 2010 marijuana distribution charge
- 2018 Controlled Substance Act amended the definition to exclude hemp; defense argued this categorically excluded him

Was defendant a career offender?

- Use the definition of drugs at the time of **SENTENCING**, not at time of prior conviction
- Luckily for defendant – not a career offender

Practice pointer – *USE definitions at date of sentencing, not at time of conviction

There is a circuit split on this – *dissent by Judge Duncan – wants to apply USSG at time of prior conviction; this is in line with the 4th and 6th Circuits....we have a circuit split with 1st, 2nd, 5th, and 9th of all circuits!

US v. Smith, 115 F.4370

Facts

- Victim was 13; victim did prostitute herself out too; defendant was pimp; pled guilty to enticement and received two 2 -level enhancements for “unduly influenced a minor to engage in a sex act” and “basis he should have known she was a vulnerable victim”

2G1.3(b)(2)(B) – unduly influenced a minor

- The facts clearly showed defendant influenced her – he was bigger, older, stronger, carried gun, kept money, they had sex, kept her at his house

3A1.1(b)(1) – vulnerable victim

- “vulnerable victim” means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.
- Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.
- Defense argued victim’s age should not matter; court disagreed
- Her age was not a factor incorporated (one where an enhancement is warranted based solely on age)
- Facts clearly showed he knew she was vulnerable

US v. Santiago, 96 F.3d 834

Facts

- Defendant and coconspirators were selling drugs out of hotel room; a buyer decided to rob them; shootout – 13 were shot, none died, over 80 shots; pled guilty but saw the PSR cross referenced 1st degree murder and moved to withdraw his plea; sentenced to 36 months and court may have cross referenced to 2nd degree murder, but def upwardly varied due to the shooting
- Prosecution argued proper – shootout in a hotel, guests could have been killed, injuries, attempted to kill other gang

Was cross -reference proper?

- Section 2A2.1 of the guidelines defines first -degree murder by reference to 18 U.S.C. § 1111. That guideline does not define non -first -degree murder, though. Without clearer guidance, we continue to look to § 1111, which defines “[a] ny other murder” that was not, inter alia, “deliberate, malicious, [or] premeditated” or committed as part of other specified crimes, as “murder in the second degree.” 18 U.S.C. § 1111(a).
- Self-defense is an affirmative defense to a charge of murder under § 1111 that “negates the[] elements of criminal behavior.”
- Defendant must present evidence that (1) he was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well -grounded apprehension of death or serious bodily injury; (2) he had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) he had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and (4) a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.
- 1, 3 and 4 = yes, the other gang attempted to rob him
- 2 – sure, selling drugs and carrying guns may be reckless and negligent, but engaging in lawful conduct does not by itself constitute provocation
 - Factor 2 – requires provocation; no evidence Defendant provoked other gang

Practice pointer – *watch cross -references – can still claim self -defense

US v. Rudolph, 103 Fth4356

Facts

- Defendant has long criminal history, one of which from July 15, 1996 and released to parole on September 12, 2000; PSR listed him as career offender
- According to PO, he was revoked on August 19, 2004 for another arrest
- PO cited to “court records” to substantiate, but defendant denied this revocation (without revocation, would have exceed 15 years)

Should Defendant be a career offender?

- objected to the claim that his parole was revoked in 2004 for the 1996 drug conviction, but he did not present rebuttal evidence. But, he is not required to present rebuttal evidence when the Government's evidence lacks an adequate evidentiary basis; his objection “sufficiently alert[ed] the district court to questions regarding the reliability of the evidentiary basis for the facts contained in the PSR.” In fact, assuming that defendant was never revoked for the 1996 drug conviction, he would be required him to prove a negative. In response to the objection, the Government explained that its factual claim was sourced from “court records.” But no records were presented in support of that assertion.
- Government has burden to prove prior convictions; the PO’s word was insufficient
- Vacated! But...Remand – allows the government to present any new evidence about parole

Practice pointer – *challenge any objection for insufficient proof – force them to provide documents; hard to prove a negative

US v. Morales, 122 F.4590

Facts

- Sentenced to 188 months for money laundering; received 4 -level enhancement for organizer/leader; 0 criminal history points
- filed a motion for reduction in sentence based on zero point offender

Should Defendant have received reduction?

(a) Adjustment. —If the defendant **meets all of the following criteria** :

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A;
 - (2) the defendant did not receive an adjustment under § 3A1.4 (Terrorism);
 - (3) the defendant did not use violence or credible threats of violence in connection with the offense;
 - (4) the offense did not result in death or serious bodily injury;
 - (5) the instant offense of conviction is not a sex offense;
 - (6) the defendant did not personally cause substantial financial hardship;
 - (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (8) the instant offense of conviction is not covered by § 2H1.1 (Offenses Involving Individual Rights);
 - (9) the defendant did not receive an adjustment under § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) or § 3A1.5 (Serious Human Rights Offense); and
 - (10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848
- Defendant did receive the 3B1.1 aggravating role = no adjustment allowed

Practice pointer - *check the factors under 4C1.1

Sentencing and Restitution



"You're hereby sentenced to 500 hours community service repairing furniture and cooking porridge for local woodland creatures."



"No, I don't think the Three little pigs had to pay restitution to the wolf's widow."

US v. Perkins, 99 F.4 804

Facts

- Convicted on multiple CP distribution/ etc ; undeniable mental health issues (schizophrenia)
- As to competency – there were 3 doctors; 2 found him competent and 1 incompetent; “religious thoughts are no uncommon” for psychotic disorder rendering incompetence

Was the sentence procedurally unreasonable as the court failed to explain its deviation from the guidelines?

- Significant procedural errors include:
 - (1) failing to calculate (or improperly calculating) the applicable Guidelines range; (2) treating the Guidelines as mandatory; (3) failing to consider the 18 U.S.C. § 3553(a) factors; (4) determining a sentence based on clearly erroneous facts; or (5) failing ... adequately [to] explain the chosen sentence, including an explanation for any deviation from the Guidelines range.
 - the question is whether the court violated its obligation to “explain [its] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.
- Very easy to satisfy, unfortunately
 - Checking “four supporting § 3553(a) factors” in the “Statement of Reasons” form and explaining that the court “opted ... for an above-guidelines sentence driven by the § 3553(a) factors” is enough; an explanation that the variance is based on “prior similar drug conduct mentioned in the PSR.” ; or a statement of reasons that explained that the court took into consideration the need to deter future criminal conduct and the need to protect the public, in light of the defendant's history of assaultive and sexually assaultive behavior, and noted that the sentence was as based on (1) the nature and circumstances of the offense and history and characteristics of the defendant, (2) the need to adequately deter criminal conduct, and (3) the need to protect the public from further crimes.
 - A statement that “the court has considered the arguments made earlier and as well as the information in the report” can be enough, depending on the content of the sentencing record
 - On the other hand, “a single passing reference to § 3553(a)” and an indication that the variance was “based upon the government motion for upward departure” do not suffice. Nor does “a bare recitation of the Guideline's calculation” that “does not mention a defendant's arguments. Nor an explanation “based ... on § 3553(a)(2)(A)” that merely “discussed what [the defendant's] sentence might have been” for a related, but uncharged, crime —and that failed to “address [his] argument regarding the factors under § 3553(a)(1).”

*** Therefore, we hesitate to say that what is minimally sufficient for a 41-month sentence is also sufficient for a 137-year sentence. What is good for the goose, is good for the gander —but not necessarily a pterodactyl”

US v. Woods

Facts

- Defendant and another broke into a British Consul General's house and stole property and caused damage; pled guilty
- PSR discussed Woods's history with substance and alcohol abuse
- At sentencing, the judge stated: "I'm going to require him to participate in a drug treatment program until he completes the program with the approval of the Probation Officer and Program Director. And while in the program, he's not to consume alcohol excessively."
- The written judgment lists three special conditions of supervision: (1) Woods must "refrain from the excessive use of alcohol"; (2) he must participate in mental health treatment; and (3) he must participate in substance abuse treatment.

Was the written condition broader than the orally stated special condition?

- The key determination is whether the discrepancy between the oral pronouncement and the written judgment is a conflict or merely an ambiguity that can be resolved by reviewing the rest of the record."
- "[I]f ... the difference between the two is only an ambiguity, we look to the sentencing court's intent to determine the sentence." A conflict exists "[i]f the written judgment broadens the restrictions or requirements of supervised release from an oral pronouncement."
- Here, the written condition conflicts with the oral pronouncement because a requirement to refrain from the excessive use of alcohol at all broadens or is more burdensome than a requirement to refrain from the use of alcohol while in the program.
- Practice pointer - *especially watch out for BROADER language on alcohol, mental health, and Internet special conditions



US v. Martin, 119 F.4410

Facts

- Remember the large capacity magazine case? As to special conditions, similar case to the last case - *Woods*
- The district court orally pronounced several conditions of his supervised release.
 - First, the district court required that he participate in an outpatient treatment program for drug and alcohol abuse.
 - Second, the court required that he submit to searches conducted at a reasonable time, in a reasonable manner, and when reasonable suspicion exists
 - The written judgment differed from the oral pronouncement regarding drug and alcohol abuse by permitting “inpatient” treatment facilities and by allowing the probation officer to determine whether defendant should participate in “an approved treatment program for substance abuse” after a positive urinalysis test. The written judgment differed from the search condition by requiring Martin to “consent to a warrantless search or seizure” of “the defendant's person and premises, including any vehicle.” The written judgment also lacked the oral requirement that the search be “conducted at a reasonable time in a reasonable manner.”
- Remanded

US v. Trevino, 125 F.4198

Facts

- Convicted of CP production
- ON SECOND APPEAL – on first appeal, the Panel vacated and remanded because the court failed to orally pronounce the standard conditions; because the standard conditions are discretionary, they must be read into the record
- The district court complied and removed the standard conditions
- Later, probation moved to modify the sentence and reimpose the standard conditions, believing they were necessary to supervise the defendant

Should the district court be allowed to reimpose the standard conditions based on a modification?

- Yes – 18 USC 3583(e)(2) allows for modification after considering the factors set out in 18 U.S.C. of supervised release at any time prior to the expiration or termination of the term of supervised release.”
 - The statute permits the court to, § 3553(a), “modify ... the conditions
- The initial panel vacated the conditions, the district court complied.

Practice pointer – *even if you win on appeal, the standard conditions can pretty much be included via modification

US v. Vega-Santos, 122 F.4 571

Facts

- Very niche case
- Special condition - The defendant shall undergo a psychosexual evaluation with the understanding **that if further sex offender specific treatment is recommended**, he will participate in a sex offender treatment program operated by a Licensed Sex Offender Treatment Provider and/or other sex offender treatment program until successfully discharged. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph examinations, to determine if the defendant is in compliance with the conditions of release. The defendant shall pay the costs of the program based on the defendant's ability to pay.
- While Vega -Santos's appeal was pending, this court held in *United States v. Pimentel -Soto* that the same special condition at issue here constitutes an unlawful delegation of sentencing authority. No. 23 -50727, 2024 WL 4692026, at *1 (5th Cir. Nov. 6, 2024) (unpublished). In *Pimentel -Soto*, we explained that “several” prior cases had already “vacated substantively indistinguishable conditions” and that “the district court erred by delegating the decision on *Pimentel -Soto*'s sex offender treatment to an evaluator.” *Id.* at *2 (collecting cases). Accordingly, we vacated the special condition in that case and remanded to the district court for resentencing.
- To the contrary, upon “a psychosexual evaluation,” the condition imposes treatment automatically, without any subsequent court order, “if further sex offender specific treatment is recommended.” See also *id.* at *1 (stating the same). Under those plain terms, the condition as written makes clear that the discretion lies in the hands of a psychosexual evaluator, not the court.

US v. Nelson, 114 F.478

Facts

- Defendant convicted of CP possession; at sentencing, the court was furious:
- The district court orally pronounced its decision to restrict Internet access for life and without exception. The district court several times repeated, “I’m not going to at this time allow you to ever access a computer as a term of your supervised release,” “[a]s far as I’m concerned, you will never use a computer or a phone, anything that has images on it or accesses the Internet,” and “you will not have access to a computer.”
- But the written judgment mirrors the PSR’s language. It outlines **less restrictive** special conditions, allowing defendant to access and use the Internet “for reasons approved in advance by the probation officer.”
- *in general – oral pronouncement must be followed!!!
- Here the special condition must be narrowly tailored
- District courts cannot impose lifetime conditions banning Internet
- Temporal limits must be set – 25 years is ok though

Practice pointer – *watch out for the Internet condition –
must be narrowly tailored and not infinite



Restitution cases

US v. West , 99 F.4th 775

- CP case – *Paroline* reaffirmed; if there is more than \$3,000 in restitution under 18 USC 2259 (mandatory restitution for CP production or trafficking) to each victim; the court must conduct a proximate -cause analysis
- District court imposed \$6,000 but did not conduct proximate -cause analysis; the analysis must determine that the defendant's conduct proximately caused the victim's claimed losses
- Vacated and remanded – prosecution can, however, show evidence of proximate cause

US v. Joseph , 102 F.4th 686

- Incarcerated for 460 months; owed \$24,000 restitution; while incarcerated, he accumulated over \$18,000 in his trust account
- Prosecution, right at the 20 year mark, seized it and applied it towards restitution, 18 USC 3613(b); argued 3613(c) controlled

US v. Stinson , 125 F.4th 191

- Convicted and owed \$3.6 million in fraud; prosecution sought to garnish assets titled solely in WIFE's name – IRA \$150,000
- District court said it was marital property
- Question is whether, under Mississippi law, a person has a property interest in assets titled solely in his or her spouse's name that may be garnished under the governing federal statutes?
- Caselaw and Debbie Bell said NO! marital property is only that upon divorce; property does not become marital simply by marriage

Substantive offenses



US v. Fatani, 2025 WL 100796

Facts

- PPP wire fraud case; would apply and falsify numbers/payroll info; defendant was a borrower and submitted false info about company

“To support a wire fraud conviction, the government must prove: (1) a scheme to defraud; (2) the use of, or causing the use of, wire communications in furtherance of the scheme; and (3) a specific intent to defraud.” On appeal, defendant does not challenge the first or third element. He challenges the second element, contending that the government did not show that the June 26 check and resulting wire were in furtherance of the scheme to defraud.

- Defendant asserts that the scheme to defraud was complete when the PPP loan funds were deposited into company’s bank account on June 5 (21 days before the June 26 check). As a result, he contends that the June 26 check could not have been an essential part of that scheme.
- Sufficient evidence that co -d was a “person[] intended to receive the money” and that co -d receiving his share was an essential part of the scheme. Co -d was the one who falsified or directed the falsification of the payroll information necessary for company to receive a PPP loan. When the co -conspirators explained the fraudulent loan scheme, they told borrowers that the funds would be divided between the borrower and the co -conspirators. Money was to be diverted to the mastermind. Thus, the division of proceeds between co -d and mastermind was an essential part of the scheme to defraud.

US v. Perez-Gorda, 115 F.4th 4653

Facts

- Her husband suffered brain injury with army; defendant was able to secure Dept. of VA benefits; but husband was more mobile than represented

Defendant went to trial and challenged jury instruction

- A conviction for wire fraud or mail fraud requires a showing that the defendant acted with “specific intent to defraud.”
- the district court instructed the jury that a “specific intent to defraud” means “a conscious, knowing intent to deceive **or** cheat someone.” That instruction was consistent with pattern instructions in effect at the time of the trial.
- After conviction, and while this appeal was pending, the Fifth Circuit clarified that specific intent in this context requires an intent to both “deceive **and** cheat” someone. *United States v. Greenlaw*, 84 F.4th 325, 351 (5th Cir. 2023)
- However, no showing was made – defendant failed to even attempt to show a different outcome (harmless)
- The jury also heard evidence that the Department of Veterans Affairs awarded the highest tier of caregiver benefits after she told them Justin could not be left alone —but that defendant then left him alone for nine days while she vacationed at Disneyworld. And it heard evidence that she traded in the car that she had requested from Veteran Affairs to accommodate husband’s mobility —for a new Escalade without the corresponding adaptive equipment.

Practice pointer - *specific to wire fraud or mail fraud conviction under 1341 et seq

US v. Abundiz, 93 F.4th 825

Facts

- Defendant convicted of aggravated sexual abuse of minor; court allowed minor to testify via CCTV
- Defendant challenged the CCTV as violation of 6th Amendment confrontation clause

Was this a 6th amendment violation?

- The Sixth Amendment guarantees a criminal defendant the right to confront witnesses who testify against them. However, the Supreme Court has recognized several exceptions to the right to physically confront witnesses. Relevant here, the Supreme Court in *Maryland v. Craig* held:
 - [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.
- Following *Craig*, Congress enacted 18 U.S.C. § 3509(b) to “specify[] the procedures to be used in federal courts to allow a child victim to testify via [CCTV].” Of note, § 3509(b) permits 2-way CCTV under certain circumstances, providing a greater ability for defendants to confront witnesses than the Craig Court, which upheld the use of 1-way CCTV.
- In 2004, the Supreme Court in *Crawford v. Washington* held that testimonial out-of-court statements by witnesses are barred by the Confrontation Clause unless the witness is otherwise unavailable and the defendant had a previous opportunity for cross-examination. Defendant argues that the Supreme Court's holding in *Crawford* “conflict[s]” with *Craig*—and presumably by extension, 18 U.S.C. § 3509(b)—and that “various courts and scholars have struggled to reconcile *Craig* with the Court's subsequent holding in *Crawford* .”
- BUT...*Crawford* did not overturn *Craig*
- Plus – defendant did not explain how having minor testify in person would be better than CCTV or how this was a different situation

US v. Lerma, 123 F.4768

Facts

- On 3rd revocation and transferred to Dismas
- Defendant leapt the fence and left
- Voluntarily returned that day, but charged with escape
- PSR base-level offense of thirteen. The officer then applied two reductions: a two -level reduction for acceptance of responsibility and a four -level decrease under U.S.S.G. § 2P1.1(b)(3). U.S.S.G. § 2P1.1(b)(3) provides a four -level reduction where an individual escapes from a **non -secure** facility yet did not return voluntarily within ninety -six hours. As a result, Lerma's base offense level was seven.
- By contrast, U.S.S.G. § 2P1.1(b)(2) provides a seven -level reduction where the individual does return voluntarily within ninety -six hours —as Lerma did here.

Should he have received the 7 level reduction or 4 level reduction?

- Commentary attached to U.S.S.G. § 2P1.1(b)(2), which defines “non -secure custody” as “custody with no significant physical restraint.” The Commentary also observes that escape from “an institution with no physical perimeter” would constitute an escape from non -secure custody. U.S.S.G. § 2P1.1(b)(2) n.1.
- The parties agree that defendant jumped a fence to escape Dismas Charities, a secured facility.
- Leaping a fence to escape a community corrections center, community treatment center, halfway house, or similar facility, constitutes escape from secure custody.
- Therefore, only the 4 level reduction applied, not the 7 level.



US v. Lerma (cont.)

Facts

Here, counsel objected to the sentence, but did not claim there was an improper factor used or that Lerma's history and characteristics did not justify the variance.

The Government argues that this statement was insufficiently general and denies the court the opportunity to identify and correct any errors. We agree and accordingly review for plain error.

“To preserve error, an objection must be sufficiently specific to alert the district court to the nature of the [claimed] error and to provide an opportunity for correction.”

To be sure, “[w]e have never required a party to express its objection in minute detail or ultra precise terms.” But merely reciting the magnitude of a departure from the Sentencing Guidelines is insufficient to preserve procedural error. Simply objecting that the sentence was a “tenfold increase” is nothing more than a statement of mathematical fact and was not sufficient to preserve procedural error.

Specific = procedural error

General = substantive error

Practice pointer - *object with specificity, especially as to procedural error! But really just be specific and contemporaneous always

US v. De Bruhl, 118 F.435

Facts

- Defendant was special agent who was tasked with developing a relationship with a person who had suspected terrorist ties in Dubai; the relationship turned into a relationship and eventually tipped him off about the investigation; numerous convictions, but this concerns 1512(c)(2)

Section 1512(c) provides that:

Whoever corruptly —

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or **attempts to do so** ,

SCOTUS handed down *Fischer v. US* — which reversed and found that ‘attempts to do so’ requires a finding of (1)...instead of in tandem

- Fischer assaulted a police officer during J6 and charged with 1512
 - SCOTUS- the conduct proscribed by the statute must comprise “obstruct[ing], influence [ing], or impede [ing] any official proceeding” by tampering **with evidence** . See id. at 2186 (“Subsection (c)(2) was designed by Congress to capture other forms of evidence and other means of impairing its integrity or availability beyond those Congress specified in (c)(1).”).

How to define involve in terrorism enhancements?

- 1001 — “involve” and how much does it encompass regarding terrorist activities?
- In defendant’s view, the statute's enhancement can only be triggered by a connection to specific acts of terrorism; the Government asserts that misconduct more generally linked to terrorism —e.g., compromising a counterterrorism investigation and then lying to cover it up —suffices
- Both are correct ... but with all reasonable inferences in support of the verdict...it was sufficient

US v. Brannan, 98 F.4th 636



Facts

- Sister called cops due to defendant's alleged assault of her boyfriend; defendant used pipe sealed with clay and cardboard and dimes inside; defendant claims it was "a makeshift roman candle firework"
- At trial, defendant asked for a jury instruction that they had to find he intentionally designed it for use as a weapon; court rejected and said it was an affirmative defense, not an element

Was this error?

- Decades ago, we held in *Beason* that § 5845(f)'s exceptions are affirmative defenses, not offense elements. 690 F.2d at 445. As we explained, "[e]xceptions to statutory definitions are generally matters for affirmative defenses, especially where the elements constituting the offense may be defined accurately without any reference to the exceptions."
- Destructive device. --The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant ... ; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. **The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device ;**
- Practice pointer - *destructive device cases = check the exception under 5845(f) definition section

Wake up!

We're finally done!

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