

# Top of the Ninth

*An Outline of (Mostly) Defense Wins  
in the Ninth Circuit (and Elsewhere)*

By Michael T. Drake

(Coverage: July 16, 2012 through Jan. 30, 2015)

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## ABOUT TOP OF THE NINTH

*Top of the Ninth* is mostly a collection of criminal convictions and sentences reversed, with some links to practice- and case-related articles, blog posts, briefing, and other resources thrown in, all organized by topic. Think of it as a slightly Ninth-centric, running update to the DFCC.

Links to cases use either free online sources or WestlawNext. Citation forms are wildly heterogeneous (yet there is method in't) and aren't intended to be brief-ready, but please do [email me](#) if you find any substantive citation errors or dead links.

Periodic updates to the outline are posted in the FPD's TGIF Roundup weekly blog series, which is available to FPD personnel on the [DEN](#), to CJA panel members on [CJAnet](#), and to the public at my [personal blog](#).

*Caveat*: This document is only an aid to research. By design it leaves out most "bad" Ninth Circuit and SCOTUS law. Some of the authorities it contains are probably no longer in force. And (let's face it) I probably get some of the cited authorities wrong. So use with care, and please [email me](#) with any comments, questions, or corrections.

Procedural habeas issues are beyond the scope of this collection.

*Navigation tip*: Cross-references are clickable; if you're in Adobe Reader, you can get back to the page you started from by using ALT-LEFT ARROW.

*Errata* (6.13.14): A disastrous find-and-replace maneuver led to the loss of all apostrophes/single-quotation marks. I've replenished most of them, but you should still generally treat quotations with heightened suspicion, and please [let me know](#) if you happen to find any of these missing marks.

*Tip of the hat*: To District Judge Larry Alan Burns and CJA panel attorney Timothy A. Scott, whose [Ninth Circuit Criminal Handbook](#)'s TOC provided a helpful starting place to hang all this stuff on.

## CHAPTER 1: BAIL

Recent data from the Bureau of Justice Statistics show that only 19 percent of federal defendants on release committed pretrial misconduct—and most of those violations were technical. Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (2013) ([pdf](#)).

### § 1.01 The Bail Reform Act

Carl Gunn [counts the ways](#) the government’s pro forma requests for pretrial detention misunderstand the Act (2012), and also shares some ideas for [challenging remote detention](#). (2014)

#### A. Detention

##### 1. Flight

Carl Gunn has some helpful case law for getting bond when your client is held on an ICE detainer, [here](#) (2012) [here](#) (2013) and [here](#) (2014). One of the favorable district court decisions Carl discusses on this point has since been affirmed in the Ninth. See *United States v. Castro-Inzunza*, 12-30205, 2012 WL 6622075 (9th Cir. July 23, 2012).

[Lopez-Valenzuela v. Cnty. of Maricopa](#) (9th Cir. 2014) (en banc) (prisoner’s rights) (Arizona law that categorically forbade any pretrial release for certain undocumented immigrants was “scattershot attempt” to address flight risk, and violated substantive due process; per se denial of bail cannot be justified by general risk of flight posed by immigrants’ undocumented status).

[U.S. v. Bustamonte-Conchas](#), 2014 WL 892888 (10th Cir. 2014) (unpub’d) (alleged leader of heroin enterprise with family ties in Mexico who had permanent resident status, was married to U.S. citizen, and had no criminal history overcame presumption he was flight risk).

## CHAPTER 2: DISCOVERY

ODS has a 2010 discovery outline [here](#).

### § 2.01 *Brady*

“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (order) (Kozinski, C.J., dissenting from denial of reh’g en banc); see also *id.* at 633 (“By turning a blind eye to this grave transgression [of *Brady*], the panel has shirked its own duty and compounded the violence done to the Constitution by the Assistant U.S. Attorney.”). More at [Ninth Circuit Blog](#) (2013) and at [Carl Gunn’s blog](#) (2014). In earlier (2012) posts at his blog, Carl also discusses a couple of basic things the government frequently forgets about *Brady*: First, “[materiality](#)” is a part of review on appeal, not a requirement at pretrial, where all that matters is whether there is any tendency to aid the defense. (Carl has an update to that post [here](#) (2014).) Second, *Brady* [applies to sentencing mitigation](#) as well as trial evidence.

[U.S. v. Sedaghaty](#) (9th Cir. 2013) (in “tax fraud case that was transformed into a trial on terrorism,” there was no *constitutional* violation in district court’s handling of classified material under CIPA, its evidentiary decisions, or government’s refusal to aid defendant in obtaining evidence overseas) (but government did violate *Brady*; its evidentiary substitutions were “unfairly colored” and violated CIPA; and its search of defendant’s hard drives exceeded scope of warrant) (“We are particularly troubled by the cumulative effect of these errors.”). More at [Ninth Circuit Blog](#) (2013).

[United States v. Doe](#), 705 F.3d 1134, 1152–53 (9th Cir. 2013) (where discovery of material needed to evaluate *Brady* claim on appeal had been improperly denied as part of defendant’s Rule 16 request to mount entrapment defense, evidentiary would be required on remand).

*Milke v. Ryan*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (9th Cir. 2013) (Kozinski, C.J.), a capital habeas case, contains a lot of helpful language about the requirements of *Brady* and *Giglio*. See generally [Ninth Circuit Blogs analysis](#).

[Amado v. Gonzalez](#) (9th Cir. 2013) (§ 2254) (government’s failure to disclose probation report of witness violated *Brady* on de novo review, and would have met AEDPA standard, where witness had pleaded guilty to robbery, was on

probation for it when he testified, and had been a member of a gang affiliated with intended victim's own).

[\*United States v. Morales\*](#), \_\_\_ F.3d \_\_\_, 13-3558, 2014 WL 1203140 (7th Cir. Mar. 25, 2014) (questioning the “incentive structure created by *Brady*'s harmless-error exception”) (“One would think that by now failures to comply with this rule would be rare. But *Brady* issues continue to arise. Often, nondisclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a “reasonable probability of a different result.”)

[\*U.S. v. Tavera\*](#) (6th Cir. 2013) (prosecutor's failure to disclose nontestifying codefendant's exculpatory statements was *Brady* violation, and panel recommends investigation by USAO) (exception for information available from another source did not mean defendants have a duty to interview cooperating codefendants).

[\*United States v. Mahaffy\*](#), 693 F.3d 113 (2d Cir. 2012) (in trial of brokerage house employees for “frontrunning” securities fraud scheme, government violated *Brady* by failing to disclose testimony of brokerage house members in related SEC investigation that internal information transmitted was not confidential).

[\*Wolfe v. Clarke\*](#), 691 F.3d 410 (4th Cir. 2012) (§ 2254) (prosecution's withholding of police report that explained how sole witness against petitioner was threatened by police to testify was clear *Brady* violation, both favorable to accused and suppressed by state).

## **A. *Brady* Violations—elements**

### **1. Materiality**

[\*United States v. Mahaffy\*](#), 693 F.3d 113 (2d Cir. 2012) (in honest services and property fraud case, SEC deposition transcripts were material within *Brady*).

## **§ 2.02 Disclosures Required by Rule 16**

Carl Gunn has some tips on getting draft transcripts from the government without strings attached [here](#) (2012), and some ideas for overcoming special barriers to discovery in child pornography cases, [here](#). (2012) Also, he has some material you can use to refresh the government's recollection about [their Rule 16 obligations](#), with an update [here](#) (2014).

The Ninth Circuit Blog [notes](#) that [United States v. Juan](#), \_\_\_ F.3d \_\_\_, \_\_ (9th Cir. Jan. 7, 2013), “invites discovery litigation for counsel confronted with a witness whose testimony has – evolved – after counsel was appointed.”

[U.S. v. Muniz-Jaquez](#) (9th Cir. 2013) (defense request under Rule 16 for Border Patrol dispatch tapes for possible impeachment and to further official-restraint defense was not “fishing expedition,” and district court abused its discretion by failing to order production). Some notes on how to use the case are [here](#) (FPD CACD only) (2013).

[U.S. v. Hernandez-Meza](#) (9th Cir. 2013) (district court abused its discretion in permitting government to reopen case in chief to introduce evidence to counter derivative-citizenship defense) (“[W]hen our rules and precedents don’t require the defendant to give notice, he’s entitled to remain silent as to what defense he will present, and the government must anticipate any issues he might raise.”) (“A defendant needn’t spell out his theory of the case in order to obtain discovery. Nor is the government entitled to know in advance specifically what the defense is going to be.”) (judicial reassignment ordered). More at [Ninth Circuit Blog](#).

#### **A. Items material to the preparation of the defense**

Carl Gunn has [this post](#) (2012) on the particular discovery challenges posed in child pornography cases under the Adam Walsh Act.

[United States v. Doe](#), 705 F.3d 1134, 1150–51 (9th Cir. 2013) (district court abused discretion in denying Rule 16(a)(1)(E)(i) request related to entrapment defense; defendant’s failure to follow-up by requesting more specific information was irrelevant).

#### **B. Expert witnesses**

Did you know that you’re entitled to discovery on experts even if the expert didn’t prepare a report? That and more tidbits from [Carl Gunn](#). (2012)

### **§ 2.03 The Jencks Act**

#### **A. “Statements”**

Carl Gunn has a series of posts discussing defense and government reports, notes, and the like (all from 2013):

- [To Report or Not to Report, That is the Question](#)
- [Interview Reports: The Difference Between Them and Us](#)
- [Aren't Notes a Written Record Too?](#)
- [Have You Thought About the Discovery that Word Processing Might Produce?](#)
- [If They're Giving Us the Report, Why Not Give Us the Notes?](#)

### **B. Timing of disclosures**

Carl Gunn [argues](#) that defense attorneys should be very hesitant to provide *Jencks* material before the government rests (2013).

### **C. Remedies**

#### **§ 2.04 Other Grounds for Discovery**

A district judge in the Seventh Circuit recently granted discovery so that the defense could assess whether to bring a selective prosecution claim based on racial profiling in the government's discretionary charging decisions in fake stash house robbery cases. See [United States v. Davis](#), 14-1124, 2014 WL 4402121 (7th Cir. Sept. 8, 2014) (finding no jurisdiction for interlocutory review of discovery order, where government claimed "finality" based on its request for dismissal *without prejudice*).

## CHAPTER 3: PRETRIAL MOTIONS

### § 3.01 Motions about the Prosecution or Charging Statute

#### A. Venue

Ninth Circuit Blog tries to [take the edge off](#) of [U.S. v Lukashov](#) (9th Cir. 2012) (venue was proper where, at minimum, defendant had illicit intent while crossing state line en route to minor victim’s home).

[U.S. v Auernheimer](#) (3d Cir. 2014) (in prosecution for conspiracy to violate the Computer Fraud and Abuse Act, 17 U.S.C. § 1030, and identify fraud, 18 U.S.C. § 1028(a)(7), New Jersey was improper venue, and error was not only not harmless but may have been structural, based on concerns that are “especially” concerning when it comes to computer crimes “in the era of mass interconnectivity”).

#### B. Double jeopardy

[U.S. v Mavromatis](#) (9th Cir. 2014) (order) (conviction for possessing firearm after commitment to mental institution, 18 U.S.C. § 922(g)(4), violated double jeopardy, where it followed entry of acquittal on charge of being felon in possession under § 922(g)(1) that had been based on same underlying possession).

Retrial after a trial judge grants a midtrial directed verdict based on the state’s failure to prove a fact that wasn’t actually an element violates the Double Jeopardy Clause. [Evans v. Michigan](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013).

##### 1. When jeopardy attaches

Jeopardy attaches when jury is sworn—even if state indicates beforehand, after losing motion continuance, that it’s going to take its ball and go home. [Martinez v. Illinois](#), 134 S. Ct. 2070, 2074 (2014).

##### 2. Retrial

“[T]he conclusion that jeopardy has attached, however, begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried. Here, there is no doubt that Martinez’s jeopardy ended in a manner that bars his retrial: The trial court acquitted him of the charged offenses” after

the government opted not to put on its case. [Martinez v. Illinois](#), 134 S. Ct. 2070, 2075 (2014) (internal citations and quotation marks deleted).

[U.S. v. Sanchez-Aguilar](#) (9th Cir. 2013) (because defendant conceded pretrial, and did not dispute at trial, that he'd left U.S. after 2009 § 1326 conviction that had been based on 2006 removal order, there was no plain double jeopardy error in government's reliance at trial on that same removal order to prove subsequent § 1326) (in dissent, D.J. Fitzgerald would reverse for insufficient evidence that defendant had been outside U.S. since prior § 1326 conviction).

[Lemke v. Ryan](#) (9th Cir. 2013) (§ 2254) (pleading guilty to armed robbery felony murder after jury hung did not waive double jeopardy claim based on implied acquittal of predicate armed robbery).

[U.S. v. Moreno-Montenegro](#) (2d Cir. 2014) (unpub'd) (separate convictions and sentences for two drug conspiracy counts violated double jeopardy).

#### **a. Retrial after mistrial**

[U.S. v. Mondragon](#) (9th Cir. 2013) (no double jeopardy bar to retrial on superseding indictment after mistrial declared on defendant's motion, which he made when he had received a requested settlement conference and reached agreement with government). More at [Ninth Circuit Blog](#).

### **3. Multiplicity in the indictment**

[U.S. v. Wahchumwah](#) (9th Cir. 2012) (counts charging Lacey Act violations of offering to sell prohibited eagle body parts were lesser-included in counts charging their sale, and therefore multiplicitous).

[United States v. Grimes](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. (8th Cir. Dec. 21, 2012) (harassment counts based on repeated messages defendant left over six days were multiplicitous because calls were part of single ongoing course of conduct).

[U.S. v. Frierson](#) (10th Cir. 2012) (convictions for cocaine distribution were plainly multiplicitous).

### C. The Ex Post Facto Clause

[Al Bahlul v. United States](#), 11-1324, 2014 WL 3437485 (D.C. Cir. July 14, 2014) (en banc) (military convictions for material support and solicitation of terrorism based on activity pre-9/11 were plain Ex Post Clause violations).

### D. Competency

#### 1. Due process requirements

[U.S. v. Gillenwater](#) (9th Cir. 2013) (a defendant has a constitutional right to testify at court-ordered pretrial competency hearing, which is not waived by defendant's disruptive behavior or by attorneys acquiescence).

##### a. Competency to stand trial as a matter of due process

The circuits are split on whether deprivation of counsel at competency hearing requires automatic reversal. See *United States v. Ross*, \_\_\_ F.3d \_\_\_, \_\_\_, No. ([slip op.](#)) (6th Cir. Dec. 31, 2012).

#### 2. Statutory requirements—18 U.S.C. § 4241 *et seq.*

Carl Gunn [explains](#) some of the limits on the government's powers under these sections, shows [how to use some of those limits as a sword](#), and [explains](#) why you want to make sure any competency examination is by court order rather than defense request. (2014). See also **Error! Reference source not found.**

When “the record before the district court at sentencing was sufficient to cause a genuine doubt as to the defendant’s competence,” it is plain error for the district court not to order a competency hearing *sua sponte*. [United States v. Dreyer](#), 705 F.3d 951 (9th Cir. 2013) (on denial of reh’g). More from Ninth Circuit Blog [here](#) (about initial decision) and [here](#). But see [United States v. Garza](#), \_\_\_ F.3d \_\_\_, 13-10294, 2014 WL 2058088 (9th Cir. May 20, 2014) (duty not triggered, where “medical history evidence [wa]sn’t strong”: despite claims of dementia, no dementia exhibited; attorney “yield[ed]” the issue after evaluation in federal medical custody; and district court found malingering). More on *Garza* at [Ninth Circuit Blog](#) (noting new “general guidelines” for applying “substantial evidence” standard).

**a. Hearing**

A defendant cannot waive representation at a competency hearing. See 18 U.S.C. § 4247(d) (emphasis added) (“[T]he person whose mental condition is the subject of the hearing *shall* be represented by counsel.” (emphasis added); [United States v. Ross](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. ([slip op.](#) at 8) (6th Cir. Dec. 31, 2012).

**b. Forced medication**

[U.S. v. Brooks](#) (9th Cir. 2014) (involuntary medication order vacated for new *Sell* inquiry on agreement by the parties).

[U.S. v. Gillenwater](#) (9th Cir. 2014) (involuntary medication was supported by adequate showing under *Sell*). More at [Ninth Circuit Blog](#).

[U.S. v. Curtis](#) (8th Cir. 2014) (forced medication was not supported by showing that it would be medically appropriate).

[U.S. v. Debenedetto](#) (7th Cir. 2014) (insufficient *Sell* findings for involuntary medication order).

[U.S. v. Chavez](#) (10th Cir. 2013) (involuntary medication order improper where government failed to present evidence of individualized treatment plan)

[U.S. v. Chatmon](#) (4th Cir. 2013) (district court erred in ordering forced medication of paranoid schizophrenic without considering less intrusive alternatives, like ordering defendant to take prescribed medication or else face civil contempt sanctions).

[U.S. v. Grisby](#) (6th Cir. 2013) (district court order allowing government to medicate detainee diagnosed with paranoid schizophrenia was improper, despite important government interest in bringing bank robbery defendant to trial).

## § 3.02 Motions about Timing and Delay of Indictment or Arrest

### A. Pre-indictment delay

#### 1. Statutes of limitations

##### a. Limitations periods

[U.S. v. Grimm](#) (2d Cir. 2013) (interest payments were “result of a completed conspiracy” and not “in furtherance” of extant conspiracy charged, and were therefore outside its scope for purposes of statute of limitations).

### B. The Speedy Trial Act

[U.S. v. Hernandez-Meza](#) (9th Cir. 2013) (district court violated Speedy Trial Act by excluding time after defendant purportedly notified court that agreement had been reached—notification not reflected in record) (judicial reassignment ordered). More at [Ninth Circuit Blog](#).

## § 3.03 Motions about the Indictment

The Sixth Circuit has held that a district court may dismiss a superseding indictment that charges a new mandatory minimum in retaliation for defense filing of a suppression motion, if it cannot overcome the presumption of vindictiveness. [U.S. v. LaDeau](#) (6th Cir. 2013) (affirming one such dismissal).

### A. Sufficiency

[United States v. Gonzalez](#), 686 F.3d 122 (2d Cir. 2012) (mention of § 841(b)(1)(B) in text of indictment did not cure failure to lack of relevant factual allegations).

### B. Joinder and severance

Carl Gunn has thoughts [here](#) about severance law (and about how to use it to resist government attempts to leverage a conditional plea into a prejudicial joinder). (2012)

#### 1. Severance under Rule 14

See generally [United States v. McRae et al.](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. (slip op. 2) (5th Cir. Dec. 17, 2012) (in case involving three defendant police officers convicted of offenses arising out of deaths in the wake of Katrina, one was improperly denied severance from codefendants who had allegedly tried to cover up facts related to shooting for which he was charged).

### § 3.04 Other Pretrial Motions

#### A. Motions to substitute counsel

FPDO note on pro se motions for substitute counsel is available (FPD CACD only) [here](#).

[United States v. Blackledge](#), \_\_\_ F.3d \_\_\_, 13-7419, 2014 WL 1759080 (4th Cir. May 5, 2014) (abuse of discretion to deny motions to withdraw in civil commitment proceedings where judge didn't ask about amount of trial preparation and length of time appellant and attorney had been out of communication).

[U.S. v. Diaz-Rodriguez](#) (1st Cir. 2014) (district court violated Sixth Amendment by failing to inquire into breakdown in attorney-client relationship before denying substitution request).

#### B. *Faretta* motions

[United States v. Booker](#), 684 F.3d 421 (3d Cir. 2012) (*Faretta* waiver was invalid where court misinformed defendant about maximum penalty and mandatory consecutive sentence).

#### C. Motions for continuance

[In re Joannie Plaza-Martinez](#) (1st Cir. 2014) (trial judges sanctioning AFPD for asking to postpone sentencing due to trial in other case was abuse of discretion).

## CHAPTER 4: SEARCH AND SEIZURE

See generally [Developments in Federal Search and Seizure Law](#), Stephen R. Sady (Sept. 2014).

### § 4.01 Scope of the Fourth Amendment

Fourth Amendment protections apply to (1) “searches” or (2) “seizures” (3) either by or attributable to the government.

#### A. “Search”

Occurs when the searched party either has a “reasonable expectation of privacy,” *Katz v. United States*, 389 U.S. 347, --- (1967) (wiretap of telephone booth was “search”), or suffers trespass by the government upon his property if done for the purpose of obtaining information. *United States v. Jones*, 565 U.S. \_\_\_, \_\_\_, 243 S. Ct. 945, 95 (2012). See generally [Litigating the Fourth Amendment after Jones](#) in *The Champion* (2013) (subscription only).

[Patel v. City of Los Angeles](#) (9th Cir. 2013) (civil) (en banc) (nonconsensual inspection of hotel guest records under Los Angeles ordinance requiring such records be given to police for inspection was a “search,” and the ordinance facially invalid under Fourth Amendment). **NB:** Cert [was granted](#) in this case in October 2014 to hear whether facial challenges are permitted under the Fourth Amendment, and if so, whether this one is for failing to require pre-compliance judicial review.

#### 1. Reasonable expectation of privacy

The Fourth Amendment allows DNA collection from charged arrestees. [Maryland v. King](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). Some points *contra* from Barry Friedman, [here](#) (2013).

##### a. Expectation of privacy in the home

###### i. The home itself

[Andrews v. Hickman County](#) (6th Cir. 2012) (Fourth Amendment does not recognize de minimis intrusions of home).

[Dalcour v. City of Lakewood](#) (10th Cir. 2012) (civil) (placing foot into doorway was clear Fourth Amendment entry into home)

## ii. Open fields and curtilage

Curtilage encompasses any “small, enclosed yard adjacent to a home in a residential neighborhood.” *Sandoval v. Las Vegas Met. Police Dep’t.*, 12-15654, [slip op.](#) 10 n.4 (9th Cir. July 1, 2014) (quoting *United States v. Struckman*, 603 F.3d 731, 738–39 (9th Cir. 2010)).

In [Florida v. Jardines](#) (2013), the Supreme Court held that the government’s use of trained police dogs to investigate a person’s home and immediate surroundings was a Fourth Amendment “search,” though it also noted that the “typical person” would find “cause for great alarm” in seeing someone snooping around on front porch - “with or without a dog.” More on the decision from [Orin Kerr](#) and [Ninth Circuit Blog](#). See also [Powell v. State](#) (Fla. Ct. App. 2013) (peering through window next to front door was Fourth Amendment search under *Jardines*).

[Carmen v. Carroll](#) (3d Cir. 2014) (§ 1983) (entry through back of property for knock-and-talk at back door was entry into curtilage and clear violation of Fourth Amendment).

## b. Expectation of privacy in other settings.

### i. Hotel rooms

[Smart v. Borough of Bellmawr](#) (3d Cir. 2013) (civil) (911 call about argument in motel lobby didn’t support entry into plaintiff’s room).

### ii. Other

[Arnzen v. Palmer](#) (8th Cir. 2013) (putting video camera over bathroom stalls of sex-offender civil-commitment unit violated inmates reasonable expectation of privacy).

## c. “Enhanced” surveillance

### i. Wiretaps

Dan Broderick has a pair of posts over at Carl Gunn’s blog about minimizing wiretap recordings, [here](#) and [here](#). (2013) Carl has a pair of posts on procedural limitations on state wiretap authority, [here](#) (2013) and [here](#) (2014).

## ii. GPS Monitoring and cell site location data

“[C]ell site location information is within the subscriber’s reasonable expectation of privacy.” [United States v. Davis](#), \_\_\_ F.3d \_\_\_, 12-12928, 2014 WL 2599917 (11th Cir. June 11, 2014)

The government’s installation of a GPS device on a targets vehicle to monitor the vehicles movements is a Fourth Amendment “search.” [United States v. Jones](#), 565 U.S. \_\_\_, \_\_\_, 243 S. Ct. 945, 95 (2012) (with plurality holding attachment of device on vehicle a “trespass,” which supplements *Katzs* reasonable-expectation-of-privacy test). The Court did not address whether the search was unreasonable. However, five justices apparently agree that modern surveillance technologies pose novel Fourth Amendment problems. *See generally* Stephen E. Henderson, *Real-time and Historic Location Surveillance after United States v. Jones: An Administrable, Mildly Mosaic Approach*, J. Crim. L. & Criminology (forthcoming) ([SSRN](#)); Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*,” N.C. J. L. & Tech. (2013) ([SSRN](#)); David C. Gray & Danielle Keats Citron, *The Right to Quantitative Privacy*, Minn. L. Rev. (2013) ([SSRN](#)) (argues that after *Jones*, any technology capable of facilitating broad programs of continuous and indiscriminate surveillance should be subject to Fourth Amendment regulation). Two recent (as of 2014) district court cases that have adopted the mosaic theory are [U.S. v. White](#) (E.D. Mich. 2014) and [U.S. v. Vargas](#) (W.D. Wash. 2014), both discussed (critically) by Orin Kerr [here](#).

## iii. Metadata

[Klayman v. Obama](#) (D.D.C. Dec. 16, 2013) (Leon, J.) (NSA metadata collection program likely violates Fourth Amendment). ([H/T](#)) More at the [New Yorker](#).

## d. Expectation of privacy in personal property

### i. Computers

Carl Gunn has written a series of posts about challenging computer searches [here](#) (2012), [here](#) (2012), [here](#) (2012) [here](#) (2013), [here](#) (2013), [here](#) (2013), [here](#) (“Don’t forget e-mails and other electronic material in your discovery requests.”). He also has one [here](#) (2013) suggesting that *United States v. Cotterman* (9th Cir. 2013), unfavorable as it is, might provide support for challenges beyond the immediate context of border searches addressed in that case, with a follow-up post [here](#) (2013). More recently, he’s had thoughts about how *Cotterman’s* holding might be further [limited by the SCOTUS’s decision in Riley](#) (2014), with related

thoughts (in light of the Ninth Circuit’s intervening decision in *Camou*) [here](#). Some further *Riley*- (and *Cotterman*-)related thoughts [here](#) (2015) on how to extend the argument to probation searches.

Two more from Carl about computer search protocols—one [here](#) on the Second Circuit’s read on Ninth Circuit law about search protocols (the case is [United States v. Galpin, 720 F.3d 436 \(2d Cir. 2013\)](#) (finding warrant authorizing search for images depicting child sex as facially overbroad when crime specified was failure to register)); and one [here](#) on a recent NACDL report (2015).

On a slightly different note, Carl blogs [here](#) (2014) about *Joffe v. Google*, \_\_\_ F.3d \_\_\_, No. 11-17483, 2013 WL 6905957 (9th Cir. Dec. 27, 2013), a civil case based on the wiretap statute, 18 U.S.C. § 2511 et seq., which he argues provides “significant protections in criminal cases where e-mails sent over Wi-Fi networks are accessed.”

#### **e. Fourth Amendment Standing**

[U.S. v. Starks](#) (1st Cir. 2014) (defendant had Fourth Amendment standing to challenge vehicle stop; though he was not authorized to drive vehicle, which his son had rented, his standing was at least equal to that of mere passenger)

[U.S. v. \\$304,980.00](#) (7th Cir. 2013) (cash claimant had standing by possession despite pleading Fifth in forfeiture).

[United States v. Gibson](#) (11th Cir. 2013) (defendant has standing to challenge GPS tracking of vehicle he legitimately borrowed and had controlled at time of search).

## **2. Trespass**

### **a. Different standing analysis under *Jones*?**

Maybe so. See Orin Kerr’s blog post [here](#) (2012).

### **B. “Seizure”**

[Lavan v. City of Los Angeles](#), 693 F.3d 1022 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2855, 186 L. Ed. 2d 910 (2013) (civil) (seizure of homeless persons personal property momentarily unattended was meaningful interference with their possessory interests and violated Fourth and Fourteenth Amendments).

[U.S. v. McClendon](#) (9th Cir. 2013) (defendant wasn't seized before he tossed gun away).

### **C. Government action.**

#### **1. Private actions attributable to government**

A search by a private person working with law enforcement is attributable to the government when (i) the government knew of and acquiesced in the search; and (ii) the person performing the search intended to assist law enforcement or further his or her own ends. *United States v. Walther*, 652 F.2d 788, 791–92 (9th Cir. 1981) (airport employees examination of luggage was “search”). See also *United States v. Reed*, 15 F.3d 928, 930–33 (9th Cir. 1994) (same for hotel managers search of guests room in presence of police).

[George v. Edholm](#) (9th Cir. 2014) (§ 1983) (forced rectal search by doctor was attributable to government where officers allegedly gave doctor false information to induce doctor to perform the search) (possibility that cocaine baggie in rectum would explode was not exigency).

[U.S. v. Booker](#) (6th Cir. 2013) (doctors medically paralyzing suspect for rectal search was government action, and “shocked the conscience”).

#### **2. Restricted to scope of private search**

Fourth Amendment bars government searches beyond scope of search conducted by private party. *United States v. Runyan*, 275 F.3d 449, 463–64 (5th Cir. 2001) (warrantless search of computer disks that private party provided but had not viewed).

### **§ 4.02 Searches and Seizures on a Warrant**

[U.S. v. Needham](#) (9th Cir. 2013) (defense loss) (reliance on warrant search predicated on bare inference that those who molest children are likely to possess child pornography was in good faith). More at [Ninth Circuit Blog](#).

[U.S. v. Buffer](#) (6th Cir. 2013) (no good faith reliance on warrant that was based on anonymous drug tip at an address where officers observed “several visits” and stopped visitor who “made a transaction”).

[U.S. v. Glover](#) (D.C. Cir. 2013) (blatant violation of FRCP 41(b)(2)s jurisdictional requirement in not mere “technical defect”).

## **A. Probable cause requirement**

### **1. Tainted evidence in the affidavit**

[U.S. v. Ruiz](#) (9th Cir. 2014) (failure to tell magistrate at warrant hearing about victim-cum-CI's dishonesty and drug-related activity was serious breach of officer's duty to court, and lineup identification was dicey, but still, residual information about shooting and defendant's alias still provided probable cause) (dissent by J. Gould). More at [Ninth Circuit Blog](#).

[U.S. v. Fisher](#) (4th Cir. 2013) (officer's lies in search warrant affidavit rendered subsequent plea involuntary).

### **2. Informants and corroboration**

[U.S. v. Gifford](#) (1st Cir. 2013) (saying your CI is reliable don't make it so).

### **3. Staleness**

[U.S. v. Wade](#) (11th Cir. 2014) (staleness doctrine applies to reasonable suspicion for parole search).

## **B. Particularity and breadth**

[U.S. v. Voustianiouk](#) (2d Cir. 2014) (warrant for apartment on first floor did not permit search of apartment on second)

[United States v. Folk](#), 754 F.3d 905, 911 (11th Cir. 2014) ("small scale" of defendant's drug operation made it less likely that guns found were connected to drugs, though holding on plain view made it unnecessary to decide whether warrant to seize drugs implicitly authorized seizure of guns).

[In re: \[Redacted\]@gmail.com](#) (N.D. Cal. 2014) (denying application for search of cloud account, and calling out government's judge-shopping ("charitably" so-described)).

[U.S. v. Underwood](#) (9th Cir. 2013) (102-page state warrant, a cut-and-paste job that used personal-use amounts of marijuana as probable cause for search related to MDMA trafficking, was not supported by probable cause, and there could be no good faith). More at [Ninth Circuit Blog](#).

[Matter of the Search of Apple iPhone, IMEI 013888003738427](#), 14-278 (JMF), 2014 WL 1239702 (D.D.C. Mar. 26, 2014) (Facciola, M.J.) (search warrant application rejected for not ensuring search wouldn't be overbroad; search of smartphone is in effect search of computer) ([H/T](#)) Some interesting (though critical) analysis from [Orin Kerr](#).

[U.S. v. Ballard](#) (3d Cir. 2014) (search warrants reference to “items of evidentiary value” was limited to those referred to in attached affidavit).

[U.S. v. Galpin](#) (2d Cir. 2013) (warrant purporting to authorize search of computer for “evidence that will constitute, substantiate or support violations” of New York State penal law or of federal statutes was overbroad) (not clear from record that overbroad provision was severable).

[Armijo v. Perales](#) (10th Cir. 2012) (civil) (warrant “inexplicably” authorizing search for documents, drugs, firearms was plainly overbroad in relation to firearm larceny charge).

### **C. False statements or omissions in affidavit—*Franks* hearing**

[U.S. v. Glover](#) (7th Cir. 2014) (*Franks* hearing required where warrant affidavit provided no evidence of informant's credibility).

Permitting government to offer additional evidence at a truncated “pre-*Franks*” hearing triggers a right to a full *Franks* hearing. [United States v. McMurtrey](#) (7th Cir. 2013).

### **D. Execution of the warrant**

#### **1. Scope**

[U.S. v. Lawson](#) (9th Cir. 2012) (unpub'd) (hidden beeper that prematurely emitted continuous tone (and possibly alerted defendant to its presence in home) neither “fail[ed] to transmit” within warrants provisions nor amounted to “exigent circumstance”).

[James v. Hampton](#) (6th Cir. 2015) (§1983) (in judicial misconduct investigation, warrantless search of judge's personal safe during search of office was unreasonable).

[United States v. Ganius](#), 755 F.3d 125 (2d Cir. 2014) (indefinitely keeping computer files that weren't responsive to warrant violates Fourth Amendment).

[United States v. Shaw](#) (6th Cir. 2013) (executing arrest warrant at wrong address, on opposite side of street, because it was only one occupied was unreasonable, nor by person of same gender as target opened door for police then closed it on them).

## 2. The knock-and-announce requirement

Trent v. Wade (5th Cir.) (§1983) (family's right to be free from no-knock entry is clearly established)

## 3. Search and seizure of persons during execution of warrant

Detention of occupants of premises during a warrant search is limited to those in the immediate vicinity of the premises. [Bailey v. U.S.](#), \_\_\_ U.S. \_\_\_ (2013).

### § 4.03 Warrantless Searches

#### A. Searches incident to arrest

##### 1. General search incident to arrest rule

Orin Kerr argues that instead of permitting blanket "full" searches of person and property incident to arrest, the Supreme Court should adopt the narrower rule for searching automobiles in [Arizona v. Gant](#), 129 S. Ct. 1710 (2009). Orin Kerr, *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Poly 403 (2013) ([SSRN](#)).

##### a. Exception: Cell phones (and other data storage devices)

[Riley v. California](#) (2014) (police can't search your phone incident to arrest without a warrant; data is different). *See also* [U.S. v. Camou](#) (9th Cir. 2014) (applying *Riley* in child pornography case) (holding that warrantless cell phone search should have been suppressed, where search took place more than an hour after arrest, and seven intervening acts signaled arrest was over) (*Riley* foreclosed finding of exigency, and search was in any case overbroad) (cell phones are not "containers" for purposes of vehicle exception) (inevitable discovery foreclosed by *Mejia*) (good faith didn't apply; officer's own negligence distinguished *Herring*). More at [Ninth Circuit Blog](#) (2014) and from [Carl Gunn](#). (2015)

## 2. Automobiles

### B. Protective sweeps

[U.S. v. Mallory](#) (3d Cir. 2014) (unpub'd) (reentry after initial protective sweep to locate gun once defendant had been handcuffed was unreasonable, despite that gun was unaccounted for).

[U.S. v. White](#) (3d Cir. 2014) (no articulable basis for protective sweep given after defendant was arrested outside house).

[United States v. Fadul](#), S2 13 CR. 143 JMF, 2014 WL 1584044 (S.D.N.Y. Apr. 21, 2014) (noting that circuits are split—the Ninth “unto itself”—on whether protective-sweep doctrine extends beyond arrest warrant context).

[U.S. v. Scott](#) (11th Cir. 2013) (arrest of defendant outside his house did not justify sweep of house).

[U.S. v. Newsome](#) (6th Cir. 2012) (search of jacket found in kitchen during protective sweep violated Fourth Amendment).

### C. Automobile exception

[United States v. Dougherty](#), 754 F.3d 1353 (11th Cir. 2014) (§ 1983) (speeding and perceived inconsistencies between occupants' stories were clearly not probable cause for car search, and reliance on other officer's statement that there was probable cause did not provide good faith defense).

### D. Inventory searches

[U.S. v. Kelly](#) (C.A. A.F. 2013) (inventory of injured soldiers computer was outside scope of military regulations and violated Fourth Amendment).

### E. Border searches

In [United States v. Cotterman](#), \_\_\_ F.3d \_\_\_ (9th Cir. 2013) (en banc), a defense loss, the Circuit held that a “border search” examination of a computer 170 miles from the border where it was initially seized was not an “extended border search,” where the computer never cleared customs and the defendant never regained possession. *Id.* at \_\_\_ (slip. op. 17). Nonetheless, a forensic examination at the border requires “reasonable suspicion.” *Id.* at \_\_\_–\_\_\_ (slip. op. 17–28) (holding that there was reasonable suspicion in light of circumstances that included TECS

alert and fact that files were password-protected). See also [Ninth Circuit Blog](#) and [Carl Gunn's](#) blog (suggesting *Cotterman* provides ammo for challenges to computer searches in contexts other than just border searches).

#### **F. Other administrative or “special need” Searches**

[Tarabochia v. Adkins](#) (9th Cir. 2014) (civil) (roving game warden stop of commercial fishers driving on public highway to investigate compliance with Washington fish and game laws was clear Fourth Amendment violation).

[Lebron v. Sec’y of the Fla. Dep’t of Children & Families](#) (11th Cir. 2014) (suspicionless drug testing of welfare recipients violated Fourth Amendment).

[Berry v. Leslie](#) (11th Cir. 2014) (civil) (clear Fourth Amendment violation to conduct administrative inspection as if it were criminal raid without any indication of risk to safety).

#### **G. Parole/probation searches**

The Ninth Circuit still requires officers to have probable cause to conclude a parolee lives at an address before carrying out a warrantless search under parole search condition, even after [Samson](#). See [U.S. v. Grandberry](#) (9th Cir. 2013) (finding no probable cause existed).

[U.S. v. King](#) (9th Cir. 2012) (en banc) (Supreme Court ruling in *Samson* that “parolees have fewer expectations of privacy than probationers” abrogated all circuit precedent that had held expectations equal). More at [Ninth Circuit Blog](#).

[United States v. Hill](#), \_\_\_ F.3d \_\_\_, No. 13-4806, 2015 WL 151613 (4th Cir. Jan. 13, 2015) (use of drug dog for walk-through of supervised releasee’s home violated Fourth Amendment) (pre-*Jardines* precedent didn’t support good-faith exception, since it only applied to dog sniffs in public areas).

[U.S. v. Walton](#) (7th Cir. 2014)(defendant who violates parole by crossing state line doesn’t per se lack all expectation of privacy).

[United States v. Wade](#), 551 F. App’x 546 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2318, 189 L. Ed. 2d 195 (2014) (circuit’s “staleness doctrine” applies to reasonable suspicion for parole search).

[U.S. v. Starnes](#) (6th Cir. 2012) (unpub'd) (probation search that ignored court order releasing defendant from probation was illegal).

#### **H. Exigent circumstances**

[U.S. v. Camou](#) (9th Cir. 2014) (*Riley* foreclosed finding of exigency, and search was in any case overbroad). More at [Ninth Circuit Blog](#) (2014) and from [Carl Gunn](#). (2015)

[U.S. v. Fowlkes](#) (9th Cir. 2014) (no exigency for “brutally and physically invasive” rectal search of arrestee and removal of drugs from his rectum).

[Sandoval v. Las Vegas Met. Police Dep't.](#) (9th Cir. July 1, 2014) (civil) (neither exigent circumstance nor emergency aid exceptions applied to warrantless entry based on “prowler call,” where number and description of suspects on scene didn't match report and officers gathered no information to suggest boys found on property were there illegally).

Dissipation of blood-alcohol isn't an exigency justifying blood test. [Missouri v. McNeely](#), \_\_\_ U.S. \_\_\_ (2013).

[United Pet Supply v. City of Chattanooga](#) (6th Cir. 2014) (civil) (exigent circumstances supported seizure of neglected, suffering animals from pet store, but not seizure of store records).

[Walters v. Freeman](#) (11th Cir. 2014) (unpub'd) (§ 1983) (there was no evidence of violence and so no exigency justifying warrantless entry, and clear violation not excused by “robust” statutory power to investigate and report domestic violence).

[Hawkins v. Bowersock](#) (7th Cir. 2014) (§ 1983) (warrantless entry and arrest for disorderly conduct was clearly unreasonable and inexigent, even given occupant's known history of domestic abuse).

[U.S. v. Lawson](#) (9th Cir. 2012) (unpub'd) (hidden beeper that prematurely emitted continuous tone (and possibly alerted defendant to its presence in home) was not exigency).

[U.S. v. Timmann](#) (11th Cir. 2013) (“service call” about what appeared to be bullet hole made at least 39 hours before entry didn't justify emergency entry).

Smoking marijuana in home is not an exigency. [U.S. v. Mongold](#) (10th Cir. 2013).

Police officer's failure to evacuate a house containing a makeshift "grenade" showed that he did not believe an exigency existed. [United States v. Yengel](#) (4th Cir. 2013).

[United States v. Delgado](#), 701 F.3d 1161, 1163 (7th Cir. 2012) (circumstances did not support reasonable belief that shooter remained in apartment posing danger after victim and defendant both left without mentioning any shooter, and government's waiver of opportunity to put on additional proof is binding on remand).

[Dalcour v. City of Lakewood](#) (10th Cir. 2012) (civil) (placing foot into doorway was clear Fourth Amendment violation, and entry to home was not justified).

[U.S. v. Watson](#) (6th Cir. 2012) (possibility that someone in neighborhood would give a "heads up" to defendant at residence was not plausible exigent circumstance for home entry).

### **I. Good faith**

[U.S. v. Camou](#) (9th Cir. 2014) (good faith exception didn't apply to cell phone search 1:20 after arrest; officer's own negligence distinguished *Herring*). More at [Ninth Circuit Blog](#) (2014) and from [Carl Gunn](#). (2015)

### **J. Consent**

[U.S. v. Arreguin](#) (9th Cir. 2013) (persons answering door is not reason to assume that person has authority to consent to search of entire house, and government's failure to ask weighs against government, not defendant). More at [Ninth Circuit Blog](#).

[U.S. v. Lopez-Cruz](#) (9th Cir. 2013) (consent for cell phone search doesn't include answer incoming calls, which defendant had standing to challenge even though he'd disclaimed ownership). More at [Ninth Circuit Blog](#).

[U.S. v. Iraheta](#) (5th Cir. 2014) (car driver's consent to search car wasn't consent to search passengers' bags, where officer knew whose bags they were)

[U.S. v. Saafir](#) (4th Cir. 2014) (false statement of authority to search car based on occupant's hip flask invalidated consent).

[\*United States v. Guzman\*](#), 739 F.3d 241 (5th Cir. 2014) (officer's statement that he was "going to search the car" could constitute false claim of authority affecting validity of defendant's admissions or consent).

[\*United States v. Robertson\*](#), 736 F.3d 677 (4th Cir. 2013) (in bus shelter dominated by police presence, "consent" was merely submission to claim of authority).

[\*U.S. v. Cotton\*](#) (5th Cir. 2013) (evidence found after exceeding scope of defendant's limited consent suppressed).

[\*United States v. Beals\*](#), 698 F.3d 248 (6th Cir. 2012) (remanding for findings of fact on defendant's claim that police improperly expanded search beyond limited consent given).

### **1. Apparent authority**

[\*Webb v. Brawn\*](#) (4th Cir. 2014) (unpub'd) (§ 1983) (former girlfriend who had no key to house could not possibly have had apparent authority to consent under circumstances).

[\*U.S. v. Peyton\*](#) (D.C. Cir. 2014) (defendant adequately raised argument that great-grandmother with whom he lived in apartment lacked authority to consent to search, and her apparent authority did not encompass shoe box in common area).

### **K. Closed container exceptions**

[\*U.S. v. Camou\*](#) (9th Cir. 2014) (cell phones are not "containers" for purposes of vehicle exception). More at [Ninth Circuit Blog](#) (2014) and from [Carl Gunn](#). (2015)

### **L. Community caretaker function**

The "community caretaking" exception isn't a "ruse for general rummaging." [\*United States v. Cervantes\*](#), 678 F.3d 798, 805 (9th Cir. May 16, 2012) (quoting [\*Florida v. Wells\*](#), 495 U.S. 1, 4 (1990) (impoundment and inventory search after officers had tracked defendant from supposed stash house were pretextual, where no one testified vehicle was parked illegally etc., and impoundment may not have complied with California Vehicle Code).

[\*U.S. v. Burgos\*](#) (9th Cir. 2013) (unpub'd) (government failed to show that cars location justified impounding under community-caretaking exception).

## § 4.04 Warrantless Seizures

### A. *Terry* stops

The government may not “patch[] together a set of innocent, suspicion-free facts . . . to establish reasonable suspicion.” [United States v. Black](#), [slip op.](#) at 11 (4th Cir. 2013).

[United States v. Dapolito](#), 713 F.3d 141 (1st Cir. 2013) (on government appeal, police failure to confirm find defendant’s name, which had been misspelled, wasn’t reasonable suspicion that we was wanted fugitive).

[United States v. Navedo](#), 694 F.3d 463 (3d Cir. 2012) (looking at a gun someone is showing you and briefly talking to that person and companion was not reasonable suspicion in relation to shooting at different address that wasn’t “that recent”).

#### 1. Tips, reasonable suspicion, and probable cause

[U.S. v. Edwards](#) (9th Cir. 2014) (defense loss) (officers responding to 911 call finding defendant in area of reported shooting who “matched” suspect’s description via anonymous tip had reasonable suspicion for stop-and-frisk, and did not convert detention into arrest). More at [Ninth Circuit Blog](#).

[U.S. v. Montoya](#), \_\_\_ F. App’x \_\_\_ (9th Cir. 2012) (no reason to suspect defendant of criminal activity based on anonymous tip containing identifying info and general allegations of criminal activity; “hand-to-hand” transaction between two teenage boys at door of defendant’s home; and defendant’s “doing something” in car trunk of woman he met with at Walgreens).

[U.S. v. Hernandez](#) (9th Cir. 2012) (unpub’d) (frisk of nervous defendant who had been assaulted was without reasonable suspicion).

[U.S. v. Freeman](#) (2nd Cir. 2013) (two anonymous calls no better than one when they don’t contain indicia of reliability)

[U.S. v. Williams](#) (7th Cir. 2013) (911 call about group of about 25 men brandishing firearm was not probable cause where upon arrival group was smaller and no guns visible).

## 2. “High crime area”

[United States v. Hill](#), 752 F.3d 1029 (5th Cir. 2014) (defendant’s girlfriend’s getting out of car and briskly walking toward apartment complex with “drug reputation” in “high-crime county” when police arrived late on a Saturday night, while defendant sat in car without a driver’s license, wasn’t reasonable suspicion for order to exit car for stop and frisk).

[Huff v. Reichert](#) (7th Cir. 2014) (civil) (being in high-crime area with 10-year-old clearly not probable cause).

## 3. Flight

[United States v. Navedo](#), 694 F.3d 463 (3d Cir. 2012) (flight was not probable cause for arrest, and suppression of evidence seized from it was warranted, despite suspects being scene talking with another displaying a gun near where a recent shooting had occurred).

## 4. Dog Alert

[U.S. v. I.E.V., Juvenile Male](#) (9th Cir. 2012) (frisk of passenger based on dog alert of car was unjustified at inception and exceeded appropriate scope). More on I.E.V. at [Ninth Circuit Blog](#).

“[W]hen a defendant requests dog history discovery to pursue a motion to suppress, Federal Rule of Criminal Procedure 16 compels the government to disclose the handler’s log, as well as training records and score sheets, certification records, and training standards and manuals pertaining to the dog.” [U.S. v. Thomas](#), [slip op.](#) at 22 (9th Cir. 2013) (quoting [United States v. Cedano-Arellano](#), 332 F.3d 568 (9th Cir. 2003)). These records may not be excessively redacted. *Id.* at 23 (noting that redaction here had “hamstrung” defense).

## 5. Prolonged detention

In August 2014 SCOTUS granted cert on whether an officer may extend an already-complete traffic stop to allow suspicionless canine sniff. See [Rodriguez v. U.S.](#) (SCOTUSblog case page).

[United States v. de la Cruz](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. 11-5114 (slip op. [7–8](#)) (10th Cir. Jan. 9, 2013) (extending defendant’s detention “just to be safe” after officers determined he was not person they’d thought he was unreasonable).

[United States v. Watson](#), \_\_\_ F.3d \_\_\_ (4th Cir. 2012) (three-hour detention of building occupant without probable cause while police obtained warrant was unreasonable).

## 6. Dissipation of reasonable suspicion

[United States v. \\$85,688.00 in U.S. Currency](#), 13-4067, 2014 WL 4237377 (10th Cir. Aug. 28, 2014) (unpub'd) (no reasonable suspicion to detain truck driver after suspicion of vehicle registration offenses and possible vehicle theft dissipated, with two judges who voted for reversal giving different rationales).

[U.S. v. Valerio](#) (11th Cir. 2013) (*Terry* stop has to happen “on-the-spot,” not a week later).

## 7. Vehicle stops

[Green v. City & Cty. of San Francisco](#) (9th Cir. 2014) (civil) (vehicle stop based on mistaken automatic license plate reading without visual confirmation was clear Fourth Amendment violation).

[U.S. v. Valdes-Vega](#) (9th Cir. 2013) (en banc) (defense loss) (“experience[d]” border patrol agents who observed truck with Baja California plates driven by Hispanics “suspicious[ly]” on smuggler-frequented area of I-15 70 miles north of the border had reasonable suspicion for roving border stop) (prior decisions holding that certain factors are per se not probative or not more than minimally probative are no longer good law) (separate dissents by Pregerson and Reinhardt). More at [Ninth Circuit Blog](#); NCB’s ode to the prior (and more favorable) panel decision is [here](#).

[U.S. v. Martins](#) (8th Cir. 2014) (traffic stop evidence should have been suppressed where detaining officer testified pretrial that he’d had to guess state of license plates issue by shape of lettering, but then testified at trial that he was able to tell state of issue when he pulled within 100 feet of defendant’s car).

Traffic stops based on mistake of law are unreasonable, *United States v. Lopez-Soto*, 205 F.3d 1101, 1106–07 (9th Cir. 2000) (officer lacked reasonable suspicion to stop defendant based on mistaken belief about proper placement of registration sticker). That’s so even when the law is “unclear.” [U.S. v. Nicholson](#), slip op. at 10 (10th Cir. 2013). But see [Heien v. North Carolina](#) (2014) (police officer’s reasonable mistake of law—here, about meaning of outdated state vehicle code

that required only one working brake light—can support reasonable suspicion, though won't excuse "sloppy study" of laws officer is "duty-bound to enforce").

[U.S. v. Noble](#) (6th Cir. 2014) (tip that car was suspected of being linked to DEA drug investigation was basis for stop, but passenger's apparent nervousness wasn't reasonable suspicion for frisk, and government waived standing argument).

[United States v. Esquivel-Rios](#), 725 F.3d 1231 (10th Cir. 2013) (district court improperly found probable cause for vehicle stop that had been based on "no return" report from dispatch on Colorado 30-day registration tags without considering dispatchers additional statement that such tags "usually don't return").

[Petihomme v. County of Miami-Dade](#), \_\_\_ F.3d \_\_\_, \_\_\_ (11th Cir. 2013) (search of car because driver must have "be[en] up to no good" clearly unreasonable).

[United States v. Uribe](#), \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2013) (color difference on car registration not sufficient basis for stop).

Furtive movements after stop can't justify it. [U.S. v. Serrano](#) (E.D. Pa. 2013).

[United States v. Younis](#), 890 F. Supp. 2d 818 (N.D. Ohio 2012) (officer's "inexplicable" failure to turn on recording equipment "greatly" undermines credibility of his testimony about supposed traffic violation).

## **B. Warrantless arrests**

### **1. Arrests inside home**

[U.S. v. Nora](#) (9th Cir. 2014) (arrest of defendant in his home for misdemeanor handgun possession on porch violated *Payton*, and his subsequent incriminating statements and warrant search based on them required exclusion of all evidence consequently discovered). More at [Ninth Circuit Blog](#).

[Morris v. Town of Lexington Alabama](#), 748 F.3d 1316 (11th Cir. 2014) (§ 1983) (officers entered home for *Terry* stop "without . . . anything remotely approaching reasonable suspicion," based on vague assertions of drunk woman who had been abandoned on homeowners property and said she was in danger, but whose only accusation vis-à-vis homeowner was that someone had been "beating [his] horses").

[Mitchell v. Shearrer](#) (8th Cir. 2013) (reaching in and pulling someone out of his house was unlawful seizure despite probable cause to arrest).

[United States v. Stokes](#), 733 F.3d 438, 444 (2d Cir. 2013) (suppression was appropriate for firearms and ammunition discovered by law enforcement officer after warrantless entry into defendant’s motel room; county assistant district attorney made deliberate strategic choice to have officer attempt to arrest defendant without warrant so he could question defendant outside of presence of counsel, and rather than waiting for defendant to leave room, seeking consent to enter, or attempting ruse in effort to lure defendant out of room, officer deliberately entered room without warrant or consent.) (no inevitable discovery).

## § 4.05 The Exclusionary Rule

### A. Fruit of the poisonous tree

“[L]aw enforcement agents have been directed to conceal how such investigations truly begin—not only from defense lawyers but also sometimes from prosecutors and judges.” John Shiffman & Kristina Cooke, [U.S. directs agents to cover up program used to investigate Americans](#), Reuters, Aug. 5, 2013. If you suspect that your case is infected by this kind of “intelligence laundering,” [here’s one suggestion for flushing it out](#) (FPD CACD only) (2014).

Suppression remedy applies to evidence, not identity. *But see* [U.S. v. Hernandez-Mandujano](#) (5th Cir. 2013) (Dolly, J., concurring) (arguing *contra* circuit precedent that says identify evidence is never suppressible, and citing [Fourth Circuit decision](#) noting that Ninth Circuit law on the issue appears inconsistent).

### B. Exceptions to the exclusionary rule

#### 1. Attenuation

[U.S. v. McClendon](#) (9th Cir. 2013) (defense loss) (taint from illegal search of defendant’s backpack was purged by defendant’s intervening act of walking away from police after they made it clear they were trying to arrest him). More at [Ninth Circuit Blog](#).

[U.S. v. Brodie](#) (D.C. Cir. 2014) (flight and abandonment of guns mere seconds after illegal seizure was tainted).

## 2. Inevitable discovery

[U.S. v. Hernandez](#) (9th Cir. 2012) (unpub'd) (inevitable discovery of arrest warrant did not apply because its basis for initial stop—nervousness and officer's hunch about drugs—was questionable).

[U.S. v. Guarino](#) (2d Cir. 2014) (unpub'd) (inevitable discovery of illegal guns was not justified by assumption that defendant might take certain actions or other events might occur, or by defendant's pre-Mirandization disclosure of combination to gun safe).

[United States v. Carrion-Soto](#), 493 F. App'x 340 (3d Cir. 2012) (search of suitcase before dog alert was not justified by inevitable discovery; record did not show that procedures were in place or that if followed would have led to discovery of evidence, and district court's notion that discovery would have been made had "best practices" been followed was speculation).

## 3. Good-faith

A "bare bones" affidavit cannot support probable cause—"even if extrinsic factors point to reasonableness." [U.S. v. Underwood](#) (9th Cir. 2013) (102-page state warrant, a cut-and-paste job that lacked factual details about MDMA pills sought, was not supported by probable cause). More at [Ninth Circuit Blog](#).

### § 4.06 Statutory Protections

[U.S. v. Perez-Valencia](#) (9th Cir. (2013) ("principle prosecuting attorney" within § 2516(2) can include state assistant district attorney designated to act in DA's stead, but only where assistant could exercise full authority of DA's position). Before the decision came down, Carl Gunn had a post on the case [here](#) (2013), and after, a post [here](#) (2014) ("A Half Step in Our Favor on State Wiretaps").

[United States v. Oliva](#), 705 F.3d 390, 394 (9th Cir. 2012) (defendant had standing to challenge interceptions of cell phone communications 18 U.S.C. § 2518, even though he neither admitted voices were his nor asserted any intercepts took place on his premises: he was named as subject and his conversations were target of surveillance) ("[I]f the government seeks authorization for the use of new technology to convert cellular phones into "roving bugs," it must specifically request that authority, the court must scrutinize the need for such surveillance and the authorization orders must be clear and unambiguous."). More at [Ninth Circuit Blog](#).

[\*United States v. Glover\*, 736 F.3d 509, 512 \(D.C. Cir. 2013\)](#) (plain error for district judge to authorize, under 18 U.S.C. §§ 2515 or 2518, installation of bug or wiretap in another district) (distinguishing [\*U.S. v. Luong\*](#) (9th Cir. 2006), which addressed “interceptions” under Title III, which take place at both location of listening post and location of tapped phone).

## CHAPTER 5: CONFESSIONS AND EXTRAJUDICIAL STATEMENTS

### § 5.01 *Miranda* Rights

Carl Gunn discusses the “public safety” exception in blog posts [here](#) and [here](#) (2013). He also has some thoughts about how to use a [new DOJ policy adopting a presumption that custodial interrogations be recorded](#). (2014)

#### A. In custody

[U.S. v. I.M.M., Juvenile Male](#) (9th Cir. 2014) (non-*Mirandized* inculpatory statements should have been suppressed because defendant was “in custody” during questioning at police station).

[U.S. v. Barnes](#) (9th Cir. 2013) (defendant meeting with FBI agents and his parole officer was custodial interrogation). More at [Ninth Circuit Blog](#).

[U.S. v. Morgan](#) (9th Cir. 2013) (Border agents reading of I-214 Form, normally done at arrest, was not reinitiation of interrogation under *Miranda*, where agent did not try to question defendant or have her waive rights). More at [Ninth Circuit Blog](#).

[United States v. Borostowski](#), \_\_\_ F.3d \_\_\_, No. 13-3811, 2014 WL 7399074 (7th Cir. Dec. 31, 2014) (remand for findings about whether defendant invoked right to counsel and whether he was in custody for *Miranda* purposes, where there had been heavy police presence, restraint by two agents using handcuffs and shackles, extended interrogation, confinement in small, crowded room).

#### 1. Particular settings

##### a. At home

[U.S. v. Hashime](#) (4th Cir. 2013) (3-hour interrogation during SWAT-style execution of search warrant was “custodial”).

##### b. Other

[U.S. v. Barnes](#) (9th Cir. 2013) (defendant meeting with FBI agents and his parole officer was custodial interrogation). More at [Ninth Circuit Blog](#).

## B. Sufficiency of particular warning

[U.S. v. Botello-Rosales](#) (9th Cir. 2013) (Spanish-language warning administered to defendant failed to convey Miranda rights, where the Spanish word *libre*, which means “available,” was incorrectly used for “without cost”).

[Lujan v. Garcia](#) (9th Cir. 2013) (§ 2254) (wording of *Miranda* warnings didn’t inform petitioner that he had right to speak with an attorney at all times, and state court of appeals holding harmless the introduction of derivative confession at trial clearly violated *Harrison*).

## C. Invocation of Miranda rights

[Sessoms v. Grounds](#) (9th Cir. 2015) (en banc) (habeas, on remand from SCOTUS) (defendant’s statements during custodial interrogation—“There wouldn’t be any possible way that I could have a lawyer present while we do this?”; and then: “[G]ive me a lawyer.”—were clear invocation of right to counsel).

Request for consent after person invokes right to counsel violates *Edwards v. Arizona* [U.S. v. Hutchins](#) (C.A. A.F. 2013).

### 1. Unequivocal

[Sessoms v. Runnels](#) (9th Cir. 2014) (en banc) (§ 2254) (on remand from SCOTUS) (petitioner’s statement, “give me a lawyer,” was unequivocal, and California court’s decision to the contrary was unreasonable application of *Davis*).

[United States v. Santistevan](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. (slip op.) (10th Cir. Dec. 17, 2012) (non-English-speaking defendant unambiguously invoked right to counsel by handing agent letter from defense counsel that stated defendant did not want to speak without counsel present).

[United States v. Hunter](#), \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2013) (defendant’s statement—“Can you call my attorney?”—was unambiguous invocation of right to counsel, and subsequent question by officers—“What do you want me to tell these people?”—was interrogation).

## D. Waiver

### 1. General test: knowing, voluntary, and intelligent

#### a. Coerced confessions and *Kastigar* hearings

The remedy for a coerced confession isn't just suppression, but a full *Kastigar* hearing. See [United States v. Anderson](#), 79 F.3d 1522 (9th Cir. 1996). Carl Gunn [explains in detail](#) that the burden in the *Kastigar* setting is on the government, that *Kastigar* narrows the exceptions that apply, and that it broadens the inquiry to include both evidentiary and nonevidentiary uses of statements or testimony.

### 2. Two-step interrogation procedures

[U.S. v. Barnes](#) (9th Cir. 2013) (agents engaged in improper two-step interrogation, despite that target was ostensibly another suspect). More at [Ninth Circuit Blog](#).

## E. Voluntariness

[U.S. v. Preston](#) (9th Cir. 2014) (en banc) (confession by 18-year-old with intellectual disabilities was involuntary, overruling *Derrick v. Petersons* restriction on considering suspects individual characteristics).

[United States v. Taylor](#), No. 11-2201, 2014 WL 814861 (2d Cir. Mar. 4, 2014) (confessions during two-hour interrogation, and subsequent confession the next morning, were involuntary, where defendant had attempted suicide by swallowing a bottle of Xanax shortly before interrogation, had intermittently “nodded off” during interrogation, and had drooled and exhibited thought disorder after interrogation; the subsequent confession, though made when defendant was “lucid,” was “tainted” by the prior coerced statements).

## § 5.02 Procedural and statutory bases for suppression: Rule 8 and McNabb-Mallory

Carl Gunn highlights some of the limits the federal evidentiary rules place on use of a defendant's silence, in a blog post [here](#). (2013). He also [explains](#) (2012) why you should think about *McNabb-Mallory* in addition to *Miranda* and voluntariness, and [notes](#) (2012) an exception to the state-custody limitation to the *McNabb-Mallory* rule that applies when the state custody is part of an improper “working arrangement between state and federal law enforcement, with more discussion and a link to some exemplary briefing by Alexandra Yates [here](#) (2012), and yet more tips on finding the sort of collusion that counts under the rule [here](#) (2013).

[U.S. v. Pimental](#) (9th Cir. 2014) (interrogation 48 hours after arrest was unnecessary delay under Fed. R. Crim. P. 5 and *McNabb-Mallory* rule). More at [Ninth Circuit Blog](#).

[U.S. v. Thompson](#) (3d Cir. 2014) (seeking “cooperation” from defendant is not reasonable excuse for delay in presentment)

### **§ 5.03 The Fifth Amendment right against self-incrimination**

A district court’s consideration at sentencing of compelled statements made by defendant during an earlier post-prison supervision violates the Fifth Amendment. [U.S. v. Bahr](#) (9th Cir. 2013). More at [Ninth Circuit Blog](#).

Carl Gunn talks about the different ways the privilege works for defendants and witnesses, [here](#), [here](#), [here](#), and [here](#) (2013). He elsewhere makes an [interesting suggestion](#) (2013) in cases in which you might be accusing an adverse government witness on cross-examination of a crime: Argue to the court that given the anticipated accusation, the witness should be represented by counsel. The upshot is that [counsel might advise that witness \*not to testify\*](#).

## CHAPTER 6: SUBSTANTIVE DEFENSES

### § 6.01 Mental Defenses

#### A. Diminished capacity

[U.S. v. Christian](#) (9th Cir. 2014) (excluding defendant’s expert psychologists testimony on diminished capacity, solely because that expert had examined defendant for competency in state court, was abuse of discretion, and error required reversal under civil rule established in [Estate of Barabin v. AstenJohnson, Inc.](#) (en banc)) (district court did not abuse its discretion in denying diminished capacity instruction on this record, though Judge Alarcón dissents on the point). More at [Ninth Circuit Blog](#).

#### B. Entrapment and related defenses

[United States v. McGill](#), 754 F.3d 452 (7th Cir. 2014) (evidence of CI’s weeks of pestering defendant to copy child pornography from defendant’s computer entitled defendant to entrapment instruction).

##### 1. Elements

[U.S. v. Barta](#) (7th Cir. 2015) (government’s use of “repeated attempts at persuasion,” “fraudulent representations,” “please based on need, sympathy, or friendship,” and promises of rewards beyond those “inherent” in usual commission of crime added up to inducement).

##### 2. Exclusion of the defense

[U.S. v. Mayfield](#) (7th Cir. 2014) (en banc) (defendant is entitled to present entrapment defense if he proffers “some evidence”—regardless of its credibility or weight, and regardless of government’s contrary proffer—from which reasonable jury could find government induced him to commit particular crime charged, and reasonable doubt that he was disposed to commit crime before government proposed it) (“[T]he court must accept the defendant’s proffered evidence as true and not weigh the government’s evidence against it.”).

##### 3. Entrapment by estoppel

Ninth Circuit blog [makes](#) lemons out of the lemonade of [U.S. v. Rodman](#) (9th Cir. 2015) (firearms licensee who told defendants that their activity was legal was not government official for purpose of entrapment by estoppel) (buyer-seller defense

was inapposite to conspiracy charged, which did not involve conspiracy to distribute guns but only to submit fraudulent forms).

### **C. Public Authority**

#### **1. Burden of proof in doubt?**

See [Ninth Circuit Blog](#) on how to handle *United States v. Doe*, \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (9th Cir. Jan. 31, 2013), which held that a defendant has the burden to prove a public authority defense when it would not negate an element, as with the “knowing” mens rea required by particular drug statutes charged here.

## CHAPTER 7: PLEAS AND PLEA BARGAINING

Some basic cost-benefit on signing plea agreements from [Carl Gunn](#) (2012).

### § 7.01 Types of Pleas

#### A. Unconditional & conditional pleas

Carl Gunn has [these reasons](#) (2012) and [even more reason](#) (2013) to insist on a conditional plea when you've got a good issue for appeal. And don't let them use the deal to leverage [prejudicial joinder](#) (2012), either.

#### B. *Alford* pleas

[U.S. v. Williams](#) (9th Cir. 2014) (*Alford* pleas are insufficient to prove state crime in supervised release violation when state itself doesn't treat it as proof of the criminal conduct—and state here, Washington, doesn't). More at [Ninth Circuit Blog](#).

### § 7.02 Plea Procedure and Advisement

[U.S. v. Arqueta-Ramos](#) (9th Cir. 2013) (failure in “operation streamline” en masse plea proceeding to question defendant individually to ensure she understood her rights was Rule 11 error; questioning in groups of five not good enough). See also [U.S. v. Aguilar-Vera](#) (9th Cir. 2014) (“streamlined” procedure for taking pleas en masse violates Rule 11, though the error was harmless here because counsel stated that defendant was not requesting individual hearing).

#### A. Penalties

[U.S. v. Hogg](#) (6th Cir. 2013) (in crack case, defendant should have been permitted to withdraw his plea because neither district court nor counsel anticipated effect of Fair Sentencing Act on his case).

#### B. Other consequences

The Sixth Amendment requires defense attorneys to inform criminal defendants of the deportations risks of guilty pleas. [Padilla v. Kentucky](#), \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 1473 (2010). Berman [suggests](#) that opinion's language might expand *Padilla's* reach to encompass “non-criminal consequence[s]” more generally. See also [U.S. v. Urias-Marrufo](#) (5th Cir. 2014) (district court denied motion to withdraw from plea without proper consideration to defendant's *Padilla* claim); [Kovacs v. U.S.](#) (2d Cir. 2014) (coram nobis granted for erroneous advice about

deportation consequences); [United States v. Akinsade](#), 686 F.3d 248 (4th Cir. 2012) (same).

Quick-reference charts for collateral immigration consequences of California state laws are available [here](#) (FPD CACD only) (2013). For collateral consequences of federal laws, see [Selected Immigration Consequences of Certain Federal Offenses](#) (2010). Similar charts for laws in other states are collected [here](#) (2010) (Defending Immigrants Partnership login required).

See also § 8.08H below.

### **C. Voluntariness**

[United States v. Preston](#) (9th Cir. 2013) (defense loss) (“Preston’s diminished mental capacity does not so heavily influence the totality of circumstances test that a finding of involuntariness is appropriate.”) More at [Ninth Circuit Blog](#).

[United States v. Fard](#), \_\_\_ F.3d \_\_\_, No. 14-1221, 2015 WL 75275 (7th Cir. Jan. 7, 2015) (guilty plea was not knowing and voluntary, where wire fraud charges were complex, legal argot—“fraudulent intent” and “fraudulent scheme”—was never explained, defendant denied responsibility several times, and defendant had not admitted to elements of wire fraud).

[U.S. v. Tien](#) (2d Cir. 2013) (nature of inconsistencies and misunderstandings by medicated defendant during Rule 11 colloquy should have alerted district court to fact that problem was more than just language barrier).

### **D. Special plea procedures**

[U.S. v. Aguilar-Vera](#) (9th Cir. 2012) (“streamlined” procedure for taking pleas en masse violates Rule 11, though the error was harmless here because counsel stated that defendant was not requesting individual hearing).

## **§ 7.03 Withdrawal of Guilty or Nolo Plea**

### **A. After court’s rejection of binding plea agreement**

[United States v. Adame-Hernandez](#), 763 F.3d 818 (7th Cir. 2014) (district court violated Rule 11(c)(1)(C) by withdrawing defendant’s guilty plea (rather than merely rejecting plea agreement) over his objection, and in effect violated double jeopardy by haling defendant back into court to face a subsequent indictment after making that error).

### **B. After plea is accepted, but before sentencing**

[U.S. v. Urias-Marrufo](#) (5th Cir. 2014) (defendants can withdraw guilty plea at this stage for counsel's failure to explain immigration consequences as required by *Padilla*).

### **§ 7.04 Plea Agreements**

[U.S. v. Mergen](#) (2d Cir. 2014) (clause in provision tolling limitations period did not encompass evidence derived from criminals defendant helped to catch—which provision might have cut in government's favor but for rule that plea agreements must be construed strictly against government).

[U.S. v. Hughes](#) (5th Cir. 2013) (district court abused its discretion in refusing to drop four counts as parties had agreed upon, where it hadn't advised defendant it wasn't bound by plea agreement on the point).

### **§ 7.05 Negotiations**

#### **A. Proffer sessions**

[United States v. Melvin](#), 730 F.3d 29, 37 (1st Cir. 2013) (agreement not to use statements “or other information” provided by defendant against him at trial precluded introduction of voice identification testimony of officer who had been present at session and gained familiarity with his voice).

### **§ 7.06 Bar on Judicial Involvement**

[U.S. v. Kyle](#) (9th Cir. 2013) (district court became improperly involved in plea negotiations when it went beyond giving reasons for rejecting agreement to comment on hypothetical sentences it would or would not accept, even though no new plea agreement was pending) (whether plain error applies to violations of Rule 11(c)(1) is an open question, but standard was met here) (case reassigned on remand). More at [Ninth Circuit Blog](#).

[U.S. v. Sanya](#) (4th Cir. 2014) (district court's urging that defendant accept plea bargain was plain error, where comments were “repeated and direct,” and “saturated the hearing”)

[United States v. Hemphill](#), \_\_\_ F.3d \_\_\_, 13-50267, 2014 WL 1758416 (5th Cir. May 2, 2014) (district court's repeated references to bad sentencing outcomes for other,

similarly-situated defendants who rejected plea offers and went to trial was improper judicial involvement in plea negotiations).

[U.S. v. Harrell](#) (11th Cir. 2014) (district court's participation in plea negotiations required reversal under *Davila*, despite court's intention to promote "what he believed to be [defendants] best interests").

## § 7.07 Breach

### A. By defendant

It's not the government's call whether there's a breach; a hearing and judicial finding are generally required. See [Carl Gunn's Blog](#) (2013). Briefing of the issue in the 5K1.1 context available (FPD CACD only) [here](#) (2014).

[United States v. Adame-Hernandez](#), 763 F.3d 818 (7th Cir. 2014) (district court erred in finding defendant in breach of plea agreement based on objection to drug quantity, when agreement was only about base offense level).

### B. By prosecutor

Substantive points from Carl Gunn [here](#) ("You can make them fix that breach!") (2012), and [here](#) (2013).

[United States v. Morales Heredia](#), 12-50331, 2014 WL 5018109 (9th Cir. Oct. 8, 2014) (government breached fast-track agreement by repeated and inflammatory references to defendant's criminal history, whose only purpose was to implicitly argue for greater punishment than it had agreed to recommend). Detailed advice on how to use *Morales* in your fast-track cases [here](#) (FPD CACD only). More at [Ninth Circuit Blog](#). Still more from Carl Gunn [here](#) and [here](#) (2014).

[United States v. Whitney](#), 673 F.3d 965, 970–72 (9th Cir. 2012) (on review for plain error, finding breach where prosecutor emphasized seriousness of the defendant's priors) (government's statements "could only have been intended to persuade the court to impose a sentence higher than the within-guideline sentence that the defendant was bound to request, and not to guard against an unsolicited downward departure").

[United States v. Johnson](#), 187 F.3d 1129 (9th Cir. 1999) (prosecutor who'd agreed to recommend a low-end sentence later introduced a victim impact statement from prior offense that described defendant as a "monster").

[\*United States v. Mondragon\*](#), 228 F.3d 978, 980–81 (9th Cir. 2000) (prosecutor emphasized seriousness of priors *in response* to the defense attorney’s characterization of the defendant’s criminal history) (“Because the prosecutor’s comments did not provide the district judge with any new information or correct any factual inaccuracies, the comments could have been made for only one purpose: to influence the district court to impose a harsher sentence than that suggested by appellant’s counsel.”)

[\*United States v. Myers\*](#), 32 F.3d 411, 413 (9th Cir. 1994) (finding that it was “insufficient that the court, by reading the presentence report and the plea agreement, was aware that the government had agreed to recommend” low-end sentence).

[\*United States v. Fisch\*](#), 863 F.2d 690, 690 (9th Cir. 1988) (per curiam) (holding that “prosecutor’s bare statement that Fisch had cooperated did not fulfill the government’s obligation under the terms of the plea agreement,” which required government to “inform the sentencing court of all Fisch’s cooperation”).

### 1. Harmless error

“The harmless error rule does not apply when the government breaches a plea agreement.” *United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000).

### § 7.08 Appeal waivers

[\*U.S. v. Spear\*](#) (9th Cir 2014) (waiver of right to appeal sentence didn’t apply to appeal of conviction). More at [Ninth Circuit Blog](#).

[\*U.S. v. Tercero\*](#) (9th Cir. 2013) (appeal waiver encompassing “any aspect of [defendants] sentence” didn’t apply to § 3582(c)(2) proceeding, and in any case government waived waiver by failing to invoke it at proceeding). More at [Ninth Circuit Blog](#) (2013).

The NACDL’s Ethics Advisory Committee has opined that it’s unethical for criminal defense lawyers to participate in plea agreements that bar collateral attacks based on ineffective assistance of counsel. NACDL Ethics Advisory Committee, Formal Op. 12-02 (2012) ([pdf](#)).

[\*United States v. Santiago-Burgos\*](#), \_\_\_ F.3d \_\_\_, 13-1897, 2014 WL 1613707 (1st Cir. Apr. 21, 2014) (challenge to consecutive sentence was not within appeal waiver where no reference to consecutive sentencing mentioned in agreement). *See also*

[United States v. Maldonado-Escarfullery](#), 689 F.3d 94, 97 n.2 (1st Cir. 2012) (fact that court imposed sentence in respective agreements in separate cases did not bring consecutive sentencing decision within the waiver).

[U.S. v. Adkins](#) (7th Cir. 2014) (appeal waiver did not bar argument that special release condition barring defendant's viewing pornography or sexually stimulating material is unconstitutionally vague, which it was).

[Hurlow v. U.S.](#) (7th Cir. 2013) (§ 2255) (plea agreement waiver of collateral review doesn't cover IAC in negotiation of plea agreement, which is not limited to claims of IAC in negotiation of plea waiver itself).

## CHAPTER 8: COMMON (AND LESS COMMON) OFFENSES

### § 8.01 Administration of Justice Offenses

#### A. Contempt

[U.S. v. Peoples](#) (4th Cir. 2012) (summary criminal contempt trial based on defendant's tardiness to other criminal contempt trial, which it immediately followed, was plain error in violation of Fed. R. Crim. P. 42(a), despite district court's "notice" to defendant of pending second trial at beginning of first trial).

#### B. Obstruction

The Ninth Circuit is (as of 10.3.14) reviewing en banc whether federal obstruction statute § 1503 applies to factually true statements that are evasive or misleading).

[U.S. v. Bonds](#) (en banc order, vacating decision [here](#)).

[U.S. v. Ermoian](#) (9th Cir. 2013) (criminal investigations aren't "official proceedings" under obstruction statute, and instructional error on point required reversal). More at [Ninth Circuit Blog](#).

#### C. False statements

In late April of 2014, the government [conceded](#) in its [cert. stage briefing](#) in *Ajoku v. United States* that "willfully" in the context of §§ 1001 and 1035 should be interpreted as it is in the criminal law generally, to require action "with knowledge that [the] conduct was unlawful." The Supreme Court GVR'd the Ninth Circuit's [decision below](#), which had held that willfulness in this context "simply means deliberately and with knowledge," without requiring knowledge of unlawfulness.

[United States v. Hale](#), 762 F.3d 1214 (10th Cir. 2014) (conviction for making materially false statements was plain error, where question defendant had answered was ambiguous about whether it referred to accuracy of bankruptcy petition at time executed or at time question had been posed, and there was no evidence that defendant knew property's value when petition was filed).

True statements intended to be false do not qualify. [United States v. Castro](#) (3d Cir. 2013). Nor do statements that are merely misleading. [United States v. Kurlemann](#) (6th Cir. 2013).

[U.S. v. Ashurov](#) (3d Cir. 2013) (under rule of lenity, you can't "knowingly present" materially false statement in an immigration form if it's not made under oath).

## § 8.02 Arson

[U.S. v. McBride](#) (7th Cir. 2013) (defendant's attempt to burn down store wasn't "malicious," and thus wasn't arson, because he owned it).

## § 8.03 Assault

### A. Assault on federal officers

[U.S. v. Acosta-Sierra](#) (9th Cir. 2012) (in case involving alleged assault of federal officer, 18 U.S.C. § 111, district court erred both in concluding that defendant's throwing rock in officer's direction was assault under "reasonable apprehension of harm" theory and in holding that assault under that theory did not require finding of intentional use of force, where officer never saw rock coming). More at [Ninth Circuit Blog](#).

## § 8.04 Drugs

New (as of 10.10.14) Holder memo on use of 851s to leverage a guilty plea [here](#), with another on appeal waivers for IAC claims [in the works](#). For the DOJ's earlier policy statement, see [Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases](#) (2013).

[Burrage v. United States, 134 S. Ct. 881 \(2014\)](#) (enhancement under § 841(b)(1)(C) requires proof that distributed drug was but-for cause of death or injury; "contributing" causation not enough). See also [U.S. v. Miller](#) (6th Cir. 2014) (applying *Burrage* to causation requirement for conviction of hate crime under § 249(a)(2)(A)).

### A. Drug trafficking

[U.S. v. Maloney](#) (9th Cir. 2014) ((en banc) (order on motion by U.S. Attorney reverses conviction for possession of marijuana with intent to distribute, where district court had refused defense request for surrebuttal after government sandbagging). More at [Ninth Circuit Blog](#).

"[S]eparate acts of distribution of controlled substances are distinct offenses under 21 U.S.C. § 841(a), as opposed to a continuing crime, and must therefore be charged in separate counts." [U.S. v. Mancuso](#), slip op. at 19 (9th Cir. 2013). Section 841(a) requires a finding that distribution was a "primary or principal purpose" of the residence. *Id.* at 20 (holding that instruction using "significant purpose" standard was plain error). More at [Ninth Circuit Blog](#).

## **B. Possession**

[United States v. Clark, 740 F.3d 808 \(2d Cir. 2014\)](#) (evidence of cocaine possession insufficient where defendant was patted down for weapons and cuffed hands-behind-back before being placed in back seat of police car where cocaine was later found wedged 5 inches down beneath the seat cushions) (applying Ninth Circuit’s approach in *U.S. v. Acosta-Sierra*, 690 F.3d 1111 (9th 2012)).

## **C. Doctors**

The Second Circuit has held that encouraging people to put FDA-approved drugs to non-approved or “off-label” use is not “misbranding” within 21 U.S.C. §§ 331(a) and 333(a)(1). [United States v. Caronia](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. ( slip op. 3) (2d Cir. Dec. 12, 2012).

## **D. Use of a communication facility**

[U.S. v. Biglow](#) (10th Cir. 2014) (unpub’d) (insufficient evidence to show unlawful use of communication facility, 21 U.S.C. § 843(b)).

## **E. Use of a firearm in furtherance of drug trafficking**

See § 8.05B below.

## **F. Resulting in death**

[Burrage v. United States, 134 S. Ct. 881 \(2014\)](#) (enhancement under § 841(b)(1)(C) requires proof that distributed drug was but-for cause of death or injury; “contributing” causation not enough).

### **1. Conspiracy**

“[A] district court must make specific factual findings to determine whether each defendant’s relevant conduct encompasses the distribution chain that caused a victim’s death before applying the twenty-year penalty” set by 21 U.S.C. § 841(b)(1)(A). [U.S. v. Walker](#) (7th Cir. 2013) (agreeing with Sixth Circuit’s approach).

## **G. Other drug-related issues**

In early 2015, the Supreme Court granted cert on whether conviction for distributing controlled substance analogue under 21 U.S.C. § 813 requires knowledge that it was a controlled substance analogue. The case is [McFadden v. U.S.](#)

## § 8.05 Firearms Offenses

### A. Possession by prohibited persons

In October of 2014 SCOTUS granted cert. on whether a district court may order transfer of defendant's gun to proper third-party to sell it for defendant's benefit, where defendant is unable to possess firearms under 18 U.S.C. § 922(g). The case is [Henderson v. U.S.](#)

#### 1. Disqualifying status or act

##### a. Misdemeanor crime of domestic violence

[U.S. v. Castleman](#) (2014) (state conviction for misdemeanor domestic assault qualifies as “misdemeanor crime of domestic violence” within § 922(g)(9), under which “physical force” requirement is, as in common law, “satisfied by even the slightest offensive touching.”). For some guidance on *Castleman*, go [here](#) (FPD CACD only).

#### 2. Second Amendment issues

[Tyler v. Hillsdale Cnty. Sheriff's Dep't](#), \_\_\_ F. App'x \_\_\_, No. 13-1876, 2014 WL 7181334 (6th Cir. Dec. 18, 2014) (civil) (federal provision prohibiting firearms possession by anyone adjudicated as “mental defective” or committed to mental institution, 18 U.S.C. § 922(g)(4), is reviewed for strict scrutiny, and here violated Second Amendment as applied). More at [SCOTUSblog](#) (2014).

[Binderup v. Holder](#) (E.D. Pa. 2014) (civil) (section 922(g)(1) violated Second Amendment as applied, where plaintiff demonstrated that despite prior conviction he posed no greater threat of violence than average law-abiding citizen).

See also [Peruta v. Cnty. of San Diego](#) (9th Cir. 2014) (civil) (California restriction on carrying concealed gun violates Second Amendment).

### B. Use of a firearm during drug crime or crime of violence—§ 924(c)

[Rosemond v. U.S.](#) (2014) (to prove aiding and abetting under § 924(c), government must show that defendant actively participated in underlying crime with advance knowledge that confederate would use or carry gun during crime, and had “realistic opportunity to quit the crime”).

[United States v. Carr](#), 761 F.3d 1068, 1080 (9th Cir. 2014) (insufficient evidence to sustain §§ 2113(d) and 924(c) enhancements for driver who was not present at robbery when firearms were shown or during getaway when firearms were discharged, and where guns weren't discussed or present at planning meeting).

[U.S. v. Rentz](#) (10th Cir. 2015) (en banc) (single gunshot that wounded one victim and killed another supported only one § 924(c) count, not two).

[United States v. Smith](#), 756 F.3d 1179, 1185–86 (10th Cir. 2014) (sentencing courts can take into account mandatory sentence required by § 924(c) when considering what sentence to impose for the underlying offense).

[United States v. Feliciano](#), \_\_\_ F.3d \_\_\_, 13-15341, 2014 WL 1318632 (11th Cir. Apr. 3, 2014) (evidence was insufficient to sustain conviction for using gun in bank robbery, where no one saw defendant with a gun and accomplice testified he knew “for a fact” that defendant didn't have it during robbery).

[United States v. Cureton](#), 739 F.3d 1032 (7th Cir. 2014) (defendant who only used gun once in simultaneous commission of two predicate offenses may only be convicted of one violation of § 924(c))

### C. Other

[U.S. v. Bowling](#) (7th Cir. 2014) (defendant convicted of making false statements in connection with firearm purchase, 18 U.S.C. § 922(a)(6), was entitled to present mistake-of-fact defense based on intervening offer by local prosecutor to drop charges in exchange for misdemeanor plea, which could have caused him to believe he was no longer under felony information)

[U.S. v. Graham](#) (2d Cir. 2012) (firing round from semi-automatic handgun is not use of “an explosive” within § 844(h)).

### § 8.06 Fraud and Related

Dan Broderick has a trio of posts on materiality and fraud cases [here](#) (“Intent to Defraud Is Misdefined in the Ninth Circuit Model Instructions”), [here](#) (so is “materiality”), and [here](#) (more on “materiality”). (2012)

In late April of 2014, the Supreme Court granted cert. on whether the phrase “tangible object”—within the *anti-shredding* provision of Sarbanes-Oxley, 18

U.S.C. § 1519—fairly encompasses fish. The case is [Yates v. U.S.](#) [key words: overcriminalization; due process; overfederalization; executive expansion].

[United States v. Sadler](#), \_\_\_ F.3d \_\_\_, 13-4450, 2014 WL 1622194 (6th Cir. Apr. 24, 2014) (federal fraud statutes do not cover “right to accurate information,” and defendant’s lying to pharmaceutical distributors when she ordered pills using fake name, saying they’d be used for indigent patients, did not deprive distributors of property or show intent to do so).

[U.S. v. Nkansah](#) (2d. Cir. 2012) (evidence that defendant had spoken to coconspirators about which banks would be least likely to discovery bank fraud scheme was insufficient to show intent to defraud).

[U.S. v. Rojas](#) (11th Cir. 2013) (marriage fraud is not continuing offense, so limitations period runs from day defendant entered marriage).

[U.S. v. Nkansah](#) (2d. Cir. 2012) (evidence that defendant had spoken to coconspirators about which banks would be least likely to discovery bank fraud scheme was insufficient to show intent to defraud).

## **A. Wire and Mail fraud**

### **1. Ninth Circuit**

Using the mail to send items purchased with funds derived from a fraudulent scheme is not a relevant use of the mails. [United States v. Phillips](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. (slip op.)\_\_\_ F.3d \_\_\_, \_\_\_, No. (slip op. [16–17](#)) (9th Cir. Dec. 6, 2012).

### **2. Other Circuits**

[U.S. v. Hawkins](#) (7th Cir. 2015) (mail fraud instruction violated *Skilling* because by using “reward” instead of “in exchange for” or the like, it failed to require showing that county employees who took money from property owner who wanted them to lower his property tax assessment actually did (or planned to do) something to lower it).

[U.S. v. Rivera Borrero, et al.](#) (7th Cir. 2014) (mail and wire fraud convictions, which involved scheme to help people without Social Security numbers get vehicle titles and plates, were vacated because registration papers that victims lost were not “money or property”) (defendants were immediately ordered released pending government’s decision to retry).

[U.S. v. Durham et al.](#) (7th Cir. 2014) (evidence that wire transfers were made without evidence about how they furthered fraudulent scheme was insufficient to sustain wire fraud convictions).

[U.S. v. Sadler](#) (6th Cir. 2014) (proof of scheme to use fake prescription forms and other such to purchase pharmaceuticals from drug companies was insufficient to support conviction for wire fraud seeing as companies were not deprived of anything of value; “paying the going rate for a product does not square with the conventional understanding of ‘deprive’”).

[U.S. v. Simpson](#) (5th Cir. 2014) (even assuming renewal of domain name after effective date of § 3559(g) can be false registration, government failed here to show that name had been used in course of conspiracy).

[U.S. v. Oyegoke-Eniola](#) (10th Cir. 2013) (in mail fraud case that involved district court’s improper adoption of sophisticated means enhancement based on insufficient evidence, defendant’s failure to object couldn’t be faulted under circumstances and review was for abuse of discretion rather than plain error).

#### **B. Honest services fraud**

[United States v. Mahaffy](#), 693 F.3d 113 (2d Cir. 2012) (instruction failed to require jury find bribery to convict on honest services fraud).

#### **C. Identity Theft**

[United States v. Doss](#), 741 F.3d 763, 767 (7th Cir. 2013) (two-level under § 2B1.1(b)(11)(B) for trafficking in stolen credit cards was plain error where defendant was also subject to statutory minimum for aggravated identity theft).

[U.S. v. Miller](#) (6th Cir. 2013) (term “use” within aggravated identity theft statute excludes “merely lying about what [others] did,” and requires that defendant steal or possess identities, impersonate someone, or obtain something of value in their name).

[United States v. Spears](#), 729 F.3d 753 (7th Cir. 2013) (defendant who made fake handgun permit for another person who used it to try to buy a gun was not use of identification information of “another person” for purposes of aggravated identity theft).

[United States v. Hilton](#), \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (4th Cir. 2012) (under rule of lenity, identity theft statute cannot be read to include corporate victims).

#### **D. Bribery**

[McCutcheon v. FEC](#) (2014) (First Amendment) (Congress’s only legitimate interest for restricting campaign finances is preventing quid pro quo corruption, and only in connection with elections, not in connection with efforts to control exercise of an officeholders quid pro quo corruption).

[United States v. Fernandez](#), 722 F.3d 1 (1st Cir. 2013) (tipping state legislator doesn’t violate federal program bribery statute, § 666).

[U.S. v. Owens](#) (7th Cir. 2012) (in program bribery case, evidence was insufficient to show that value of benefit, here, certificates of occupancy for newly constructed homes, was \$5000).

#### **E. Extortion (18 U.S.C. § 1951)**

[U.S. v. Villalobos](#) (9th Cir. 2014) (extortion instruction was overbroad, though error was harmless).

[Sekhar v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013) (attempting to compel someone to recommend that his employer approve an investment isn’t “obtaining property from another,” and therefore isn’t extortion under Hobbs Act).

#### **F. Other**

##### **1. Ninth Circuit**

[U.S. v. French](#) (9th Cir. 2014) (evidence was insufficient to sustain money laundering convictions, where there was no evidence that she, as opposed to her husband, engaged in monetary transaction related to purchase of truck using proceeds from fraud).

[U.S. v. White Eagle](#) (9th Cir. 2013) (in convictions for tribe-related theft and conversion, government’s misapplication theory failed because it was predicated on employer directive and civil regulation, and embezzlement theories failed because defendant never controlled funds she later borrowed) (no concealment of corruption under § 100(a)(1) either, because government didn’t show defendant violated duty to report program fraud) (but bribery conviction upheld).

In cases involving [26 U.S.C. § 7212\(a\)](#), [26 U.S.C. § 7202](#), or [26 U.S.C. § 7201](#), “the government has the burden of proving a defendant acted willfully, [and thus] also has the burden of negating a defendant’s claim that because of a misunderstanding of the law, the defendant had a good faith belief that he was not violating the relevant provisions of the tax code.” *United States v. Kahre*, 737 F.3d 554, 577 (9th Cir. 2013) (quoting and approving of district court’s jury instructions). More at [Ninth Circuit Blog](#).

## 2. Other circuits

[U.S. v. Newman](#) (2d Cir. 2014) (instruction for insider trading under 15 U.S.C. § 78j(b) erroneously failed to require finding that tippee knew that an insider both disclosed confidential information and did so quid pro quo) (evidence was insufficient for substantive offense and conspiracy because (1) benefit alleged insiders received didn’t establish tipper liability from which tippee liability would derive; and alternatively (2) there was no evidence defendants knew they’d obtained relevant insider information in violation of insiders’ fiduciary duties).

[U.S. v. Simmons](#) (4th Cir. 2013) (payments to investors with money from fraud “merged” with fraud under *Santos*).

[U.S. v. Lang](#) (11th Cir. 2013) (proper unit of prosecution for structuring payments under § 5324(a)(3) is the amount exceeding reporting threshold, which is structured into smaller amounts below that threshold, rather than each of the resulting subthreshold transactions, and so indictment here charging 85 counts each alleging single check less than threshold was deficient).

[U.S. v. Davis](#) (5th Cir. 2013) (bank fraud reversed because insufficient proof American Express is “financial institution”)

[U.S. v. McKye](#) (10th Cir. 2013) (whether investment notes were “securities” for purposes of charged securities fraud was question for jury, and failure to give instruction was error).

[United States v. Coplan](#), 703 F.3d 46 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013) (multiple convictions reversed on sufficiency grounds in tax fraud conspiracy case, where among other things evidence that one defendant “coached” partner to lie to IRS by helping him come up with knowingly false non-tax explanations for COBRA shelter was equivocal, as was evidence that another shelter offered no reasonable possibility of profit).

[United States v. Marston](#), 694 F.3d 131 (1st Cir. 2012) (no false-oath bankruptcy fraud for using someones name to get credit without evidence that debts were still unpaid when bankruptcy petition was filed).

[United States v. Nixon](#), 694 F.3d 623 (6th Cir. 2012) (AmEx card was not "unauthorized access device" within § 1029(a)(2) because there was no evidence that defendant obtained card intending to use it for fraud).

### **§ 8.07 Homicide**

[U.S. v. Garcia](#) (9th Cir. 2013) (involuntary manslaughter conviction reversed because district court's instruction didn't require finding that defendant acted with gross negligence).

[United States v. Toledo](#), 739 F.3d 562 (10th Cir. 2014) (defendants testimony that he feared much taller and heavier drunk who rushed him required involuntary manslaughter instruction).

### **§ 8.08 Immigration**

[Villa-Anguiano v. Holder](#) (9th Cir. 2013) (immigration) (after district court presiding in illegal entry case invalidates prior removal order on constitutional grounds, government cannot rely on pre-prosecution determination to reinstate it, but must give defendant an opportunity to address reinstatement determination, and agency then must independently assess whether full removal proceeding was required).

After *Windsor*, same-sex spouses are "spouses" for purposes of immigration law. [Matter of Zeleniak](#) (BIA 2013).

[Vitug v. Holder](#) (9th Cir. 2013) (immigration) (no reasonable factfinder could conclude that harm gay petitioner suffered in Philippines was not persecution within Convention Against Torture).

#### **A. Harboring or concealing**

[U.S. v. Rivera Borrero, et al.](#) (7th Cir. 2014) (evidence was insufficient to sustain convictions for conspiracy to shield unauthorized aliens from detection, where nothing showed that defendants' actions helped aliens reside in U.S. and avoid detection) (defendants were immediately ordered released pending government's decision to retry).

### **B. Encouraging illegal entry**

[U.S. v. Thum](#) (9th Cir. 2014) (charge of “encouraging or inducing” undocumented alien to reside in U.S., 8 U.S.C. § 1324(a)(1)(A)(iv), or aiding abetting same, *id.* § 1324(a)(1)(A)(v)(II), requires some action taken to convince illegal alien to stay in country or facilitate aliens ability to live in country indefinitely).

### **C. Illegal entry**

[U.S. v. Barrios-Siguenza](#) (9th Cir. 2014) (in illegal entry case, panel declines government request to leave deported defendant’s assault conviction intact pending his return and submission to the court, without prejudice to his request to vacate it; “He should not be required to suffer the indignity—and the collateral consequences—of this felony conviction until . . . he is able to return.”).

### **D. Fraud or misuse of immigration documents**

[U.S. v. Lin](#) (9th Cir. 2013) (§ 1546(a) does not encompass possession of unlawfully obtained Northern Mariana Islands driver’s license).

### **E. Illegal reentry**

To prove illegal entry under 8 U.S.C. § 1326(a), the government must show the defendant is (1) an alien (2) previously deported (3) found in the United States (4) without permission of the Attorney General (or the legal equivalent). *Almendarez-Torres v. United States*, 523 U.S. 224, 229 (1998).

The validity of a prior removal order may be challenged only if “the alien demonstrates that (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d). But these “narrow criteria” are interpreted “broadly,” because an alien in removal proceedings “has a due process right to be informed” about his prospects for relief from removal. *See United States v. Vidal-Mendoza*, \_\_\_ F.3d \_\_\_, \_\_\_, No. 11-30127 ( slip op. 7) (9th Cir. 2013). Caveat: To establish apparent eligibility for relief from order based on post-removal change in law, a defendant must nonetheless show that the new law clarified existing precedent rather than “deviat[ing] “ or “sharply depart[ing]” from it. *Id.* at 17–18). A note with briefing on getting around Vidal-Mendoza is available (FPD CACD only) [here](#).

[U.S. v. Vasquez Macias](#) (2d Cir. 2014) (defendant was not “found in” U.S. when, after walking across bridge from U.S. to Canada, Canadian officials refused him entry and forcibly returned him to U.S. and handed him over to U.S. officials) (rejecting Ninth’s approach in, e.g., *U.S. v. Gonzalez-Diaz*, 630 F.3d 1239 (9th Cir. 2011)).

## F. Deportation

**G. Note: This section includes immigration decisions that might (or might not—you tell me) be helpful in developing collateral challenges to deportation orders. See also § 8.08H (“Assorted immigration decisions”) below. For immigrations addressing the categorical analysis of predicates relevant to deportation, see generally § 12.06 (“Consideration of Prior Convictions”) below, in particular, § 12.06D (“Aggravated felonies”**

*United States v. Hernandez*, 769 F.3d 1059 (9th Cir. 2014) (California felon-in-possession, former Cal. Pen. Code § 12021(a)(1), encompasses antique firearms and is therefore categorically not an aggravated felony predicate for eight-level bump under § 2L1.2(b)(1)(C)).

*U.S. v. Aguilera-Rios* (9th Cir. 2014) (superseding opinion on denial of reh’g) (after *Moncrieffe*, lack of antique-firearm exception in felon-in-possession under former Cal. Pen. Code § 12021(a)(1), now Cal. Pen. Code § 29800, means it’s categorically not an aggravated felony). More at Ninth Circuit Blog (an older post about the original decision is [here](#)).

Immigration Categorical Approach Cases).

[United States v. Hernandez](#), 769 F.3d 1059 (9th Cir. 2014) (California felon-in-possession, former Cal. Pen. Code § 12021(a)(1), encompasses antique firearms and is therefore categorically not an aggravated felony predicate for eight-level bump under § 2L1.2(b)(1)(C)).

[U.S. v. Aguilera-Rios](#) (9th Cir. 2014) (superseding opinion on denial of reh’g) (after *Moncrieffe*, lack of antique-firearm exception in felon-in-possession under former Cal. Pen. Code § 12021(a)(1), now Cal. Pen. Code § 29800, means it’s categorically not an aggravated felony). More at [Ninth Circuit Blog](#) (an older post about the original decision is [here](#)).

If you have a case where the underlying removal occurred when your client was a juvenile and he or she wasn't provided an attorney, some briefing for your situation is [here](#) (2014).

[U.S. v. Raya-Vaca](#) (9th Cir. 2014) (expedited removal underlying § 1326 conviction violated due process, where immigration officer failed to advise defendant of charge and permit review of sworn statement officer had prepared, which prejudiced defendant by denying him plausible opportunity to withdraw his application for admission—all despite defendant's inadmissibility and multiple prior deportations, but with consideration given to his minor criminal history and to fact that his partner and their children resided in U.S.). More at [Ninth Circuit Blog](#).

In August 2014 SCOTUS granted cert on whether the government must prove a connection between a predicate drug paraphernalia conviction and a listed substance to trigger deportability under 8 U.S.C. §1227(a)(2)(B)(i). The case is [Mellouli v. Holder](#) (SCOTUSblog case page).

[U.S. v. Aguilera-Rios](#) (9th Cir. 2014) (superseding opinion on denial of reh'g) (after *Moncrieffe*, lack of antique-firearm exception in felon-in-possession under former Cal. Pen. Code § 12021(a)(1), now Cal. Pen. Code § 29800, means it's categorically not an aggravated felony and therefore not valid basis for deportation). More at [Ninth Circuit Blog](#) (an older post about the original decision is [here](#)).

[U.S. v. Gomez](#) (9th Cir. 2014) (stipulated removal was invalid both because (1) removal proceeding denied right to appeal order, and (2) immigration judge violated [8 C.F.R. § 1003.25\(b\)](#)).

[Brown v. Holder](#) (9th Cir. 2014) (immigration) (waiver of administrative appeals did not bar due process challenge to removal based on nonfrivolous citizenship claim).

[Mellouli v. Holder](#) (2014) (immigration) (granting cert on whether government must prove connection between drug paraphernalia conviction and listed substance to trigger deportability under 8 U.S.C. §1227(a)(2)(B)(i)).

[United States v. Gill](#), \_\_\_ F.3d \_\_\_, 13-2207-CR, 2014 WL 1797463 (2d Cir. May 7, 2014) (allowing deportation of defendant after statutorily-provided discretionary

relief was eliminated by repeal of INA § 212 would have impermissible retroactive effect).

[U.S. v. Martinez-Cruz](#) (D.C. Cir. 2013) (in collateral challenge to prior conviction, once defendant has shown that he is unable to understand the only explanation of rights the parties are aware of, the government has the burden to show the conviction was secured in compliance with due process).

### 1. Related Practical Issues

[U.S. v. Aguilar-Reyes](#) (9th Cir. 2013) (defendants *improper* sentence *affirmed* without prejudice to later request for resentencing should he return or waive presence). More at [Ninth Circuit Blog](#) (“If there are problems with a sentence, remember that two-week clock ticks away towards a hard jurisdictional bar: move to fix sentencing problems early.”).

[Rodriguez v. Robbins](#) (9th Cir. 2013) (immigration) (district court properly required bond hearings for detainees locked up six months or longer while fighting their deportation cases).

### H. Assorted immigration decisions

Cases employing categorical analysis are outside the scope of this section, and are collected at § 12.06 (“Consideration of Prior Convictions”) below.

In early 2015 the Supreme Court granted cert in [Mata v. Holder](#) on whether court of appeals has jurisdiction to review BIA’s denial of request to equitably toll 90-day deadline for filing motion to reopen for IAC.

#### 1. Ninth Circuit

[Abdisalan v. Holder](#) (9th Cir. 2014) (en banc) (immigration) (BIA decisions that deny some claims while remanding others for further proceedings are not final orders of removal).

[Singh v. Holder](#) (9th Cir. 2014) (immigration) (BIA abused its discretion in holding it lacked authority to stay removal and reopen proceedings to give alien opportunity to pursue relief from removal before another agency).

[Bassene v. Holder](#) (9th Cir. 2013) (immigration) (amended opinion, holding that BIA may not draw adverse inference from low level of detail about persecution

provided in petitioners mistakenly filed N-400, and finding no support for inconsistencies BIA claimed existed among petitioners filings)

[Oshodi v. Holder](#) (9th Cir. 2013) (en banc) (immigration) (applicants for asylum and withholding of removal have due process right to testify about merits of application).

[Montes-Lopez v. Holder](#) (9th Cir. 2012) (immigration) (petition whose right to retained counsel before immigration judge was violated need not show actual prejudice to obtain relief).

## 2. Other circuits

[Iracheta v. Holder](#) (5th Cir. 2013) (immigration) (birth certificate issued in Tamaulipas, Mexico legitimated child to acquire citizenship through U.S. citizen father).

### § 8.09 Robbery and Theft

#### A. Theft of government property

Carl Gunn [discusses](#) (2014) some case law you can use to challenge indictments that charge continuing thefts over time as a single theft to meet § 641's \$1,000 threshold.

[U.S. v. Lagrone](#) (5th Cir. 2014) (theft amounts in two counts of violating 18 U.S.C. § 641, each for stealing \$880 of stamps from a post office, could be aggregated to charge a single felony, but not two).

#### B. Robbery

[U.S. v. Goldtooth](#) (9th Cir. 2014) (evidence insufficient for attempted robbery, where only "fair inference" was that pat-downs by defendants were intended to find weapons, not wallet or cash).

### § 8.10 Sex Offenses

#### A. Ninth Circuit

[U.S. v. Sheldon](#) (9th Cir. 2014) (order recalls mandate in child pornography case, vacates opinion, and reissues it to provide defendant an opportunity to petition for certiorari on knowledge element).

[Aguilar-Turcios v. Holder](#) (9th Cir. 2014) (immigration) (under *Descamps*, modified categorical didn't apply to UCMJ Article 92 conviction for violating general order barring use of government computers to access pornography, which did not contain element of conduct involving depiction of minor engaging in sexually explicit conduct; whether defendant actually possessed child pornography, and whether provisions are characterized as "broader" as opposed to "missing" an element, "makes no difference"). More at [Ninth Circuit Blog](#). (2014) Even before this opinion superseded an earlier, pre-*Descamps* version, Carl Gunn noted [here](#) (2012) how that earlier version had already clarified some of the significant limits on facts and admissions that can be considered in a modified-categorical analysis.

[U.S. v. Shill](#) (9th Cir. 2014) ("criminal offense" within § 2422(b) encompasses at least some state "misdemeanors," including Oregon state misdemeanors here for sexually coercing and contributing to delinquency of minor) More at [Ninth Circuit Blog](#) (2014) (noting that *Shill* creates circuit split).

[U.S. v. DeJarnette](#) (9th Cir. 2013) (SORNA "initial registration" requirement does not (pending valid specification by Attorney General) apply to offenders who were already subject to pre-SORNA sex-offender registration obligations when SORNA was passed, and instruction here to the contrary required acquittal).

Knowledge of interstate commerce is not required under 18 U.S.C. § 2251. [U.S. v. Sheldon](#) (9th Cir. 2013). More at [Ninth Circuit Blog](#).

[U.S. v. Teague](#) (9th Cir. 2013) (entry of judgment of receipt and possession counts after failure to give instruction on separate conduct requirement violated Double Jeopardy Clause, though it wasn't plain error).

[U.S. v. Cabrera-Gutierrez](#) (9th Cir. 2014) (district court erred in sentencing defendant as Tier III sex offender; Oregon second-degree sexual abuse isn't comparable to or more severe than aggravated sexual abuse or sexual abuse under §§ 2241 and 2242, and is overbroad and indivisible).

## **B. Other circuits**

[United States v. Hite](#), 769 F.3d 1154 (D.C. Cir. 2014) (in prosecution for attempting to persuade minor to engage in unlawful sexual activity under 18 U.S.C. § 2422(b), jury instruction failed to require finding that communications with an intermediary were aimed at persuading minor).

[U.S. v. Husmann](#) (3d Cir. 2014) (placing files in shared folder without evidence that someone downloaded the file is not “distribution” within § 2252). NB: This is (arguably?) already the rule in the Ninth. *U.S. v. Budziak*, 697 F.3d 1105, 1109 (9th Cir. 2012).

[U.S. v. Fast Horse](#) (8th Cir. 2014) (in criminal sexual conduct case, district court failed to tell jury it had to find defendant knew victim lacked capacity to consent)

[U.S. v. Jones](#) (1st Cir. 2014) (New Jersey aggravated sexual assault and endangering welfare of child did not qualify as predicate for life sentence under § 2241(c) because it lacked requirement for intent to degrade, etc.).

[U.S. v. Emly](#) (8th Cir. 2014) (possession of copies of different files involving child sexual exploitation, on separate devices, was single violation of § 2252(a)(4)(B)).

[U.S. v. Grzybowicz](#) (11th Cir. 2014) (distribution under § 2252A requires transfer by defendant to someone else).

[U.S. v. Mateen](#) (6th Cir. 2014) (enhancement under § 2252(b)(2) applies only to predicate priors that necessarily involved minor) (cf. enhancements under §§ 2251(e) and 2252A(b)).

[U.S. v. Piper](#) (D. Vt. 2013) (under Attorney Generals SMART Guidelines, conviction for Vermont lewd and lascivious conduct, though involving sex offense against minor, was not “sex offense” under SORNA because minor status was not an element of offense). But see [U.S. v. Byun](#) (9th Cir. 2008).

[U.S. v. Joe](#) (10th Cir. 2012) (U.S.S.G. §§ 2A3.1(b)(1) and 3A1.3 enhancements for force and physical restraint against victim could not be applied to conviction for 18 U.S.C. § 2244(a)(1) aggravated sexual assault, which by definition requires force and restraint).

[U.S. v. Kebodeaux](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013) (SORNA registration requirements, as applied to defendant who had completed service of sentence for military sex offense before SORNA was enacted, are within congressional authority under Necessary and Proper Clause).

[United States v. Lott](#), No. 2:11-cr-097 (D. Vt. Dec. 12, 2012) (SORNA registration is invalid under Commerce Clause as interpreted in *NFIB v. Sebelius*, though district court here was still bound by Second Circuit law to the contrary).

*United States v. Craig*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (7th Cir. 2012) (Posner, J., concurring) (though 50-year sentence for child pornography production was justified here in case involving murder threats, district courts should be cautious in imposing de facto life sentences, and should consider net costs of imprisonment).

*United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012) (New York endangering the welfare of a child, is not divisible, and so not “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” within § 2252A(b)(1)).

### § 8.11 Importation and Regulatory Crimes

*U.S. v. Mohamed* (7th Cir. 2014) (evidence was insufficient to prove intent to sell contraband cigarettes in Indiana under 18 U.S.C. § 2342(a); cigarettes passing through state in commerce did not require tax stamp, defendant had purchased them in Kentucky, and defendant could have made profit by selling them in any of 38 states).

*United States v. Wu*, \_\_\_ F.3d \_\_\_ (1st Cir. 2013) (question of whether imported "phase shifters" fell under restricted Munitions List should have been put to jury). (H/T)

*U.S. v. Caronia* (2d Cir. 2012) (conviction under §§ 331 and 333 for promoting "off-label use" of Xyrem violated First Amendment).

### § 8.12 Mailing threatening communications (18 U.S.C. § 876(c))

*U.S. v. Keyser* (9th Cir. 2012) (addressing statements to generic "manager" was sufficient to prove that mailings were addressed to natural persons). More at [Ninth Circuit Blog](#). However,

### § 8.13 Second-Order Crimes

#### A. Alternative theories of criminal liability

##### 1. Aiding and abetting

*U.S. v. Goldtooth* (9th Cir. 2014) (evidence insufficient for aiding & abetting robbery, where government presented no evidence that taking of victim's tobacco was other than spontaneous).

[U.S. v. Ransfer](#) (11th Cir. 2014) (evidence that one defendant aided and abetted three robberies was not enough to show he aided and abetted a fourth, even though he was in the area at the time and same associates were involved).

[U.S. v. Rufai](#) (10th Cir. 2013) (evidence of defendant's personal and business relationships to health care fraudster, his setting up straw owner operation on fraudsters behalf, and his knowledge that company customers were not receiving orders were insufficient to prove defendant aided fraud).

## 2. Conspiracy

[U.S. v. Grimm](#) (2d Cir. 2013) (interest payments were “result of a completed conspiracy” and not “in furtherance” of extant conspiracy charged, and were therefore outside its scope for purposes of statute of limitations).

### a. Agreement

[U.S. v. Ramirez](#) (9th Cir. 2013) (evidence was insufficient to show any distribution agreement that would support conspiracy charge). More at [Ninth Circuit Blog](#).

### b. Withdrawal

A defendant who withdraws from a conspiracy outside the relevant statute-of-limitations period has a complete defense to prosecution (though the defendant bears the burden of proving withdrawal). [Smith v. United States](#), \_\_\_ U.S. \_\_\_, \_\_\_ (Jan. 9, 2013).

## § 8.14 Other, Less Common Offenses

[U.S. v. Agront](#) (9th Cir. 2014) (defense loss in a disorderly conduct case under 38 C.F.R. § 1.218(a)(5) and (b)(11) that at least [narrows](#) the standard to require “the quantum of ‘[d]isorderly conduct which creates loud, boisterous, and unusual noise’ that is required to violate the regulation is conduct sufficiently ‘loud boisterous and unusual’ that it would tend to disturb the normal operation of the VA facility”).

[U.S. v. Garcia](#) (9th Cir. 2014) (defense loss) (in conviction for using pipe bomb to damage car and apartment building in violation of 18 U.S.C. § 844(i), there was sufficient evidence that damage to rental apartment building substantially affected interstate commerce). More at [Ninth Circuit Blog](#) (noting that jurisdiction might not be triggered under *Garcia* in cases only involving damage to vehicles).

[U.S. v. Thompson](#) (9th Cir. 2013) (using thermal lance to cut through back of ATM is not "us[ing] fire" under § 844(h)(1)).

[U.S. v. Wheeler](#) (10th Cir. 2015) (federal threat statute, 18 U.S.C. § 875(c), requires proof of subjective intent to threaten, and instructional error here on the point was nonharmless).

[U.S. v. Powell](#) (10th Cir. 2014) (for purposes of 18 U.S.C. § 513(a), forged checks were not "of" banks into which they were eventually deposited).

[United States v. Chappell](#), 691 F.3d 388 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 965, 184 L. Ed. 2d 748 (U.S. 2013) (Wynn, J., dissenting) (18 U.S.C. § 13 impersonating an officer is First Amendment violation under *Alvarez*).

[United States v. Heineman](#), 13-4043, 2014 WL 4548863 (10th Cir. Sept. 15, 2014) (to satisfy "true threats" doctrine under First Amendment, conviction for transmitting threats in interstate commerce under §875(c) requires proof that defendant intended to cause recipient to feel threatened) (citing *U.S. v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011)). NB: The Supreme Court granted cert to review this issue in 2014. The case is [Elonis v. U.S.](#)

[U.S. v. Miller](#) (6th Cir. 2014) (instruction in hate crime case under § 249(a)(2)(A), which allowed conviction based on finding that victims' faith was "significant factor" rather than "but for" cause, was error under *Burrage*).

[U.S. v. Toviave](#) (6th Cir. 2014) (federal forced labor offense, 18 U.S.C. § 1589, doesn't apply to having children do homework, babysit, or do household chores).

**CHAPTER 9: JUVENILES****§ 9.01 Transfer to Adult Prosecution**

[U.S. v. JDT](#) (9th Cir. 2014) (district court erred in denying defendant's requests to suspend status as juvenile).

[U.S. v. LKAV, Juvenile Male](#) (9th Cir. 2013) (district court erred by committing juvenile for study of competency to stand trial under 18 U.S.C. § 4241(d) instead of Federal Juvenile Delinquency Act).

## CHAPTER 10: JURIES AND JURY SELECTION

“Petty” crimes or offenses are not subject to the Sixth Amendment jury trial provision. “To determine whether an offense is petty, courts look to the maximum penalty that could result from a conviction. Courts presume that an offense is petty when it carries a maximum term of imprisonment of six months or less. [United States v. Stanfill E1](#), \_\_\_ F.3d \_\_\_, 2013 WL 18000046 (9th Cir. Apr. 30, 2013). The “potential for an order of restitution in a substantial amount is [not] enough to overcome that presumption.” *Id.* More at [Ninth Circuit Blog](#).

### § 10.01 Waiver of Jury

[U.S. v. Shorty](#) (9th Cir. 2013) (record was not clear that low-IQ defendant’s jury-trial waiver in gun trafficking case was made knowingly and intelligently, requiring retrial).

### § 10.02 Jury Selection

#### A. Juror qualifications

[U.S. v. Shepard](#) (10th Cir. 2014) (district court improperly denied defense motion to remove juror who told court he would not look at child pornography images in evidence).

#### B. Fair cross-section challenges

In assessing fair-cross-section challenges, courts are no longer restricted to “absolute disparity” test, and may use whatever method(s) most appropriate in a given case. [U.S. v. Hernandez-Estrada](#) (9th Cir. 2014) (en banc)). More at [Ninth Circuit Blog](#).

#### C. Voir dire

Carl Gunn [suggests](#) filing motions for attorney-conducted voir dire in our cases, with some practice tips. (2014).

#### 1. Manner of conducting

[United States v. Reyes](#), 764 F.3d 1184 (9th Cir. 2014) (district court violated Fed. R. Crim. P. 43 when it questioned venireperson outside defendant’s earshot, though error here was harmless). More at [Ninth Circuit Blog](#).

### D. *Batson* challenges

[Castellanos v. Small](#) (9th Cir. 2014) (§ 2254) (state court unreasonably found no purposeful discrimination under *Batson*; state prosecutor's stated reason for striking venireperson was factually-erroneous and pretextual).

[SmithKline Beecham Corp. v. Abbott Labs](#) (9th Cir. 2014) (civil) (*Batson* prohibits strikes based on sexual orientation) (after *Windsor*, discrimination on basis of sexual orientation is subject to heightened scrutiny rather than rational basis).

[Ayala v. Wong](#), 730 F.3d 831, 845 (9th Cir. 2013) (§ 2254) (on de novo review, trial court exclusion of defense from in camera consideration of prosecutors purported reasons for peremptories violated *Batson*).

[United States v. Tomlinson](#), 13-5625, 2014 WL 4085823 (6th Cir. Aug. 20, 2014) (*Batson* challenge does not have to be contemporaneous to each challenged strike; challenges here were timely because made before jury was sworn). See also [United States v. Contreras–Contreras](#), 83 F.3d 1103, 1104 (9th Cir.1996) (challenge timely if made “as soon as possible,” “preferably” before jury is sworn).

*Adkins v. Warden*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (11th Cir. 2013) (state's peremptories against nine of eleven blacks from venire were clear violation of *Batson*, where among other things prosecutor had marked prospective black jurors “BM” or “BF” in notes).

[U.S. v. Russ](#) (6th Cir. 2012) (*Batson* objection made within minute of jurors being excused was timely, even though juror had left courtroom).

### § 10.03 Juror Bias and Misconduct

[United States v. Aguilar](#), 752 F.3d 1148 (8th Cir. 2014) (alternate juror's participation in deliberations prejudiced defendant).

[Stouffer v. Trammell](#), 738 F.3d 1205 (10th Cir. 2013) (§ 2254) (petitioner was entitled to evidentiary hearing about nonverbal communications—winking, nodding, looks of reassurance, etc.—throughout the penalty phase between juror and her husband).

### A. Investigating juror bias and misconduct

[\*Barnes v. Joyner\*](#), \_\_\_ F.3d \_\_\_, 13-5, 2014 WL 1759085 (4th Cir. May 5, 2014) (§ 2254) (state post-conviction court's failure to apply presumption of prejudice and failure to investigate juror misconduct claim was unreasonable application of CEFL).

[\*United States v. Haynes\*](#), 729 F.3d 178 (2d Cir. 2013) (district court “[f]aced with a credible allegation of juror misconduct . . . ha[d] an obligation to investigate . . . the problem”).

### § 10.04 Jury Deliberations

[\*U.S. v. Ramirez\*](#) (9th Cir. 2013) (district court was not required to instruct jury it could conclude that reason government did not call drug-sale go-between as witness was that testimony would hurt government's case, but court's instruction not to "speculate" about reasons for go-betweens absence was error, though harmless). More at [Ninth Circuit Blog](#).

[\*U.S. v. Salazar\*](#) (5th Cir. 2014) (jury still has to deliberate and reach verdict even if defendant admits guilt while testifying amidst evidence of overwhelming guilt)

### A. Jury instructions

[\*Smith v. Lopez\*](#) (9th Cir. 2013) (§ 2254) (though charges put defendant on notice that he could be subject to aiding-and-abetting liability, prosecutors conduct pre/trial conduct led petitioner to believe prosecution would not rely on aiding-and-abetting, and so giving aiding-and-abetting instruction here violated Sixth Amendment notice requirements under CEFL).

If inadequate opportunity is given for review of the jury instructions before given to the jury, an objection may not be required to preserve the issue. See [\*United States v. Liu\*](#), 731 F.3d 982, 987 (9th Cir. 2013) (reviewing instruction issue de novo despite no objection, where district court had made several substantive changes the night before defense case). More at [Ninth Circuit Blog](#).

A district court's use of boilerplate instructions, even if approved by prior circuit decisions, can confuse jurors if not tailored to the specifics of the case. [\*U.S. v. Wright\*](#) (7th Cir. 2013) (expressing disapproval, though not finding reversible error).

## 1. Particular instructions

### a. Presumption of innocence

[Williams v. Swarthout](#) (9th Cir. 2014) (§ 2254) (not really an instructional issue, but state trial court’s misstatement before trial commenced that petitioner had pleaded guilty violated due process and Sixth Amendment, depriving him of presumption of innocence, where statement was not corrected until jury began deliberations, and error was not harmless, contra state court of appeals) (NB: AEDPA deference didn’t apply).

### b. Willful ignorance

One circuit has held that evidence was insufficient to show defendant police officer knew of or was willfully blind to drug conspiracy, despite “warning signs that something illegal was afoot.” [United States v. Burgos](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. 11-1877 ( slip op. 32) (1st Cir. Dec. 14, 2012).

[United States v. Burgos](#), \_\_\_ F.3d \_\_\_, \_\_\_ (1st Cir. 2012) (in drug conspiracy case, evidence showing defendant former vice officer was familiar with Vice Squad operations in “high crime” area was insufficient to show he was willfully blind to marijuana distribution operation).

### c. Unanimity

In one case, the Circuit held that no unanimity instruction was required—even though the government’s charge encompassed three different theories of possession, see [Ninth Circuit Blog](#)—because the defendant was charged with possession “during *one ten-minute period on one night in one location.*” [United States v. Ruiz](#), \_\_\_ F.3d \_\_\_, slip op. at 7 (2013). More on *Ruiz* at [Ninth Circuit Blog](#).

### d. Innocent possession

[U.S. v. Baird](#) (1st Cir. 2013) (defendant in 922(j) case who accepted neighbors offer to sell him gun then returned it two days later was entitled to innocent possession instruction).

### e. Miscellaneous

[Frost v. Van Boening](#), \_\_\_ F.3d \_\_\_, 13-35114, 2014 WL 1677820 (9th Cir. Apr. 29, 2014) (§ 2254) (preventing trial counsel from making both accomplice liability and duress theories to jury was structural error).

[Dixon v. Williams](#) (9th Cir. 2014) (§ 2254) (jury instruction that honest *reasonable* belief doesn't negate malice diluted the burden of proof, and error was not harmless (regardless of state court's harmless analysis)).

[U.S. v. Mancuso](#) (9th Cir. 2013) (in cocaine distribution case, instruction for maintaining drug-involved premises that used "significant purpose" rather than "primary or principal purpose" standard was plain error, notwithstanding that premises here was dental office) More at [Ninth Circuit Blog](#).

[U.S. v. Munguia](#) (9th Cir. 2012) (district court erred in refusing defendant jury instruction that "reasonable cause to believe" drugs were used to manufacture meth is evaluated from defendant's perspective).

#### **i. Other circuits**

[United States v. Sasso](#), 695 F.3d 25 (1st Cir. 2012) (in prosecution under 18 U.S.C. § 32(a)(5), instruction improperly suggested to jury that it could infer that defendant acted willfully if he intentionally pointed laser at helicopter and interference occurred as natural and probable consequence without finding defendant *knew* that interference was natural and probable consequence).

## **2. Appellate review**

### **B. Jury questions**

[U.S. v. French](#) (9th Cir. 2014) (district court failed to define "proceeds" as "profits" under *Santos*, and whether the Frenches use of truck purchased with fraudulent proceeds to deliver appliances was "central component of the scheme" should have gone to jury ).

[United States v. Miller](#), 738 F.3d 361, 383 (D.C. Cir. 2013) (district court's responses to jury notes, which asked for clarification about certain calls erroneously identified in verdict forms, improperly confirmed the identification in the jury note of what was intended by the charge in the indictment, and directed the jury to evidence previously unidentified by the jury as supporting the charge in the indictment).

**C. Jury unanimity**

[U.S. v. Ramirez-Castillo](#) (4th Cir. 2014) (plain error to enter conviction where jury made findings only on disputed elements on verdict form that did not include choices for “guilty” and “not guilty”).

**§ 10.05 Jury Deadlock****A. Declaring a mistrial**

[United States v. Moore](#), 763 F.3d 900 (7th Cir. 2014) (district court request for partial verdict on 924(c) gun charge while deliberations on predicate crime of violence remained ongoing, and before jury indicated true deadlock on any count, exceeded authority of Fed. R. Crim. P. 31(b)).

## CHAPTER 11: ISSUES AT TRIAL

### § 11.01 Evidentiary Issues

[United States v. Evans](#), 728 F.3d 953, 960–62 (9th Cir. 2013) (district court cannot exclude evidence under FRE 104 without relying on substantive basis provided by other rule(s) of evidence; lack of "credibility" isn't enough). More at [Ninth Circuit Blog](#).

[United States v. Groysman](#), 13-1031, 2014 WL 4337798 (2d Cir. Sept. 3, 2014) (agent's testimony that incorporated hearsay from cooperators who later testified at trial, his inadequate foundation for admission of summary charts, and his inappropriate opinion testimony affected substantial rights).

#### A. Relevance

##### a. Rules 401 and 402

[U.S. v. Certified Environmental Services, Inc.](#) (2d Cir. 2014) (corporate defendants charged with violating Clean Air Act were entitled to present conversations with unknown federal employee to show they acted in good-faith belief that their air monitoring complied with state law; fact that conversation predated conspiracy by five years was no bar under FRE 401).

[United States v. White](#), 692 F.3d 235 (2d Cir. 2012), *as amended* (Sept. 28, 2012) (in felon-in-possession case, district court should have allowed (1) evidence of government's decision to initially charge four women traveling with defendant for possessing same gun as defendant and (2) prior judicial finding that discredited government witness).

##### b. Rule 403

"[C]orroborating testimony is not cumulative when it bolsters the defendant's contested version of the facts." [United States v. Miller](#), 12-50534, \_\_\_ Fed. Appx \_\_\_, \_\_\_, 2013 WL 6224848, at \*1 (9th Cir. Dec. 2, 2013) (citing [United States v. Ibisevic](#), 675 F.3d 342, 351 (4th Cir. 2012)) (holding that district court abused its discretion in precluding defense testimony about alleged extramarital affair that would have bolstered framing defense).

[Vega v. Ryan](#) (9th Cir. 2013) (§ 2254) (in case involving sexual abuse of a minor, evidence that victim had recanted her allegations to her priest was not cumulative to evidence that she recanted to her mother).

The district court may not refuse to admit evidence under Rule 403 just because he does not find the evidence credible. [United States v. Evans, 728 F.3d 953, 963 \(9th Cir. 2013\)](#) (reversing district court's rejection of birth certificate into evidence, which it had concluded was "without probative weight" and could "only lead to undue delay").

"Whatever the ultimate validity of any particular decision to admit testimony from members of a grand jury that issued an indictment against a defendant might be, admitting that evidence is sensitive and even dangerous. It is redolent of peril to the fairness of the trial itself." [U.S. v. Wiggan](#) (9th Cir. 2012) (holding that admission of grand jury foreman's testimony that defendant wasn't credible violated Rule 403, requiring reversal on all counts related or unrelated).

[United States v. Cunningham](#), 694 F.3d 372 (3d Cir. 2012) (district court's showing two minutes of child pornography video clips without first viewing them violated FRE 403) (discussing [United States v. Curtin](#), 489 F.3d 935 (9th Cir. 2007)).

#### **c. Pleas and plea discussions inadmissible**

[U.S. v. Condon](#) (8th Cir. 2013) (in "close" case, district court properly excluded under FRE 403 defendant's recorded plea discussions with his mother).

#### **d. Rule 901 (authentication)**

[Owino v. Holder](#) (9th Cir. 2014) (immigration) (arrest warrant was properly authenticated by Federal Defender investigator under FRE 901; 8 C.F.R. § 287.6(b) is not exhaustive of authentication methods).

[United States v. Vayner](#), 769 F.3d 125 (2d Cir. 2014) (insufficient showing under FRE 901 that social networking personal profile page was defendant's, where there was no evidence he'd created it, and information it contained was known to others).

[U.S. v. Young](#) (8th Cir. 2014) (note found in defendant's purse outlining her plan to make her codefendant out as "fall guy" for murder was authenticated under FRE 901(b)(4) to corroborate codefendant's defense).

## **B. Witnesses**

### **1. Lay and Expert testimony**

[U.S. v. Vera](#) (9th Cir. 2014) (testimony by expert in drug jargon intermingled lay and expert testimony, and it was plain error not to instruct jury on the distinction, requiring vacatur of special verdict on drug quantity, though with option of retrial, which would not violate double jeopardy). More at [Ninth Circuit Blog](#). (2014).

#### **a. Lay testimony (FRE 701)**

[U.S. v. Gadson](#) (9th Cir. 2014) (defense loss) (no plain error under FRE 701 in allowing officer testimony interpreting content of prison phone call recordings). More at [Ninth Circuit Blog](#). (2014)

[U.S. v. Freeman](#) (6th Cir. 2013) (FBI agents lay testimony in murder conspiracy case violated FRE 701, and couldn't be held harmless under alternative FRE 702 analysis).

[U.S. v. Hampton](#) (D.C. Cir. 2013) (FBI agents testimony about his understanding of recorded conversations played for jury violated FRE 701).

#### **b. Expert testimony (FRE 702)**

[U.S. v. Vera](#) (9th Cir. 2014) (opinions of expert in drug jargon about drug weights were given without adequate foundation, which "resulted in admission of specific drug quantity opinions that did not rest on reliable methods" required under FRE 702). More at [Ninth Circuit Blog](#).

[United States v. Hite](#), 769 F.3d 1154 (D.C. Cir. 2014) (in prosecution for attempting to persuade minor to engage in unlawful sexual activity under 18 U.S.C. § 2422(b), defendant was entitled to present expert testimony about his lack of any real sexual interest in children to prove lack of intent).

[United States v. Garcia](#), \_\_\_ F.3d \_\_\_, 13-4136, 2014 WL 1924857 (4th Cir. May 15, 2014) (trial court abused its discretion letting FBI testify as both expert and lay witness without adequate safeguards against jury's conflating the two, and cautionary instruction wasn't enough to stem prejudice).

[U.S. v. Hill](#) (10th Cir. 2014) (plain FRE 702 error to admit special agents expert opinion that defendant lacked credibility during videotaped statement).

[Hoffman v. Ford Motor Co.](#), 493 F. App'x 962 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2734, 186 L. Ed. 2d 192 (2013) (civil) (district court failed to make sufficient reliability findings regarding expert testimony about seat buckles under conditions of actual crash rather than in laboratory).

Schauer and Spellman doubt the legitimacy of the lay-expert distinction. See Frederick Schauer & Barbara A. Spellman, “Is Expert Evidence Really Different?,” working paper (2013) ([SSRN](#)).

### c. Threshold admissibility—*Daubert* and *Kumho Tire*

[City of Pomona v. SQM](#) (9th Cir. 2014) (civil) (expert testimony excluded after *Daubert* hearing as unreliable should have been presented to jury).

[Estate of Barabin v. AstenJohnson Inc.](#) (9th Cir. 2014) (en banc) (civil) (*Daubert* findings can be made by court of review based on record established by district court).

[U.S. v. Medina-Copete](#) (10th Cir. 2014) (“expert” testimony about link between religious iconography and drug trafficking, and about comparative “legitimacy” of iconography, was improper under *Daubert* and *Kumho*).

[Lees v. Carthage College](#) (7th Cir. 2013) (civil) (“aspirational” industry standards may be considered knowledge that is scientific, technical or specialized under FRE 702)

[United States v. Reddy](#), 534 F. App'x 866, 875 (11th Cir. 2013) (in medical fraud case, defense expert should have been permitted under *Daubert* to summarize his peer review of medical sampling images that defendant had purportedly examined and diagnosed).

### d. “Ultimate issue” testimony

*United States v. Hayat*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (9th Cir. 2013) (in case involving material support to terrorists, holding former imams expert testimony about implications of Arabic note found in defendant’s wallet may have “crossed the Rule 704(b) line,” though it did not amount to plain error).

## 2. Impeachment

### a. Prior statements

Generally, prior inconsistent statements are only admissible for impeachment. As Carl Gunn explains (2014), the [government can't use a witness's prior inconsistent statement for "impeachment" if they know the witness would give the adverse answer](#) (and the primary reason they called the witness was to introduce the prior inconsistent statement). Carl points out that you can make offensive use of this rule by warning the government ahead of time that their witness will give the adverse answer. Also, he discusses another possibly overlooked impeachment tool, FRE 806, which allows [impeachment of statements by those not present](#) (e.g., statements of coconspirator to counter an admission).

### C. Character evidence

#### 1. Past bad acts to show propensity and Rule 404(b)

Carl gun has some suggestions for (possibly) [keeping 404\(b\) evidence out with a stipulation](#) (2014).

#### a. Ninth Circuit cases

[U.S. v. Garcia](#) (9th Cir. 2013) (in involuntary manslaughter case, district court should have admitted photos from victim's MySpace page as impeachment evidence to counter testimony that he'd never been seen with firearm).

[U.S. v. Bailey](#) (9th Cir. 2012) (district court erred under FRE 404(b) in admitting prior SEC complaint filed against defendant, where defendant had settled civil suit without admitting liability).

#### b. Other cases

[U.S. v. Stacy](#) (7th Cir. 2014) (in methamphetamine manufacturing conspiracy case, evidence of prior meth possession was FRE 404(b) error, though harmless)

[United States v. Chapman](#), 12-1415, 2014 WL 4242554 (7th Cir. Aug. 28, 2014) (details of defendant's prior drug-trafficking conviction to prove knowledge and intent relied on impermissible propensity evidence, violating FRE 404(b)).

[United States v. Brown](#), 13-2214, 2014 WL 4211171 (3d Cir. Aug. 27, 2014) (admitting evidence of defendant's prior gun purchases during trial for being felon-in-possession six years later violated FRE 404(b)).

[U.S. v. Caldwell](#) (3d Cir. 2014) (evidence of prior convictions for unlawful weapons in 922(g) case violated 404(b)) (observing that no link in chain of inferences to establish relevance may rely on propensity) ("Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'").

[U.S. v. Davis](#) (3d Cir. 2013) (convictions for simple cocaine possession not admissible to prove knowledge or intent to distribute)

[U.S. v. Smith](#) (3d Cir. 2013) (even though motive behind gun possession was relevant and had been put in play by self-defense claim, government's theory that motive was proven by two-year-old history of selling heroin in same location as gun use didn't pass 404(b) muster).

[United States v. Vargas](#), 689 F.3d 867, 874 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 804, 184 L. Ed. 2d 594 (2012) (in cocaine distribution case, admission of CI's testimony that DEA agent told him defendant was involved in trafficking was not direct evidence of crime or inextricably intertwined with it, though error was harmless).

## 2. Other Issues

[U.S. v. Abair](#) (7th Cir. 2014) (allowing government to cross defendant on alleged false statements without good faith basis for believing they were false violated FRE 608(b)).

[U.S. v. Delgado-Marrero](#) (1st Cir. 2014) (defense witness testimony that went to entrapment defense and that contradicted government witness should have been admitted under FRE 608(b)).

[U.S. v. DeLeon](#) (5th Cir. 2013) (district court erroneously excluded character evidence under FRE 608(a)).

### D. Hearsay

Don't forget to make that Confrontation Clause objection too. See [Ninth Circuit Blog](#) (discussing [United States v. Anekwu](#), 695 F.3d 967 (9th Cir. 2012), the unhappy upshot of failing to mark that advice).

Dealing with an agents “translation”? Carl Gunn has [some discussion](#) of the case law in this area, and suggests subpoenaing the “translator” to produce exemplars in the foreign language to assess the agents actual skill. (2012)

[U.S. v. Demmitt](#) (5th Cir. 2013) (testimony by government witness that he had sworn to factual resume in his own plea was inadmissible hearsay and not on-the-stand admission that they were true statements). (H/T)

[U.S. v. Nelson](#) (6th Cir. 2013) (officer’s testimony about anonymous tip was improperly admitted to prove possession of gun).

## 1. Nonhearsay

### a. Declarant-witness’s prior statement

[U.S. v. Mergen](#) (2d Cir. 2014) (district court erred in excluding on hearsay and authentication grounds recording in which FBI agent assured defendant, a CI, that he’d done nothing wrong in connection with arson).

### b. Opposing party’s statement

Carl Gunn notes that FRE 801(d)(2) can be our friend, in [this post](#) on government “confessions”— statements in argument, or statements by agents or prosecutors in affidavits or pleadings, and even statements in agency reports. (2014)

### c. Not offered for truth

[United States v. Phillips, 731 F.3d 649, 652–53 \(7th Cir. 2013\)](#) (district court improperly excluded statements by mortgage broker that defendants wanted to introduce to show they hadn’t known their statements on loan application were false and that they weren’t intended to influence bank).

## 2. Hearsay exceptions

### a. Exceptions that apply whether or not declarant is available (803)

[U.S. v. Morales](#) (9th Cir. 2013) (admission of forms filled out by Border Patrol agents in the field were government records, so not admissible as “business” records under FRE 803(6), and defendant’s statements contained in those forms were inadmissible hearsay—though the error was harmless).

**b. Exceptions that apply where declarant is unavailable  
(804)**

[United States v. Duenas](#), 691 F.3d 1070 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1618, 185 L. Ed. 2d 603 (2013) (district court abused its discretion by admitting hearsay of deceased officer under FRE 804(b)(1) because defense counsel did not have “similar motive” to cross officer at prior suppression hearing).

[U.S. v. Henderson](#) (7th Cir. 2013) (admission of statement against penal interest must be corroborated as to its trustworthiness, not just as to whether it was made).

**E. Reliability generally**

"Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence," Keith A. Findley, Ga. L. Rev. (2013) ([SSRN](#)) (argues that current trends in Supreme Court jurisprudence suggest a due process framework that focuses upstream of the trial process on regulating the police and prosecutorial conduct that generates some of the most suspect trial evidence, and assesses new applications of non-constitutional evidence law that offer promise for filling the void in reliability review of such suspect types of evidence).

**1. Confessions**

Leo et al. argue that constitutional criminal procedure rules provide insufficient safeguards against the admissibility of false confession evidence that is the product of police contamination, and call for pretrial reliability assessments.

Richard A. Leo et al., “Promoting Accuracy in the Use of Confession Evidence: An Argument for Pre-Trial Reliability Assessments to Prevent Wrongful Convictions,” Temple L. Rev., forthcoming ([SSRN](#)).

**2. Eyewitness ID**

[Young v. Conway](#) (2d. Cir. 2012) (§ 2254) (after review of “extensive body of scientific literature” on unreliability of eyewitness ID, panel concludes that admission of ID testimony violated law clearly established in *Crews* and *Wade*).

**F. Privileges**

**1. Attorney-client privilege**

The government has recently claimed that there is no attorney-client privilege for emails over BOP Corrlinks/Trulincs. Carl Gunn has some contrary thoughts and

practical advice [here](#) and [here](#) (2014). Relatedly, the Ninth Circuit has held that a prisoner's allegations that prison officials read confidential legal mail addressed to his attorney stated a Sixth Amendment claim. [Nordstrom v. Ryan](#) (9th Cir. 2014).

[Gennusa v. Canova](#) (11th Cir. 2014) (civil) (warrantless monitoring of private attorney-client conversations in police station interview room clearly violates Fourth Amendment, in case you were wondering).

### G. "Opening the door"

"The specific content of the prosecutions arguments are red herrings. Defense counsel opens the door to topics or issues, not specific facts." [U.S. v. Maloney](#) (9th Cir. 2012) (defense opened door to government discussion of defendant's credibility in closing argument, and was not entitled to surrebuttal, by basing its argument on the proposition that government "had not cast doubt on [defendant's credibility and had not shown him to be a liar]"). More at [Ninth Circuit Blog](#).

**UPDATE** (7.6.2013): The Court has [ordered](#) en banc review in the case.

[U.S. v. Schmitt](#) (7th Cir. 2014) (after government had elicited testimony from its witness about defendant's alleged meth use, district court's ruling that defense's follow-up opened door to prior meth possession was error, though harmless)

[U.S. v. Shannon](#) (3d Cir. 2014) (government's argument that by intimating he'd cooperated with authorities defendant had opened door to questions about his decision to invoke right to counsel was "badly strained").

[Valadez v. Watkins Motor Lines, Inc.](#), 758 F.3d 975 (8th Cir. 2014) (civil) (plaintiff witness testimony about absence of statement in accident report did not open door to officer's conclusions about traffic accident).

### H. Constructive Amendment

[U.S. v. Ward](#) (9th Cir. 2014) (district court constructively amended indictment by permitting jury to convict defendant of stealing identifies not charged in indictment). More at [Ninth Circuit Blog](#).

[Smith v. Lopez](#) (9th Cir. 2013) (§ 2254) (though charges put defendant on notice that he could be subject to aiding-and-abetting liability, prosecutors conduct pre/trial conduct led petitioner to believe prosecution would not rely on aiding-and-abetting, and so giving aiding-and-abetting instruction here violated Sixth Amendment notice requirements under CEFL).

[United States v. Madden](#), 733 F.3d 1314, 1318–19 (11th Cir. 2013) (on plain error, superseding indictment that charged defendant knowingly used and carried firearm “during and in relation to a crime of violence” and knowingly possessed it “in furtherance of a drug trafficking crime” was constructively amended by addition of “during and in relation to” in jury instructions).

[United States v. Whitfield](#), 695 F.3d 288, 309 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013) (jury instruction for § 2113(e) bank robbery enhancements “death results” prong that hadn’t been charged in indictment was constructive amendment, and not harmless even if only variance).

### **I. Other evidentiary issues**

[United States v. Jacques](#), 684 F.3d 324 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 916, 184 L. Ed. 2d 703 (2013) (in federal death case, district court properly excluded rape priors under 18 U.S.C. § 3593(c), where rapes were remote, occurred when defendant was still “a youth,” and lacked relevant, “relatively contemporaneous adjudication”)

## **§ 11.02 The Defendant at Trial**

[United States v. Roy](#), 761 F.3d 1285 (11th Cir. 2014) (allowing government to examine computer forensics expert and admit inculpatory photographs without defense counsel in courtroom violated Sixth Amendment under *Cronic*, which is structural error).

### **A. The defendant’s testimonial rights**

#### **1. Right not to testify**

##### **a. Doyle error**

[U.S. v. Ramirez-Estrada](#) (9th Cir. 2014) (*Doyle* violation occurs when prosecution uses defendant’s post-invocation silence to impeach defendant, regardless of whether police complied with *Miranda*). More at [Ninth Circuit Blog](#).

[U.S. v. Shannon](#) (3d Cir. 2014) (government’s questions about defendant’s post-arrest silence—why he hadn’t come forward earlier with exculpatory facts, etc.—violated *Doyle*) (government’s argument issue wasn’t preserved because no specific mention was made of *Doyle* or *Miranda* “borders on frivolous”) (government’s

argument that defendant opened door by intimating he'd cooperated with authorities was "badly strained").

### **B. The right to present a defense**

"At its core, the right to due process is the right to fairly present a defense." [United States v. Juan](#), \_\_\_ F.3d \_\_\_, \_\_ (9th Cir. Jan. 7, 2013) (quoting [Webb v. Texas](#), 409 U.S. 95, 98 (1972) (per curiam)). Thus, "the government may not substantially interfere with the testimony of defense witnesses." *Id.* at \_\_\_ (citing [Webb v. Texas](#), 409 U.S. 95, 98 (1972) (per curiam)). Nor may the government interfere with the testimony of its own witnesses. *Id.* at \_\_\_ (denying due process claim where defendant failed to show alleged threats by prosecutor were ever communicated to government witness). And while "the prototypical *Webb* challenge involves conduct so threatening as to effectively drive [the] witness off the stand," *id.* at \_\_\_ (quoting [United States v. Jaeger](#), 538 F.3d 1227, 1231 (9th Cir. 2008)), prosecutorial interference may violate due process even when the allegedly threatened witness continued to testify after the alleged threat. *Id.* at \_\_\_. The Ninth Circuit Blog [notes](#) that Juan "invites discovery litigation for counsel confronted with a witness whose testimony has – evolved – after counsel was appointed."

[U.S. v. Leal-Del Carmen](#) (9th Cir. 2012) (unilateral deportation of possible defense witnesses violated right to fair trial and to present defense). *See also* good stuff in footnotes 3 & 4. More at [Ninth Circuit Blog](#). (2012).

[Cudjo v. Ayers](#) (9th Cir. 2012) (§ 2254) (trial court's exclusion of hearsay account of defendant's brother's confession was clear violation of due process under *Chambers*).

[United States v. Arechiga-Mendoza](#), \_\_\_ F.3d \_\_\_, No. 13-1082, 2014 WL 1876244 (10th Cir. May 12, 2014) (trial court improperly refused to review in camera information about informant's compensation).

[United States v. Murray](#), 736 F.3d 652 (2d Cir. 2013) (district court improperly refused to allow defendant to put on surrebuttal witness to address cell tower evidence that government had offered in rebuttal to show defendant had lied about the frequency of his visits to marijuana growers house).

[U.S. v. Stern](#) (7th Cir. 2013) (in money-laundering case, district court improperly prevented defendant from testifying about out of court statements made to him that misled him about purpose behind purchasing CDs).

### 1. Prosecutors duty to grant immunity to defense witnesses

Carl Gunn [has some thoughts](#) on how to get the force the government to give immunity to both defense and prosecution witnesses (2014).

[U.S. v. Wilkes](#) (9th Cir. 2014) (failure to compel use immunity for defense witness did not violate Sixth Amendment, where defense couldn't identify direct contradiction between what its witness would have said and what government's witnesses said). More at [Ninth Circuit Blog](#).

### C. The right to confrontation

[U.S. v. Morales](#) (9th Cir. 2013) (admission of forms filled out by Border Patrol agents in the field did not violate Confrontation Clause). More at [Ninth Circuit Blog](#) (7.8.13).

[United States v. Webster](#), \_\_\_ F.3d \_\_\_ (No. 13-1927, 2015 WL 55448 (7th Cir. Jan. 5, 2015) (lab reports admitted on testimony of officers without testimony by technician was Confrontation Clause violation, though not plain error because defense had affirmatively stated twice it had no objection).

[U.S. v. Duron-Caldera](#) (5th Cir. 2013) (in illegal entry case, admission of 40-year-old affidavit of dead grandmother violated Confrontation Clause).

[U.S. v. Charles](#) (11th Cir. 2013) (admission of third-party testimony by customs officer as to out-of-court statements by interpreter violated Confrontation Clause.) But see [Orm Hieng](#) (9th Cir. 2012).

[U.S. v. Soto](#) (1st Cir. 2013) ("second analysis" expert testimony is permitted under Confrontation Clause, but should avoid referring to first examiners conclusions).

[U.S. v. Woodard](#) (10th Cir. 2012) (district court improperly barred cross of government witness about prior judicial determination that witness was not credible).

## 1. *Crawford* and the Confrontation Clause

[U.S. v. Brooks](#) (9th Cir. 2014) (in trial for conspiracy to possess marijuana with intent to distribute, admission of nontestifying postal supervisor's statements with no contention of unavailability or prior opportunity to cross violated Confrontation Clause, and error was nonharmless as to one count). More at [Ninth Circuit Blog](#)

[United States v. Shaw](#), 758 F.3d 1187 (10th Cir. 2014) (admission of redacted confession by accomplice not tried as codefendant trial, and denial of hearing on issue, was *Bruton* error, though harmless).

[U.S. v. Ford](#) (6th Cir. 2014) (defense loss noting circuit split on whether denial of severance preserves later challenge under *Bruton*).

### a. "Testimonial" statements

In August 2014 SCOTUS granted cert to review Confrontation Clause limits on use at trial of out-of-court statements made by child about being abused. See [Ohio v. Clark](#) (SCOTUSblog case page). The case also raises the question of whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause.

In, [Williams v. Illinois](#), 132 S. Ct. 2221 (2012), the Supreme Court ruled that the Confrontation Clause was not violated by testimony given a state analyst who had not personally tested the DNA, because the information in the report that was the basis of his opinion was not introduced into evidence, and was not testimonial. But at least one court, the D.C. Court of Appeals, has characterized *Williams* as being of "questionable precedential value," and held that a defendant has the right to confront the forensic scientist who tested DNA evidence in his case. [United States v. Young](#), \_\_\_ A.3d \_\_\_ (D.C. Ct. App. 2013). See also "Confronting Science: Expert Evidence and the Confrontation Clause," Jennifer Mnookin & David H. Kaye, S. Ct. Rev. (forthcoming, 2013) ([SSRN](#)) (noting in abstract "bewildering array of opinions in which majority support for admitting the opinion of a DNA analyst about tests that she did not perform was awkwardly knitted together out of several incompatible doctrinal bases").

[U.S. v. Liera-Morales](#) (9th Cir. 2014) (in kidnapping scheme linked to human-trafficking ring, agent's testimony recounting call with victim's mother did not violate Confrontation Clause because call primarily addressed ongoing

emergency) (even if rule of completeness applied, it did not entitle defendant to introduce exculpatory statements from interview). More at [Ninth Circuit Blog](#). (suggesting *Liera-Morales* can be read as restricted to “extraordinary” circumstances).

[U.S. v. Bustamante](#) (9th Cir. 2012) (document purporting to be transcript of Filipino birth certificate to prove defendant was not U.S. citizen was testimonial).

[U.S. v. Cameron](#) (1st Cir. 2012) (in child pornography case, ISPs internal reports of child pornography were testimonial and admission violated Confrontation Clause).).

#### **b. Used against the defendant at trial**

[United States v. Taylor](#), No. 11-2201, 2014 WL 814861 (2d Cir. Mar. 4, 2014) (admission of redacted confession violated *Bruton*).

[United States v. Powell](#), 732 F.3d 361, 378 (5th Cir. 2013) (introducing co-defendants statements against defendant through cross-examination was *Bruton* error).

#### **c. Forfeiture by wrongdoing**

[U.S. v. Johnson](#) (9th Cir. 2014) (defense loss) (facts triggering forfeiture exception to Confrontation Clause need only be proven by preponderance of the evidence). More at [Ninth Circuit Blog](#).

#### **D. In-court identification of the defendant**

On issues related to identification procedures generally, see *Identifying the Culprit: Assessing Eyewitness Identification*, National Academy of Sciences Report (2014) ([website](#)).

### **§ 11.03 Prosecutorial Misconduct**

[U.S. v. Certified Environmental Services, Inc.](#) (2d Cir. 2014) (misconduct [included](#) (1) improper bolstering of government witnesses based on their cooperation agreements; (2) improper vouching in summation; (3) improper extra-record references in rebuttal summation; and (4) improper appeals in rebuttal summation to the consequences the jury's verdict would have).

### **A. Presenting false evidence**

[Dow v. Virga](#) (§ 2254) (9th Cir. 2013) (in case of "textbook misconduct," prosecutor elicited false testimony that defendant (rather than his attorney) had requested all lineup participants to wear patch in same location defendant had distinctive scar, then argued to jury that this was evidence of guilty conscience).

### **B. Improper questioning**

#### **1. Bolstering**

[United States v. Certified Env'tl. Servs., Inc.](#), \_\_\_ F.3d \_\_\_, 11-4872, 2014 WL 2198541 (2d Cir. May 28, 2014) (reversal based on denial of fair trial due to improper bolstering and to exclusion of evidence of good faith to demonstrate lack of intent, with detailed discussion of limits on prosecutors use of cooperation agreement).

#### **2. Other improper questioning**

[United States v. Lopez-Avila](#), --- F.3d ---, No. 11-10013 (9th Cir. 2012) (as amended) (holding that misleading, partial quotation of prior testimony to impeach was misconduct, chastising government for failing to "appreciate[e] the seriousness of the misconduct," and noting that prosecutors "should not be able to hide behind the shield of anonymity when they make serious mistakes").

### **C. Arguments**

[U.S. v. Woods](#) (4th Cir. 2013) (prosecutors statement in closing argument that defendant lied under oath was reversible misconduct on plain error).

#### **1. Vouching**

[U.S. v. Rangel-Guzman](#) (9th Cir. 2014) (prosecutors invocation of personal knowledge of interview during cross was "highly improper" by government's own concession, though it did not affect substantial rights).

#### **2. Arguing erroneous facts or law**

[Deck v. Jenkins](#) (9th Cir. 2014) (§ 2254) (California Supreme Court unreasonably applied *Darden* in finding prosecutor's misstatement of law of attempt harmless).

[United States v. Mageno](#), 762 F.3d 933 (9th Cir. 2014) (prosecutor's multiple misstatements of evidence during closing resulted in plain error) (issue could be

considered on appeal even though not raised in *opening brief*, where government raised it in answering brief, and there was no prejudice). More at [Ninth Circuit Blog](#).

The government cannot argue that “someone must be lying.” [United States v. Ruiz](#), \_\_\_ F.3d \_\_\_, slip op. at 10 (9th Cir. 2013) (“[P]rosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying.” (quoting *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999)). Still, while this “distorts the burden of proof and misstates the law,” it “sadly is condoned by the incantation: harmless error review.” *Id.* at 20 (Pregerson, J., concurring). More on *Ruiz* at [Ninth Circuit Blog](#).

## **D. Other misconduct**

### **1. Interference with witnesses**

“[T]he testimony of [the government’s ] own witnesses can violate the Due Process Clause...” [T]he substantial and wrongful interference with a prosecution or defense witness that does not drive the witness off the stand but instead leads the witness to materially change his or her prior trial testimony can, in certain circumstances, violate due process.” [United States v. Juan](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. (slip op. 9) (9th Cir. Jan. 7, 2013). See also [Ninth Circuit Blog](#).

### **2. Destruction of evidence (or failure to preserve it)**

- Biological Evidence Preservation Handbook, DOJ/NIST (2013) ([pdf](#))

#### **a. Remedial instruction**

Bad faith “is the wrong legal standard for a remedial jury instruction.” [U.S. v. Sivilla](#), slip op. at 9 (9th Cir. 2013). Rather, the district court must balance “the quality of the Government’s conduct” against “the degree of prejudice to the accused,” where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice.” [U.S. v. Sivilla](#) (9th Cir. 2013). More at [Ninth Circuit Blog](#).

## § 11.04 Mistrials and New Trials

### A. Motion for new trial

[U.S. v. Claxton](#) (3d Cir. 2014) (district court's failure to rule on *Brady/Giglio* issues raised in Rule 33 motion after granting Rule 29 motion was implicit denial of motion, so issues were preserved).

#### 1. Scope

[U.S. v. Steele](#) (9th Cir. 2013) (district courts may entertain prejudgment motion for new trial on IAC grounds, though court's decision here not to do so was not error).

#### 2. Newly discovered evidence

A district court finding that the defendant "present[ed] a defense based on perjured testimony" is no bar to a retrial. [United States v. Moore](#), \_\_\_ F.3d \_\_\_, \_\_\_ (4th Cir. 2013).

## CHAPTER 12: SENTENCING AND SUPERVISED RELEASE

General sentencing resources:

- Sentencing resources [webpage](#) at defender services
- [USSC Quick Facts](#)

### § 12.01 Statutory Sentencing Provisions

#### A. § 3553 and minimally sufficient sentencing

[United States v. Chin Chong](#), 13-CR-570, 2014 WL 4773978 (E.D.N.Y. Sept. 24, 2014) (Weinstein, J.) (for defendant methylole dealer who would be deported upon serving sentence, time served was sufficient sentence).

#### 1. Unwarranted similarities and disparities (§ 3553(a)(6))

[U.S. v. Prado](#) (7th Cir. 2014) (sentencing court erred in telling parties it would only consider evidence of “nationwide” disparities).

[U.S. v. Smith](#) (10th Cir. 2013) (district court erred in considering disparity with co-defendant without considering disparities nationwide, rejecting government’s argument that court “necessarily considered” such disparities by correctly calculating and reviewing guidelines range).

#### 2. Rehabilitation (§ 3553(a)(2)(D))

“[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.” *Tapia v. United States*, 131 S. Ct. 2382, 2393, 180 L. Ed. 2d 357 (2011). See also, e.g., [U.S. v. Wooley](#) (5th Cir. 2014) (finding *Tapia* error).

[U.S. v. Mendiola](#) (10th Cir. 2012) (revocation sentence was plain error under *Tapia*).

#### 3. Deterrence (§ 3553(a))

The DOJ-funded NIJ has a nice outline of recent social science on deterrence, [here](#) (2014). You can find the article on which that webpage is based [here](#).

#### 4. Misc. § 3553(a) factors

A district court may “inquire[] into” a defendant’s ability to pay restitution to his victims as part of “considering the serious financial impact” the crime had on

victims. [U.S. v. Rangel](#) (9th Cir. 2012) (amended opinion & order denying reh'g). More at [Ninth Circuit Blog](#) (analogizing to non/acceptance of responsibility reward/punishment context).

### B. “Safety valve”

[U.S. v. Lizarraga-Carrizales](#) (9th Cir. 2014) (*Alleyne* doesn't apply to safety valve determination). More at [Ninth Circuit Blog](#).

[United States v. Carillo-Ayala](#) (11th Cir. 2013) (drug-dealer who also sells firearms to drug customers doesn't necessary possess them “in connection with” charged drug offense for purposes of safety valve, even if connection was enough for purposes of § 2D1.1(b)).

### C. § 851

New (as of 10.10.14) Holder memo on use of 851s to leverage a guilty plea [here](#), with another on appeal waivers for IAC claims [in the works](#). For the DOJ's earlier policy statement, see [Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases](#) (2013).

[U.S. v. Young](#) (D. Iowa 2013) (Bennett, J.) (government §851 charging decisions “reveal jaw-dropping, shocking disparity”).

[U.S. v. Kupa](#) (E.D.N.Y. 2013) (Gleeson, J.) (post-Holder Memo, urging DOJ to exercise its discretion to charge recidivist enhancements “less destructively and less brutally”)

## § 12.02 Federal Sentencing Guidelines

Carl looks at *Booker's* creeping effect in district courts away from guideline sentencing, [here](#) (2014).

[U.S. v. Vasquez-Cruz](#) (9th Cir. 2012) (Amendment 741 to the guidelines did not abrogate *Mohamed*, and so the panel declined to review for *procedural* error district court's failure to grant departure for cultural assimilation or consider departure and variance arguments as separate steps). More at [Ninth Circuit Blog](#) (“Guidelines, Schmuidelines...”).

### A. Deconstruction (and Reconstruction)

Carl Gunn has a three-part series on guidelines deconstruction (and “reconstruction”), [here](#) (*Kimbrough* and other background), [here](#) (the “dirty little secret”), [here](#) (the how-to), [here](#) (some examples), and [here](#) (“reconstruction”) (2013). See also Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 306 (2013) (“[T]he pre-*Booker* guidelines likely harmed defendants more than anything in the history of federal criminal law.”).

District courts can’t use “institutional considerations”—such as institutional competence, deference to Congress, or the risk that other judges will set different ratios—as a reason to reject guidelines deconstruction arguments. [U.S. v. Kamper](#) (6th Cir. 2014) (in context of MDMA guideline).

### B. Grouping (§ 3D1.4) and double counting

[U.S. v. Smith](#) (9th Cir. 2013) (in sentence for sex trafficking of children by force, fraud, or coercion, it was not impermissible double counting to apply § 2G1.3(b)(2)(B) enhancement for exerting under influence on minor) More at [Ninth Circuit Blog](#).

[U.S. v. Williams](#) (9th Cir. 2012) (mailbox bombing counts should not have been grouped with wire fraud and extortion counts) (court also erred in applying brandishment and leadership, brandishment, and obstruction enhancements) (extortion offense was not “relevant conduct” for purposes of sentencing for extortion).

[United States v. Garcia-Figueroa](#), 753 F.3d 179 (5th Cir. 2014) (illegal entry conviction should have been grouped with convictions for bringing<sup>1</sup> and conspiring<sup>2</sup> to bring alien into United States, where all three were based on same transaction and “victim” was United States).

### C. “Relevant Conduct”

“Relevant conduct” under the guidelines is limited to criminal conduct. See [United States v. Catchings](#), \_\_\_ F.3d \_\_\_, \_\_\_, Nos. 11-6303/6305 (slip op. at 13) (6th Cir. Jan. 15, 2013) (citing *United States v. Schaefer*, 291 F.3d 932, 940 (7th

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<sup>1</sup> 8 U.S.C. §§ 1324(a)(1)(A)(i), 1324(a)(1)(A)(v)(I) & 1324(a)(1)(B)(i).

<sup>2</sup> 8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(i) & 1324(a)(1)(B)(i).

Cir. 2002)) (holding that having victim of scheme open accounts in name of business was not criminal).

[United States v. Purham](#), 754 F.3d 411 (7th Cir. 2014) (2008 drug distribution while on probation for 2006 drug offense was not relevant conduct for the 2006 drug offense) (noting among other things that drug amounts and method of transport were different).

### 1. Extraterritorial conduct excluded?

In a RICO case, the Ninth Circuit held that foreign conduct (a fraud on Chines Banks to the tune of \$482 million) did not apply to a base offense level calculation, where the defendants were convicted of conspiracy but not the underlying offense, and the government did not trace the defendants' fraud to the bank losses. See [United States v. Xu](#), 706 F.3d 965 (9th Cir.), *as amended on denial of reh'g* (Mar. 14, 2013). See also [Ninth Circuit Blog](#).

### D. Ex Post Facto Issues

The Ex Post Facto Clause continues after *Booker* to apply to the guidelines, which are the “lodestone” and “anchor” of federal sentencing; EPF principles protect not only reliance interests but “principles of fundamental justice.” [Peugh v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). The remedy for reversible *Peugh* error is plenary resentencing—even if the government requests a limited remand. [U.S. v. Adams](#) (7th Cir. 2014).

If there's a pending guideline amendment that might help your client, consider trying to get a sentencing pushed till after the effective date. Carl Gunn [explains](#) the helpful chemistry between the ex post facto rule and 18 U.S.C. § 3553(a)(4) that generally makes this a no-lose proposition. (2012)

[U.S. v. McMillian](#) (7th Cir. 2015) (Posner, J.) (under *Peugh*, guidelines “one book” rule couldn't apply to multiple sex trafficking offenses involving four different victims, at least two of whom had stopped working for defendant before change to guidelines) (offenses could not be grouped as “closely related” under § 3D1.2 because the offenses didn't fall into relevant exception to rule against grouping offenses with different victims; and even if they did, court would hesitate to treat the “nigh unintelligible” grouping provisions as providing notice that would circumvent ex post facto problem).

[\*United States v. Myers\*](#), 772 F.3d 213 (5th Cir. 2014) (six-level enhancement for 250 or more victims violated Ex Post Facto Clause, where revised definition encompassed more “victims”) (Note: ex post facto argument was raised in untimely reply brief)

[\*U.S. v. Clark\*](#) (D.C. Cir. 2014) (application of guidelines not yet published was ex post facto violation).

[\*U.S. v. Woodard\*](#) (7th Cir. 2014) (plain *Peugh* error in applying 2011 guidelines to conduct spanning 2006 and 2007).

[\*U.S. v. Williams\*](#) (7th Cir. 2014) (ex post facto violation in applying § 2B1.1(b)(2)(A) enhancement because “victim” was defined differently at time of offense in 2008 than at sentencing under 2012 guidelines) (declining government’s request for limited remand).

## **E. Specific guidelines**

### **1. § 1B1.1**

When “two or more guideline provisions appear equally applicable, [the court should] use the provision that results in the greater offense level.” U.S.S.G. § 1B1.1 Application Note 5. However, this tie-breaker “is not a license to shoehorn an offense into an ill-suited” guideline. [\*U.S. v. Huizar-Velazquez\*](#) (9th Cir. 2013) (holding that appropriate guideline for importing wire hangers without paying proper duties was § 2T3.1 smuggling, not § 2C1.1 bribery).

### **2. § 1B1.3 (relevant conduct)**

[\*United States v. Isaacson\*](#), \_\_\_ F.3d \_\_\_, 13-14287, 2014 WL 2119820 (11th Cir. May 22, 2014) (Morgan Stanley made investment independent of fraudulent valuations prepared by defendant and so loss was not attributable to him, even though conspiracy likely delayed and possibly prevented auditors discovery of fraud).

### **3. § 2A3.1**

[\*United States v. Joe\*](#), 696 F.3d 1066 (10th Cir. 2012) (U.S.S.G. §§ 2A3.1(b)(1) and 3A1.3 enhancements for force and physical restraint against victim could not be applied to conviction for 18 U.S.C. § 2244(a)(1) aggravated sexual assault, which by definition requires force and restraint).

#### 4. § 2A3.5

[U.S. v. Johnson](#) (7th Cir. 2014) (defendant’s performing oral sex on girlfriend against her wish but without “force or threat of force” required by Illinois sexual assault statute, so enhancement under § 2A3.4(b)(1)(A) was improper).

#### 5. § 2A4.1

[United States v. Bonilla-Guizar](#), 729 F.3d 1179, 1187 (9th Cir. 2013) (application of U.S.S.G. § 2A4.1(b)(3) two-level for using “dangerous weapon” in kidnapping based on brandishing alone was plain error).

#### 6. § 2A6.1

[United States v. Keyser](#), 704 F.3d 631, 644 (9th Cir. 2012) (expenditures for four-level enhancement under § 2A6.1(b)(4) should have been limited to those related to mailings for which defendant had been convicted).

#### 7. § 2B1.1 (fraud)

The fraud guidelines “are just too goddamn severe.” District Judge Jed S. Rakoff, as quoted [here](#) (2014). Carl Gunn posts [here](#) (2015) on how to make current use of pending amendments to 2B1.1.

[U.S. v. Juncal](#) (2d Cir. 2013) (statutory maximum sentence in \$3 billion dollar loan scheme was procedurally unreasonable, where district court did not adequately address argument that 30-point enhancement from guideline loss calculation etc. overstated seriousness of offense) (Underhill, J., concurring argues that loss guideline is “fundamentally flawed”).

Unlawful or unauthorized transfer or sale of identifying information is not, per se, “use” for “fraudulent purpose” within § 2B1.1. [United States v. Hall](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. 11-14698 ( slip op. 12–13) (11th Cir. Jan. 16, 2013).

##### a. Loss

[U.S. v. Popov](#) (9th Cir. 2014) (amount billed to Medicare in scheme overstated intended loss because Medicare caps payments for each service performed).

[United States v. Laurienti](#), 611 F.3d 530, 557 (9th Cir. 2010) (district court erred in failing to give credits against loss where individual victims’ realized gains from house stocks sold as part of “pump and dump” scheme).

[U.S. v. Prange](#) (1st Cir. 2014) (district court failed to credit against loss value of stocks sold to government during sting operation).

[United States v. Powers](#), 578 F. App'x 763 (10th Cir. 2014) (in determining “gross receipts” within § 2B1.1(b)(14)(A), district court failed to make findings about buyers’ culpability).

[United States v. Domnenko](#), 763 F.3d 768 (7th Cir. 2014) (14-level loss enhancement was unsupported by finding that losses caused by fraudulent real estate sale were reasonably foreseeable; no evidence defendants knew their buyer was fictitious).

[United States v. Evans](#), 744 F.3d 1192 (10th Cir. 2014) (not all investor losses for entirety of scheme were fraudulent; proper inquiry was what loss was caused by lies about status of securities and properties, starting when the fraud began, and excluding lost value due to unsustainable business model and any losses due to unforeseeable extrinsic factors).

[U.S. v. Nelson](#) (5th Cir. 2013) (total possible value of grant based on statements in defendant’s letter supporting grant request was too speculative to support \$6 million bribery amount under § 2B1.1).

[U.S. v. Pratt](#) (5th Cir. 2013) (district court’s calculation under money laundering guideline of loss, which was based on value of all goods and services instead of value of laundered funds, was plain error even though sentence was still within correctly calculated range).

A district court may not presume that the combined credit limit of counterfeit cards was intended loss. *United States v. Diallo*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (3d Cir. Jan. 15, 2013).

#### **b. Number of Victims**

[U.S. v. Brown](#) (9th Cir. 2014) (in case involving Ponzi scheme and bankruptcy fraud, enhancement for endangering solvency or financial security of at least 100 victims under § 2B1.1(b)(15)(B)(iii) was unsupported as to number of victims) (enhancement for at least 250 victims under § 2B1.1(b)(2)(C) erroneously included 148 victims who weren’t included in loss calculation).

[United States v. Myers](#), 772 F.3d 213 (5th Cir. 2014) (six-level enhancement for 250 or more victims violated Ex Post Facto Clause, where revised definition

encompassed more “victims”) (Note: ex post facto argument was raised in untimely reply brief).

[U.S. v. Williams](#) (7th Cir. 2014) (ex post facto violation in applying § 2B1.1(b)(2)(A) enhancement because “victim” was defined differently at time of offense in 2008 than at sentencing under 2012 guidelines) (declining government’s request for limited remand).

[United States v. Moore](#), 733 F.3d 161 (5th Cir. 2013) (where mail is stolen from more than one postal service collection box, district court cannot simply multiply the number of collection boxes involved by number of victims presumed by § 2B1.1, cmt., n.4(C)(ii)(I), to be involved when one collection box is involved; nothing in that rule applies the presumption to subsequent boxes)).

[U.S. v. Washington](#) (11th Cir. 2013) (fact that government told district court at sentence that over 6,000 people had identifying information stolen, 250 during defendant’s involvement in scheme, was not enough for § 2B1.1(b)(2)(C) enhancement).

[U.S. v. Lacey](#) (2d Cir. 2012) (fraud guideline mass-marketing enhancement requires those targeted in marketing be victimized; record findings were insufficient to conclude straw buyers targeted by radio ads in mortgage fraud scheme were victimized).

### **c. Miscellany**

[United States v. Charles](#), 757 F.3d 1222 (11th Cir. 2014) (two-level increase under §2B1.1(b)(11)(B) for trafficking in unauthorized access device can’t be applied where defendant was also convicted of aggravated identity theft).

[United States v. Mathauda](#), 740 F.3d 565 (11th Cir. 2014) (two-level for violation of prior court order, §2B1.1(b)(8)(C), in FTC matter that defendant never received was error, and inattention to outcome of that matter was not willful blindness).

[United States v. Doss](#), 741 F.3d 763, 767 (7th Cir. 2013) (two-level under § 2B1.1(b)(11)(B) for trafficking in stolen credit cards was plain error where defendant was also subject to statutory minimum for aggravated identity theft).

[U.S. v. Lacey](#) (2d Cir. 2012) (fraud guideline mass-marketing enhancement requires those targeted in marketing be victimized) (district court’s record findings

were insufficient to conclude straw buyers targeted by radio ads in mortgage fraud scheme were victims).

### **8. § 2B3.1 Robbery**

[U.S. v. Whatley](#) (11th Cir. 2013) (defendant's herding bank employees inside bank during robbery did not support § 2B3.1(b)(4)(A) "abduction" enhancement).

[U.S. v. Zuniga](#) (5th Cir. 2013) (conclusory statement in PSR that minor saw one man trample over a 15-year-old causing pain wasn't enough for § 2B3.1(b)(3)(A) enhancement for causing bodily injury).

[U.S. v. Wooten](#) (6th Cir. 2012) (defendant's saying "I have a gun" during bank robbery was not "threat of death" within § 2B3.1).

### **9. § 2B3.2 (extortion)**

[U.S. v. Williams](#) (9th Cir. 2012) (firearm enhancement under (b)(3)(iii) didn't apply to defendants possessed of destructive device and other guns during time he staged mailbox bombing; the bombing played no role in extortionate scheme and wasn't "relevant conduct").

### **10. § 2C1.1 (bribery)**

[United States v. Rousel](#), \_\_\_ F.3d \_\_\_ (5th Cir. 2013) (down payment on bribe was one bribe under § 2C1.1(b)(1), notwithstanding future installments supposedly contemplated).

[U.S. v. Renzi](#) (D. Ariz. 2013) (notable public corruption sentencing of former congressman, in which district court varied to 36 from 97–121, where government had recommended 9–12 years).

[U.S. v. Ghavami](#) (S.D.N.Y. 2013) (SL&P link discussing 18-month sentence imposed in \$25 million bid-rigging case, where government had sought at least 17 years).

### **11. § 2D1.1 (drug offenses)**

In April of 2014, the Sentencing Commission voted unanimously to adjust the Drug Quantity Table downward by two levels. The amendments are [here](#). A handy summary prepared by sentencing resource counsel, is [here](#). Attorney General Holder has already instructed U.S. Attorneys not to object if defendants

seek to have the changes applied [now](#). Some anticipatory ruminations on all of this from Carl Gunn from back in March are [here](#).

[U.S. v. Rangel-Guzman](#) (9th Cir. 2014) (district court inadequately explained why it decided not to apply two-level reduction under § 2D1.1(b)(16) for safety-valve, where only disputed factor was whether defendant had “truthfully provided” all relevant information and evidence.).

[United States v. Lee](#), 725 F.3d 1159 (9th Cir. 2013) (district court improperly concluded that reference to Ice in plea agreement compelled conclusion that defendant admitted to transporting “Ice” within the guidelines, whose 80% purity criterion is not dispositive about how to interpret defendant’s understanding of plea terms) (NB: panel is explicit about construing plea agreement in defendant’s favor in analyzing this error).

[U.S. v. Trujillo](#) (9th Cir. 2013) (upward departure under amended § 2D1.1 was not ex post facto violation).

[United States v. Freeman](#), 763 F.3d 322 (3d Cir. 2014) (district court’s conclusory statements were insufficient to support disputed PSR drug quantity estimate).

[U.S. v. Castro-Perez](#) (10th Cir. 2014) (two-level for committing drug crime while possessing dangerous weapon under § 2D1.1(b)(1) was error, where there was no evidence gun was near drugs or transaction).

[U.S. v. Biglow](#) (10th Cir. 2014) (unpub’d) (failure to make particularized drug quantity findings in conspiracy case was plain error).

[United States v. Block, et al.](#), \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (7th Cir. Feb. 1, 2013) (seeing coconspirators firearm at his home or on his person does not make possession reasonably foreseeable in connection with conspiracys drug business as required for application of § 2D1.1(b)(1)).

[United States v. Cervantes](#), \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (5th Cir. 2013) (application of § 2D1.1(b) enhancement for use of firearm was improper double punishment for defendants separately sentenced for possession of firearm in furtherance of drug trafficking).

[U.S. v. Marquez](#) (1st Cir. 2012) (drug quantity in crack cocaine distribution case was unsupported, despite recorded boasts by defendant of having obtained amount in question).

[U.S. v. Miller](#) (8th Cir. 2012) (“confused sentencing record” left drug quantity finding in doubt).

[United States v. Marquez](#), 699 F.3d 556 (1st Cir. 2012) (defendant’s purported admission of dealing 152 grams of drug was insufficient to support quantity, where it was based on garbled exchange, lacked any supporting detail, and was prone to exaggeration).

#### **a. Cases criticizing guideline**

[United States v. Diaz](#), No. 11-cr-00821-2 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (“I will place almost no weight on the [Guidelines recommendation]. The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants.”).

[U.S. v. Hayes](#) (N.D. Ia. 2013) (Bennett, C.J.) (imposing six years for meth, where guidelines recommended 16) (“The methamphetamine offense Guidelines are excessive because they subject all defendants to harsh treatment, regardless of their role.”).

#### **12. § 2G1.1 (promoting commercial/prohibited sex)**

[United States v. Wernick](#), 691 F.3d 108 (2d Cir. 2012) (in child enticement case, defendant’s other acts involving abuse or attempted abuse of young children were not “relevant conduct” applicable to § 2G1.1 because they did not occur “during” offenses, notwithstanding temporal overlap, and error was plain).

#### **13. § 2G2.2 (child pornography)**

One Ninth Circuit judge has noted the “unjust and sometimes bizarre results [that may] follow if § 2G2.2 is applied . . . without special awareness of the Guidelines anomalous history.” [United States v. Henderson](#), 649 F.3d 955, 964 (9th Cir. 2011) (Berzon, J., concurring). See also [United States v. Dorvee](#), 616 F.3d 174 (2d Cir. 2010) (cited with approval in Henderson) (finding sentence substantively unreasonable largely based on defects in the guideline). [U.S. v. Hardrick](#) (9th Cir. 2014) (Reinhardt, J., concurring) (lamenting unfair minimum sentencing in child pornography possession cases).

A sample deconstruction memo out of the 6th Cir. At fd.org, [here](#) (2012).

[U.S. v. Vallejos](#) (9th Cir. 2014) (knowing-use of file-sharing program is enough for two-level distribution enhancement, and there was no *Alleyne* error). More at [Ninth Circuit Blog](#). But see [U.S. v. Baldwin](#) (2d Cir. 2014) (two-level distribution enhancement under § 2G2.2(b)(3)(F) requires that defendant know he is sharing child pornography).

[United States v. Walters](#), \_\_\_ F.3d \_\_\_, No. 14-3097, 2015 WL 24475 (6th Cir. Jan. 2, 2015) (concurring with majority affirmance of within-guideline sentence for child pornography possession, J. White says that in child pornography sentencing, “competent counsel” should “be expected to bring to the district court’s attention that the Guidelines do not, as in other contexts, reflect the presumed superior expertise and breadth of information of the Commission, and in fact are contrary to the Commission’s considered judgment”) (dissent laments that “nothing is going to soon change the injustices such as this one that are going on every day in the federal courts—unless the courts themselves find a solution that at least ameliorates the problem for the time being”).

[U.S. v. D.M.](#) (E.D.N.Y. 2013) (Weinstein, J.) (imposing straight probation in child pornography possession originally charged as distribution).

Other resources:

- [Sample Sentencing Memorandum in a Child Pornography Case](#) (2013)

[U.S. v. McManus](#) (4th Cir. 2013) (use of GigaTribe isn’t sufficient to support commercial distribution enhancement).

#### **14. § 2G1.3 (sex trafficking of minors)**

[U.S. v. Smith](#) (9th Cir. 2013) (in sentence for sex trafficking of children by force, fraud, or coercion, it was not impermissible double counting to apply § 2G1.3(b)(2)(B) enhancement for exerting under influence on minor) More at [Ninth Circuit Blog](#).

[U.S. v. Pringler](#) (5th Cir. 2014) (defense loss noting circuit split on issue of whether §2G1.3 cmt. n.4 is inconsistent with the guideline itself).

[\*United States v. Patterson\*](#), 576 F.3d 431 (7th Cir. 2009) (“use of a computer” enhancement did not apply even though the crime involved internet-based prostitution, where no computers were used to “communicate directly” victim).

### 15. § 2K2.1

[\*U.S. v. Vargem\*](#) (9th Cir. 2014) (in sentencing for conviction of possessing unregistered machine gun, application of base offense level under § 2K2.1(a)(4) and multiple-gun enhancement under § 2K2.1(b)(1)(C) was plain error—defendant was not prohibited person, and possession of other guns was not related to offense of conviction). More at [Ninth Circuit Blog](#).

[\*United States v. Norris\*](#), 580 F. App’x 456 (6th Cir. 2014) (after selling gun to prohibited buyer, asking buyer to dispose of gun because it was evidence in murder case was not “use” within § 2K2.1(b)(6)(B)).

[\*United States v. Arechiga-Mendoza\*](#), \_\_\_ F.3d \_\_\_, No. 13-1082, 2014 WL 1876244 (10th Cir. May 12, 2014) (export of guns into Mexico is not per se unlawful and here did not support § 2K2.1(b)(5) enhancement).

[\*United States v. Kilgore\*](#), \_\_\_ F.3d \_\_\_, 13-5623, 2014 WL 1424474 (6th Cir. Apr. 15, 2014) (four-level enhancement to base offense level for possessing a firearm “in connection with another felony offense” under § 2K2.1(b)(6)(B) was improperly applied to theft of pistols that triggered underlying felon-in-possession conviction and two-level enhancement for theft under 2K2.1(b)(4)).

[\*U.S. v. Hagman\*](#) (11th Cir. 2014) (defendant’s placing himself in middle of negotiations for return of missing firearms did not imply that he knew who had them and that he had access to them, so four-point for bartering 8 to 24 firearms did not apply).

[\*United States v. Seymour\*](#), 739 F.3d 923 (6th Cir. 2014) (§ 2K2.1(b)(6)(B) enhancement for possessing firearm in connection with another felony could not be applied where defendant possessed only small amount of drugs, where there was no evidence of drug trafficking, and where there was evidence he was trying to sell the gun).

[\*U.S. v. Johns\*](#) (7th Cir 2013) (district court erroneously applied trafficking and “another felony offense” enhancement in a 922(g) case where both enhancements were premised on the same conduct, contrary to § 2K2.1 application note 13(d)).

[United States v. Mann](#) (8th Cir. 2012) (application of § 2K2.1(b)(4) to grenades that had lot numbers and manufacturing dates removed was error because these weren't serial numbers, and testimony by government witness established grenades do not have serial numbers).

[U.S. v. Horton](#) (4th Cir. 2012) (application of murder cross-reference guideline to murder that occurred during course of unrelated, uncharged offense was error).

#### **16. § 2T1.1(b)(2) (sophisticated means)**

Efforts to conceal income by using a bank account with a “deceptive” name (defendant’s own real name instead of name of corporation) is enough. [United States v. Jennings](#) (9th Cir. 2013). More on *Jennings* at [Ninth Circuit Blog](#).

[U.S. v. Adepoju](#) (4th Cir. 2014) (imposition of sophisticated means enhancement based on absence of evidence that fraud victim’s personally identifying information could have been retrieved by simple internet search was clear error, “essentially shifting the burden to Adepoju to disprove sophistication”).

[U.S. v. Valdez](#) (5th Cir. 2013) (undisguised transfers from operating accounts to investment accounts did not qualify for sophisticated means enhancement).

#### **17. § 2L1.1 (smuggling, transporting, harboring unlawful alien)**

[U.S. v. Reyes](#) (9th Cir. 2014) (defense loss) (in sentencing for harboring and concealing illegal aliens, 8 U.S.C. § 1324(a)(1)(A)(iii) and (B)(i), there was no error in applying two-level enhancement under § 2L1.1(b)(4) for harboring unaccompanied minor aliens, or two-level under § 2L1.1(b)(8)(A) for detaining aliens through coercion). More at [Ninth Circuit Blog](#).

[U.S. v. Pineda-Doval](#) (9th Cir. 2012) (in applying cross-reference to second-degree murder guideline, district court clearly erred in finding malice aforethought in deaths caused during illegal transportation of aliens that resulted in fatal roll after defendant tried to avoid spike strip).

#### **18. § 2L1.2 (illegal reentry)**

Cases that perform categorical analysis of “crimes of violence,” “controlled substance offenses,” or “aggravated felonies” are dealt with in  § 12.06C, and § 12.06D below. This section addresses encompasses types of predicates and

application questions, and provides authorities for deconstructing the guideline. Some general sentencing resources in this setting:

- [Illegal Reentry Quick Facts](#) (Sentg Comm.) (FY2012)
- [Sentencing Issues in Reentry Cases](#) (Dec. 31, 2012)
- [Challenging the Upward Bumps: The Categorical Approach and Other Sentencing Strategies for Illegal Re-Entry \(8 U.S.C. § 1326\) Cases](#) (Nov. 2, 2012)

[U.S. v. Aguilar-Reyes](#) (9th Cir. 2013) (Arizona attempted smuggling law is not categorical “alien smuggling offense” within § 2L1.2(b)(1)(A)(vii)).

[U.S. v. Catalan](#) (9th Cir. 2012) (guideline amendment clarified rather than altered existing law that probation revocation served after deportation is not “sentence imposed” under § 2L1.2(b)(1)(B), and district court here thus erred in treating it as one).

[United States v. Catalan](#), 701 F.3d 331 (9th Cir. 2012) (guideline amendment clarified rather than altered existing law that probation revocation served after deportation is not “sentence imposed” under § 2L1.2(b)(1)(B), and district court here thus erred in treating it as one).

#### **19. § 2L2.1 (immigration-related documents, statements, marriages)**

[United States v. Xiao Yong Zheng](#), 762 F.3d 605 (7th Cir. 2014) (two-level for fraudulent use of foreign passport, §2L2.1(b)(5)(B) in sentencing for aggravated identity theft and conspiracy to misuse Social Security numbers and commit passport fraud was improper double counting) (distinguishing and finding unpersuasive *United States v. Dehaney*, 455 F. App’x 781 (9th Cir. 2011)).

#### **20. § 2Q2.1 (Fish, Wildlife, Plants)**

[United States v. Butler](#), 694 F.3d 1177 (10th Cir. 2012) (fair-market value of deer killed did not include price of expedition to hunt it).

#### **21. § 2S1.1**

[United States v. Lucena-Rivera](#), \_\_\_ F.3d \_\_\_, 13-2200, 2014 WL 1624107 (1st Cir. Apr. 24, 2014) (“intertwined” nature of drug-trafficking and money-laundering business insufficient for “in the business of laundering funds” enhancement)).

[U.S. v. Salgado](#), 2014 WL 988537 (11th Cir. 2014) (conduct in underlying drug conspiracy cannot be used to impose role enhancement when calculating adjusted offense level for money laundering under § 2S1.1(a)(1)).

#### **22. § 3A1.1**

[U.S. v. Nielsen](#) (9th Cir. 2012) (district court erred in applying vulnerable victim adjustment without determining victim was less able than typical minor to defend herself).

[United States v. Dougherty](#), 754 F.3d 1353 (11th Cir. 2014) (flight one week after robbery not “immediate” for application of § 3A1.2 six-level).

[United States v. Ramos](#), 739 F.3d 250 (5th Cir. 2014) (vulnerable victim enhancement improperly double counts conduct covered by age (U.S.S.G. § 2G2.2(b)(2)) and sadistic-conduct (U.S.S.G. § 2G2.2(b)(3)) enhancements).

#### **23. § 3A1.2**

[United States v. Collins](#), 754 F.3d 626 (8th Cir. 2014) (defendant’s attempt to stab officer with pen during interview after arrest did not satisfy enhancement for assaulting officer during or after flight under § 3A1.2(c)(1)).

[U.S. v. Jones](#) (3d Cir. 2014) (enhancement for assault of police officer under § 3A1.2(c)(1) improperly applied where officer was unaware defendant was attempting to withdraw gun).

#### **24. § 3A1.3**

[U.S. v. Joe](#) (10th Cir. 2012) (U.S.S.G. §§ 2A3.1(b)(1) and 3A1.3 enhancements for force and physical restraint against victim could not be applied to conviction for 18 U.S.C. § 2244(a)(1) aggravated sexual assault, which by definition requires force and restraint).

#### **25. § 3B1.1 (role)**

[U.S. v. Brown](#) (9th Cir. 2014) (in case involving Ponzi scheme and bankruptcy fraud, leadership role enhancement under § 3B1.1(c) was erroneous, where, as district court noted, record wasn’t clear about whether defendant controlled particular participant).

[U.S. v. Kamper](#) (6th Cir. 2014) (in MDMA trial, role enhancement was error where record may have shown defendant “was responsible for directing other individuals in menial tasks,” but where there was no factual finding that he’d managed others involved in the conspiracy).

[United States v. Eiland, 738 F.3d 338 \(D.C. Cir. 2013\)](#) (evidence was insufficient to show defendant had been organizer, supervisor, or manager to five or more people within 21 U.S.C. §848).

For leader role, district court must make clear finding that defendant “manage[d] or supervise[d] another participant. [United States v. Bonilla-Guizar, 729 F.3d 1179, 1187 \(9th Cir. 2013\)](#) (remanding for clarification).

#### **26. § 3B1.3 (abuse of position of trust)**

[U.S. v. Solomon](#) (3d Cir. 2014) (two-level for abuse of position of trust, § 3B1.3, cannot be applied to sentences originating under § 2C1.1 even if offense level is ultimately determined by cross-reference to guideline the enhancement to which § 3B1.3 can be applied, here, § 2D1.1).

[United States v. Rushton, 738 F.3d 854, 859 \(7th Cir. 2013\)](#) (enhancement for abuse of position of trust was plain error when also applying enhancement for committing fraud while being commodity pool operator, even though guidelines range as properly calculated by panels lights—i.e., adding a missed two-level for vulnerable victim—would be the same).

[U.S. v. Zehrung](#) (1st Cir. 2013) (fact that medical office billing manager did billing without supervision or review was not enough to support enhancement for abuse of position of trust).

#### **27. § 3B1.4 (use of a person younger than eighteen)**

[U.S. v. Flores](#) (9th Cir. 2013) (district court’s vague statement about knowing that participant in conspiracy was a minor was not sufficient for § 3B1.4 enhancement).

#### **28. § 3C1.1 (obstruction)**

[U.S. v. Castro-Ponce](#) (9th Cir. 2014) (district court improperly applied obstruction enhancement, § 3C1.1, where it did not find defendant’s false testimony willful and material). **UPDATE**(11.10.14): More at [Ninth Circuit Blog](#).

Lying to pretrial services about possession of firearms, failing to appear for pretrial revocation hearing, and fleeing to Mexico have been held to qualify, even where the defendant recanted and had intended to obstruct only a prior case in which defendant was on release. See [U.S. v. Manning](#) (9th Cir. 2012). More at [Ninth Circuit Blog](#).

[United States v. Pena](#), \_\_\_ F.3d \_\_\_, 13-1787, 2014 WL 1797464 (2d Cir. May 7, 2014) (sentencing judge clearly erred in making false statements determination based on trial judges credibility finding in denial of motion to suppress).

[U.S. v. Kamper](#) (6th Cir. 2014) (in MDMA trial, obstruction enhancement was error where district court ruled statements false without making factual findings of perjury—materiality and intent).

[United States v. Macias-Farias](#) (6th Cir. 2013) (district court’s reliance on government’s off-the-cuff summary of defendant’s testimony does not support obstruction enhancement on perjury theory).

[United States v. Williams](#) (6th Cir. 2013) (defendant’s lying about his identity for two months was not material to magistrate judges probable cause and indigency determinations, so § 3C1.1 obstruction enhancement didn’t apply).

[United States v. Gray](#) (10th Cir. 2013) (unpub’d) (noting circuit split as to whether § 3C1.2 requires nexus between crime of conviction and reckless endangerment (which Ninth has [assumed](#) without deciding)).

[United States v. Galaviz](#), 687 F.3d 1042 (8th Cir. 2012) (plotting to kill informant in retaliation for cooperation in prosecution of offense to which defendant pleaded guilty was not obstruction).

### **29. § 3C1.2 (reckless endangerment during flight)**

[United States v. Johnson](#), 694 F.3d 1192 (11th Cir. 2012) (enhancement erroneously applied to defendant who’d been passenger in getaway vehicle after bank robbery without showing he’d counseled, etc. drivers leading police on chase).

### **30. § 3E1.1 (acceptance)**

[U.S. v. Torres-Perez](#) (5th Cir. 2015) (government’s withholding third acceptance point for defendant’s refusal to waive appeal rights was nonharmless error).

[\*United States v. Evans\*](#), 744 F.3d 1192 (10th Cir. 2014) (government’s refusal to grant -1 for acceptance was not rationally related to resource allocation, where government had promised to move for reduction even if defendant challenged loss amount).

[\*U.S. v. Haggerty\*](#) (10th Cir. 2013) (district court improperly denied one point for acceptance based on criteria outside § 3E1.1(b)).

The circuits are split on whether § 3E1.1(b) adjustment for acceptance is mandatory when government moves for it, declining to address issue in light of plea waiver. See *United States v. Castro*, \_\_\_ F.3d \_\_\_, \_\_\_, ([slip op.](#)) (3d Cir. 2013).

### 31. § 4A1.1 et seq. (criminal history)

[\*United States v. Jenkins\*](#), No. 13-3409, 2014 WL 6746590 (7th Cir. Dec. 1, 2014) (plain error under U.S.S.G. § 4A1.2, cmt. n.6 to include in criminal history calculation prior conviction under statute that was later invalidated).

[\*U.S. v. McLaurin\*](#) (4th Cir. 2014) (including two juvenile robberies in criminal history calculation was plain error, with third prong fulfilled by district court’s concerns that sentencing range was driving by fictitious drug quantity in stash house prosecution).

[\*United States v. Santiago-Burgos\*](#), \_\_\_ F.3d \_\_\_, 13-1897, 2014 WL 1613707 (1st Cir. Apr. 21, 2014) (two criminal history points erroneously assessed under § 4A1.1(d) where assault was overt act within conspiracy defendant pleaded to, and government concedes error).

[\*U.S. v. Vazquez\*](#) (9th Cir. 2013) (district court erred in treating suspended sentence as sentence of probation under § 4A1.2(c)(1)(A), where conditions merely required lawful conduct).

### 32. §§ 4B1.1, 4B1.2 (career offender)

Cases that perform categorical analysis of “crimes of violence” or “controlled substance offenses” are dealt with in  and § 12.06C below. This section addresses application questions and provides authorities for deconstructing the career offender guideline.

A conviction is not a “prior felony” within the meaning of § 4B1.1 unless it receives criminal history points under § 4A1.1(a), (b), or (c). The Eighth Circuit has held that a prior controlled substance offense did not qualify as a career offender predicate because it was grouped with another state drug offense that received a longer sentence—and therefore itself received no criminal history point. [United State v. Higgins](#) (8th Cir. 2013).

[U.S. v. Davis](#) (2d Cir. 2013) (consolidated sentences counted as one, not two, prior felony convictions for career offender purposes).

[U.S. v. Duran](#) (10th Cir. 2012) (defendant’s conviction for Texas law that encompassed causing injury recklessly with deadly weapon was not “crime of violence” within § 4B1.2(a)).

[United States v. Reyes](#), 691 F.3d 453 (2d Cir. 2012) (use of controlled substance offense post-dating instant offense as CO predicate was plain error).

#### **a. Cases criticizing**

[United States v. Newhouse](#) ([slip op.](#)) (D. Ia. Jan. 30, 2013) (in “pill smurfer” case, holding that career offender guideline results in sentencing recommendations that are “aperiodic, irrational, and arbitrary”).

#### **b. Other resources**

- Amy Baron-Evans, et al., “Deconstructing the Career Offender Guideline,” 2 Charlotte L. Rev. 39 (2010) ([WLN](#)) ([pdf](#)—periodically updated).
- FD.org [CO deconstruction page](#).
- Note: “Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines,” Andrew Tunnard, Vand. L. Rev. (2013) ([pdf](#)) (argues contra Ninth that convictions before 18 should not count toward career offender enhancement).

### **33. § 4B1.5 (Repeat Sex Offender against Minors”)**

[U.S. v. Nielsen](#) (9th Cir. 2012) (juvenile sexual assault was not “sex offense conviction” within § 4B1.5(a)).

### 34. § 5D1.2

[\*United States v. Collins\*](#), 773 F.3d 25 (4th Cir. 2014) (ten-year supervised release term vacated in light of intervening amendment clarifying that failing to register under SORNA is not a “sex offense” within § 5D1.2).).

### 35. § 5K1.1

Unconstitutional grounds for withholding 5K1.1 include withdrawal because the defendant chose to go to trial, see *United States v. Khoury*, 62 F.3d 1138, 1142 (9th Cir. 1995); a prosecutors improper ex parte communication and decision to solicit his grand jury testimony which violated the attorney-client relationship and Sixth Amendment, *United States v. Treleven*, 35 F.3d 458, 461 (9th Cir. 1994); breaching the plea agreement, *United States v. De la Fuente*, 8 F.3d 1333, 1341 (9th Cir. 1993) (affirming district court’s remedial 5K1.1. departure in government’s stead); and an unspecified “indication of an unconstitutional basis” for government’s refusal, *United States v. Delgado-Cardenas*, 974 F.2d 123, 126 (9th Cir. 1992) (remanding for further proceedings).

“[E]very other circuit that has examined this issue has expressly stated that a court may consider evidence of cooperation under § 3553(a)(1) even in the absence of a § 5K1.1 motion.” [\*United States v. Robinson\*](#), 741 F.3d 588, 600 (5th Cir. Jan. 24, 2014) (joining the First, Sixth, Seventh, and Tenth Circuits).

## § 12.03 Appellate Review of Sentences

A sentence that is either procedurally or substantively unreasonable must be set aside. See *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1053 (9th Cir. 2009); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

Sentencing resource counsel has a list of reversals for unreasonableness after *Gall*, [here](#) (last updated Dec. 5, 2013). Decisions in this section address general errors or substantive unreasonableness. Cases that provide substantive criticism of particular guidelines are collected in § 12.02E above, under the specific guideline in question.

Some cases involving substantively or procedurally unreasonable conditions are (currently without rhyme or reason) also collected under § 12.10A (“Conditions”) below.

### A. Procedural reasonableness

The kinds of “significant procedural error[s],” *Gall*, 552 U.S. at 51, that require a remand for resentencing include:

- miscalculating the advisory guidelines range, and failing to use it as starting point and keep it in mind throughout sentencing, *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011) (per curiam); *United States v. Doe*, 705 F.3d 1134, 1153–54 (9th Cir. 2013);
- treating the guidelines range as presumptively reasonable, *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam);
- treating a non-guidelines sentence as unreasonable, *Rita v. United States*, 551 U.S. 338, 354–55 (2007);
- failing to properly consider the 18 U.S.C. § 3553(a) sentencing factors, *see Carty*, 520 F.3d at 993, including giving inadequate consideration to a relevant factor, *see United States v. Robertson*, 662 F.3d 871, 874 (7th Cir. 2011), *United States v. Bragg*, 582 F.3d 965, 969 (9th Cir. 2009), such as
  - evidence of rehabilitation, *Pepper v. United States*, 131 S. Ct. 1229, 1241–43 (2011);
  - sentences other than imprisonment. *Gall v. United States*, 552 U.S. 38, 58 (2007).
  - conditions of pretrial confinement. *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001).
  - susceptibility to abuse in prison. *United States v. Parish*, 308 F.3d 1025, 1031 (9th Cir. 2002).
- elevating one factor above others, *Pepper v. United States*, 131 S. Ct. 1229, 1249 (2011), including the guidelines, *Carty*, 520 F.3d 984, 994);
- failing adequately to explain the sentence, *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011) (supervised release restriction); *United States v. Doe*, 705 F.3d 1134, 1153–54 (9th Cir. 2013); *United States v. Armstead*, 552 F.3d 769, 784-85 (9th Cir. 2008) (failure to explain variance);
- 2011); *see also United States v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010)
- basing a sentence on
  - unreliable evidence, *United States v. Hanna*, 49 F.3d 572, 577 (9th Cir. 1995);
  - clearly erroneous facts, *Carty*, 520 F.3d at 993; *Gall v. United States* 552 U.S. 38, 51 (2007);

- materially false evidence, [United States v. Ayers](#), 924 F.2d 1468, 1481 (9th Cir. 1991);
  - a hunch, [United States v. Bragg](#), 582 F.3d 965, 969-70 (9th Cir. 2009);
  - approximations, [United States v. Waknine](#), 543 F.3d 546, 557-58 (9th Cir. 2008);
- improperly limiting the evidence that would be considered, [Pepper](#), 131 S. Ct. at 1235;
- relying on an improper sentencing factor such as
  - rejection of a plea agreement, [United States v. Vasquez-Landaver](#), 527 F.3d 798, 805-06 (9th Cir. 2008); [United States v. Carter](#), 804 F.2d 508, 513-15 (9th Cir. 1986);
  - prior arrests, [United States v. Johnson](#), 648 F.3d 273 (5th Cir. 2011);
  - inability to pay restitution, [United States v. Burgum](#), 633 F.3d 810, 814 (9th Cir. 2011);
  - the criminal conduct underlying a supervised release revocation (as opposed to the breach of the court's trust), [United States v. Miqbel](#), 444 F.3d 1173, 1181-82 (9th Cir. 2006);
  - rehabilitation as a basis for prison, [Tapia v. United States](#), 131 S. Ct. 2382, 2391 (2011);
- relying on facts that aren't judicially noticeable in a modified categorical analysis, such as
  - the PSRs description of a prior offense, [Reina-Rodriguez v. United States](#), 655 F.3d 1182, 1191 (9th Cir. 2011);
  - evidence outside the record of conviction, [Reina-Rodriguez v. United States](#), 655 F.3d 1182, 1192-93 (9th Cir. 2011);
  - statements or admissions by defense counsel, [United States v. Rodriguez-Guzman](#), 506 F.3d 738, 747 n.9 (9th Cir. 2007);
  - an unpublished state appellate court opinion summarizing the facts, [United States v. Espinoza Morales](#), 621 F.3d 1141, 1150 (9th Cir. 2010);
- failing to address a defendant's *Kimbrough* argument, [United States v. Henderson](#), 649 F.3d 955, 964 (9th Cir. 2011);
- failing to give parties an opportunity to argue, [Gall v. United States](#), 552 U.S. 38, 49 (2007); [United States v. Doe](#), 705 F.3d 1134, 1153-54 (9th Cir. 2013);

- failing to make findings by clear and convincing standard where an enhancement has a disproportionate effect on the sentence, [United States v. Treadwell](#), 593 F.3d 990, 1000 (9th Cir. 2010); [United States v. Pineda-Doval](#), 614 F.3d 1019, 1040 (9th Cir. 2010).<sup>3</sup>

Procedural sentencing errors must be preserved by objection in the Ninth Circuit. [United States v. Autery](#), 555 F.3d 864 (9th Cir. 2009). *But see, e.g., United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) (noting that objection requirement would only “saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case.”).

Cases other than those above collected below.

### 1. Adequate explanation; address nonfrivolous argument

See generally Jennifer Niles Coffins “[Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation](#)” (July 2010, updated Dec. 2011).

#### a. Ninth Circuit

A district judge who imposes a non-guidelines sentence must justify the variance (as it must justify any sentence), and in general “adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *See Gall v. United States*, 128 S. Ct. 586, 597 (2007). An inadequate explanation may require reversal. *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011).

[U.S. v. Bell](#) (9th Cir. 2014) (conditions requiring substance abuse treatment and barring alcohol use for defendant convicted of tax fraud weren’t adequately explained)

[United States v. Garcia](#), 491 F. App’x 815 (9th Cir. 2012) (in case involving false tax return, 26 U.S.C. § 7206(1), and conspiracy, 18 U.S.C. § 371, imposition of identical within-guideline sentence was procedurally unreasonable and remanded to new judge, where both times district court had provided inadequate explanation).

[United States v. Mota](#), 434 F. App’x 636 (9th Cir. 2011) (district court’s rote recitation of statutory sentencing factors and statements that statutory maximum

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<sup>3</sup> H/T to Alexandra Yates for many of the cases and points in this list.

was reasonable, sufficient, and no greater than necessary punishment were procedurally unreasonable, where defendant had provided arguments for leniency, and where length of sentence and supervised release term was severe).

[\*United States v. Dulay\*](#), 505 F. App'x 679, 680 (9th Cir. 2013) (“[B]ecause the district court did not calculate the applicable Guidelines range, it could not adequately explain ‘the extent of [any] deviation’ from that range.”).

#### **b. Other circuits**

[\*United States v. Fernandez\*](#), \_\_\_ F.3d \_\_\_, No. 14-30151, 2015 WL 178999 (5th Cir. Jan. 14, 2015) (lifetime computer-filter condition for defendant’s failure to register was abuse of discretion, where defendant’s offense did not involve use of internet, or of computer generally, and district court’s reasoning was “not sufficiently tied to the facts”).

[\*United States v. Morris\*](#), \_\_\_ F.3d \_\_\_, No. 14-2242, 2015 WL 51638 (7th Cir. Jan. 5, 2015) (district court inadequately considered defendant’s mitigation based on 18:1 crack-to-powder ratio; though sentence was below-guideline, defendant was subjected to substantially increased penalty for delivering counterfeit substance in quantities directed by CI, taking his case out of the “mine-run”) (defense counsel’s negative response to court’s generic “anything further?” inquiry did not waive argument; litigant is not required under Rule 51 to complain about district court’s decision after it’s been made).

[\*United States v. Cary\*](#), \_\_\_ F.3d \_\_\_, No. 14-1961, 2015 WL 66514 (7th Cir. Jan. 6, 2015) (computer monitoring condition required hearing on nature and scope of monitoring and greater explanation for condition)

[\*U.S. v. Hinds\*](#) (7th Cir. 2014) (suspicionless supervised release search condition ordered “based on the nature of the instant offense” was not adequately justified).

[\*United States v. Payton\*](#), \_\_\_ F.3d \_\_\_, 13-1242, 2014 WL 2609612 (6th Cir. June 12, 2014) (sentence for robbery more than double the guideline high-end was “major departure,” “unusually harsh,” and demanded “significant explanation,” which district court did not provide, particularly in failure to respond to defendant’s argument that his age diminished public safety benefit of incapacitation—a point the panel discusses in great detail).

District courts can't use "institutional considerations"—such as institutional competence, deference to Congress, or the risk that other judges will set different ratios—as a reason to reject guidelines deconstruction arguments. [U.S. v. Kamper](#) (6th Cir. 2014) (in context of MDMA guideline).

[U.S. v. Poulin](#) (7th Cir. 2014) (district court failed to consider defendant's principal mitigation argument based on Sentencing Commission survey of judges, 70 percent of whom believed that guideline sentences for sex offenses are too harsh).

[United States v. Washington, 739 F.3d 1080 \(7th Cir. 2014\)](#) (guideline sentence of 97 months for cocaine possession with intent was not adequately explained, even though defendant's mitigation arguments were "stock").

[U.S. v. Lyons](#) (7th Cir. 2013) ("A court may not arrive at a sentence simply by ... eliminating the defendant's o[wn] proposals[, which] does not eliminate [the court's] obligation to explain its own reasons.").

[U.S. v. Schmitz](#) (7th Cir. 2013) (district court must address policy challenges to guidelines even if they aren't directly linked to circumstances and characteristics in defendant's particular case).

[U.S. v. Martin](#) (7th Cir. 2013) (failure to address defendant's two principle mitigation arguments at sentencing was error);

[U.S. v. Begin](#) (3d Cir. 2012) (district court abused discretion in failing to consider downward variance in light of disparity between defendant's sentence for attempt to induce statutory rape, § 2422(b), on the one hand, and lower state and federal maximum sentences for committing statutory rape, on the other).

[U.S. v. Quinn](#) (7th Cir. 2012) (release terms can be made more onerous, and therefore in need of greater justification, by their duration - as was the case here in child pornography possession case, in which judge failed to consider burdensomeness of restriction on defendant's visits with son that lasted until son turned 18).

#### Resources:

- "Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing," [36-MAR Champion 36](#) (2012).

- Scott Michelman & Jay Rorty, “Doing *Kimbrough* Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines,” 45 *Suffolk U. L. Rev.* 1083 (2012) (recommend adding an analytical step to the sentencing process through which courts can explicitly apply policy considerations separately from, and prior to, individualized considerations, making sentencing more precise, transparent, and fair).
- Here’s a note about the psychological effect of empty “because” clauses, from Daniel Gilbert, [The Vagaries of Religious Experience](#): “[P]sychology experiments reveal that people are often satisfied by [the] empty form [of an explanation]. For instance, when experimenters approached people who were standing in line at a photocopy machine and said, Can I get ahead of you? the typical answer was no. But when they added to the end of this request the words because I need to make some copies, the typical answer was yes. The second request used the word because and hence sounded like an explanation, and the fact that this explanation told them nothing that they didn’t already know was oddly irrelevant.”

## 2. Properly calculate and consider guidelines range

The miscalculation of a guideline sentence requires that the reviewing court remand for resentencing, regardless of whether the district court stated it would independently impose the same sentence under § 3553. [United States v. Munoz-Camarena](#), 631 F.3d 1028, 1031 (9th Cir. 2011) (remanding for incorrect guidelines calculation even though sentence imposed was well below correctly calculated guidelines range). See also [United States v. Lee](#), 725 F.3d 1159 (9th Cir. 2013) (district court failed to use guidelines as starting point, incorrectly calculated base level base on erroneous purity assessment and then at the government’s request, selected departure level for Lee's substantial assistance under § 5K1.1 that would enable it to hold that desired sentence was within guideline range) (noting that on remand court should consider defendant’s age and likelihood of dying in prison: “There is a worthy tradition that death in prison is not to be ordered lightly, and the probability that a convict will not live out his sentence should certainly give pause to a sentencing court.”) (note: district court also failed to calculate revised minimum sentence under § 3553(e)).

[United States v. Keyser](#), 704 F.3d 631, 644 (9th Cir. 2012) (imposition four-level enhancement under § 2A6.1(b)(4) was procedurally unreasonable, where it included mailings for which defendant had not been convicted).

*United States v. Romero*, 482 F. App'x 215, 218 (9th Cir. 2012) (sentence was procedurally unreasonable, where district court imposed 16-level enhancement for losses exceed \$1 million but had found losses were only \$110,000, and failed to explain sentence).

*United States v. Yellow Owl*, 390 F. App'x 692 (9th Cir. 2010) (one-month difference at top of incorrectly calculated guideline range rendered sentence procedurally unreasonable) (noting on remand district court “should directly address Yellow Owl's mitigating arguments”).

*United States v. Falcon*, 415 F. App'x 815, 816 (9th Cir. 2011) (finding sentence procedurally unreasonable upon government's concession that district court should have relied on U.S.S.G. § 2K2.1(b)(6) application note 14(A) when determining whether to apply the enhancement rather than analogizing to burglary and relying on U.S.S.G. § 2K2.1(b)(6) application note 14(B), and that factual record was insufficient to support the enhancement).

*United States v. Dulay*, 505 F. App'x 679, 680 (9th Cir. 2013) (district court's failure to calculate the applicable guidelines range and failure to explain the extent of any variance was non-harmless procedural error) (“[B]ecause the district court did not calculate the applicable Guidelines range, it could not adequately explain ‘the extent of [any] deviation’ from that range.”).

*United States v. Millan-Isaac*, \_\_\_ F.3d \_\_\_, 13-1693, 2014 WL 1613683 (1st Cir. Apr. 18, 2014) (district court failed to calculate or discuss guidelines range).

### **3. Properly consider 3553(a) factors, not presume reasonableness**

*United States v. Thompson*, \_\_\_ F.3d \_\_\_, No. 14-1316, 2015 WL 151609 (7th Cir. Jan. 13, 2015) (Posner, J.) (district court must consider §3553(a) factors when imposing all discretionary supervised release conditions, including standard conditions) (several standard conditions are “hopelessly vague,” “unnecessary,” etc. without district court effort to explain their necessity in particular cases).

*United States v. Johnson*, 635 F.3d 983, 987–90 (7th Cir. 2011) (district court improperly presumed guidelines reasonable and failed to make it clear it had considered parsimony principle, where it “regrettably” imposed life sentence saying that adhering to Congress's judgment would be “prudent”).

#### 4. Clearly erroneous facts

[\*United States v. Stokes\*](#), \_\_\_ F.3d \_\_\_, 13-1779, 2014 WL 1673132 (8th Cir. Apr. 29, 2014) (sentence based in part on notion that defendant’s long-term unemployment suggested he was drug-dealer reversed where record only showed prior drug use and not dealing).

#### 5. Unreliable or insufficient evidence

[\*United States v. Thomas\*](#), \_\_\_ F.3d \_\_\_, 13-3046, 2014 WL 1673820, at \*10 (10th Cir. Apr. 29, 2014) (sentence procedurally unreasonable where based on criminal history score incorporating six convictions only five of which government provided evidence for, and government would not get opportunity on remand to cure the failure of proof).

[\*United States v. Richey\*](#), 758 F.3d 999 (8th Cir. 2014), reh’g denied (Sept. 15, 2014) (basing revocation sentence on unproven, disputed, or “perhaps even undisclosed” allegations in probation officer’s reports, including adjustment reports is procedurally unreasonable).

#### 6. Miscellaneous or multiple procedural errors

[\*U.S. v. Odachyan\*](#) (9th Cir. 2014) (Reinhardt, J., concurring) (though district court’s statements at sentencing—expressing “wonder and amazement” at those who “come to this country” then “prey” on government institutions “as their own personal piggybanks” then cite terrible conditions back home as an excuse—were not constitutional error outside plea waiver, they were “wholly inappropriate” and have “no place at a sentencing hearing”).

[\*United States v. Coppenger\*](#), \_\_\_ F.3d \_\_\_, No. 13-3863, 2015 WL 72833 (6th Cir. Jan. 7, 2015) (district court’s upward variance of 23 months in fraud case was plain Rule 32 error and procedurally unreasonable, where court failed to give defendant notice and meaningful opportunity to respond to its “novel” reliance on offense conduct’s impact on coconspirator straw buyers, which was not signaled in PSR or otherwise reasonably foreseeable, requiring vacatur of upward variance).

[\*U.S. v. Sanchez\*](#) (2d Cir. 2014) (miscalculation of mandatory minimum in drug case—20 years, instead of 10—was plain error, even though 288-month sentence imposed was well above the miscalculated mandatory minimum) (“[T]he assumption of a 20-year minimum sentence permeates the record.”).

[United States v. Garcia](#), 754 F.3d 460, 483–84 (7th Cir. 2014) (court’s granting acceptance but then running sentences concurrent was a “confusing outcome, at best,” where court didn’t mention final calculated guidelines range, and judgment stated final range that doesn’t exist in guidelines).

[United States v. Millan-Isaac](#), \_\_\_ F.3d \_\_\_, 13-1693, 2014 WL 1613683 (1st Cir. Apr. 18, 2014) (court considered evidently new sentencing information (about how robbery emotionally affected cashier) without notice).

[United States v. Currie](#), 739 F.3d 960 (7th Cir. 2014) (where wrong statutory minimum was considered at sentencing, resentencing was required even though sentence imposed was above lower mandatory minimum).

[United States v. Whitlow](#), 740 F.3d 433 (7th Cir. 2014) (limited remand where district court misunderstood its discretion to correct BOP miscalculation of credit for time served when BOP refused to do so).

[U.S. v. Romanini](#) (6th Cir. 2012) (unpub’d) (district court improperly considered defendant’s elevated socioeconomic status to justify greater punishment).

### **B. Substantive reasonableness**

In determining whether a sentence is substantively reasonable, the court reviews the totality of the circumstances. After that review, the court should reverse if it has “a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.” *Amezcuva-Vasquez*, 567 F.3d at 1055. The Seventh Circuit has suggested that the need for a compelling justification for a variance from guideline range should generally be assessed by looking at relative as opposed to absolute measures. [U.S. v. Castillo](#) (7th Cir. 2012) (Posner, J.).

Even if the sentence is not substantively unreasonable, a sentence near “the boundary of substantiv[e] unreasonable[ness]” should receive greater scrutiny for procedural sentencing error. *United States v. Ingram*, 721 F.3d 35, 45 (2d Cir. 2013) (Calabresi, J., concurring); *see also Henderson*, 649 F.3d at 962 (reversing for procedural sentencing error after noting the widely “perceived severity of the child pornography [g]uidelines”).

Substantive reasonableness claims are reviewed for abuse-of-discretion regardless of objection. [\*United States v. Autery\*](#), 555 F.3d 864 (9th Cir. 2009).

[\*U.S. v. Price\*](#) (7th Cir. 2014) (on cross-appeal by government, variance downward from 40 to 18 years for child porn producer with “contemptible history [including child molestation] and unrepentant nature” was substantively reasonable).

[\*U.S. v. Howard\*](#) (4th Cir. 2014) (upward variance from 78–97 months to life plus 60 months for PCP conspiracy and distribution with possession of firearm in furtherance was substantively unreasonable, in light of district court’s excessive focus on juvenile criminal history without considering diminished culpability of juveniles, and its conclusion that chance of recidivism was “100 percent,” which was clearly untrue given declining recidivism risk with age).

[\*U.S. v. Spann\*](#) (7th Cir. 2014) (Posner, J.) (fact that trafficking in heroin is “serious” crime does not by itself justify high-end guideline sentence).

[\*United States v. Thavaraja\*](#), 740 F.3d 253 (2d Cir. 2014) (nine-year sentence for principle procurement officer for foreign terrorist group was not unreasonably lenient).

[\*U.S. v. Cole\*](#) (8th Cir. 2014) (“profound” downward variance to probation for “staggering” multi-million dollar fraud was adequately explained and substantively reasonable).

[\*U.S. v. Dayi\*](#) (D. Md. 2013) (in case involving “large, elaborate, and profitable” marijuana operation, the court adopted 2-level downward variance as “reflect[ing] national trends in the enforcement of marijuana-related offenses”).

[\*United States v. Proserpi\*](#), 686 F.3d 32 (1st Cir. 2012) (on government’s appeal of sentence imposed in fraud case, 6 months’ home monitoring in face of 87–108-month guideline sentence was substantively reasonable, where district court had appropriately determined that estimated loss amount was “unfair proxy for culpability [that] should not drive the sentencing process”).

### **C. Effect of the Fair Sentencing Act?**

At least one circuit has held (for a bright shining moment) that perpetuation of pre-FSA crack sentencing in some cases violates equal protection. *United States v. Blewett*, 719 F.3d 482 (6th Cir. 2013), *reh’g en banc granted, opinion vacated* (July 11,

2013)). See also [NACDL amicus brief](#) in *Blewett* case by Doug Berman (arguing in support of the decision on Eighth Amendment grounds). More from Carl Gunn, [here](#) (May 21, 2013); [Davis v. U.S. Sentg Comm.](#) (D.C. Cir. 2013) (noting that civil claim that crack amendments denied plaintiff equal protection was not "patently insubstantial" under Bivens). Alas, the Ninth hasn't gone near this. See [United States v. Augustine](#) (9th Cir. 2013) (guidelines promulgated under Fair Sentencing Act notwithstanding, that Acts mandatory minimums do not apply to defendants sentenced, or resentenced under § 3582(c)(2), before its enactment) (Supreme Court's decision in *Dorsey* did not overrule *Baptist* and *Sykes*).

[U.S. v. Dillon](#) (3d Cir. 2013) (district court advised to "consider [defendant's] over-incarceration" under the FSA on resentencing).

#### § 12.04 Scope and Sufficiency of Information Considered at Sentencing

[U.S. v. Aviles-Santiago](#) (1st Cir. 2014) (sentencing based on information court knew from sentencing defendant's wife required notice and placement of evidence on record).

[U.S. v. Windless](#) (5th Cir. 2013) (district court can't rely on bare arrest records in sentencing) (condition prohibiting unsupervised "direct or indirect contact" with minor was substantively unreasonable).

##### A. Sixth Amendment limitation under *Appendi* and *Alleyne*

Any fact (other than a prior conviction) "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Appendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (brief). "The statutory maximum for *Appendi* purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in original).

This encompasses facts that increase mandatory minimum sentence as well. [Alleyne v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). (More on *Alleyne* at [SL&P](#).) It also encompasses (post-*Alleyne*) facts underlying a § 924(c) enhancement must be charged. [U.S. v. Lira](#) (9th Cir. 2013). More at [Ninth Circuit Blog](#). Other notes on how to use [here](#) (FPD CACD only), with briefing on retroactivity [here](#).

Justices Scalia, Thomas, and Ginsburg are now on the record as calling for an end to the use of acquitted conduct as relevant conduct for sentencing, unregulated by *Alleyne/ Apprendi*, and subject only to review for reasonableness under *Booker*. See [Jones v. U.S.](#) (2014) (Scalia, J., dissenting from denial of cert.) (“We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.”).

[Taylor v. Cate](#) (9th Cir. 2014) (§ 2254) (after jury found defendant guilty of being shooter in felony murder case, concession by state that he was not shooter required new trial; mere resentencing on aiding-and-abetting theory clearly violated Sixth Amendment because it was based on facts jury never found).

[U.S. v. Lizarraga-Carrizales](#) (9th Cir. 2014) (*Alleyne* doesn’t apply to safety valve determination). More at [Ninth Circuit Blog](#).

[United States v. Guerrero-Jasso](#), \_\_\_ F.3d \_\_\_, 13-10372, 2014 WL 2180101 (9th Cir. May 27, 2014) (district court impermissibly applied § 1326(b), where defendant never admitted and it was never proven to jury BARD that he was removed after aggravated felony conviction; documents and statements not required for plea were not enough) (J. Berzon concurs to express concern that circuits approach to harmless error review of *Apprendi* error swallows the rule). More at [Ninth Circuit Blog](#). (2014)

[U.S. v. Catone](#) (4th Cir. 2014) (failure to put loss amount to jury in prosecution of filing false form, 18 U.S.C. § 1920, was *Alleyne* error) (because there was no evidence that would support loss amount over \$5,000, district court on remand is to sentence under § 2B1.1(b)(1)(A); no second-bite for the government).

*United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014) *reh'g en banc granted* (on other grounds?), *opinion vacated*, 12-12928, 2014 WL 4358411 (11th Cir. Sept. 4, 2014) ((imposing 7-year minimum sentence for brandishing firearm after jury had only found possession was *Apprendi/ Alleyne* error).).

[United States v. Pena](#), 742 F.3d 508 (1st Cir. 2014) (rejecting government’s request for remand to sentencing trial, rather than resentencing, to cure *Alleyne* error).

In an unpublished case, the government conceded and the panel held that *Alleyne* applies to an enhancement under § 2D1.1(a)(2), which applies when death had

resulted from the use of the controlled substance. [U.S. v. Lake](#) (10th Cir. 2013) (unpub'd).

[U.S. v. Claybrooks](#) (7th Cir. 2013) (splitting the difference between two competing drug quantities doesn't cut it, and *Alleyne* applies on remand).

*Apprendi* applies to fines. [Southern Union Co. v. United States](#), \_\_\_ U.S. \_\_\_ (2012). See also [U.S. v. Bane](#) (11th Cir. 2013) (\$3 million fine violated *Apprendi*).

### 1. Drug quantity

[U.S. v. Randall](#) (5th Cir. 2014) (sentencing to statutory minimum based on five kilograms was non-harmless *Alleyne* error)

[U.S. v. Barnes](#) (1st Cir. 2014) (sentencing based on uncharged 3,000 kg quantity of marijuana was non-harmless *Alleyne* error).

[United States v. Gonzalez](#), 13-2169, 2014 WL 4251764 (7th Cir. Aug. 29, 2014) (*Alleyne* error in RICO case, though apparently remanding only for technical correction of maximum stated on J&C).

[U.S. v. Daniels](#) (5th Cir. 2013) (ca. 1.5 kg of cocaine offered as physical evidence to jury did not support finding that conspiracy involved 5 kg or more).

## § 12.05 Rule 32 Requirements

### A. Duty to ensure defendant read and discuss PSR with counsel—R. 32(i)(1)(A)

[United States v. Petty](#), 80 F.3d 1384, 1388 (9th Cir. 1996) (finding violation where there was no indication defendant and counsel had read or discussed memoranda from probation, and timing in disclosing second memorandum discussing recommendation not to depart suggested that defendant and counsel had not had an opportunity to read it).

[United States v. Sustaita](#), 1 F.3d 950, 953–54 (9th Cir. 1993) (counsel's remarks about PSR calculation objections "we" filed were "common stylistic device" that did not infer client had read and discussed PSR with attorney; error was not harmless given counsel's failure to raise factual objections to PSR's findings).

**B. Resolution of disputed matters—R. 32(i)(3)(B)**

[United States v. Doe](#), 705 F.3d 1134, 1153–54 (9th Cir. 2013) (multiple objections to PSR inadequately addressed).

**C. Notice of intent to depart—Rule 32(h)**

[United States v. Coppenger](#), \_\_\_ F.3d \_\_\_, No. 13-3863, 2015 WL 72833 (6th Cir. Jan. 7, 2015) (district court’s upward variance of 23 months in fraud case was plain Rule 32(i)(1)(B) (rather than (h)) error and procedurally unreasonable, where court failed to give defendant notice and meaningful opportunity to respond to its “novel” reliance on offense conduct’s impact on coconspirator straw buyers, which was not signaled in PSR or otherwise reasonably foreseeable, requiring vacatur of upward variance).

[U.S. v. Paladino](#) (3d Cir. 2014) (district court’s denial of defendant right to allocute at revocation sentencing was plain error).

[U.S. v. Brown](#) (7th Cir. 2013) (district court may not change sentence or rationale through statement of reasons after notice of appeal is filed).

**§ 12.06 Consideration of Prior Convictions**

For guidance on getting a hold of California trial court records, you might try the California Judicial Councils [Trial Court Records Manual](#) (2014). The California Judges Benchguide: Sentencing Guidelines for Common Misdemeanors and Infractions (2013) is [here](#).

Note that a guilty plea to conjunctively phrased charges establishes only minimal facts necessary to sustain conviction). [Young v. Holder](#) (9th Cir. 2012) (en banc) (immigration) (overruling *Snellenberger*).

Three circuits have held that under *Carachuri-Rosendo*, “hypothetical aggravating factors cannot be considered when determining a defendant’s maximum punishment for a prior offense.” [United States v. Brooks](#), \_\_\_ F.3d \_\_\_, 13-3166, 2014 WL 2443032 (10th Cir. June 2, 2014) (circuit’s prior approach of looking to hypothetical worst offender could not survive *Carachuri-Rosendo*; it’s maximum that *this* defendant as prosecuted could have received that controls). See also *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc); *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011).

## A. Categorical approach

AFPD Paresch Patel lays out a six-step process for post-*Descamps* categorical/modified categorical analysis, [here](#).

When applying the categorical approach, “[t]he key . . . is elements, not facts.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) reh’g denied, 134 S. Ct. 41, 186 L. Ed. 2d 955 (2013).

The so-called modified categorical approach is used only for a “narrow range of cases” where the prior-conviction statute is “divisible.” *Id.* at 2283–84. A statute is “divisible” if it “sets out one or more elements of the offense in the alternative.” *Id.* at 2281. Mod cat “acts not as an exception, but instead as a tool” to facilitate the categorical analysis, *id.* at 2285, and serves only this “limited function.” *Id.* at 2283. “It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime.” *Id.* at 2285. A court cannot “imaginatively reconstruct” or “hypothetically reconceive” an indivisible statute into a divisible one. *Id.* at 2289.

### 1. Categorical analysis of conspiracy offenses

[U.S. v. Garcia-Santana](#) (9th Cir. 2014) (Nevada conspiracy statute is broader than generic federal conspiracy within 8 U.S.C. § 1101, which unlike common-law conspiracy requires an overt act, and statute was not divisible). But see [U.S. v. Chandler](#) (9th Cir. 2014) (conspiracy to commit robbery can be violent felony under ACCA residual clause) (concurrency notes circuit split on analysis of conspiracy and questioning continued validity of circuit law governing the issue). More at [Ninth Circuit Blog](#). (2014) More too from Carl Gunn, [here](#), [here](#), and [here](#). (2014).

### 2. “Modified” categorical analysis

In the absence of a categorical match, the court may use a modified categorical approach and consider other classes of court documents. [Descamps v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). They may not, however, apply the modified categorical approach to prior offenses defined as a single, indivisible set of elements. *Id.* (overruling *United States v. Aguila-Montes de Oca*, 655 F. 3d 915 (2011) (en banc) (per curiam).). In short, MCA applies in a *narrow* range of cases; concerns *elements* (and elements includes *exceptions*), not facts; and rests on Sixth Amendment concerns that fact-finding be left to *juries*. *Id.*

Query whether classes of documents approved of under previous ninth circuit law survive [Descamps v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). Compare, e.g., *United States v. Aguila-Montes*, \_\_\_ F.3d \_\_\_, 2009 WL 115727, 2 (9th Cir., January 20, 2009) (approving use of “the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”). Pre-*Alleyne*, Carl Gunn had [highlighted](#) a couple of crucial points from the Ninth Circuit’s decision in [Aguilar-Turcios v. Holder](#) (9th Cir. 2012), which, with an assist from Judge Bybee’s dissent, clarifies the significant limits that arguably existed even before *Alleyne* on facts and admissions that could be considered in a modified-categorical analysis. UPDATE (2.21.14): Order withdrawing Aguilar-Turcios opinion pending superseding version is [here](#).

Under *Descamps* and *Moncrieffe*, courts applying categorical approach courts should consider whether a purported “element” is instead part of an affirmative defense. See, e.g., [Sarmientos v. Holder](#) (5th Cir. 2014) (Florida delivery of cocaine not aggravated felony, because mens rea is affirmative defense instead of element); [Donawa v. U.S. Atty Gen.](#) (11th Cir. 2013) (lack of knowledge of illicit nature of controlled substance under Florida drug-trafficking law is affirmative defense, which does not effectively create a separate offense that supplies the missing mens rea element, and so the statute was indivisible under *Descamps*). But see *Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011) (state court conviction for firearm offense was firearm offense for federal purpose even though there is no exception for antique firearm); *U.S. v. Charles*, 581 F.2d 927 (9th Cir. 2009) (not plain error for court not to consider that California affirmative defense of entrapment places burden on D where federal does not, in determining whether Cal convictions constituted “controlled substance offenses” for CO purposes); *U.S. v. Velasquez-Bosque*, 601 F.3d 955 (9th Cir. 2010) (holding California carjacking is crime of violence as either robbery or extortion even though generic extortion has a claim of right defense and California carjacking does not).

[Moncrieffe v. Holder](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013) (to qualify as “illicit trafficking” and therefore an aggravated felony within Immigration and Nationality Act, marijuana conviction must require showing that offense involved remuneration or more than small amount of drug) (holding that categorical approach looks to “least of the acts criminalized” under statute of conviction). The Ninth has applied *Moncrieffe* retroactively in a successful collateral challenge to a deportation order. See [U.S. v. Aguilera-Rios](#) (9th Cir. 2014). More at [Ninth Circuit Blog](#). More still from [Carl Gunn](#) (2014).

More on *Descamps* over at [Ninth Circuit Blog](#) (pdf version with full citations [here](#)) and Carl Gunn's Blog [here](#) (overview), [here](#) (effect on prior Ninth precedent), [here](#) (divisibility and "elements" versus "means"), [here](#) (example of alternative means) (2013), [here](#) (more on divisibility), [here](#) (still more on divisibility), and [here](#) (yet still more on divisibility) (2014). *Descamps* is a perfect example of why you should litigate issues in this area even when they seem impossible, as Sam Josephs pointed out well before *Descamps*, over at Carl Gunn's [joint](#). (2012) Same goes for [researching](#) the federal and state definition, and [not assuming](#) words mean what you think they mean. (Carl Gunn 2012).

Though *Descamps* is a mod-cat case, its return to and emphasis of the fundamental principles under *Taylor* might help in a plain vanilla categorical case too. *See, e.g., United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc) (citing *Descamps* in holding that Maryland resisting arrest, to which mod cat does not apply, is not categorical crime of violence under illegal reentry guideline) (noting that whether decisions are "skewed" by state charging decisions "does not really matter because the key is elements, not facts").

Guilty pleas to conjunctively-pleaded charges that include a possible predicate conviction do not necessarily establish that predicate. "[W]hen either A or B could support a conviction, a defendant who pleads guilty to a charging document alleging A and B admits only A or B. Thus, when the record of conviction consists only of a charging document that includes several theories of the crime, at least one of which would *not* qualify as a predicate conviction, then the record is inconclusive under the modified categorical approach." *United States v. Lee*, \_\_\_ F.3d \_\_\_, \_\_\_, No. 10-10403 ( slip op. [8](#)) (9th Cir. Dec. 28, 2012) (quoting *Young v. Holder*, 697 F.3d 976, 988 (9th Cir. 2012) (en banc)) (holding that conjunctively pleaded conviction under California Health & Safety Code § 11352(a) was not career offender predicate).

[U.S. v. Royal](#) (4th Cir. 2013) (modified categorical approach does not apply to single prongs of single element, here, in Maryland battery statute; alternatives in the statute were means, not elements).

#### **a. Ninth Circuit**

[U.S. v. Flores-Cordero](#) (9th Cir. 2013) (Arizona resisting arrest statute, which requires only minimal force, is not categorical crime of violence within

§ 2L1.2(b)(1)(A), and is not divisible under Descamps). More at [Ninth Circuit Blog](#).

[U.S. v. Edwards](#) (9th Cir. 2013) (government conceded Nevada attempted burglary statute is indivisible under Descamps, and never argued it was categorical § 4B1.2 crime of violence, so panel vacated enhancement).

[U.S. v. Escobar](#) (9th Cir. 2014) (unpub'd) (district court's reliance on PSR to find CHS § 11378 qualifying prior on modified categorical was plain error).

#### **b. Other circuits**

[U.S. v. Dantzler](#) (2d Cir. 2014) (use of non-*Shepard* documents—including complaints attached to defendant's sentencing submission—in modified categorical analysis of alleged ACCA priors was plain error; it didn't matter that court was using these documents to determine whether priors were committed on “different occasions”).

[U.S. v. Tucker](#) (8th Cir. 2014) (Nebraska escape statute is indivisible as between escape from secure and non-secure custody, despite all the “or”s in the statute).

#### **B. “Crimes of Violence” and “Violent Felonies”**

There is no single definition of the terms “crime of violence” or “violent felony.” Instead, they are defined variously in a hodgepodge of statutes and guidelines provisions.

Ninth Circuit precedent “is clear that a district court may not rely on a PSRs factual description of a prior offense to determine whether the defendant was convicted of a crime of violence, *notwithstanding the defendant's failure to object to the PSR.*” *United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212, 1214 (9th Cir. 2002) (en banc) (emphasis added).

For convictions like inciting violence that require an underlying “offense of violence,” a federal sentencing court must consider whether underlying offense qualifies as crime of violence before it can conclude the crime itself does. [U.S. v. Denson](#) (6th Cir. 2013.)

Some useful resources for analyzing COV/VF issues:

- [Is That Prior a Violent Felony or a Crime of Violence?: An Analytical Framework for Approaching ACCA \(and Career Offender\) Predicates](#) (Oct. 2011)
- [Determining “Crimes of Violence” and “Violent Felonies”](#) (Jan. 12 2011)
- [Potential Uses of \*Begay, Chambers & Johnson: Annotated Caselaw Outline\*](#) (June 21, 2010)
- [The Armed Career Criminal Act, 18 U.S.C. § 924\(e\)](#) (Oct. 2010) (also discussing career offender guideline, and serious drug offenses COVs/violent felonies)
- [Begay and Beyond: Chipping Away at “Crimes of Violence”](#) (May 29, 2008)

Cases in this part will be listed under the relevant, defining provision. But consider how the different definitions intersect and how cases under one provision might apply to others.

## 1. § 2L1.2 (illegal reentry)

### a. Ninth Circuit cases

[U.S. v. Navarro](#) (9th Cir. 2014) (unpub'd) (Arizona second-degree burglary, Rev. Stat. §13-1507, is not generic burglary and indivisible).

The Ninth Circuit recently granted en banc rehearing of a decision that had held California assault with a deadly weapon, Cal. Pen. Code § 245(a), is a categorical crime of violence. [United States v. Jimenez-Arzate](#), 553 F. App'x 700 (9th Cir.), *vacated on order granting reh'g en banc*, No. 12-50373, [ECF No. 37](#) (2014). [As of this note (10.5.14), the subsequent history is still not reflected on WestlawNext or the Circuit's search pages for memos or published decisions. (I don't know why.) Hence the link to the record on PACER.]

[United States v. Tovar-Jimenez](#), \_\_\_ Fed. Appx \_\_\_ 13-10321, 2014 WL 2268293 (9th Cir. May 30, 2014) (Washington third-degree rape of a child, Rev. Code § 9A.44.079, not COV under § 2L1.2).

[U.S. v. Miranda-Herrera](#) (9th Cir. 2014) (unpub'd) (Minnesota criminal sexual conduct, §609.343(1), is divisible, but subsection here didn't qualify as forcible sex offense or sexual abuse of minor under § 2L1.2).

[U.S. v. Diaz-Benitez](#) (9th Cir. 2014) (unpub'd) (Washington third-degree child molestation, § 9A.44089, is indivisible and not COV under § 2L1.2).

[U.S. v. Faustino](#) (9th Cir. 2014) (Arizona sexual conduct with a minor, § 13-1405, which includes version for offenses against victims “under fifteen,” is not COV within § 2L1.2(b)(1)(A)(ii) because it lacks element of four-year age difference required by generic statutory rape).

[U.S. v. Gomez](#) (9th Cir. 2014) (conviction for Arizona sexual conduct with a minor, § 13-1405, which includes version for offenses against victims “under fifteen,” isn't generic sexual abuse of minor or statutory rape within § 2L1.2(b)(1)(A)(ii)).

[U.S. v. Domiguez-Maroyoqui](#) (9th Cir. 2014) (assaulting federal officer under § 111(a) is not categorical crime of violence within § 2L1.2; even assuming divisibility, none of the alternatives match enumerated offenses or residual definition under § 2L1.2).

[U.S. v. Diaz-Benitez](#) (9th Cir. 2014) (unpub'd) (Washington third-degree child molestation statute is indivisible and not a crime of violence under § 2L1.2).

[U.S. v. Gonzalez-Monterroso](#) (9th Cir. 2014) (phrase “substantial step” within Delaware attempted rape statute is broader than generic federal definition, and statute was not divisible, so not COV within § 2L1.2) (both attempt statute and underlying offense must categorically match federal generic attempt and underlying generic offense) (concurrency adds that sex offense against minor isn't per se “forcible,” and only qualifies if offense involves actual compulsion).

[U.S. v. Caceres-Olla](#) (9th Cir. 2013) (Florida lewd or lascivious battery is not a “crime of violence” within § 2L1.2(b)(1)(A)(ii)). More at [Ninth Circuit Blog](#).

[U.S. v. Acosta-Chavez](#) (9th Cir. 2013) (Illinois aggravated sexual abuse was not “forcible sex offense” within § 2L1.2s “crime of violence” definition because it included as minors persons who are not minors under federal law, and did so in a way that is indivisible under Descamps) (NB: government did not argue that offense was “sexual abuse of a minor” under same guideline).

**b. Other circuits**

[United States v. Banos-Mejia](#), 11-10483, 2014 WL 5013821 (9th Cir. Oct. 8, 2014) (unpub'd) (New York statutory rape, Pen. Law § 130.30(1), is categorically not statutory rape under § 2L1.2 because it lacks element of four-year age difference).

[U.S. v. Herrera-Alvarez](#) (5th Cir. May 22, 2014) (Louisiana aggravated battery, §14:34, is not a categorical crime of violence under § 2L1.2, though statute is divisible).

[U.S. v. Estrella](#) (11th Cir. 2014) (Florida wanton or malicious projecting hard object at occupied vehicle, Stat. §790.19, is not crime of violence within §2L1.2, because it does not require force be directed to persons inside).

[U.S. v. Henriquez](#) (4th Cir. 2014) (Maryland first-degree burglary covers boats and cars, thus not a crime of violence within §2L1.2(b)(1)(A)(ii)).

[U.S. v. Montes-Flores](#) (4th Cir. 2013) (South Carolina assault and battery "of a high and aggravate nature" is not divisible under *Descamps* and not a categorical crime of violence under § 2L1.2)

[United States v. Cabrera-Umanzor, 728 F.3d 347 \(4th Cir. 2013\)](#) (Maryland conviction for causing abuse to child not "crime of violence" and not divisible under *Descamps*, even though it defined offense "broadly" and described means of "abuse" in alternative).

[U.S. v. Martinez-Flores](#) (5th Cir. 2013) (New Jersey third degree assaults "significant bodily injury" requirement doesn't rise to generic definitions "serious bodily injury," so isn't crime of violence under § 2L1.2).

[U.S. v. Hamilton](#) (5th Cir. 2013) (evidence of gang membership to prove gun possession was reversible error).

[United States v. Torres-Miguel](#), \_\_\_ F.3d \_\_\_, \_\_\_ (4th Cir. 2012) (rejecting [Ninth Circuit's approach](#), holding that California conviction for threatening to commit crime that would result in death or great bodily injury is not categorical crime of violence within § 2L1.2).

[U.S. v. Rangel-Cataneda](#) (4th Cir. 2013) (Tennessee statutory rape not categorical crime of violence within 2L1.2).

[\*United States v. Gomez\*](#), 690 F.3d 194 (4th Cir. 2012) (Maryland child abuse statute, Art. 27, § 35C, is not divisible and not CO).

### c. Other resources

- [Crimes of Violence under § 2L1.2](#) (Jan. 28, 2013)
- [Sentencing Issues in Reentry Cases](#) (Dec. 31, 2012)
- [Challenging the Upward Bumps: The Categorical Approach and Other Sentencing Strategies for Illegal Re-Entry \(8 U.S.C. § 1326\) Cases](#) (Nov. 2, 2012)

### 2. U.S.S.G. § 4B1.2 (career offender)

[\*United States v. Ramos-Gonzalez\*](#), \_\_\_ F. App'x \_\_\_, No. 12-1610, 2015 WL 64710 (1st Cir. Jan. 6, 2015) (Puerto Rico statute criminalizing violence against “or” intimidation of public official, Pen. Code art. 256, P.R. Laws tit. 33, § 4491 (1998), is not categorical crime of violence, but is divisible).

[\*U.S. v. Mead\*](#) (2d Cir. 2014) (New York statutory rape, Penal Law § 139.40-2, is not categorical crime of violence within § 4B1.2)

[\*U.S. v. Brown\*](#) (3d Cir. 2014) (Pennsylvania terroristic threats, 18 Pa. Cons. Stat. §2706, is categorical not crime of violence within §4B1.1).

[\*U.S. v. Martinez\*](#) (1st Cir. 2014) (Massachusetts assault and battery conviction, Mass. Gen. Laws ch. 265, §13A, was not categorical crime of violence within §4B1.2, and could not qualify on modified categorical where defendant’s admission at plea that he “struck” victim was consistent with negligent or reckless acts).

[\*United States v. Jones\*](#), 752 F.3d 1039 (5th Cir. 2014) (escaping from halfway house under 18 U.S.C. §751(a) isn’t a crime of violence within § 4B1.2(a)).

[\*United States v. Barefoot\*](#), 754 F.3d 226 (4th Cir. June 9, 2014) (distribution and improper storage of explosive materials were not “crimes of violence,” interpreted as encompassing the definition under § 4B1.2, and so prosecution for those offenses was barred under immunity agreement).

[\*United States v. Martin\*](#), \_\_\_ F.3d \_\_\_, 12-5001, 2014 WL 2525214 (4th Cir. June 5, 2014) (Maryland fourth-degree burglary, though it encompasses conduct similar in risk to that of generic burglary, was not crime of violence under residual clause

(via § 2K2.1 cross-ref) because it extends to negligent conduct as well) (lots of discussion about difficulty of applying residual clause, and about status of *Begay* after *Sykes*).

[\*United States v. Boose\*](#), 739 F.3d 1185 (8th Cir. 2014) (Arkansas first degree battery is not COV under force or residual clauses).

[\*United States v. Covington\*](#), 738 F.3d 759 (6th Cir. 2014) (Michigan breaking-and-escaping-prison is not categorical crime of violence under career offender guidelines) (specific facts of conviction “play no role whatsoever in the [*Descamps*] analysis”).

[\*U.S. v. Carthorne\*](#) (4th Cir. 2013) (Virginia assault and battery of police officer was not crime of violence).

[\*U.S. v. Duran\*](#) (10th Cir. 2012) (under *Begay*, Texas state aggravated assault by recklessly causing bodily injury does not satisfy the residual clause under § 4B1.2(a)(2)). Berman [suggests](#) (2012) that this might provide grist for a vagueness challenge.

### 3. The Armed Career Criminal Act (ACCA)

[\*United States v. Thornton\*](#), 13-3302, 2014 WL 4412587 (8th Cir. Sept. 9, 2014) (government conceded that Missouri suspended imposition of sentence was not “conviction” under state law, so also not qualifying ACCA predicate).

#### a. “Violent felony”

In late April of 2014 the Supreme Court granted cert. on whether mere possession of short-barreled shotgun can be violent felony under ACCA’s residual clause. The Court has since ordered supplemental briefing on whether the provision is unconstitutionally vague. The case is [\*Johnson v. United States\*](#).

[\*United States v. Wilkinson\*](#), \_\_\_ F. App’x \_\_\_, No. 13-30252, 2014 WL 7399078 (9th Cir. Dec. 31, 2014) (Washington burglary statute, Rev. Code § 9A.52.025, is broader than generic burglary, and indivisible as to “enters or remains unlawfully” element).

[\*U.S. v. Prince\*](#) (9th Cir. 2014) (California attempted robbery, Pen. Code § 211, is violent felony under ACCA’s residual clause, posing serious potential risk of

injury to another roughly similar in kind an degree to enumerated burglary and extortion). More at [Ninth Circuit Blog](#).

[U.S. v. Wray](#) (10th Cir. 2015) (Colorado sexual assault with 10-year age difference, Rev. Stat. § 18-3-402(1)(e) is not a forcible sex offense or residual COV within §§ 2K2.1(a)(2) and 4B1.2).

[U.S. v. Reid](#) (8th Cir. 2014) (Missouri attempted burglary—Rev. Stat. § 564.011.1, “comparable to the attempt laws from Utah, Oklahoma, Texas, and Washington”—can be satisfied by preparatory conduct that does not pose level of risk of violent confrontation and physical harm required to qualify as ACCA violent felony).

[United States v. Thornton](#), 13-3302, 2014 WL 4412587 (8th Cir. Sept. 9, 2014) (on modified categorical, government failed to show that Kansas conviction for burglary, (Kan. Stat. Ann. § 21-3715 (1992), was generic burglary).

[United States v. Prater](#), 13-5039, 2014 WL 4403163 (6th Cir. Sept. 2, 2014) (New York third-degree burglary, N.Y. Pen. Law §140.20, is not generic burglary within ACCA, and does not fall within ACCA’s residual clause).

[U.S. v. Jones](#) (11th Cir. 2014) (Alabama third-degree burglary is not ACCA predicate under *Descamps*, and the error was plain).

[U.S. v. Howard](#) (11th Cir. 2014) (Alabama third-degree burglary defines “building” more broadly than generic burglary within ACCA to include cars or boats, and is indivisible).

[U.S. v. Bankhead](#) (8th Cir. 2014) (Illinois armed-robbery indivisible regarding type of “dangerous weapon” carried, and so not “violent felony” within ACCA).

[U.S. v. Hemingway](#) (4th Cir. 2014) (South Carolina assault and battery of a high and aggravated nature was not categorical crime of violence under ACCA residual clause, and not divisible under *Descamps*).

[U.S. v. Hockenberry](#) (6th Cir. 2013) (plain error to count Pennsylvania prior for fleeing or attempting to elude conviction as ACCA violent felony).

[U.S. v. Miller](#) (7th Cir. 2013) (Wisconsin possession of short-barreled shotgun is not ACCA violent felony; question not controlled by circuit precedent holding that same offense was violent felony per career offender guideline commentary).

[U.S. v. Brock](#) (7th Cir. 2013) (possession of machine gun is not ACCA violent felony).

#### **b. “Serious drug offense”**

See also § 12.06C (“Controlled substance offenses” and “drug trafficking crimes”) below.

[United States v. Spencer, 739 F.3d 1027 \(7th Cir. 2014\)](#) (in determining whether a prior counts as a “serious drug offense” for ACCA purposes, the “maximum term” is the highest sentence a judge can mete out, and does not include the extended time that may be imposed by state department of corrections).

#### **4. General Federal Definition—18 U.S.C. § 16**

[Flores-Lopez v. Holder](#) (9th Cir. 2014) (immigration) (Cal. Pen. Code § 69, resisting an executive officer, requires only de minimis force and so is not categorical crime of violence).

[U.S. v. Fish](#) (1st Cir. 2014) (four Massachusetts priors—daytime breaking and entering, nighttime breaking and entering, assault and battery with a dangerous weapon, possession burglary instrument—were not “crimes of violence” under § 16).

[Matter of Tavaréz Peralta](#) (BIA 2013) (conviction for interfering with operation of aircraft is not “crime of violence”).

#### **C. “Controlled substance offenses” and “drug trafficking crimes”**

See also § 12.06B.3.b (“Serious drug offense”) above.

Carl Gunn asks: [Does “trafficking” really mean “trafficking”?](#) (2015)

[United States v. Palma-Bibiano](#), \_\_\_ F. App’x \_\_\_, No. 13-10678, 2014 WL 7336405 (9th Cir. Dec. 26, 2014) (Arizona aggravated assault offenses under Rev. Stat. §§ 13-1203 & 13-1204 are not categorical crimes of violence under § 2L1.2, though they are divisible).

[United States v. Aguilar-Garcia](#), 588 F. App'x 734, 735 (9th Cir. 2014) (district court plainly erred by relying solely on PSR description of defendant's conviction under California Health & Safety Code § 11378).

[Alvarado v. Holder](#) (9th Cir. 2014) (immigration) (Arizona definition of "dangerous drug" is broader than federal "controlled substance," but factual basis proved up methamphetamine).

[Huera-Flores v. Holder](#) (9th Cir. 2014) (unpub'd) (immigration) (Arizona conviction for conspiracy to sell narcotics, Rev. Stat. §13-3408(A)(7)), is not categorical controlled substance offense within 8 U.S.C. §1227(a)(2)(B)(i).

[Ragasa v. Holder](#) (9th Cir. 2014) (immigration) (Hawaii drug statute, Haw. Rev. Stat. §§705-500(1)(b), 712-1241(1)(b)(ii)), is divisible, but no controlled substance offense here on modified categorical approach).

### 1. California statutes

The following have been held not to be a categorical "controlled substance offense" or "drug trafficking crime":

- Cal. Health & Safety Code 11351: 2014
- [Medina-Lara v. Holder](#), 13-70491, 2014 WL 5072684 (9th Cir. Oct. 10, 2014) (immigration) (assuming CHS § 11351 is divisible, there was insufficient proof that offense involved cocaine, where abstract of judgment did not mention drug and referred to count number different from one in indictment; link between charging papers and abstract "must be clear and convincing") (definition of firearm under CHS § 12022(b) is indivisible and broader than generic definition because it includes antique firearms); *see also* [United States v. Leal-Vega](#), 680 F.3d 1160 (9th Cir. 2012). NB: Rationale applies to definition of "aggravated felony," and to other California statutes that incorporate lists of controlled substances—11352, 11378, 11379, etc. More on this issue available (FPD CACD only) [here](#). Carl Gunn (who litigated *Leal-Vega*) has more [here](#) (2012) and [here](#). (2012)
  - More from Carl Gunn on *Descamps* and Cal. Pen. Code § 11352 (with exemplary [briefing](#) from DFPD Brianna Mircheff) [here](#) (2014).
  - Briefing that § 11351 is indivisible under *Descamps* available (FPD CACD only) [here](#) (Jan. 30, 2014).

- [U.S. v. Nunez-Segura](#), 2014 WL 1779052 (5th Cir. 2014) (California Health & Safety Code § 11379(a)s "transport" clause is no drug trafficking offense within § 2L1.2, rejecting Ninth Circuit's pre-Descamps decision in *U.S. v. Delgado-Moreno*, 495 Fed. Appx 847 (9th Cir. 2012)).
- Cal. Health & Safety Code § 11352 ([United States v. Kovac](#), 367 F.3d 1116, 1119 (9th Cir. 2004) (controlled substance offense)).<sup>4</sup>
- Cal. Health & Safety Code § 11360 ([United States v. Rivera-Sanchez](#), 247 F.3d 905, \_\_\_ (9th Cir. 2001) (en banc) (drug trafficking crime) (abrogated (but really?) to the extent its holding turned on rejecting reliance on abstracts of judgment, see *Cardozo-Arias v. Holder*, 495 F. App'x 790, 792 n.1 (9th Cir. 2012))).

See also [Young v. Holder](#), 697 F.3d 976, 984 (9th Cir. 2012) (California Health and Safety Code 11352 is not categorical "aggravated felony").

Briefing that Cal. Health & Safety Code § 11378 is not a "drug trafficking offense" for purposes of § 2L1.2 and is indivisible available (FPD CACD only) [here](#) (2014).

## 2. Other state statutes

[U.S. v. Galarza-Bautista](#) (9th Cir. 2014) (unpub'd) (North Carolina drug statute, Gen. Stat. §90-95(h)(3), covers simple possession, so is not drug-trafficking offense within § 924(c), though it is divisible).

[U.S. v. Martinez-Lugo](#) (5th Cir. 2014) (Georgia possession with intent is not "drug trafficking offense" under § 2L1.2 because it lacks remuneration requirement) (applying *Moncrieffe*).

[U.S. v. Woodruff](#) (6th Cir. 2013) (facilitation of cocaine sale is not "controlled substance offense" within career offender guideline, though error wasn't plain because after all "facilitate" means different things to different people).

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<sup>4</sup> At least one district court has held the statute is divisible under *Descamps*. *United States v. Ramirez-Macias*, CR-13-0059-JLQ, 2013 WL 4723453 (E.D. Wash. Sept. 3, 2013).

[Sarmientos v. Holder](#) (5th Cir. 2014) (immigration) (Florida delivery of controlled substance didn't require knowledge that substance was controlled, so not categorical drug-trafficking offense under 8 U.S.C. § 1101(a)(43)(B)).

#### **D. “Aggravated felonies”**

[United States v. Hernandez](#), 769 F.3d 1059 (9th Cir. 2014) (California felon-in-possession, former Cal. Pen. Code § 12021(a)(1), encompasses antique firearms and is therefore categorically not an aggravated felony predicate for eight-level bump under § 2L1.2(b)(1)(C)).

[U.S. v. Aguilera-Rios](#) (9th Cir. 2014) (superseding opinion on denial of reh'g) (after *Moncrieffe*, lack of antique-firearm exception in felon-in-possession under former Cal. Pen. Code § 12021(a)(1), now Cal. Pen. Code § 29800, means it's categorically not an aggravated felony). More at [Ninth Circuit Blog](#) (an older post about the original decision is [here](#)).

#### **E. Immigration Categorical Approach Cases**

##### **1. Aggravated felonies**

###### **a. Ninth Circuit**

[Almanza-Arenas v. Holder](#) (9th Cir. 2014) (immigration) (California vehicle theft and joyriding provision, Veh. Code § 10851, sets forth alternative means rather than elements and is thus indivisible; but even if divisible, cancellation eligibility is shown where record of conviction is inconclusive, as it was here) (prior en banc decision on burden of proof issue was abrogated by *Moncrieffe*).

[Sandoval-Gomez v. Holder](#) (9th Cir. 2014) (immigration) (holding against petitioner that California attempted arson, Cal. Pen. Code § 455, though not COV, is an aggravated felony because it is “described in” federal arson statute, 18 U.S.C. § 844(i), but noting that ruling creates conflict with Third Circuit).

[U.S. v. Lopez-Chavez](#) (9th Cir. 2014) (immigration) (IAC in immigration proceedings, during which attorney wrongly conceded removability based on prior violation of Missouri Rev. Stat. § 195.211, possession of marijuana with intent to deliver, entitled defendant to § 1326(d) motion).

[Aguilar-Turcios v. Holder](#) (9th Cir. 2012) (immigration) (military aggravated assault was not aggravated felony under modified categorical approach because

analysis of *Shepard* documents is limited to portions relevant to specific convictions that render alien removable, and those portions here did not mention child pornography or minors).

[Rendon v. Holder](#) (9th Cir. 2014) (immigration) (California second-degree burglary, Pen. Code § 459, is categorically not theft offense and so not aggravated felony; disjunctive phrasing (“with intent to commit grand or petit larceny *or* any felony”) does not render statute divisible: “Any statutory phrase that—explicitly or implicitly—refers to multiple, alternative means of commission must still be regarded as indivisible if the jurors need not agree on which method of committing the offense the defendant used.”).

[U.S. v. Aguilera-Rios](#) (9th Cir. 2014) (after *Moncrieffe*, lack of antique-firearm exception in felon-in-possession under former Cal. Pen. Code § 12021(a)(1), now Cal. Pen. Code § 29800, means it’s categorically not an aggravated felony) (retroactive application of *Moncrieffe* wasn’t barred by *Vidal-Mendoza* because case here concerns “not the duty to *inform* the noncitizen of his eligibility for *relief* in a removal proceeding, but whether he was removable at all”) (**NB**: court accepted substitute opening brief adding *Moncrieffe* argument after case came down). More at [Ninth Circuit Blog](#).

[Covarrubias-Sotelo v. Holder](#) (9th Cir. 2014) (unpub’d) (immigration) (Nevada burglary, § 205.060 (2009) is indivisible and not aggravated felony).

[Sanchez-Avalos v. Holder](#) (9th Cir. 2012) (immigration) (California sexual battery, Cal. Penal Code § 243.4(a), is categorically broader than federal generic “sexual abuse of a minor”).

#### **b. Other circuits**

[Omargharib v. Holder](#), \_\_\_ F. App’x \_\_\_, No. 13-2229, 2014 WL 7272786 (4th Cir. Dec. 23, 2014) (immigration) (Virginia grand larceny, Va. Code § 18.2-95, is not an aggravated felony; indivisible despite use of “or” in definition).

[Matter of Sierra](#) (BIA 2014) (Nevada attempted possession of stolen vehicle, § 205.273, wasn’t categorical theft form of aggravated felony, and assuming divisibility, record was insufficient to apply modified categorical).

[Borrome v. Attorney General](#) (3d Cir. 2012) (immigration) (unlicensed distribution of prescription drugs, 21 U.S.C. §§ 331(t) & 353(e)(2)(A), is not aggravated felony).

The following California state offenses have been held (or impliedly held) not to be a categorical “aggravated felony”:

- Cal. Penal Code § 12021(a)(1), in *United States v. Ochoa*, \_\_\_ F. App’x \_\_\_, No. 11-50537 ([slip op.](#)) (9th Cir. 2013) (record not sufficient to show § 12021(a)(1) qualified).

## **2. Controlled substance or drug-trafficking offense**

See § 12.06C (“Controlled substance offenses” and “drug trafficking crimes”) above.

## **3. Crime involving moral turpitude (“CIMT”)**

[Cervantes v. Holder](#) (9th Cir. 2014) (immigration) (in conducting modified categorical analysis of California spousal abuse provision, Pen. Code § 273.5(a), IJ could not consider alien’s admission that victim was his wife).

[Ibarra-Hernandez v. Holder](#) (9th Cir. 2014) (immigration) (Arizona identity theft, § 13-2008(A), is indivisible and no CIMT).

[Herrera v. Holder](#) (9th Cir. 2014) (unpub’d) (Arizona threats and intimidation statute, Ariz. Rev. Stat. § 13-1202(A)(3), is not categorical CIMT, though it is divisible).

[Gomez-Ponce v. Holder](#) (9th Cir. 2014) (unpub’d) (California oral copulation with minor, PC § 288a(b)(1), is not categorical CIMT and not divisible).

[Ceron v. Holder](#) (9th Cir. 2014) (immigration) (en banc) (remanding for determination as to whether California assault with deadly weapon other than firearm is categorical CIMT, overruling or finding abrogated several cases) (“[I]t is not clear that the use of a deadly weapon is sufficient. Other factors, such as the fact that [§]245(a)(1) requires neither physical injury nor even physical contact, ... suggest that the crime does not categorically involve moral turpitude.”).

[Turijan v. Holder](#) (9th Cir. 2014) (immigration) (California Health & Safety Code §§ 236 and 237 false imprisonment is not categorical CIMT).

[\*Cisneros-Guerrerro v. Holder\*](#), \_\_\_ F. App'x \_\_\_, No. 13-60446, 2014 WL 7398643 (5th Cir. Dec. 29, 2014) (immigration) (Texas public lewdness statute, Pen. Code § 21.07, is not categorical CIMT, but is divisible).

[\*Mayorga v. Attorney General\*](#) (3d Cir. 2014) (immigration) (unlicensed importing, manufacturing, or dealing in firearms, 18 U.S.C. §922(a)(1)(A), and shipping or transporting of firearms across state lines by licensed importer, manufacturer, dealer, or collector to unlicensed recipient, id. §922(a)(2), are not CIMTs).

#### 4. Other

[\*Bautista v. Attorney General\*](#) (3d Cir. 2014) (immigration) (New York attempted arson is not an aggravated felony because it lacked interstate-commerce element, a “critical and substantive” element of arson under 8 U.S.C. § 1101(a)(43), its federal counterpart) (rejecting approach taken in [\*United States v. Castillo-Rivera\*](#), 244 F.3d 1020, 1023 (9th Cir. 2001)).

#### F. Other predicates

[\*U.S. v. Bryant\*](#) (9th Cir. 2014) (domestic violence by habitual offender convictions under 18 U.S.C. §117(a) on Indian lands reversed, where predicate convictions had been secured without guarantee of right to counsel minimally required by Sixth Amendment right).

[\*U.S. v. Martinez\*](#) (8th Cir. 2014) (conviction for solicitation to commit misconduct involving weapons, Ariz. Rev. Stat. §13-3102, was not “firearms offense” within §2L1.2(b) on modified categorical).

[\*U.S. v. Davis\*](#) (6th Cir. 2014) (pandering obscenity under Ohio Rev. Code § 2907.321(A)(1) does not “relate [] to” possession of child pornography for purposes of §§ 2252(b)(1) and 2252A(b)(2)).

#### G. Miscellaneous issues relating to effect of priors

##### 1. Separate offenses

[\*United States v. Barbour\*](#), \_\_\_ F.3d \_\_\_, 13-5653, 2014 WL 1499829 (6th Cir. Apr. 18, 2014) (government failed to prove that aggravated robberies at liquor store on same day, one inside and one outside, each counted as separate predicate violent felony within ACCA).

## 2. Effect of state court's subsequent modifications to sentence

A state court's retroactive (or nunc pro tunc) order terminating defendant's probation for a state offense as of the day before the federal crime had occurred did not alter the fact of the defendant's probation status for purposes of applying the "safety valve." *United States v. Yepez*, \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (9th Cir. 2012) (en banc). But see *Amponsah v. Holder*, \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (9th Cir. 2013) (BIAs blanket rule against recognizing states nunc pro tunc adoption decrees was unreasonable and impermissible construction of 8 U.S.C. § 1101(b)(1), and issue should be considered case by case). See also note [here](#) (FPD CACD only).

Another piece of the puzzle is BOP's implementation (vel non) of the state court's sentencing decision. For more on that topic, see Steve Sady's blog post [here](#) ("*Bond*: How A Chemical Weapons Case Should Finally Bring An End To The BOP's Failure To Respect State Judgments Ordering State Sentences To Run Concurrently With Federal Sentences").

### § 12.07 Sentencing Entrapment

Sentencing entrapment occurs where "a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010) (citing *United States v. Staufer*, 38 F.3d 1103, 1106 (9th Cir. 1994)). Where there was sentencing entrapment, "the amount of drugs used in calculating the defendant's sentence should be reduced by the amount that flow[s] from[the] entrapment." *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010) (quoting *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995)). See also U.S.S.G. § 2D1.1, app. n. 12 (2007).

Sentencing entrapment is a trial defense and must be tried to a jury where evidence raises possible statutory maximum or minimum. *U.S. v. Cortes* (9th Cir. 2013). More at [Ninth Circuit Blog](#) and [Carl Gunns](#) (2013). As Carl explains, all you need to get an instruction on the defense is an [eensy-weensy-teensy bit of evidence](#). (2013)

Generally, a defendant has the burden to show both a lack of intent and a lack of capability. But in the context of a fake stash house robbery, a defendant need only show one or the other. *U.S. v. Yuman-Hernandez* (9th Cir. 2013). More on

Yuman-Hernandez case from [Ninth Circuit Blog](#) (which considers the case to be a lead decision) and [California Appellate Report](#).

Other resources:

- [Sentencing Manipulation/Sentencing Entrapment](#) (Eda Katharine Tinto (2013))

### § 12.08 Restitution

Restitution is different from “loss” under the guidelines “relevant conduct” concept. See, e.g., *United States v. May*, \_\_\_ F.3d \_\_\_, \_\_\_ ([slip op.](#)) (9th Cir. 2013) (cost incurred by relevant conduct in mail theft case that included uncharged theft which caused changes in USPS delivery policy could not be added to restitution order because mail theft underlying conviction occurred after change in procedure)). See also [Ninth Circuit Blog](#) (discussing *May*).

Though Supreme Court’s decision in *Southern Union* (holding that *Apprendi* applies to criminal fines) “provides reason to believe *Apprendi* might apply to restitution,” and “chips away at” Ninth Circuit precedent to the contrary, it isn’t “clearly irreconcilable” with that precedent. [U.S. v. Green](#) (9th Cir. 2013). More at [Ninth Circuit Blog](#).

[U.S. v. Smith](#) (3d Cir. 2014) (district court’s increase of restitution on remand exceeded scope of remand).

[U.S. v. Lochard](#) (2d Cir. 2014) (unpub’d) (defendant’s appeal from denial of request for modification of restitution order that hadn’t included any payment schedule wasn’t time-barred, the district court had jurisdiction, and the district court abused its discretion in denying the request).

[United States v. Pole](#), 741 F.3d 120 (D.C. Cir. 2013) (district court violated Rule 32 by imposing restitution for conduct without making any findings about disputed duration of fraudulent scheme was Rule 32 violation).

[U.S. v. Fair](#) (D.C. Cir. 2012) (restitution order under MVRA in amount of defendant’s sales revenue was error, where record did not support conclusion that amount was reasonable measure of copyright holders actual loss).

[U.S. v. Chaika](#) (8th Cir. 2012) (restitution order was entered without opportunity to object, lacked sufficient basis to establish actual loss, lacked evidence and failed to provide notice as to certain victims, and improperly included losses of buyers who were complicit).

### **A. Distinct from forfeiture**

Forfeiture and restitution are distinctive remedies, and the former, punitive remedy need not be offset by the latter, compensatory remedy to avoid double recovery. [United States v. Davis](#). See generally [Ninth Circuit Blog](#).

### **B. Statutory authority required.**

[U.S. v. Murray](#) (5th Cir. 2012) (MVRA does not authorize district court to reopen judgment six months after entered to add order of restitution).

### **C. Scope of Recoverable losses—causation, victim, timeframe**

#### **1. Ninth Circuit**

[U.S. v. Tanke](#) (9th Cir. 2014) (plain error to include restitution for fraudulent credit card charges and wage overpayments that weren't part of the offenses).

[U.S. v. Carter](#) (9th Cir. 2014) (defendants were not liable for remaining restitution balance after credit of forfeited assets, where district court ordered restitution amount on assumption that amount had already been satisfied by those assets).

[U.S. v. Anderson](#) (9th Cir. 2013) (in criminal copyright infringement case, restitution under MVRA should have been based on lost profits, not lost sales, and “back-of-the-envelope” calculations “simply will not do”). More at [Ninth Circuit Blog](#).

[United States v. Swor](#), 728 F.3d 971, 974 (9th Cir. 2013) (defendant's connection to victims—through third-party investor whom he'd introduced to coconspirator in scheme months earlier—was too attenuated to impose liability for restitution).

#### **2. Other circuits**

[United States v. Cuti](#), 13-2042-CR, 2014 WL 4452976 (2d Cir. Sept. 11, 2014) (“necessary” expenses under VWPA are limited to those victim was “required to incur to advance the investigation or prosecution of the offense”).

[U.S. v. Doering](#) (8th Cir. 2014) (restitution under MVRA vacated because plea agreement did not list, as required by § 3663A(C)(1), offenses that gave rise to agreement).

[U.S. v. Howard](#) (8th Cir. 2014) (restitution under §3663(a)(1)(A) vacated because it included losses from dates preceding extortion conduct charged).

[United States v. Ocasio](#), \_\_\_ F.3d \_\_\_, 13-4462, 2014 WL 1678417 (4th Cir. Apr. 29, 2014)  
(restitution ordered for insurance company whose loss was never even alleged was error).

[U.S. v. Farano](#) (7th Cir. 2014) (restitution order improper without showing that refinancing banks had based their decision in whole or part on defendant's fraudulent representations).

[U.S. v. Maynard](#) (2d Cir. 2014) (wages paid so that bank staff can stay home to recover from stress of robbery are not compensable under MVRA; nor were costs of wanted posters and temporary security guard).

[U.S. v. Freeman](#) (4th Cir. 2014) (restitution order was improper where purported victims' losses were due to an uncharged scheme and had only tangential connection to false reports filed by defendant in bankruptcy proceedings that were the basis of his obstruction conviction).

[U.S. v. DeLeon](#) (5th Cir. 2013) (district court erroneously calculated restitution under MVRA to include loss outside alleged time period of conspiracy).

Restitution should not be a "windfall" to victims. [U.S. v. Bane](#) (11th Cir. 2013) (restitution vacated, even though regulatory approval by government agency for medical services was approved by fraud, because majority of services were medically necessary and provided at appropriate rate).

[U.S. v. Davis](#) (4th Cir. 2013) (owner of stolen gun wasn't "victim" of defendant's possession of it for restitution purposes).

Section 2259 does not authorize joint and several liability, and § 3664(h) only allows for it for defendant's in the same case. [In re: Amy & Vicky](#), slip op. at 5 (9th Cir. 2013) (per curiam).

[U.S. v. Mason](#) (5th Cir. 2013) (plain error to order restitution under MVRA for losses caused by conduct charged in acquitted conspiracy count).

Under § 2259, a defendant who possessed child pornography image is not liable for the conduct of other such possessors, and restitution to victim depicted is proper only to extent defendant was proximate cause of victim's losses. [Paroline v. United States](#), \_\_\_ U.S. \_\_\_ (2014). Circuit law had already held before *Paroline* that restitution under the VWPA, MVRA, and 18 U.S.C. § 2259(b)(3) is limited to losses "proximately" caused by a defendant's conduct. [United States v. Kennedy](#), 643 F.3d 1251, 1261 (9th Cir. 2011) (quoting *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999)). This does not encompass harms caused to victims by a defendant's viewing child pornography; causation in such a case is too "remote." *Id.* at 1264. [In re: Amy & Vicky](#), slip op. at 6 (9th Cir. 2013) (per curiam).

[United States v. Robers](#), 698 F.3d 937 (7th Cir. 2012), reh'g and suggestion for reh'g en banc denied (Nov. 28, 2012), *cert. granted on other grounds*, 134 S. Ct. 470 (2013) *and aff'd*, 12-9012, 2014 WL 1757835 (U.S. May 5, 2014) (attorneys fees for collecting debt, and other unspecified fees, were not recoverable under MVRA).

#### **D. Calculating loss; sufficiency of evidence of loss**

[United States v. Luis](#), 13-50020, 2014 WL 4236390 (9th Cir. Aug. 28, 2014) (in conspiracy to engage in monetary transactions in violation of §§1956(h) and 1957 involving real estate purchases with fraudulently obtained loans, district court erred by calculating bank's restitution based on unpaid principal rather than value of loans when purchased).

[U.S. v. Snelling](#) (6th Cir. 2014) (returns to investors in Ponzi scheme must be credited for purposes of loss calculation, even if they were intended to attract new victim-investors).

[U.S. v. Simmons](#) (2nd Cir. 2014) (unsworn letter from corporate victim claiming lump-sum in unpaid charges and assessments was insufficient for \$250,000 restitution order).

[U.S. v. Laraneta](#) (7th Cir. 2012) (Posner, J.) (in child porn case, remand was required to determine whether defendant uploaded any images, and to determine victim's losses net of previous restitution payments received in previous cases).

### **E. Consideration of defendant's financial status.**

[U.S. v. Grant](#) (4th Cir. 2013) (district court can't change restitution payment without considering defendant's ability to pay).

### **F. Right to dispute restitution**

[United States v. Sheth](#), 759 F.3d 711 (7th Cir. 2014) (district court erred in ordering turnover of assets without first allowing for discovery or holding a hearing, where defendant had by agreement with government turned over assets parties agreed were worth \$13 million to be credited against restitution (which was about same amount), but government had not yet made any liquidations or disbursements, and defendant had not stipulated or waived right to discovery or evidentiary hearing).

[U.S. v. Duran](#) (11th Cir. 2012) (in connection with restitution order, district court erred in failing to adjudicate motion by defendant's wife to dissolve or stay writ of execution, where she claimed sole ownership of apartment before prosecution)

### **G. Miscellany**

[United States v. Grigsby](#), 579 F. App'x 680 (10th Cir. 2014) (district court had authority under 18 U.S.C. §§ 3664(k) & 3572(d)(3) to grant request of defendant, who had been convicted of child pornography offenses, to modify restitution order to change recipient for benefit of minor he had sexually exploited).

### **H. Standard of review**

“ [A]wards cannot be excused by harmless error; every dollar must be supported by record evidence.” [United States v. Sharma](#), \_\_\_ F.3d \_\_\_, \_\_\_ (5th Cir. ) (in health insurance fraud case, restitution was improperly based on overstated victim impact statements).

## **§ 12.09 Consecutive or Concurrent Sentences**

Carl Gunn suggests [this approach](#) for assuring that a state judges concurrent sentence order controls over a federal judges consecutive sentencing order, and sets out some alternatives via U.S.S.G. §§ 5G1.3(b) and 5K2.23. (2012). He has some other thoughts about this as it relates to relevant conduct, [here](#) (2014) (“Sometimes (Though Perhaps Not Often) Relevant Conduct Can Be a Good Thing.”).

Unless a district court orders or a statute mandates otherwise, multiple terms of imprisonment imposed at the same time are presumed to run concurrently. 18 U.S.C. § 3584(a). The reverse is true for terms imposed at different times. *Id.* § 3584(b). Several federal statutes require consecutive sentences. See 18 U.S.C. § 924(c) (for certain firearm offenses); *id.* § 1028(a)(1) (aggravated identity theft); *id.* § 3147 (offenses while on release).

Section 3584 does not permit sentencing court to impose sentence consecutive to another *federal* sentence yet to be imposed. [U.S. v. Montes-Ruiz](#) (9th Cir. 2014). More at [Ninth Circuit Blog](#).

Sentencing courts *can* take into account mandatory sentence required by § 924(c) when considering what sentence to impose for the underlying offense. [United States v. Smith](#), 756 F.3d 1179, 1185–86 (10th Cir. 2014).

[U.S. v. Joseph](#) (9th Cir. 2013) (possession of contraband by inmate, 18 U.S.C. § 1791, only requires consecutive sentences where more than one conviction results from single item of controlled substance; clear text and structure of statute and guidelines were enough to show that error was plain). More at [Ninth Circuit Blog](#).

[U.S. v. Chibuko](#) (2d Cir. 2014) (district court's failure to understand it could run multiple § 1928As charged in connection with same scheme concurrently required resentencing).

### § 12.10 Supervised Release

Ninth Circuit Blog [here](#) (2014) on how not to get hammered too hard by [U.S. v. Gavilanes-Ocaranza](#) (9th Cir. 2014) (holding that revoking supervised release and imposing more prison time doesn't violate Sixth Amendment rights to speedy trial or (notwithstanding *Alleyne*) jury trial).

Terms of supervised release are automatically tolled during periods of state custody. [U.S. v. Ahmadzai](#) (9th Cir. 2013).

[U.S. v. Turner](#) (9th Cir. 2012) (civil detention under Adam Walsh Act is not "imprisonment" within § 3624(e) and so does not toll commencement of supervised release).

## A. Conditions

Some cases involving substantively or procedurally unreasonable conditions are (currently without rhyme or reason) also collected under § 12.03A (“Procedural reasonableness”) and § 12.03B (“Substantive reasonableness”) above.

### 1. Ninth Circuit

[Doe v. Harris](#) (9th Cir. 2014) (First Amendment) (upholding preliminary injunction blocking California law that requires sex offenders who have completed supervision to report all of their internet activity).

[U.S. v. Wolf Child](#) (9th Cir. 2012) (special condition barring defendant from residing with own daughters or socializing with fiancée was substantively unreasonable, as it implicated “particularly significant liberty interest,” thus requiring enhanced procedures for making relevant findings, which were not followed here) (condition barring defendant being in company of anyone under 18, or dating or socializing with anyone with child under 18, was overbroad). More at [Ninth Circuit Blog](#). See also [U.S. v. McGeoch](#) (2d cir. 2013) (unpub’d) (supervised release condition prohibiting unsupervised contact with minors, which included his two minor sons, infringed parental rights and required determination that finding that defendant’s sexual proclivities pose threat to his sons) (citing *Wolf Child*).

[United States v. Roybal](#), 737 F.3d 621, 625 (9th Cir. 2013) (holding upon government concession that district court did not make findings sufficient for penile plethysmograph condition).

### 2. Other circuits

[United States v. Thompson](#), \_\_\_ F.3d \_\_\_, No. 14-1316, 2015 WL 151609 (7th Cir. Jan. 13, 2015) (Posner, J.) (district court must consider §3553(a) factors when imposing all discretionary supervised release conditions, including standard conditions) (several standard conditions are “hopelessly vague,” “unnecessary,” etc. without district court effort to explain their necessity in particular cases).

[United States v. Bear](#), 769 F.3d 1221 (10th Cir. 2014) (special condition restricting defendant sex offender’s contact with his children violated protected liberty interest and created greater deprivation of liberty than reasonably necessary, where it was not properly supported by evidence that he had propensity to commit sexual offenses or posed danger to his children).

[U.S. v. Benhoff](#) (7th Cir. 2014) (special conditions that included ban on all “sexually stimulating” material and any contact with minors required clarification and greater explanation).

[U.S. v. Baker](#) (7th Cir. 2014) (lifetime supervised release term in SORNA case inadequately explained, and reconsideration was also required of conditions banning alcohol or unsupervised contact with children, and requiring computer monitoring and sex offender treatment).

[United States v. Farmer](#), 755 F.3d 849 (7th Cir. 2014) (suspicionless search condition inadequately explained, where defendant wasn’t sex offender or involved with contraband and condition bore not clear relation to offense of extortion) (court’s brief explanation for self-employment ban was inadequate, violating 18 U.S.C. § 3583(d) and U.S.S.G. §§ 5D1.3(e)(4), 5F1.5(a), based as it was on speculation that defendant’s failure as entrepreneur caused extortion).

[U.S. v. Siegel](#) (7th Cir. 2014) (outlining “best practices” to sentencing judges when imposing special conditions, including early communication of recommendations to defense counsel).

[U.S. v. Poulin](#) (7th Cir. 2014) (SR condition barring contact with minors insufficiently supported by record).

[U.S. v. Salazar](#) (5th Cir. 2014) (defendant whose counsel’s attempts to object to release condition in failure-to-register case were interrupted by court was entitled to have claims heard for abuse of discretion rather than plain error) (court’s failure to explain restriction on “sexually stimulating or sexually oriented materials” was abuse of discretion).

[U.S. v. Shannon](#) (7th Cir. 2014) (supervised release condition prohibiting all sexually explicit material was overbroad and unsupported).

[U.S. v. Rodriguez-Santana](#) (1st Cir. 2014) (unpub’d) (on government concession, special condition that permitted monitoring of any device with internet access, etc. may not have been justified).

[U.S. v. Adkins](#) (7th Cir. 2014) (appeal waiver did not bar argument that special release condition barring defendant’s viewing pornography or sexually stimulating material is unconstitutionally vague, which it was).

[U.S. v. Malenya](#) (D.C. Cir. 2013) (in case involving enticement of minor whom defendant had initially believed was adult, supervised release conditions that restricted, among other things, computer access, computer pornography access, direct contact with minors, and residency were "sweeping" and unjustified deprivation of liberty).

[U.S. v. McLaurin](#) (2nd Cir. 2013) (penile plethysmograph condition was "extraordinarily invasive" and unjustified).

[U.S. v. Dotson](#) (6th Cir. 2013) (district court inadequately explained supervised release provisions barring exposure to pornographic or sexually oriented materials and imposing blanket 20-year ban on internet access).

[U.S. v. Goodwin](#) (7th Cir. 2013) (computer search condition required justification because computer played no role in conviction for failure to register as sex offender).

[U.S. v. Tang](#) (5th Cir. 2013) (internet restriction in SORNA case vacated as substantively unreasonable).

[U.S. v. Zobel](#) (6th Cir. 2012) (supervised release condition that prohibited possession of material that "alludes to sexual activity" violated the circuit's First Amendment "Bible test"—that is, was so overbroad that it would prohibit owning Bible).

[U.S. v. Dillon](#) (3d Cir. 2013) (where district court had imposed "a term" of supervised release at sentencing, it was plain error after revocation to impose more than one prison term and more than one supervised release term).

[United States v. Butler](#), 694 F.3d 1177 (10th Cir. 2012) (district court improperly imposed special condition restricting defendant's hunting, fishing, or trapping any wildlife without considering impact on his employment as manager of commercial deer operation).

[United States v. Alvarado](#), 691 F.3d 592 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 804, 184 L. Ed. 2d 594 (2012) (automatic lifetime supervision after guilty plea for receipt of child pornography, without any analysis of circumstances of offense, was plain error).

[In re Taylor](#) (Cal. Ct. App. 2012) (blanket enforcement of Jessicas Laws as parole condition in San Diego county is unreasonable, arbitrary and oppressive action).

[United States v. Worley](#), 685 F.3d 404 (4th Cir. 2012) (plain error to impose condition prohibiting drug defendant from having unsupervised contact with any child, or living near minor children without prior permission, or forming romantic relationship with person who has custody of minor).

[U.S. v. Dougan](#) (10th Cir. 2012) (sex offender release conditions for robbery conviction based on 33- and 17-year-old sex offense priors were not reasonably related to present offense).

### **B. Modification**

[U.S. v. Bainbridge](#) (9th Cir. 2014) (district court can modify SR conditions under § 3583(e)(2) even without changed circumstances, and no abuse of discretion here in requiring sexual deviancy evaluation for non-sex offense, though defendant’s argument that psychosexual evaluation involved “particularly significant liberty interest” was waived so that lower level of scrutiny applied). More at [Ninth Circuit Blog](#).

[U.S. v. Emmett](#) (9th Cir. 2014) (lack of undue hardship of continuing supervised release, though a legitimate factor in considering defendant’s request for early termination, does not adequately explain why relevant § 3553(a) factors do not weigh in defendant’s favor) (“The expansive phrases conduct of the defendant and interest of justice make clear that a district court enjoys discretion to consider a wide range of circumstances when determining whether to grant early termination”) (“we readily conclude that a district court’s duty to consider particular sentencing factors before granting or denying early termination implies that it also has a duty to explain its decision”).

[United States v. Juarez-Velasquez](#), 763 F.3d 430 (5th Cir. 2014) (supervised release term was not tolled by defendant’s ICE detainer or by his pretrial detention in connection with charges on which he was acquitted—despite district court’s potentially erroneous decision to credit defendant for latter detention).

A general appeal waiver does not bar appeal of a subsequent modification of a supervised release term. [United States v. Wilson](#) (3d Cir. 2013).

[United States v. Murray](#), 692 F.3d 273 (3d Cir. 2012) (district court's conclusory statement that it had considered 3553 factors and found modification would involve no greater deprivation of liberty than necessary was inadequate).

### **C. Revocation**

This is as good a spot as any to point to Carl Gunn's [ruminations](#) on using Bayesian thinking to challenge bad drug or alcohol test results. (2012)

[U.S. v. Castro-Verdugo](#) (9th Cir. 2014) (D.J. Breyer dissents from holding that clear error underlying sentence didn't deprive district court of jurisdiction to revoke because defendant never challenged the sentencing error under § 2255 and was therefore still on probation: "I cannot concur in an opinion that upholds clear error."). ) More at [Ninth Circuit Blog](#).

[U.S. v. Bagdy](#) (3d Cir. 2014) (supervised release may not be revoked based on defendant's "reprehensible" dissolution of inheritance in bad faith—that is, going on a spending spree—while delaying restitution modification proceedings brought under 18 U.S.C. § 3664(k), where he had complied with letter of extant restitution order).

#### **1. Hearing**

[U.S. v. Ferguson](#) (4th Cir. 2014) (at revocation hearing, introduction of lab report requires expert witness unless government shows good cause why expert is unavailable).

[U.S. v. Jordan](#) (7th Cir. 2014) (district court violated Rule 32.1(b)(2)(C) by admitting hearsay at revocation without first balancing defendant's confrontation interest against government's good cause for denying).

[United States v. Johnson](#) (8th Cir. 2013) (unavailability of officer who's report was read into record for revocation proceedings violated right to confront witnesses).

#### **2. Sentencing**

Cases involving appellate review of revocation sentences for reasonableness live in § 12.03B ("Substantive reasonableness") above.

To determine maximum prison term for failure to appear for service of sentence after revocation, the district court looks to underlying criminal offense rather than

the intervening violation. [United States v. Jensen](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. 11-10472 (slip op. \_\_\_) (9th Cir. Jan. 14, 2013). *See also* [Ninth Circuit Blog](#).

Supervised releases have absolute right post-revocation to speak before sentence is imposed. [U.S. v. Daniels](#) (9th Cir. 2014).

[U.S. v. Wiltshire](#) (2d Cir. 2014) (appeal from release revocation wasn't made moot by completion of prison sentence because it exposed defendant to two more years of supervised release).

### § 12.11 Reduction of Sentence—18 U.S.C. § 3582(c)

Waivers of appeal of “sentence” don't apply to 3582(c)(2) proceedings. [U.S. v. Tercero](#) (9th Cir. 2013) More at [Ninth Circuit Blog](#) (2013).

[U.S. v. Tercero](#) (9th Cir. 2013) (revised § 1B1.10 barring reductions below amended range does not conflict with Fair Sentencing Act, and must be complied with under *Dillon* despite that *Dillon* involved prior version) (nor does revision conflict with purposes of guidelines or with statute authorizing Commissions retroactive application of amendments) (Commission is not "agency" subject to APA requirements). More at [Ninth Circuit Blog](#) (2013).

A district court is not categorically barred from reducing a defendant's sentence under 18 U.S.C. § 3582(c)(2) where the defendant entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). *Freeman v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2685 (2011). At least one court has held that *Freeman* permits a § 3582(c)(2) reduction when the district court relied upon the crack-cocaine guideline when determining whether to accept the stipulated sentence, even if it wasn't explicitly “based on” that range. [United States v. Epps](#), (D.C. Cir. 2013) (finding plurality opinion “more persuasive” than concurrence). “The focus, even when there is a Rule 11(c)(1)(C) plea agreement, ought to be on the reasons given by the district court . . . , not on the parties agreement.” *Id.* (slip op.) at 23. Judge Berzon has opined that the Ninth Circuit should rehear the issue and adopt the D.C. Circuit's approach. *See* [U.S. v. Davis](#) (9th Cir. 2015) (Berzon, J., concurring).

The Court of Appeals continues after *Dillon* to have jurisdiction to review a district court's discretionary denial of a sentencing reduction under § 3582(c)(2). [United States v. Dunn](#), 728 F.3d 1151, 1156 (9th Cir. 2013). More at [Ninth Circuit Blog](#).

Successive motions based on the same amendment are permitted. See [U.S. v. Trujillo](#) (9th Cir. 2013) (permitting second motion under 1994 amendment, where petitioner sought prior reduction based on same 13 years ago); accord [U.S. v. Weatherspoon](#) (3d Cir. 2012).

#### A. Other circuits

[U.S. v. Bailey](#) (7th Cir. 2015) (defendant's § 3582(c)(2) construed as § 2255 instead, allowing defendant to argue mandatory minimum was 10 years instead of 20 under Dorsey)

[United States v. Davison](#), 761 F.3d 683 (7th Cir. July 30, 2014). (Posner, J.) (district court improperly denied §3582(c)(2) motion based on quantity sold by conspiracy without determination of amount reasonable foreseeable to petitioner) (noting that conspiracy liability “is generally much broader than jointly undertaken criminal activity.” Relevant conduct thus requires not just that the amounts involved in sales by others were “reasonably foreseeable”; it requires that the defendant agreed to help his coconspirators “achieve [the] goal of selling [those] amount[s].”).

[U.S. v. Garrett](#) (6th Cir. 2014) (151-month sentence was “based on” applicable range for §3582(c)(2) purposes, despite government's argument that district court constructed sentence by adding 31 months “for deterrence purposes” to a “range” of 120 months, or something like that).

[U.S. v. Ortiz-Vega](#) (3d Cir. 2014) (in crack-cocaine § 3582(c)(2), defendant who was mistakenly sentenced below statutory minimum was eligible for sentence reduction under FSA) (“ [P]erpetuating an error is exactly what is required by *Dillon*.”)

[U.S. v. Bethea](#) (2nd Cir. 2013) (where district court initially sentenced defendant to above-guideline sentence based on parties agreement that guideline range was insufficient, district court's statement in § 3582(c)(2) proceeding that reduction would only “exacerbate” the insufficiency was improper basis for denying reduction).

[In re Sealed Case](#), 722 F.3d 361, 368 (D.C. Cir. 2013) (crack offender sentenced below an otherwise applicable statutory mandatory minimum because he provided substantial assistance to law enforcement is eligible for a sentence reduction under § 3582(c)(2)).

[United States v. Battle](#) (10th Cir. 2013) (district court's supplemental findings in defendant's § 3582 proceeding were unsupported by facts found at original sentencing).

[U.S. v. Logan](#) (8th Cir. 2013) (defendant's crack-cocaine sentence as subsequently lowered on government's Rule 35(b) motion was "based on" higher range specified in (c)(1)(C) agreement, and because Rule 35(b) motion was like substantial assistance motion, defendant was now eligible under § 3582(c)(2) for reduction to sentence below statutory minimum).

[U.S. v. Mann](#) (4th Cir. 2013) (in § 3582 resentencing determination, district court did not abuse its discretion in declining government's invitation to make additional findings as to drug amount).

### **B. Effect of *Booker* and *Dillon***

§ 1B1.10 is premised on the assumption that the amended guideline range is "sufficient to achieve the purposes of sentencing." 1B1.10 ("Background"). But the Commission has stated that even as amended, the crack guideline continues to "significantly undermine[] various congressional objectives set forth in the Sentencing Reform Act and elsewhere" and is neither "permanent" nor "complete." Amend. 706 ("Reason for Amendment"). Query then whether the *Dillon* court actually holds that 1B1.10 is mandatory, as opposed to merely that a district court need not treat it as advisory.

### **§ 12.12 Resentencing after Remand**

The Ninth Circuit generally remands for resentencing de novo, on an open record. See *United States v. Matthews*, 278 F.3d 880, --- (9th Cir. 2002) (en banc). However, numerous circuit courts have held that the record on a sentencing remand ordinarily should not be reopened with respect to issues on which the Government had the burdens of production and persuasion. E.g., *United States v. Noble*, 367 F.3d 681, 682 (7th Cir. 2004); *United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995); *United States v. Dickler*, 64 F.3d 818, 832 (3d Cir. 1995); *United States v. Parker*, 30 F.3d 542, 553–54 (4th Cir. 1994). Yet again, circuit courts also have allowed the Government to submit additional evidence on remand if the Government "tender[s] a persuasive reason why fairness so requires." E.g., *United States v. Johnson*, 587 F.3d 203, 213 (3d Cir. 2009) (quoting *Dickler*, 64 F.3d at 832).

Imposition of a longer sentence upon resentencing is presumptively vindictive, though the presumption doesn't apply to a sentence of equal length, even if factual or legal grounds supporting the prior sentence are undermined. [U.S. v. Horob](#) (9th Cir. 2013) (no vindictiveness in imposing same sentence on remand in case involving cattle-based bank fraud scheme, even though circuit had overturned convictions for false statements and aggravated identity theft, because *relevant conduct*). More at [Ninth Circuit Blog](#) (2013).

[United States v. Foster](#), 11-6414, 2014 WL 4235133 (6th Cir. Aug. 28, 2014) (after parties agreed on appeal that certain drug and firearm possession counts were duplicative and violated double jeopardy, no increase on sentences on remaining counts would be permitted on remand).

### **§ 12.13 Remand to New Judge**

See generally § 13.06A, below.

### **§ 12.14 Miscellaneous sentencing**

[U.S. v. Jones](#) (9th Cir. 2012) (district court improperly included written special condition not mentioned at sentencing).

## CHAPTER 13: APPEALS

[Joseph v. U.S.](#) (2014) (statement by Kagan joined by Ginsburg & Breyer regarding denial of cert) (noting that every circuit (including the Ninth) other than the Eleventh routinely accepts supplemental briefing when intervening Supreme Court decision upsets precedent relevant to pending case).

[U.S. v. Flores-Mejia](#) (3d Cir. 2014) (en banc) (new procedural rule announced in this decision, requiring separate objection after sentencing to preserve claims of procedural sentencing error, would not be applied to defendant here since he'd relied on prior rule).

### § 13.01 Jurisdiction

#### A. Interlocutory appeals

[U.S. v. HOS](#) (9th Cir. 2012) (court of appeals had jurisdiction to hear interlocutory appeal from district court's revoking its prior determination as to defendant's age and ordering to proceed against defendant as adult, though no abuse of discretion here).

##### 1. The collateral order doctrine

[U.S. v. Guerrero](#) (9th Cir. 2012) (in dissent, Reinhardt would find jurisdiction under collateral order doctrine to take interlocutory appeal of district court's refusal to seal pretrial competency proceedings and related filings). More at [Ninth Circuit Blog](#).

##### 2. Government interlocutory appeals

[United States v. Davis](#), 14-1124, 2014 WL 4402121 (7th Cir. Sept. 8, 2014) (finding no jurisdiction for interlocutory review of discovery order, where government claimed "finality" based on its request for dismissal *without prejudice*).

#### B. Writs of mandamus

[U.S. v. Tillman](#) (9th Cir. 2014) (court had mandamus jurisdiction to consider sanctions order, which was imposed on CJA counsel in error) ("After [CJA counsel] spent years as Tillman's counsel, the district court improperly removed him for highlighting a problem with voucher payments, which the district court admitted were untimely."). More at [Ninth Circuit Blog](#).

[U.S. v. Cruanes](#) (11th Cir. 2014) (mandamus) (district court that reduced sentence initially imposed pursuant to (now-repealed) Youth Correction Act, 18 U.S.C. § 5021, “until discharged by” Parole Commission was obligated to issue certificate stating conviction had been set aside).

## § 13.02 Counsel

### A. *Anders* briefs

[U.S. v. Bey](#) (7th Cir. 2014) (Posner, J.) (not a defense win, but interesting discussion about terms “frivolous,” “nonfrivolous,” and “facial adequacy” as they apply to *Anders* briefs in the circuit).

### B. Ineffective assistance of counsel

[Public Defender v. State](#) (Fla. 2013) (public defender has right to refuse new cases when caseload precludes competent defense).

#### 1. On direct appeal

[Gov’t of V.I. v. Vanterpool](#) (3d Cir. 2014) (remand for hearing on IAC claim on direct appeal, where relief would not be available under §2255 because probation sentence would be discharged).

[United States v. Pole, 741 F.3d 120 \(D.C. Cir. 2013\)](#) (IAC claim on direct appeal in wire fraud case involving allegedly fraudulent exit bonuses was colorable and merited remand for further fact-finding, where defendant alleged counsel should have produced unredacted memos that would show chief of staff instructed him to spend budget to zero).

[United States v. Bell](#), \_\_\_ F.3d \_\_\_, \_\_\_ (slip op.) (D.C. Cir. 2013) (on direct appeal, remand appropriate to resolve whether trial counsel was ineffective for failure to advise about possible safety-valve application in his case).

## § 13.03 Procedures

### A. Petitions for rehearing

[Henry v. Ryan](#) (9th Cir. 2014) (order granting reh’g en banc after certiorari was denied and deadline for en banc review had passed, where potentially dispositive issue is pending in another case to be reheard en banc).

## § 13.04 Standards of Review

### A. Abuse of discretion

A court's "discretionary" decisions are left "not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.) (reviewing discretionary award of attorney fees in class action suit). [Martin also contrasts discretion with "whim." *Id.*]

### B. Plain error

See generally 9B Fed. Proc., L. Ed. § 22:2297.

"In exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken . . ." *United States v. Atkinson*, 297 U.S. 157, 160 (19??) (emphasis added). See also Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). Errors plain at the time of appeal are "plain" within FRCP 52(b). [Henderson v. U.S.](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013). An appellate court should correct such an error when a defendant "demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellants substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 560 U.S. 258, 130 S. Ct. 2159, 2164, 176 L. Ed. 2d 1012 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, —, 129 S.Ct. 1423, 1429, (2009)).

"In the ordinary case," the third prong requires a showing of prejudice, which means that there must be a "reasonable probability" that the error affected the outcome of the trial. *United States v. Marcus*, 560 U.S. 258, 130 S. Ct. 2159, 2164, 176 L. Ed. 2d 1012 (2010) (citing *United States v. Olano*, 507 U.S. 725, 734–35, (1993)).

No objection is required when the issue " presents a pure question of law and there is no prejudice to the opposing party that resulted from a defendant's failure

to object.” *United States v. Joseph*, No. 11-10492, 2013 WL 2321443, at \*2 n.4 (9th Cir. May 29, 2013) (quoting *Gonzalez–Aparicio*, 663 F.3d at 426).

Plain error may be satisfied where the text and structure of the relevant authority or authorities clearly govern. See *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (citing *United States v. Wagnine*, 543 F.3d 546, 552–53 (9th Cir. 2008)) (“Here, although there was no appellate case law answering this precise question, the clear text and structure of the statute, along with the Sentencing Guidelines, are sufficient to show that the error was “plain.”).

### **C. Preserving issues for appeal**

Even in the habeas context, an appellee may argue any ground fairly presented by the record, as long as the appellee’s rights are not thereby enlarged. [Jennings v. Stevens](#) (2015) (holding that federal habeas petitioner who prevailed on two of three theories of IAC was not required to file cross-appeal or seek COA on third theory to rely on it in defending against state’s appeal)).

#### **1. Objections**

[U.S. v. McElmurry](#) (9th Cir. 2015) (in limine FRE 403 objection to introduction under FRE 404(b) of admissions from interviews in prior state child pornography convictions had been ruled on, so no further objection needed; ruling reversed because court hadn’t read or listened to the material). More at [Ninth Circuit Blog](#).

[United States v. Morris](#), \_\_\_ F.3d \_\_\_, No. 14-2242, 2015 WL 51638 (7th Cir. Jan. 5, 2015) (defense counsel’s negative response to court’s generic “anything further?” inquiry did not waive procedural unreasonableness argument; litigant is not required under Rule 51 to complain about district court’s decision after it’s been made).

[U.S. v. Peyton](#) (D.C. Cir. 2014) (defendant adequately raised argument that great-grandmother with whom he lived in apartment lacked authority to consent to search, and her apparent authority did not encompass shoe box in common area) (“[D]efendants are able to preserve a suppression argument simply by stat[ing] the basis of their objection to the admission of the evidence before the district court, and need not articulate the entire body of law relevant to their claim, or expound their argument as fulsomely as they might in an appellate brief.”).

[U.S. v. Harrison](#) (10th Cir. 2014) (though trial counsel made no objection to drug quantity calculation, defendant herself did, and district court addressed it, which was enough to preserve the issue).

A defendant “preserve[s] his entitlement to [harmless error review] by expressly claiming a Rule 11 violation in the course of the district court proceedings,” even when it failed to do so “at the first available opportunity.” *U.S. v. Hogg* (6th Cir. 2013) (noting that error had been preserved only in second motion to withdraw).

[U.S. v. Salazar](#) (5th Cir. 2014) (defendant whose counsel’s attempts to object to release condition in failure-to-register case were interrupted by court was entitled to have claims heard for abuse of discretion rather than plain error).

## 2. Waiver & forfeiture

“Waiver is “the intentional relinquishment or abandonment of a known right,” whereas forfeiture is “the failure to make the timely assertion of [that] right.” [U.S. v. Scott](#) (9th Cir. 2012) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *United States v. Castillo*, 496 F.3d 947, 952 n.1 (9th Cir. 2007) (en banc)) (holding that defendant neither waived nor forfeited argument that government waived its own automobile exception, and that government did not waive automobile exception argument by not filing written response to suppression motion).

## 3. “Claims” versus “Arguments”

“[I]t is claims that are deemed waived or forfeited, not arguments.” *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (citing *Lebron v. Natl Railroad Passenger Corp.*, 513 U.S. 374, 378–79 (1995)). “Once a federal claim is properly presented, a party can make *any argument in support of that claim*; parties are not limited to the precise arguments they made below.” *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). *See also United States v. Guzman-Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009) (quoting *Yee*); *United States v. Reyes*, 772 F.3d 1152, 1157 n.6 (9th Cir. 2014) (holding that new legal argument supporting challenge to unaccompanied minor enhancement need not have been raised below) (“[W]e may consider new legal arguments raised by the parties relating to claims previously raised in litigation.”).

#### **D. Sufficiency of the evidence—examples**

[United States v. Carr](#), 761 F.3d 1068, 1080 (9th Cir. 2014) (insufficient evidence to sustain §§ 2113(d) and 924(c) enhancements for driver who was not present at robbery when firearms were shown or during getaway when firearms were discharged, and guns weren't discussed or present at planning meeting).

[U.S. v. Jackson](#) (9th Cir. 2014) (insufficient evidence that Marine Base janitor had unlawfully made an ID card that was of “design prescribed by the head of any department or agency of the United States” under 18 U.S.C. §701).

[Cain v. Oregon](#) (9th Cir. 2013) (§ 2254) (unpub'd) (alleged sex victim's recantation was enough to show actual innocence, despite district court's determination (under the wrong standard) that recantation was not “credible”).

[U.S. v. Durham et al.](#) (7th Cir. 2014) (evidence that wire transfers were made without evidence about how they furthered fraudulent scheme was insufficient to sustain wire fraud convictions).

[U.S. v. Mohamed](#) (7th Cir. 2014) (evidence was insufficient to prove intent to sell contraband cigarettes in Indiana under 18 U.S.C. § 2342(a); cigarettes passing through state in commerce did not require tax stamp, defendant had purchased them in Kentucky, and defendant could have made profit by selling them in any of 38 states).

[United States v. Nguyen](#), 758 F.3d 1024 (8th Cir. 2014)) (insufficient evidence that defendant knew of applicable taxes as required to receive “contraband cigarettes” within § 2342(a), where among other things even agents couldn't see that packs lacked state tax stamp without first opening box and removing individual packs).

[United States v. Guzman-Montanez](#), 756 F.3d 1 (1st Cir. 2014) (distance from school insufficient to prove defendant knew or should have known he was in school zone under §§ 922(q)(2)(A) & 924(a)(4)).

[U.S. v. Strayhorn](#) (4th Cir. 2014) (robbery conviction reversed due to absence of evidence that fingerprint recovered from duct tape was impressed during offense).

## § 13.05 Harmlessness

### A. Constitutional errors

[United States v. Evans](#), 728 F.3d 953, 967 (9th Cir. 2013) (due process error in excluding birth certificate at § 1326 trial was not harmless). More at [Ninth Circuit Blog](#).

[U.S. v. Hackett](#) (6th Cir. 2014) (*Alleyne* error in § 924(c)(1)(A) sentencing wasn't harmless even though defendant had admitted at trial to firing gun; using that fact to affirm sentence would result in constructive amendment).

### B. Structural errors

[United States v. Roy](#), 761 F.3d 1285 (11th Cir. 2014) (allowing government to examine computer forensics expert and admit inculpatory photographs without defense counsel in courtroom was structural Sixth Amendment error under *Cronic*).

[U.S. v. Lee](#) (7th Cir. 2014) (Posner, J.) (improperly barring defendant from representing himself cannot be harmless).

[Frost v. Van Boening](#), \_\_\_ F.3d \_\_\_, 13-35114, 2014 WL 1677820 (9th Cir. Apr. 29, 2014) (§ 2254) (preventing trial counsel from making both accomplice liability and duress theories to jury was structural error).

[U.S. v. Auernheimer](#) (3d Cir. 2014) (venue did not lie in New Jersey, and error was not only not harmless but may have been structural).

The circuits are split on whether deprivation of counsel at competency hearing requires automatic reversal. See [United States v. Ross](#), \_\_\_ F.3d \_\_\_, \_\_\_, No. ([slip op.](#)) (6th Cir. Dec. 31, 2012).

### C. Cumulative error

[U.S. v. Adams](#) (6th Cir. 2013) (RICO public corruption convictions vacated based on cumulative effect of multiple erroneous evidentiary rulings).

## **§ 13.06 The Mandate and District Court Jurisdiction on Remand**

### **A. Remand to a new judge**

[United States v. Morales](#), No. 10-50419, \_\_\_ F. App'x \_\_\_ (9th Cir. 2012)  
(reassigning case where district judge, Real, J., had “expressed strongly-held opinions about the credibility of various defense theories”).

**CHAPTER 14: MISCELLANY****§ 14.01 Other pro-defense (or otherwise possibly useful) decisions**

[\*T-Mobile S., LLC v. City of Roswell, Ga.\*](#), 135 S. Ct. 808 (2015) (administrative law) (federal provision that requires locality’s denial of application to build cell phone tower be supported by substantial evidence contained in a written record requires sufficiently clear reasons that are “essentially contemporaneous[]” with written denial).

[\*Wood v. Ryan\*](#) (9th Cir. 2014) (§1983) (by withholding information about method of execution, Arizona department of corrections violated death row inmate’s *First* Amendment rights).

[\*Whitfield v. U.S.\*](#) (2014) (cert grant on whether force by bank robber upon another to accompany him or her during robbery or flight, 18 U.S.C. § 2113(e), requires more than de minimis movement of victim).

[\*McCullen v. Coakley\*](#) (2014) (state law making it a crime to stand on public street or walkway within thirty-five feet of reproductive health care facility violated First Amendment).

[\*Bond v. United States\*](#), 134 S. Ct. 2077, 2081 (2014) (Chemical Weapons Implementation Act cannot be read to apply to spreading “toxic chemicals” on doorknob causing minor burns easily treated with water, given the lack of express congressional intent to override the “usual constitutional balance of federal and state powers”) (“Here, the ambiguity in the statute derives from the improbably broad reach of the key statutory definition, given the term—“chemical weapon”—that is being defined, the deeply serious consequences of adopting such a boundless reading, and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism, not about local assaults.”).

[\*Hall v. Florida\*](#), 134 S. Ct. 1986 (2014) (Florida’s use of IQ score on its own to determine intellectual disability for *Atkins* purposes violates Eighth Amendment).

**A. Ninth Circuit (and SCOTUS)**

[\*Glossip v. Gross\*](#) (2015) (cert grant in case where one petitioner has already been executed, on (1) whether Eighth Amendment bars execution using certain three-drug protocol, (2) whether *Baze* standard applies when challenged protocol is not

substantially similar to the one considered in *Baze*, and (3) whether prisoner must in any case establish availability of an alternative drug formula).

[Holt v. Hobbs](#) (2015) (prisoners rights) (state prison policy that prevented Muslim prisoner from growing half-inch beard in accordance with his religious beliefs violated RLUIPA)

Steve Kalar [suggests](#) there might be a possible challenge under *Neil v. Biggers* for the highly suggestive type of in-court voice identification procedure used in [U.S. v. Ortiz](#) (9th Cir. 2015).

[U.S. v. Gladding](#) (9th Cir. 2014) (district court denial of defendant's motion under Fed. R. Crim. P. 41(g) for return of noncontraband computer files was error, where court failed to place burden on government to prove difficulty and costs of segregating defendant's data). More at [Ninth Circuit Blog](#).

[Alvarez v. Tracy](#) (9th Cir. 2014) (§ 2241) (in dissent, Kozinski criticizes majority for forgiving tribal community and its lawyers their oversight while holding Alvarez to raise his claims before community court while proceeding pro se).

[Abbott v. BOP](#) (9th Cir. 2014) (habeas) (BOP determination that Montana unlawful restraint is equivalent to "kidnapping" under 28 U.S.C. § 550.55(b)(4) was arbitrary and capricious).

[ACLU v. Dep't of Justice](#) (N.D. Cal. 2014) (MJ's civil order in FOIA case, requiring government disclosure of techniques used to track location through Triggerfish or Stingray devices that mimic cell towers).

[Cruz v. City of Anaheim](#) (9th Cir. 2014) (civil) (in deadly force case, suggesting it would be clear Fourth Amendment violation to presume that motorist reaching for waistband is reaching for unseen gun, even if CI informed police that suspect carried a gun).

[U.S. v. Dreyer](#) (9th Cir. 2014) (gathering of evidence of child pornography by NCIS in case involving civilians violated Posse Comitatus Act, 18 U.S.C. § 1385, and would be excluded because this type of violation has occurred repeatedly and frequently, despite prior warnings by Ninth Circuit and other courts) ("Other

courts of appeals have recognized that the Supreme Court’s description of the exclusionary rule in the Fourth Amendment context applies to PCA cases.”)

[U.S. v. Harrington](#) (9th Cir. 2014) (conviction for refusal to submit to blood alcohol test in national park, 16 U.S.C. § 3, 36 C.F.R. § 4.23(c)(2), violated due process, where park ranger had said only that refusal could be used against him in court, not that it was itself a crime).

[U.S. v. Faherty](#) (9th Cir. 2014) (mandamus) (district court assumption of jurisdiction over passport application of defendant who had served his prison sentence and supervised release term was clearly erroneous).

[Vosgien v. Persson](#) (9th Cir. 2014) (§ 2254) (petitioner who procured sexual favors for himself was factually innocent of Oregon offense of compelling prostitution, which requires that such favors be procured for others).

[Ibrahim v. Dept Homeland Security](#) (N.D. Cal. 2014) (“public notice” that leaving plaintiff on no-fly terrorist watchlist violated her rights, and that specific basis of denial of visa must be provided).

[Grenning v. Miller-Stout](#) (9th Cir. 2014) (prisoners rights) (24-hour illumination of prisoners cell violates Eighth Amendment).

[Gonzalez v. CDC](#) (9th Cir. 2014) (prisoners rights) (reinstating § 1983 claim that CDCs “debriefing” procedures violate Eighth Amendment).

[U.S. v. Black](#) (9th Cir. 2013) (defense loss) (government’s initiation of reverse sting operation—in which ATF recruits defendants to carry out armed robbery of fictional stash-house—raises questions of government overreach, but defendants here did not demonstrate that arrest and prosecution amounted to outrageous government conduct) (in dissent, J. Noonan argues that government’s trolling for potential defendants violated *Bonanno*, and that its arbitrary invention of drug amounts violates due process). More at [Ninth Circuit Blog](#). A powerful dissent in the case from Reinhardt, joined by Kozinski, is [here](#) (2014 en banc order) (objecting to this “profoundly disturbing use of government power,” and to the “dangerous signal” the denial sends that “courts will uphold law enforcement tactics even though their threat to values of equality, fairness, and liberty is unmistakable”). Note that *Black* did not stop District Judge Otis Wright from dismissing a stash house robbery case due to outrageous government conduct. See

[order](#) (FPD CACD only) (March 10, 2014) ("The time has come to remind the Executive Branch that the Constitution charges it with law enforcement—not crime creation.") H/T Samuel Josephs.

[Scott v. Chappell](#) (9th Cir. 2013) (§ 2254) (unpub'd) (district court did not abuse its "broad" discretion in issuing protective order governing information defendant was compelled to reveal for habeas corpus proceeding).

[U.S. v. Flores](#) (a "missile" under 26 U.S.C. § 5845(f) and corresponding guideline is a "self-propelled device designed to deliver an explosive," and cartridges for grenade-launcher don't qualify).

[United States v. Valencia-Riascos](#), 696 F.3d 938, 943 (9th Cir. 2012) (noting that it "may be good practice to require a case agent to testify first," though it's not required). More at [Ninth Circuit Blog](#). See also [United States v. Frazier](#), 417 F.2d 1138 (4th Cir. 1969) ("Where the agent is the one in charge of the case and his presence is necessary, . . . he should ordinarily be called first so as to avoid giving the prosecution unfair advantage or the appearance that the prosecution is being favored[, unless doing so] would unduly break the continuity and seriously impair the coherence of the Government's proof.").

[U.S. v. Burke](#) (9th Cir. 2012) (district court properly dismissed indictment charging escape from custody, `8 U.S.C. § 7519a)—residential reentry center was not "custody" even though it was afforded as part of supervised release).

## **B. Other Circuits**

[U.S. v. Matta](#) (2d Cir. 2015) (district courts cannot delegate to probation office decision about whether treatment program should be inpatient or outpatient).

[Waste Mgmt. of Washington, Inc. v. Kattler](#), \_\_\_ F.3d \_\_\_, No. 13-20356, 2015 WL 178996 (5th Cir. Jan. 14, 2015) (civil) (attorney who repeated client's representation to district court and later withdrew from the case after client switched his story did not have a duty to correct his unwittingly false statement, and district court's contempt order was therefore an abuse of discretion) (attorney did not violate any valid portion of court's order to produce related evidence) ("show cause" order didn't give attorney adequate notice of possible contempt).

[United States v. Smith](#), \_\_\_ F.3d \_\_\_, No. 14-2223, 2015 WL 51604 (7th Cir. Jan. 5, 2015) (Posner, J.) (reversal and reassignment ordered sua sponte where panel

discovered that district judge had been AUSA in defendant's prior revocation, which disqualified her under 28 U.S.C. § 455(b)(3)) ("One might say that the judge was finishing the work of the prosecutor she had been.").

[United States v. Pinson](#), No. 14-6149, 2014 WL 7019664 (10th Cir. Dec. 15, 2014) (Fed. R. Crim. P. 36 was appropriate vehicle to ask court to correct judgment's recommendation of "FCI" Butner if transcript shows oral recommendation was to FMC).

[U.S. v. Sevilla-Oyola](#) (1st Cir. 2014) (upon defense counsel's writing in support of panel and en banc review saying he did not appreciate defendant's risk on appeal that initial punishment of life imprisonment could be reinstated, panel vacated its own reinstatement of that sentence, perhaps recognizing, as concurring judge notes, the "irrational[ity]" of initial form of "relief" court had granted).

[U.S. v. Hinds](#) (7th Cir. 2014) (finding of inability to pay fines and interest on restitution foreclosed ordering contribution to substance abuse treatment and drug testing).

[United States v. Melot](#), 768 F.3d 1082 (10th Cir. 2014) (imposing sanctions for suspected fraudulent attempt to stop foreclosure violated due process, where district court did not provide notice to defendants of possible sanctions and opportunity to respond).

[United States v. Zaleski](#), 686 F.3d 90 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 554, 184 L. Ed. 2d 360 (U.S. 2012) (where guns and ammo were seized from defendant who lawfully owned them at time, district court may under Fed. R. Crim. P. 41(g) order transfer of guns and ammo to third-party to sell them for defendant's benefit after defendant becomes convicted felon unable to possess firearms under 18 U.S.C. § 922(g)) (rejecting district court's reasoning that such transfer would result in constructive possession for purposes of § 922).

[U.S. v. Santiago](#) (1st Cir. 2014) (special condition in SORNA case was in written judgment but not stated at hearing, so vacated).

[New York Times Co. v. U.S. Dep't of Justice](#) (2d Cir. 2014) (FOIA) (court could take judicial notice under FRE 201 of statements made by government after district court's FOIA ruling).

[U.S. v. Bartholomew](#), No. 12-cr-48, ECF No. 751 (D. Colo. Apr. 28, 2014) (granting unopposed motion to reset sentencing in anticipation of Smarter Sentencing Act).

[Brown v. U.S.](#) (11th Cir. 2014) (M.J. can't enter final judgment in § 2255 cases)

[Whiteside v. U.S.](#) (4th Cir. 2014) (§ 2255 authorizes challenges to career offender sentence when subsequent case law reveals enhancement was erroneous).

[U.S. v. Annabi](#) (2d Cir. 2014) (forfeiture on count under statute that while applicable had only been charged in another count required vacatur).

[U.S. v. Pacquette](#) (11th Cir. 2014) (unpub'd) (defendant's disclaimer of ownership of drugs upon admitting to customs agents he owned everything else in bag should have been admitted under rule of completeness).

[Bryant v. Warden](#) (11th Cir. 2013) (§ 2241) (§ 2255(e) "savings clause" allowed post-*Begay* challenge to sentence). More at [SL&P](#) (2014). Some in-depth discussion addressing obstacles to getting clients who are actually innocent of sentencing aggravators back in front of a judge is available (FPD CACD only) [here](#) (2014).

[U.S. v. Ottaviano](#) (3d Cir. 2013) (district judges questioning of witnesses at trial of pro se defendant violated FRE 614)

[United States v. Pickard](#), 733 F.3d 1297, 1305 (10th Cir. 2013) (district court's denial of defendant's motion to unseal file of DEA CI who testified against them in prosecution eight years before was not supported by sufficiently weighty government interest, and district court improperly shifted burden to defense and failed to consider alternatives like partial redaction).

[U.S. v. Llenez-Garcia](#) (6th Cir. 2013) (AFPD was not required to complete Rule 16 discovery process before issuing Rule 17(c) subpoena, and neither this nor her use of nonexistent hearing date on subpoena subjected her to sanctions).

[U.S. v. Valdez](#) (5th Cir. 2013) (undisguised transfers from operating accounts to investment accounts was not money laundering by concealment).

[Conley v. U.S.](#) (D.C. Cir. 2013) (D.C. Code § 22-2511, which criminalizes being present in car that knowing that there's a gun inside, violates due process).

[U.S. v. Britton](#) (7th Cir. 2013) (district court improperly held counsel in direct contempt in a summary proceeding where the court had to rely on extrinsic evidence to conclude the lawyers conduct was contemptuous).

[U.S. v. Tyler](#) (3rd Cir. 2013) (no witness tampering by murder and by intimidation under 18 U.S.C. § 1512 in light of *Arthur Anderson and Fowler*, because there was no nexus to any particular federal proceeding).

[U.S. v. Fries](#) (11th Cir. 2013) (in unpreserved sufficiency challenge to conviction for transferring firearm to out-of-state residence when neither buyer nor seller is licensed, conviction reversed where record was devoid of evidence about buyers licensure).

[U.S. v. Adams](#) (6th Cir. 2013) (panel suggests en banc review, where “unfair presentation of the evidence” left defendants without redress under rule of completeness because of circuit bar on admitting curative hearsay).

[U.S. v. Zabawa](#) (6th Cir. (2013) ("inflicting" injury under § 111(b) requires more than just proximately cause, and subsection didn't apply where injury to officer may have resulted from officer's head-butting defendant in response to defendant's initial assault).

[Ali v. Taylor](#) (10th Cir. 2013) (unpub'd) (prisoner's rights) (prisoner has property interest in good-time credit-earning classification level).

[Cook v. FDA](#) (D.C. Cir. 2013) (upholding ban on unapproved sodium thiopental, though reversing district court order directing FDA to notify state correctional departments and requiring them to send existing stocks of drug to FDA).

[United States v. Bellaizac-Hurtado](#), 700 F.3d 1245 (11th Cir. 2012) (Maritime Drug Offenses Act was unconstitutional as applied to drug trafficking conspiracy, which is not an offense against customary international law).

[Vinter v. United Kingdom](#) (Eur. Ct. H.R. 2012) (LWOP violates human rights).

[U.S. v. Gupta](#) (2d Cir. 2012) (district court improperly excluded public from courtroom).

[U.S. v. Bailey](#) (8th Cir. 2012) (district court was required to give appellant opportunity to assert civil damages claim, where court had denied defendant's

motion under Fed. R. Crim. P. 41 for return of property because government no longer possessed it).

[U.S. v. Davis](#) (2d Cir. 2012) (defendant's struggle to free himself from being handcuffed after officers pinned him to the ground was not resisting arrest under § 111).

[U.S. v. Shavers](#) (3d Cir. 2012) (defendant's witness tampering was directed at preventing testimony in state proceedings, so there was no federal nexus even if federal proceeding might have been foreseeable).

[U.S. v. Gotti](#) (E.D.N.Y. 2012) Texas Hold 'Em is not "predominately a game of chance" within Illegal Gambling Business Act).

### § 14.02 Cognitive Bias in the system

A couple of articles of note:

- "The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions," Saul M. Kassina et al., *J. Applied Res. in Memory & Cognition* (2013) ([pdf](#))
- Eric Rassin, Anita Eerland & Ilse Kuijpers, *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 *J. Investigative Psychol. & Offender Profiling* 231, 238 (2010) ("[P]articipants who believed that the suspect was innocent looked for information confirming that he, indeed, was innocent. On the other hand, participants who believed that the suspect was guilty were more interested in investigations aimed at gathering more evidence of guilt.").

### § 14.03 Law of the case

Under the doctrine of law of the case, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011) (quoting *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996)). But "there is no clear precedent in this Circuit as to the applicability of the law of the case doctrine in the criminal context." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1007 (9th Cir. 2011). And even if it does apply, a prior decision should not be followed as law of the case if "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes

reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial.” *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011) (citing *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995) (assuming *arguendo* that doctrine applies in habeas proceedings, but declining to follow prior decision that was “clearly wrong as a matter of law”). *See also* *United States v. Marguet-Pillado*, \_\_\_ F.3d. \_\_\_ (9th Cir. 2011) (law of the case did not bar defendant’s proposed derivative-citizenship instruction in retrial for illegal reentry, where instruction was legally correct and supported by evidence, and where substantially different evidence was adduced). And in appellate courts, application of the doctrine is discretionary. *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010) (citing *Messinger v. Anderson*, 225 U.S. 436 (1912)). The challenge can be waived. *See [United States v. Trujillo](#)*, 713 F.3d 1003, 1008 (9th Cir. 2013) (waived by government).

#### § 14.04 Sixth Amendment Speedy Trial

[U.S. v. Velazquez](#) (3d Cir. 2014) (five-year delay of trial caused by government’s failure to apprehend defendant by running database check was speedy trial violation because other leads were available).

[U.S. v. Heshelman](#) (6th Cir. 2013) (government’s three-year delay after indicting defendants was speedy trial violation; fact that first defendant’s residing in Switzerland made extradition difficult in his case did not excuse delay in either).

#### § 14.05 Tribal Issues

[U.S. v. Bryant](#) (9th Cir. 2014) (domestic violence by habitual offender convictions under 18 U.S.C. §117(a) on Indian lands reversed, where predicate convictions had been secured without guarantee of right to counsel minimally required by Sixth Amendment right).

Rehearing en banc is [pending](#) in [U.S. v. Zepeda](#), which had held that (1) federal recognition of a tribe for jurisdiction under § 1153 is a question of law, and (2) the defendant’s tribal enrollment certificate was not sufficient to prove defendant an Indian for jurisdictional purposes, where no bloodline evidence was presented.

[U.S. v. Jackson](#) (8th Cir. 2012) (record was inadequate to show alleged assault occurred within boundaries of Red Lake Reservation in Minnesota, after land had been granted to railways by Secretary of Interior).

#### § 14.06 Rule of Lenity

[United States v. Izurieta](#) (11th Cir. 2013) (rule of lenity precludes conviction based on arguably noncriminal customs regulation, here, an FDA regulation governing food imports).

#### § 14.07 Intellectual Property Crimes

[U.S. v. Liu](#) (9th Cir. 2013) (“willfully” within 17 U.S.C. § 506(a) required government prove that defendant knew he was acting illegally rather than simply that he knew he was making copies) (to “knowingly” traffic in counterfeit labels under 18 U.S.C. 2318(a)(1) requires knowledge that labels were counterfeit). More at [Ninth Circuit Blog](#).

[U.S. v. Cone](#) (4th Cir. 2013) (government’s theory of prosecution based on “material alteration” of counterfeiting trademarks was not cognizable under criminal counterfeiting statute).

#### § 14.08 Chevron deference

[City of Arlington v. FCC](#), \_\_\_ U.S. \_\_\_, \_\_\_ (2013) (agency) (courts must apply *Chevron* framework to agency’s resolution of statutory ambiguity about scope of agency’s jurisdiction).

#### § 14.09 Judicial notice

[Pahls v. Thomas](#) (10th Cir. 2013) (civil) (in connection with incident involving political protest, panel took judicial notice of “general location” and approximate distances generated by Google Maps “Distance Measurement Tool”).

#### § 14.10 Retroactivity

[Miller v. U.S.](#) (4th Cir. 2013) (though *Carachuri-Rosendo* created a new procedural rule, which isn’t retroactive, by applying *Carachuri-Rosendo* in prior case circuit had created a new substantive rule, which is).

#### § 14.11 Lead and crime

“[Does latest FBI report of crime's decline provide still more support for lead-exposure-crime link?](#)” (Sentencing Law & Policy) (2014).

**§ 14.12 Stash house cases**

See “Fighting the Stash House Sting,” Katherine Tinto, 38-Oct Champ. 16 (2014) ([NACDL](#)) ([Westlaw Next](#)).

**§ 14.13 Expungement resources**

The [Papillon Foundation](#) has links to web-based resources for expungement and sealing of criminal records throughout the United States.



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