

**From:** Criminal Law - Justia Weekly Opinion Summaries [REDACTED]  
**Sent:** Friday, August 21, 2020 6:01 AM  
**To:** Gary Koeppel  
**Subject:** Latest 94 Cases This Week: United States v. Adams (1st Cir.), United States v. Goodman (1st Cir.), United States v. Reyes-Correa (1st Cir.)

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## New on Verdict

### Legal Analysis and Commentary

## Democracy Is on the Ballot: One Party Defends It, The Other Would Let It Die

AUSTIN SARAT



Austin Sarat—Associate Provost, Associate Dean of the Faculty, and William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College—explains why the 2020 Democratic National Convention was unlike any other political gathering in American history for reasons beyond its virtual platform. Sarat argues that the future of American democracy lies in the balance, and when we vote in November, it will be up to us whether democracy lives or dies.

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## Criminal Law Opinions

### United States v. Adams

**Court:** US Court of Appeals for the First Circuit

**Docket:** 18-1465

**Opinion Date:** August 18, 2020

**Judge:** Selya

**Areas of Law:** Criminal Law

The First Circuit affirmed Defendant's conviction and sentence for drug-trafficking and firearms offenses, holding that the district court did not err in refusing to suppress the evidence obtained from a number of warrant-



backed searches. After he was charged, Defendant filed several motions to suppress stemming from the seizures and searches of cellphones, a hotel room, a storage locker, and a Connecticut apartment. The district court denied all of the motions. Defendant subsequently entered a conditional plea to two charges. The First Circuit affirmed, holding (1) Defendant was foreclosed from raising on appeal his claims regarding the traffic stop; (2) search warrants used to gather evidence against Defendant were supported by probable cause and otherwise valid; (3) Defendant was foreclosed from raising on appeal new arguments regarding the district court's denial of his motion to reconsider various suppression rulings; and (4) the district court did not abuse its discretion in determining that Defendant failed to establish a fair and just reason for withdrawing his conditional guilty plea.

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### **United States v. Goodman**

**Court:** US Court of Appeals for the First Circuit

**Docket:** 19-1313

**Opinion Date:** August 18, 2020

**Judge:** David J. Barron

**Areas of Law:** Criminal Law

The First Circuit affirmed Defendant's convictions, entered pursuant to his guilty plea, for eight counts of sexual exploitation of a minor and one count of possession of child pornography and dismissed Defendant's challenges to his sentence, holding that that the district court did not err. Specifically, the First Circuit held (1) th district court did not plainly error in concluding that the factual foundation for Defendant's plea to two of his eight convictions for sexual exploitation of a minor sufficed to give it a reasoned basis to believe that Defendant actually committed the crime to which he was admitting guilt; and (2) the appeal waiver in Defendant's plea agreement barred this Court's consideration of the substance of Defendant's challenges to the procedural and substantive reasonableness of his sentence.

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### **United States v. Reyes-Correa**

**Court:** US Court of Appeals for the First Circuit

**Docket:** 19-1003

**Opinion Date:** August 14, 2020

**Judge:** David J. Barron

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

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The First Circuit reversed the decision of the district court denying Defendant's motion to dismiss his indictment under the Double Jeopardy Clause of the United States Constitution based on his prior conviction in a Commonwealth court for a local drug offense, holding that Defendant met his burden to make a prima facie case that he had been prosecuted twice for the same conduct under equivalent criminal laws. On March 15, 2016, Defendant pleaded guilty to a violation of Article 406 of the Puerto Rico Controlled Substances Act. About sixteen months later, Defendant was named in a federal indictment charging him with five drug-related federal offenses, including conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.c. 846. Defendant moved to dismiss the section 846 conspiracy count on double jeopardy grounds, alleging that his prior Article 406 conviction was for the same criminal conduct that the section 846 count charged him with committing. The district court denied the motion. The First Circuit reversed, holding that Defendant met his burden of presenting evidence to establish a prima facie non frivolous double jeopardy claim, and the government failed to meet its burden to rebut it.

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### **Mota v. Barr**

**Court:** US Court of Appeals for the Second Circuit

**Docket:** 19-1385

**Opinion Date:** August 17, 2020

**Judge:** Barrington D. Parker

**Areas of Law:** Criminal Law

The Second Circuit denied a petition for review of the BIA's decision affirming the IJ's finding that petitioner was removable for having been convicted of two crimes involving moral turpitude (CIMTs) under section 1227(a)(2)(A)(ii) of the Immigration and Nationality Act. The court held that petitioner's conviction for two counts of felony possession of narcotics with intent to sell, in violation of Connecticut General Statutes 21a-277(a)(1), qualify as CIMTs. Although the court acknowledged that Connecticut's legislature has broadly defined "sale" to encompass exchanges, gifts, and offers of a narcotic substance even for no consideration, the court concluded that the plain meaning of the statute encompasses every instance in which a defendant offers to, or does in fact, "barter, exchange or gift" narcotics to another. The court explained that the fact that the statute may cover scenarios in which a defendant "offered," "exchanged," or "gifted" a narcotic substance, even a small amount, to a friend for no or little remuneration does not foreclose its conclusion under the categorical approach.

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### **Rampersaud v. Barr**

**Court:** US Court of Appeals for the Second Circuit

**Docket:** 19-825

**Opinion Date:** August 19, 2020

**Judge:** Leval

**Areas of Law:** Criminal Law, Immigration Law

The Second Circuit granted a petition for review of the BIA's decision finding petitioner removable as an aggravated felon for having been convicted of fraud involving a loss to the victims exceeding \$10,000 pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), 1101(a)(43)(M)(i). Defendant was convicted of insurance fraud and grand larceny, and was ordered to pay \$77,199 in restitution without any indication as to whether the restitution order was for the benefit of victims of the insurance fraud, the grand larceny, or both. The court held that the BIA relied on inadequate analysis in concluding that the \$77,199 restitution order, on its own, showed that petitioner's insurance fraud caused more than \$10,000 in victim losses. In this case, where petitioner was convicted of two separate crimes and ordered to pay an overarching restitution amount without indication of what part, if any, was for the insurance fraud, the court held that the restitution order, without more, is insufficient to demonstrate that more than \$10,000 in losses were caused by the insurance fraud count as distinct from the larceny count. Furthermore, the BIA gave no explanation why it concluded that more than \$10,000 of the restitution award was attributable to losses caused by the insurance fraud. Accordingly, the court vacated the BIA's decision and remanded for further proceedings.

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### **United States v. Anastasio**

**Court:** US Court of Appeals for the Second Circuit

**Docket:** 18-421

**Opinion Date:** August 19, 2020

**Judge:** Susan Laura Carney

**Areas of Law:** Criminal Law

Defendant appealed his conviction for one count of racketeering conspiracy (RICO conspiracy count) and two counts of murder in aid of racketeering (VCAR murder counts) based on his involvement with the 10th Street Gang in Buffalo, New York and his role in the 2006 murders of two individuals. The jury also found that defendant was guilty of two special factors that, as part of the RICO conspiracy count, charged defendant with intentionally causing the deaths of the two individuals in violation of New York Penal Law 125.25(1) and 20.00. The Second Circuit held that the evidence was insufficient to convict defendant of aiding and abetting the two murders. However, the court held that the government adequately proved defendant's

knowing agreement to participate in a racketeering enterprise; there was no error in the district court's Batson ruling; and there was no abuse of discretion in the district court's denial of defendant's motion to sever his trial from that of his co-defendants. Accordingly, the court affirmed defendant's RICO conspiracy count; reversed the VCAR murder counts and the murder enhancements of the RICO conspiracy count; and remanded for resentencing.

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### **United States v. Delgado**

**Court:** US Court of Appeals for the Second Circuit

**Docket:** 15-1453

**Opinion Date:** August 18, 2020

**Judge:** Pooler

**Areas of Law:** Criminal Law, Juvenile Law

Defendant appealed his conviction for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as narcotics-conspiracy and firearm-possession charges related to his membership in the 10th Street Gang of Buffalo, New York. Defendant, who was seventeen years old at the time, participated in a double murder and was sentenced to life imprisonment. The Second Circuit rejected defendant's challenges to the introduction into evidence of a gun seized from his home; the denial of his motion for a mistrial based on a Bruton violation; the denial of his Batson challenges, and the denial of his requests for certain jury charges. However, the court held that the district court imposed defendant's sentence without explicitly considering his age at the time of the double murders, and thus violated the principle recognized in *Miller v. Alabama*, 567 U.S. 460, 471 (2012), that children are constitutionally different from adults for purposes of sentencing. Miller stated that those under the age of eighteen are different because the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Therefore, the court affirmed defendant's conviction but vacated his sentence, remanding for resentencing in light of Miller.

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### **Abreu v. Superintendent Smithfield SCI**

**Court:** US Court of Appeals for the Third Circuit

**Docket:** 17-2442

**Opinion Date:** August 19, 2020

**Judge:** Michael A. Chagares

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law, Immigration Law

In 2004, Abreu was convicted in Pennsylvania of 22 drug-related counts and was sentenced to 27-54 years' imprisonment, to run consecutively to a federal sentence Abreu was already serving. The Superior Court of Pennsylvania affirmed. Abreu later unsuccessfully sought relief under the Pennsylvania Post Conviction Relief Act (PCRA). In 2015, Abreu filed a habeas petition under 28 U.S.C. 2254, claiming that his PCRA counsel's assistance was ineffective in failing to assert that his trial counsel had rendered ineffective assistance. The district court rejected his claims. The Third Circuit granted a certificate of appealability as to claims that trial counsel performed ineffectively by failing to challenge the admission of grand jury testimony and by failing to seek to strike a police officer's testimony recounting statements made by others. While Abreu's appeal was pending, he was released on early parole, subject to a federal removal order, and then removed to the Dominican Republic. His federal conviction (not at issue) permanently bars his reentry. The Third Circuit directed the district court to dismiss Abreu's petition as moot. Without a collateral consequence of Abreu's state conviction that can be redressed by a favorable decision on his petition, there is no case or controversy under Article III.

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### **Cabeda v. Attorney General United States**

**Court:** US Court of Appeals for the Third Circuit

**Docket:** 19-1835

**Opinion Date:** August 18, 2020

**Judge:** Jordan

**Areas of Law:** Criminal Law, Immigration Law

Argentine citizen Cabeda, a lawful U.S. permanent resident, was convicted in Pennsylvania state court of having involuntarily deviate sexual intercourse at age 34 with a 15-year-old boy. Immigration authorities found her removable for having committed a state-law offense qualifying as an "aggravated felony," 8 U.S.C. 1227(a)(2)(A)(iii), specifically the "sexual abuse of a minor." The Third Circuit granted her petition for review. Notwithstanding her actual, admitted sexual abuse of a minor, she cannot be removed because the Pennsylvania statute under which she was convicted could conceivably be violated by conduct that falls short of satisfying all the elements of the federally defined crime of sexual abuse of a minor. The categorical approach mandates ignoring what she actually did and focusing instead on what someone else, in a hypothetical world, could have done. The court called this "a surpassingly strange result but required by controlling law."

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### **United States v. Heinrich**

**Court:** US Court of Appeals for the Third Circuit

**Docket:** 19-3035

**Opinion Date:** August 18, 2020

**Judge:** Smith

**Areas of Law:** Criminal Law

A four-year-old stated that Heinrich had pulled her pants down and taken pictures. Pennsylvania state police conducted a consensual search of Heinrich's electronic devices and found sexually explicit images of two children. Heinrich was charged with 15 counts of using or inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct, 18 U.S.C. 2251(a), and one count of possessing material depicting the sexual exploitation of a minor, section 2252(a)(4)(B). Heinrich admitted to taking the pictures and that they depicted sexually explicit conduct but planned to defend himself against the production charges, claiming he lacked the requisite specific intent. Heinrich proffered an expert witness, a psychologist. The government moved to exclude that evidence as inadmissible because the charged offenses were general intent crimes and under Federal Rules of Evidence 401, 403, 702, or 704(b). After a hearing on the applicability of Rule 704(b), the judge's law clerk conducted a telephonic status conference, stating that the court intended to grant the government's motions based on Rules 403 and 704(b). No opinion or order was docketed. The judge did not participate in the conference, which was unrecorded and not transcribed. Heinrich entered a conditional guilty plea and appealed. The Third Circuit vacated without addressing the merits of the ruling, noting the "impossible position" of attempting "to review an adjunct-presented non-ruling that caused the Defendant to plead guilty." District courts must articulate their Rule 403 reasoning on the record.

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### **United States v. Seibert**

**Court:** US Court of Appeals for the Third Circuit

**Docket:** 19-2400

**Opinion Date:** August 19, 2020

**Judge:** Restrepo

**Areas of Law:** Criminal Law

Seibert pleaded guilty to production and possession of child pornography following a raid in which agents recovered approximately 1,500 images. The Probation Office recommended enhancements under U.S.S.G. 2G2.2(b)(5), which applies "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor," and 4B1.5(b)(1), which applies if "the defendant engaged in a pattern of activity involving prohibited sexual conduct," resulting in a Guidelines range of 360 months to life imprisonment.

After applying the two enhancements and weighing the 18 U.S.C. 3553(a) sentencing factors, the court sentenced Seibert to 360 months' imprisonment. The Third Circuit affirmed. The Guidelines allow for the simultaneous application of both enhancements to the same conduct; there was no procedural error. The court rejected an argument that application of the section 3553(a) factors led to an unduly harsh sentence because it did not place enough weight on Seibert's personal circumstances, including the mental health, medical, and learning challenges. Seibert submitted a psychological evaluation concluding that he "has the libido of an adult but the mind of a small child and does not have the capacity to use rationality to control his impulses." The district court acknowledged that evidence but concluded that Seibert's "family struggles" are not "unusually severe."

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### **Argueta v. Barr**

**Court:** US Court of Appeals for the Fourth Circuit

**Docket:** 18-2514

**Opinion Date:** August 18, 2020

**Judge:** Allison J. Rushing

**Areas of Law:** Criminal Law, Immigration Law

The Fourth Circuit denied the petition for review of the BIA's decision dismissing petitioner's appeal of the IJ's finding that petitioner is statutorily ineligible for cancellation of removal because, during his first seven years of continuous residence after admission to the United States, he committed an offense listed in 8 U.S.C. 1182(a)(2) that rendered him inadmissible. The Supreme Court held, in *Barton v. Barr*, 140 S. Ct. 1442 (2020), that conviction of an offense listed in Section 1182(a)(2) renders a lawful permanent resident "inadmissible" for purposes of Section 1229b(d)(1) even if he is not seeking admission. In this case, because petitioner committed such an offense during his initial seven years of residence after admission to the United States, and was later convicted of that offense, the court held that he is ineligible for cancellation of removal.

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### **United States v. Millender**

**Court:** US Court of Appeals for the Fourth Circuit

**Dockets:** 18-4784, 18-4785, 19-4165

**Opinion Date:** August 17, 2020

**Judge:** Diana Jane Gribbon Motz

**Areas of Law:** Criminal Law, White Collar Crime

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This criminal case stemmed from Defendant Terry and Brenda Millender's involvement in the Victorious Life Church. The district court granted Brenda's motion for a judgment of acquittal based on insufficient evidence to support her convictions for conspiracy to commit wire fraud, money laundering, and conspiracy to commit money laundering. The district court also conditionally ordered a new trial. The government appealed. The Fourth Circuit dismissed Terry's cross-appeal after his death and remanded the judgment against Terry to the district court for further proceedings. The court reversed the judgment of acquittal as to Brenda's convictions and held that the district court erred in concluding that no reasonable juror could find that Brenda knew of the fraud perpetrated by Micro-Enterprise and Kingdom Commodities; the district court relied on this ground alone to override the jury's guilty verdict as to two counts of wire-fraud conspiracy and two counts of money-laundering conspiracy; a reasonable jury could find that the Millenders not only spent the money but also tried to conceal its nature; and no more is required to sustain the jury's verdict on the three substantive counts of money laundering. The court also vacated the grant of a new trial where, on the record, the court cannot see whether the district court appreciated the limits on its discretion in making the decision. The court remanded for further proceedings.

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### **United States v. Ward**

**Court:** US Court of Appeals for the Fourth Circuit

**Docket:** 18-4720

**Opinion Date:** August 20, 2020

**Judge:** Richardson

**Areas of Law:** Criminal Law

Defendant's convictions under Va. Code 18.2-248 each qualify as a "controlled substance offense" that may trigger the career-offender enhancement. The Fourth Circuit affirmed defendant's 10 year term of imprisonment imposed after he pleaded guilty to one count of distributing cocaine. The court held that the district court did not erroneously sentence defendant as a career offender under USSG 4B1.1 where defendant's prior Virginia convictions for possession with the intent to distribute heroin fall within the Guidelines' categorical definition of a "controlled substance offense." Therefore, the district court correctly counted those convictions as predicate offenses for the career-offender enhancement.

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### **Melot v. Bergami**

**Court:** US Court of Appeals for the Fifth Circuit



**Docket:** 19-50436

**Opinion Date:** August 18, 2020

**Judge:** W. Eugene Davis

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Fifth Circuit affirmed the district court's denial of a petition for habeas relief under 28 U.S.C. 2241. Petitioner claimed that he was improperly denied release to home confinement under the First Step Act's Elderly Offender Home Detention Program. The court liberally construed the petition as asserting a Bivens civil rights claim and held that Congress has vested the executive branch, not the judicial branch, with the power to decide which prisoners may participate in the Program. In this case, petitioner argued in the district court that defendant wrongly declined petitioner's request for participation in the Program based on a prior disciplinary proceeding for which he was sanctioned for "attempted escape." The court explained that petitioner's claim would have required the district court to assess his prior actions and make a determination as to whether those actions constituted an escape attempt. However, only defendant had authority to make that determination for purposes of petitioner's eligibility for the Program. The court stated that 34 U.S.C. 60541(g) does not give federal courts the power to do so. The court held that petitioner did not raise a due process argument involving his prior disciplinary proceedings in the district court and may not raise them for the first time on appeal.

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### **United States v. Abbate**

**Court:** US Court of Appeals for the Fifth Circuit

**Docket:** 19-10797

**Opinion Date:** August 18, 2020

**Judge:** Per Curiam

**Areas of Law:** Criminal Law

Defendant challenged two special conditions of his supervised release following the revocation of his first term of supervised release: first, a condition prohibiting possession of pornographic matter; and second, a condition prohibiting use of gaming consoles. The Fifth Circuit affirmed the pornography condition, holding that the condition is neither vague nor overbroad. In this case, defendant's interest in child pornography is intertwined with adult pornography. The court modified the gaming console condition, narrowing the condition to forbid defendant from using or possessing any gaming console or device that allows for internet access without prior permission from the probation officer.

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### **United States v. Bostic**

**Court:** US Court of Appeals for the Fifth Circuit

**Docket:** 19-50591

**Opinion Date:** August 18, 2020

**Judge:** Leslie Southwick

**Areas of Law:** Criminal Law

The Fifth Circuit vacated defendant's 235 month sentence after he pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. The court held that the district court procedurally erred by offering an inadequate explanation for its sentencing determination, which was an abuse of its discretion. The court need not address defendant's argument regarding substantive reasonableness. Accordingly, the court remanded for further proceedings.

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### **United States v. Burgos-Coronado**

**Court:** US Court of Appeals for the Fifth Circuit

**Dockets:** 19-60294, 19-60295, 19-60380

**Opinion Date:** August 18, 2020

**Judge:** Leslie Southwick

**Areas of Law:** Criminal Law

The Fifth Circuit affirmed the district court's denial of defendants' motion to suppress evidence of credit card skimming found in a Toyota and a Volkswagen stopped at a driver's safety checkpoint. The court held that the troopers had the minimum level of objective justification to support a reasonable suspicion of criminal activity -- namely, human trafficking -- sufficient to justify prolonging the stop by inquiring further about where the Toyota occupants were going. During the justified extension, the court explained that more facts were discovered to support reasonable suspicion and, eventually, a search of the vehicles.

**Read Opinion**

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### **United States v. Crittenden**

**Court:** US Court of Appeals for the Fifth Circuit

**Docket:** 18-50635

**Opinion Date:** August 20, 2020

**Judge:** Jennifer Walker Elrod

**Areas of Law:** Criminal Law

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Defendant and his wife were convicted of possession with intent to distribute 500 grams or more of methamphetamine. The district court granted defendant a new trial because the record does not show that he knew that the bags he removed from his house—and the bag his wife requested that he bring her—contained methamphetamine or any other controlled substance. The Fifth Circuit affirmed and held that the district court did not abuse its discretion in granting a new trial on the basis of insufficient evidence of knowledge. In this case, the evidence does not show that defendant ever laid eyes on the drugs themselves; the district court was not required to credit the wife's testimony in granting the motion for new trial; and the evidence only shows that defendant complied with his wife's request to bring her the bag containing the drugs but nothing more.

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### **United States v. Gallegos-Espinal**

**Court:** US Court of Appeals for the Fifth Circuit

**Docket:** 19-20427

**Opinion Date:** August 17, 2020

**Judge:** E. Grady Jolly

**Areas of Law:** Criminal Law

The Fifth Circuit reversed the district court's grant of defendant's motion to suppress evidence of child pornography found on his phone. In this case, DHS suspected defendant of participating in his mother's alien-smuggling conspiracy and convinced defendant to voluntarily consent to the search of his iPhone. Rather than discovering evidence to support the conspiracy, federal agents instead discovered evidence of the unrelated crime of possession of child pornography. The district court suppressed three incriminating videos that the government discovered and ruled that defendant's written consent to a "complete search" of the iPhone could not support a review of extracted data three days after the phone was returned. The court held, however, that defendant signed a consent form that, in its broad terms, encompasses the search and seizure conducted. Furthermore, defendant failed affirmatively to limit the scope of his broad consent. Accordingly, the court vacated the district court's suppression of the evidence and remanded for further proceedings.

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### **Will v. Lumpkin**

**Court:** US Court of Appeals for the Fifth Circuit

**Docket:** 18-70030

**Opinion Date:** August 17, 2020

**Judge:** Don R. Willett

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Fifth Circuit affirmed the district court's judgment that petitioner's Rule 60(b) motion was a successive habeas petition. The court held that when a court order disposes of a habeas claim on procedural and, in the alternative, substantive grounds, a Rule 60(b) motion contesting this order inherently presents a successive habeas petition. In this case, petitioner's Rule 60(b) motion—facially challenging a procedural ruling and implicitly challenging a merits determination—presents a habeas claim. Therefore, the district court correctly held that it lacked jurisdiction to consider the motion under the Antiterrorism and Effective Death Penalty Act. The court also affirmed the denial of petitioner's inherent-prejudice claim where petitioner identifies no clearly established law that the CCA misapplied, nor any unreasonable factual determinations on which that court based its holding.

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### **Bard v. Brown County**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 19-3468

**Opinion Date:** August 18, 2020

**Judge:** Karen Nelson Moore

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Less than an hour after a Brown County, Ohio jail officer was captured on video yelling in Goldson's ear, "I'd like to break your fucking neck right now," multiple correctional officers apparently discovered Goldson hanging by his neck from a bedsheet tied to the sprinkler escutcheon in his cell, in what the officers now characterize as a suicide. Goldson's sister claims that Goldson's hanging was staged. The district court acknowledged that there was a genuine dispute of fact as to whether Goldson was capable of hanging himself, mainly due to the physical layout of the cell and Goldson's physical characteristics but nonetheless granted the defendants summary judgment, reasoning that the plaintiff had not adduced sufficient evidence as to a specific theory of how Goldson died. The Sixth Circuit reversed in part, reinstating claims against two correctional officers relating to Goldson's death. The court affirmed with respect to other defendants and claims.

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### **Chase v. MaCauley**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 19-1202

**Opinion Date:** August 20, 2020

**Judge:** R[ansey] Guy Cole, Jr.

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Chase was convicted of kidnapping, first-degree criminal sexual conduct, unlawful imprisonment, and assault with a dangerous weapon. In 2013, the Michigan court imposed two consecutive terms of 25-80 years' imprisonment on the criminal sexual conduct counts, to be served concurrently with terms for the other counts. Michigan's sentencing guidelines allowed a sentencing court to depart from the guidelines' mandatory sentencing ranges upon a showing of "a substantial and compelling reason," using "prior record variables" and "offense variables." In Chase's case, the court increased Chase's minimum sentencing range based on offense variables that had not been found by the jury, such as serving as a "leader" and causing bodily injury and serious psychological injury requiring professional treatment. Days after Chase's sentencing, the U.S. Supreme Court held, in "Alleyne," that the Sixth Amendment requires any fact that increases a defendant's mandatory minimum sentence be found by a jury, not a judge. Chase did not raise an "Alleyne" claim on direct appeal. The Michigan Supreme Court did not determine that Alleyne rendered its sentencing scheme unconstitutional until 2015. The Sixth Circuit granted Chase habeas relief, excusing the procedural default. Because there is a reasonable probability that, but for his appellate counsel's error, Chase would have received relief from the Michigan Supreme Court, he has shown prejudice. A decision upholding the sentencing court's use of judge-found facts to raise Chase's mandatory minimum sentence would be contrary to clearly established federal law.

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### Cooper v. Chapman

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 18-1391

**Opinion Date:** August 17, 2020

**Judge:** Bush

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

In 1978, McKillop was brutally murdered. In 2006, Lolley, McKillop's former neighbor, told police that Cooper had confessed to killing McKillop. On March 3, 2010, after multiple interviews and while in custody, Cooper admitted that he had witnessed McKillop's murder and that he knew who had tied him up and shot him, but denied that he had done it., declaring: "I'm not saying no more." He accused the detectives of having already concluded that he was the murderer and made statements indicative of his desire to be arraigned. The questioning did not stop. Finally, Cooper admitted that he and Bollis forced McKillop to the floor, where McKiddie shot McKillop in the head. Although the trial court declined to suppress the March 3 statements, the prosecutor agreed not to use proof from that interview affirmatively. However, during his questioning of the officer who conducted the interview, defense counsel referenced certain statements made by

Cooper at the March 3 interview and moved for the interview's admission into evidence. Cooper was convicted of first-degree felony murder and sentenced to life in prison. On appeal, the Michigan court found that Cooper had waived any challenge to the admission of his statements from the March 3 interview under Michigan's invited-error doctrine. The Sixth Circuit affirmed the denial of Cooper's petition for federal habeas relief. The Michigan trial court's admission of the confession was not an error that rose to the level of actual prejudice.

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### **England v. Hart**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 18-6039

**Opinion Date:** August 17, 2020

**Judge:** Siler

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

In 2000, Lisa was found dead in her driveway. Investigators focused on McCary, Halvorson's former boyfriend. After hearing of a \$10,000 reward, Woodfork alleged that McCary had paid him and England to murder Lisa. Woodfork wore a wire, allowing the police to record a conversation between him and England. England complained about McCary's not having paid him in full and made threats. Police subsequently brought England to the station for questioning, telling him that he had been recorded. England stated, "go on and lock me up then and call my lawyer ... I don't know what you're talking about." The interrogation continued. England ultimately admitted that he was present at the murder but claimed only to have punched Lisa, which knocked her down, and that he attempted to talk McCary out of further violence. He claimed that Lisa was alive when they departed the scene. The prosecution's theory was that the two planned to make it appear that Lisa was accidentally run over by her own truck and that they knocked her to the ground, accelerated the truck backward, and broke her windpipe. The Kentucky Supreme Court affirmed England's conviction and life sentence. The Sixth Circuit affirmed the denial of federal habeas relief, rejecting arguments that the trial court erroneously admitted his confession, that improper admission of hearsay statements from the deceased victim was erroneously deemed harmless error, and that the prosecution suppressed evidence in violation of Brady.

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### **Pirkel v. Burton**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 19-1349

**Opinion Date:** August 14, 2020

**Judge:** Donald

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Pirkel committed 17 crimes in 2007. He was suicidal when he was arrested. Pirkel expressed reservations about entering a plea; he was given 90 minutes to read police reports. When the court reconvened, Pirkel pleaded no contest to all of the charges except criminal sexual conduct and accosting a minor, which were dismissed. Pirkel stated that he understood the plea agreement and that no one had threatened him or promised him anything. Before sentencing, Pirkel sent the judge a letter expressing concerns with his representation and his plea. The court would not allow Pirkel to withdraw his plea, refused to appoint new attorneys, and sentenced Pirkel to 20-50 years' imprisonment for assault with intent to murder. Pirkel's appointed appellate counsel, Ujlaky, advised Pirkel that he "found no issue of even colorable merit to pursue." The judge who had presided over Pirkel's plea and sentencing allowed Ujlaky to withdraw and declined to appoint new counsel. Michigan courts declined to hear his delayed pro se appeal. Pirkel filed a federal habeas petition. The district court found that Pirkel failed to exhaust several claims and denied relief on the other claims. The Sixth Circuit appointed counsel and allowed Pirkel to proceed on claims that his plea was rendered involuntary by ineffective assistance of trial counsel; that appellate counsel performed ineffectively; that the court violated Pirkel's constitutional rights by allowing appellate counsel to withdraw; and that any exhaustion defense was waived. The court then reversed the denial of relief. The Michigan trial court failed to conduct its own review of the merits of Pirkel's appeal before allowing counsel to withdraw based on a conclusory statement. The Constitution requires more. The Michigan courts unreasonably applied clearly established federal law. Pirkel is entitled to a new first-tier appeal in the Michigan courts

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### **Stewart v. City of Euclid**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 18-3767

**Opinion Date:** August 14, 2020

**Judge:** Siler

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Euclid Officers Rhodes and Catalani were dispatched to check on a "suspicious" vehicle in a residential area near a school. Stewart was sleeping in the car. Catalani shined his flashlight through the windows and saw indications of marijuana and alcohol. The officers did not turn on their dashboard camera, belt microphones, nor their vehicle's overhead lights. Stewart woke up and started the car. Neither officer announced himself as a police officer. The officers attempted to remove Stewart from the car;



Rhodes got into the car. Stewart drove away within the speed limit. Rhodes attempted to gain control of the gearshift and the keys while striking Stewart in the head. Rhodes eventually deployed his taser and pulled the trigger six times. The car came to a stop. Rhodes did not try to leave the car. Stewart then continued driving. When the car stopped, Rhodes fired two shots into Stewart's torso. According to Rhodes, Stewart attempted to "punch" him. Rhodes shot Stewart three additional times. Stewart died from his wounds; 59 seconds elapsed from the time Catalani advised dispatch that Stewart was fleeing to the time he reported shots fired. The Sixth Circuit affirmed the dismissal of claims under 42 U.S.C. 1983 as barred by qualified immunity but reversed the dismissal of state law claims. Regardless of whether a constitutional violation occurred, the contours of the right were not clearly established in these circumstances. Few cases have ever considered the danger faced by an officer inside a fleeing suspect's vehicle and at what point it justifies the use of deadly force. Violation of Stewart's rights cannot be the "known or obvious consequence" disregarded by the city through its training program. Statutory immunity under Ohio law is distinct from federal qualified immunity.

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### United States v. Davis

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 19-3094

**Opinion Date:** August 14, 2020

**Judge:** Murphy

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Castro-White, age 23, was found dead in his bedroom with signs of an opiate overdose. The Lorain Police Department retraced Castro-White's final hours and identified Davis as the dealer who sold the drugs that killed Castro-White. Davis had sold the drug to Castro-White's friends, who had shared the drugs. Davis received a life sentence under 21 U.S.C. 841(b)(1)(C) which imposes a mandatory life sentence if a defendant with a prior felony drug conviction distributes an illegal substance and death results from its use. The Sixth Circuit rejected Davis' argument that the enhancement does not apply because he did not sell drugs directly to Castro-White. The enhancement's text does not require such a buyer-seller relationship with the victim. The court also rejected Davis's other evidentiary and instructional claims. The court remanded because the government conceded that the warrant that allowed the police to search Davis' home and seize his cellphone lacked probable cause. The government claimed that the affiant gave additional unrecorded oral testimony to establish probable cause in front of the state magistrate who issued the warrant. The Fourth Amendment does not mandate recorded testimony, so the court



allowed the government to offer evidence of this additional testimony in an evidentiary hearing on remand.

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#### **United States v. Fleischer**

**Court:** US Court of Appeals for the Sixth Circuit

**Docket:** 19-3719

**Opinion Date:** August 20, 2020

**Judge:** John K. Bush

**Areas of Law:** Criminal Law

Fleischer pleaded guilty to one count of sexual exploitation of a minor (Victim 1), 18 U.S.C. 2551(a), and one count of receipt and distribution of visual depictions of real minors engaged in sexually explicit conduct, 18 U.S.C. 2552(a)(2). The parties agreed to dismiss Count Four, charging Fleischer with the exploitation of a minor victim (Victim 2), 18 U.S.C. 2551(a). The plea agreement included a section labeled, “RELEVANT CONDUCT,” which contained Fleischer’s admission to the offense conduct involving Victim 2. The district court sentenced Fleischer to a within-Guidelines sentence of 447 months. The Sixth Circuit affirmed the sentence. The court rejected Fleischer’s arguments that the district court committed error in applying to his sentence both a multiple count adjustment under U.S.S.G. 2G2.1(d)(1), based on his conduct in relation to Victim 2, and a pattern of activity enhancement under U.S.S.G. 2G2.2(B)(5), and by placing an unreasonable amount of weight on the “seriousness” of his conduct as a sentencing factor under 18 U.S.C. 3553(a).

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#### **Machicote v. Roethlisberger**

**Court:** US Court of Appeals for the Seventh Circuit

**Docket:** 19-3009

**Opinion Date:** August 14, 2020

**Judge:** Scudder

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law, Medical Malpractice

Machicote, a Wisconsin inmate underwent surgery to remove damaged bone, tissue, and cartilage in his ankle after he suffered an injury while playing basketball in the prison yard. After the procedure, the surgeon supplied Machicote with oxycodone and warned that he would be in “extreme pain” when the medication wore off. He was discharged with instructions recommending narcotic-strength painkillers every six hours. At the prison, Dr. Herweijer ordered Tylenol #3, as needed every six hours for three days. Because of Nurse Stecker’s scheduling of the doses, Machicote

woke at 3:30 a.m. in “excruciating pain.” Machicote continued to have trouble accessing the medication that had been ordered; the prison’s medication distribution schedule did not match Machicote’s prescription. Concerned about pain during the night, Machicote was told: “That’s how it will go.” Machicote’s medication order ran out completely and he began experiencing agonizing pain around the clock. Nurse Stecker refused to contact a doctor. Five days later, Dr. Hoffman prescribed him another painkiller, Tramadol. Machicote did not receive the medication for two more days, and his medical records show that the pain required management for several more weeks. In Machicote’s suit under 42 U.S.C. 1983, the district court granted the defendants summary judgment. The Seventh Circuit affirmed as to the other defendants but vacated in part; a factual issue remains as to the deliberate indifference of Nurse Stecker.

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### **Pittman v. Madison County**

**Court:** US Court of Appeals for the Seventh Circuit

**Docket:** 19-2956

**Opinion Date:** August 14, 2020

**Judge:** Barrett

**Areas of Law:** Civil Rights, Construction Law, Criminal Law

After four months of pretrial detention at the Madison County jail in 2007, Pittman attempted suicide by hanging himself with a blanket. The attempt left Pittman in a vegetative state. In his suicide note, he stated that the guards were “f\*\*\*ing” with him and would not give him access to “crisis [counseling].” Banovz, an inmate housed near Pittman’s cell, substantiated the claim that Pittman had made in his suicide note. In a recorded interview with a county detective, Banovz stated that in the days leading up to Pittman’s suicide attempt, Pittman had asked officers Werner and Eaton to refer him to crisis counseling; neither of them followed through with their promises. On remand, in a suit under 42 U.S.C. 1983, a jury ruled in favor of the defendants. The Seventh Circuit ruled that the district court’s exclusion of the Banovz video interview was a reversible error. After a second trial, the jury again returned a verdict for the defendants. The Seventh Circuit again remanded. One of the jury instructions erroneously directed the jury to evaluate Pittman’s Fourteenth Amendment claim according to a subjective rather than objective standard. The jury was told to consider whether the defendants “consciously failed to take reasonable measures to prevent [Pittman] from harming himself.”

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### **United States v. Cook**

**Court:** US Court of Appeals for the Seventh Circuit  
**Docket:** 18-1343  
**Opinion Date:** August 17, 2020  
**Judge:** ROVNER  
**Areas of Law:** Constitutional Law, Criminal Law

Police conducted a traffic stop, approached Cook's car and noticed a strong odor of marijuana. Cook was driving on a suspended license and without a license plate. The officers ordered him to step out of the vehicle and removed Cook's loaded pistol from his holster. In purchasing the firearm, Cook completed an ATF form, answering "no" to the question, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?" Cook acknowledged that he used marijuana almost daily and had smoked two "blunts" that day. The Seventh Circuit affirmed Cook's conviction for being an unlawful user of a controlled substance in possession of a firearm, 18 U.S.C. 922(g)(3). The Supreme Court subsequently held in "Rehaif," that the knowledge element of section 924(a)(2) requires the government to show that the defendant knew not only that he possessed a firearm, but that he belonged to the relevant category of persons barred from possessing a firearm. The indictment in Cook's case did not allege, nor the jury instructions advise the jury that it must find, that Cook knew he was an unlawful user of a controlled substance. On remand, the Seventh Circuit again rejected Cook's vagueness and Second Amendment challenges and his objection to the jury instruction on who constitutes an unlawful user of a controlled substance but held that, in light of Rehaif, Cook is entitled to a new trial.

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### **United States v. Greene**

**Court:** US Court of Appeals for the Seventh Circuit  
**Docket:** 19-3069  
**Opinion Date:** August 14, 2020  
**Judge:** Daniel Anthony Manion  
**Areas of Law:** Criminal Law

Greene pleaded guilty to distributing child pornography, 18 U.S.C. 2252A(a)(1), 2252A(b)(1), and received a within-guidelines 15-year prison sentence and a life term of supervised release. Greene argued that the sentence violated the parsimony provision of the sentencing statute, which requires that a sentence be "sufficient, but not greater than necessary." He challenged the district court's statement that, for him, at age 59, terms of 10 years and life would be "effectively the same" because his life after prison would be "short." The Seventh Circuit affirmed. The district court considered the guidelines and explained, with reference to section 3553(a)'s factors, why it believed that a life term of supervised release was necessary. Agents found approximately 2,850 images of child pornography on his laptop and a

thumb drive; he had a prior conviction for child pornography and was subject to a statutory minimum term of 15 years in prison. While Greene admitted that he had a problem and that his actions had caused a lot of pain and injury, the court saw a need for deterrence and to protect the public.

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#### **United States v. Thomas**

**Court:** US Court of Appeals for the Seventh Circuit

**Docket:** 19-2129

**Opinion Date:** August 14, 2020

**Judge:** Scudder

**Areas of Law:** Criminal Law

Thomas agreed to sell methamphetamine to a government cooperator and drove to the prearranged delivery time and place, where the police arrested him and searched his car. When police opened the glove compartment, out fell two firearms and a bag of methamphetamine. Thomas claimed that he used the guns for lawful purposes unrelated to drug dealing and did not possess them “in furtherance of” a drug trafficking crime in violation of 18 U.S.C. 924(c)(1)(A)(i). He had a concealed-carry permit. The Seventh Circuit affirmed his conviction, applying the plain error standard. At trial, Thomas had not challenged the admission of so-called “dual-role” (both expert and lay) testimony from a federal agent nor the jury instructions. Even setting aside the agent’s testimony, the government had ample evidence to show that Thomas was using the firearms found in his car to facilitate his drug dealing. Imperfect as they were, the jury instructions were not so confusing or misleading as to warrant reversal.

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#### **Waagner v. United States**

**Court:** US Court of Appeals for the Seventh Circuit

**Docket:** 19-3008

**Opinion Date:** August 20, 2020

**Judge:** Kenneth Francis Ripple

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Waagner was convicted as a felon in possession of a firearm and of possessing a stolen vehicle that had crossed a state line. The court adopted the PSR finding that Waagner was an armed career criminal under the ACCA based on his prior convictions for “violent felonies,” 18 U.S.C. 924(e)(2)(B): two 1978 convictions for Ohio aggravated burglary and one 1992 conviction for Ohio attempted robbery. Waagner had a sentencing guidelines range of 262-327 months’ imprisonment; the statutory minimum

was 15 years. While awaiting sentencing, Waagner escaped from custody and, while a fugitive, committed offenses in multiple districts. After his apprehension, he pleaded guilty to escape. The court imposed a 364-month sentence. Waagner filed a second collateral attack on his sentence, challenging his ACCA classification. The district court denied his motion, finding that, although his Ohio aggravated burglary convictions no longer constitute ACCA predicate offenses under the Supreme Court's 2015 "Johnson" decision, invalidating the residual clause, they still qualify as predicate offenses under ACCA's enumerated offenses clause. The Seventh Circuit affirmed. The advent of Johnson permitted Waagner to bring a second motion under 28 U.S.C. 2255; before Johnson, any such challenge would have been futile. Nonetheless, Ohio aggravated burglary and Ohio attempted robbery are violent felonies as that term is defined in the ACCA.

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#### **Gonzalez v. Bendt**

**Court:** US Court of Appeals for the Eighth Circuit

**Docket:** 18-2360

**Opinion Date:** August 19, 2020

**Judge:** James B. Loken

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

In 2016, plaintiff filed a pro se damages action asserting equal protection and First Amendment claims arising out of his grievances stemming from his transfer to FPC Yankton where he was denied permission to possess an aviation manual he had been allowed to have at his prior correction facility. The district court dismissed all but one claim asserting that plaintiff's First Amendment rights were violated when an FPC Yankton Correctional Counselor retaliated against him for filing grievances by denying him prison grievance forms. The district court interpreted the action as one brought against the counselor under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and granted summary judgment, concluding that a *Bivens* remedy should not be implied for retaliatory denials of administrative remedies. The Eighth Circuit affirmed, holding that plaintiff failed to prove an essential element of a First Amendment retaliation claim -- that denial of a few grievance forms would chill an inmate of ordinary firmness from filing future grievances. In this case, the record establishes that the BOP's flexible four-step process allowed plaintiff to have his initial grievance decided on the merits and then to submit a second grievance that initially bypassed the informal resolution step, which was also decided on the merits. Furthermore, there is no evidence that other inmates would not be granted comparable procedural access to BOP administrative grievance remedies.

**United States v. Aquilar Escobar****Court:** US Court of Appeals for the Eighth Circuit**Docket:** 19-3251**Opinion Date:** August 14, 2020**Judge:** William Duane Benton**Areas of Law:** Criminal Law, Immigration Law

The Eighth Circuit affirmed the district court's denial of defendant's motion to dismiss the indictment charging defendant with illegal reentry in the United States. The court held that an alien may not collaterally attack the underlying deportation order unless: (1) the alien exhausted his administrative remedies with respect to the order; (2) the deportation proceedings improperly deprived the alien of an opportunity for judicial review; and (3) entry of the order was fundamentally unfair. In this case, defendant failed to meet his burden on any of the elements. Furthermore, even if defendant could collaterally attack the deportation order under *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018), his attack fails. Therefore, the immigration court had jurisdiction over defendant's deportation proceedings and the district court did not err in denying his motion to dismiss the indictment.

**United States v. Campbell****Court:** US Court of Appeals for the Eighth Circuit**Docket:** 19-3226**Opinion Date:** August 19, 2020**Judge:** Per Curiam**Areas of Law:** Criminal Law

Defendant challenged his 336-month sentence imposed after he pleaded guilty to producing child pornography. The district court subsequently amended the original judgment to include the specific case numbers. The court held that the amended judgment did not disturb or revise legal rights and obligations because it did not make a material change. Therefore, the amended judgment did not trigger a new time to appeal. The court stated that defendant's notice of appeal was timely as to the amended judgment, but was untimely as to the original judgment. Accordingly, the court remanded for the district court to find whether this is a case of excusable neglect or good cause under Appellate Procedure 4(b)(4) and to extend the time to file a notice of appeal.

**United States v. El Herman****Court:** US Court of Appeals for the Eighth Circuit**Docket:** 19-2920**Opinion Date:** August 20, 2020**Judge:** Steven M. Colloton**Areas of Law:** Criminal Law

The Eighth Circuit held that the transferee court has jurisdiction to resolve a motion to reduce sentence under the First Step Act of 2018 when the offender is serving a term of supervised release and the sentencing court has transferred jurisdiction over the offender to another district court. In this case, the district court in Northern Iowa dismissed defendant's motion under the First Step Act, without prejudice, on the ground that it lacked jurisdiction over the motion after the transfer. The district court in Northern Illinois later denied defendant's motion for relief under the First Step Act, and he did not appeal that decision to the Seventh Circuit. The court held that the transferee court in the Northern District of Illinois was the district court with jurisdiction to consider defendant's motion to reduce sentence under the First Step Act. The court explained that the powers of the transferred court under 18 U.S.C. 3583 encompasses the authority to resolve defendant's motion under the First Step Act. The court affirmed the judgment.

**United States v. Gallardo****Court:** US Court of Appeals for the Eighth Circuit**Docket:** 19-1282**Opinion Date:** August 17, 2020**Judge:** Kobes**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's conviction for two counts of Abusive Sexual Contact involving a child less than 12 years-old. The court held that the district court did not err by denying defendant's motion for acquittal; by admitting hearsay through a forensic interviewer's testimony and, even assuming that the district court abused its discretion in admitting the testimony, any error was harmless; by failing to instruct the jury on specific intent; and by failing to grant a mistrial because members of the public wore clothing with the words "Bikers Against Child Abuse" where no motion was filed, no juror indicated they had seen the insignia, and there was no prejudicial impact. The court declined to reach the issues regarding the Speedy Trial Act and defendant's ability to testify in his own defense. Finally, the court held that the district court correctly rejected defendant's



claim that because he is an Indian and 18 U.S.C. 1152 does not apply to offenses committed by one Indian against the person or property of another Indian.

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### **United States v. Harriman**

**Court:** US Court of Appeals for the Eighth Circuit

**Docket:** 19-2679

**Opinion Date:** August 17, 2020

**Judge:** Stephen R. Clark

**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's conviction of two counts of murder-for-hire. The court upheld the jury's verdict rejecting defendant's entrapment defense where defendant did not produce sufficient evidence that the ATF induced him to commit murder-for-hire. Furthermore, a reasonable jury could find that the prosecution proved defendant was predisposed to commit this crime. In this case, the evidence established that defendant previously sought to hire someone to murder his ex-wife through a fellow inmate, he contacted the purported hitman, and entered into a written contract with the purported hitman. Therefore, the district court did not abuse its discretion in denying defendant's motion for new trial on the entrapment defense. The district court also did not abuse its discretion in denying defendant's motion for new counsel where most of defendant's complaints do not relate to anything in the adversarial process in this case. Finally, the court declined to consider claims of ineffective assistance of counsel on direct appeal.

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### **United States v. Marlon Iron Crow**

**Court:** US Court of Appeals for the Eighth Circuit

**Docket:** 19-2304

**Opinion Date:** August 14, 2020

**Judge:** Erickson

**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's conviction and sentence for second-degree murder. The court held that the district court did not commit clear error in denying the Batson challenge where the reason proffered for the challenged strike was that the juror appeared disinterested and was very hard to engage; the district court did not err by denying the motion to dismiss the indictment and allowing each side an opportunity to explore the circumstances of the pre-trial investigation; the district court did not err when



it denied defendant's claim based on the elicitation of false testimony; even if the prosecutor acted improperly at trial, the court cannot find that these actions—considered separately or together—prejudiced defendant to such an extent as to render his trial fundamentally unfair; the evidence was sufficient to support defendant's conviction; and defendant's 240 month sentence was substantively reasonable and the district court did not abuse its discretion.

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### **United States v. Overton**

**Court:** US Court of Appeals for the Eighth Circuit

**Docket:** 19-2574

**Opinion Date:** August 19, 2020

**Judge:** Jane Louise Kelly

**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's conviction for conspiracy to manufacture, distribute, and possess with intent to distribute 100 grams or more of heroin. Defendant challenges, among other things, the district court's admission of dual-role testimony from an officer who interpreted recorded telephone calls as both a lay and expert witness. The court held that it does not categorically prohibit dual-role testimony and when that testimony is presented in a concise and differentiated way so that there is no confusion, it may be admissible. However, in this case, the testimony at trial was not presented in a concise and differentiated fashion. The court concluded that, while portions of the officer's testimony constituted admissible expert testimony, other portions did not. The court further concluded that the officer's improper testimony did not have more than a slight influence on the jury's verdict and was therefore harmless. The court also held that the evidence was sufficient to enable a reasonable jury to conclude that at least 100 grams of heroin was within the scope of the conspiracy and that defendant could have reasonably foreseen the extent of the conspiracy; the district court did not abuse its discretion by concluding that a buyer-seller instruction was not warranted by the evidence; to the extent the prosecutor's closing arguments strayed from the evidence, the error was not so obvious as to undermine the fairness, integrity or public reputation of the judicial proceedings; and a comment defendant contends disparaged his counsel did not rise to the level of plain error affecting his substantial rights.

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### **United States v. Smialek**

**Court:** US Court of Appeals for the Eighth Circuit

**Docket:** 19-2342  
**Opinion Date:** August 17, 2020  
**Judge:** Kobes  
**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's conviction for bank robbery. The court held that the district court did not err by denying defendant's motion to suppress statements where the special agent attempted to give defendant a Miranda warning but was repeatedly interrupted by defendant, who was noncompliant and insisted on knowing the date of the robbery. In this case, defendant's alleged alibi was not prompted by interrogation. The court also held that the district court did not err by denying defendant's motion for a mistrial where the jury improperly heard testimony about his prior bank robbery convictions, because the district court gave a curative instruction and there was substantial evidence of defendant's guilt. Finally, the court rejected defendant's claim that the district court should have sua sponte dismissed his indictment because the Government presented inaccurate testimony to the grand jury. In this case, the jury convicted defendant without the disputed evidence and the district court did not plainly err by failing to dismiss the indictment sua sponte.

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### **United States v. Zambrano**

**Court:** US Court of Appeals for the Eighth Circuit  
**Docket:** 19-1781  
**Opinion Date:** August 20, 2020  
**Judge:** Lavenski R. Smith  
**Areas of Law:** Criminal Law

The Eighth Circuit affirmed defendant's 240 month sentence imposed after he pleaded guilty to distributing more than 500 grams of methamphetamine. The court held that the district court did not err by applying a four-level role enhancement for defendant's leadership role in the offense pursuant to USSG 3B1.1(a); the district court did not err by applying a two-level sentencing enhancement for obstruction of justice under USSG 3C1.1; and defendant's below-Guidelines sentence was not substantively unreasonable where the district court considered mitigating factors such as defendant's young age, absent father, minimal education, and lack of criminal history.

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### **Balbuena v. Sullivan**

**Court:** US Court of Appeals for the Ninth Circuit  
**Dockets:** 12-16414, 18-15432  
**Opinion Date:** August 17, 2020  
**Judge:** Bridget S. Bade

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law, Juvenile Law

The Ninth Circuit affirmed the denial of petitioner's federal habeas petition and his Federal Rule of Civil Procedure 60(b) motion to set aside the judgment and amend his habeas petition to add a new claim. Petitioner was convicted of first degree murder, attempted murder, and street terrorism. In regard to the habeas petition, the panel applied the deferential standard in the Antiterrorism and Effective Death Penalty Act (AEDPA) and held that the state court's conclusion that petitioner's statements were voluntary was not contrary to or an unreasonable application of federal law. Under the totality of the circumstances, petitioner was advised of his Miranda rights; the state court did not unreasonably conclude that petitioner was sixteen years old and considered his age, experience, and maturity as part of the totality of the circumstances of his confession; and the state court did not unreasonably conclude that the circumstances of the interview were not coercive. Furthermore, the video recording of the interview refutes petitioner's argument that those tactics overbore his will and rendered his confession involuntary. In regard to the Rule 60(b) motion, the panel held that the district court properly denied that motion as an unauthorized second or successive petition under 28 U.S.C. 2244(b)(3)(A).

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### **Cheneau v. Barr**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 15-70636

**Opinion Date:** August 19, 2020

**Judge:** Per Curiam

**Areas of Law:** Criminal Law, Immigration Law

The Ninth Circuit granted in part and denied in part a petition for review of the BIA's determinations that petitioner does not qualify for derivative citizenship and that his burglary conviction renders him removable. The panel held that petitioner is not a derivative citizen of the United States and did not become a citizen of the United States under 8 U.S.C. 1431(a). In this case, petitioner concedes that he never resided in the United States pursuant to a lawful admission for permanent residence while he was under the age of eighteen. Therefore, petitioner was subject to removal proceedings. The IJ and the BIA found that petitioner was removable because his California burglary conviction was a crime-of-violence aggravated felony. While this appeal was pending, the Supreme Court held that the "crime of violence" statute, as incorporated into the Immigration and Nationality Act's definition of aggravated felony, is unconstitutionally vague. Therefore, the panel held that petitioner's burglary conviction can no longer support removal as a crime-of-violence aggravated felony. The panel remanded to the BIA for the agency to determine whether petitioner is

removable on another ground, including based on his California conviction for receipt of stolen property.

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#### Kipp v. Davis

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 16-99004

**Opinion Date:** August 19, 2020

**Judge:** Richard A. Paez

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Ninth Circuit reversed the district court's denial of petitioner's habeas corpus petition challenging his California conviction and death sentence for first degree murder and attempted rape. Over petitioner's objection, the trial court allowed the prosecution to present evidence of an unadjudicated murder and rape in Los Angeles County. The prosecution then relied on this "other acts evidence" to show the identity of the victim's killer and intent to commit rape and to kill. The panel held that the state court made a crucial erroneous factual determination in linking the two crimes and apparently failed to consider the entire record. Therefore, the California Supreme Court's decision finding no due process violation was based on an unreasonable determination of the facts under 28 U.S.C. 2254(d)(2). The panel also held that the admission of the evidence constituted a due process violation that prejudiced petitioner. Accordingly, the panel remanded with instructions to issue a conditional writ of habeas corpus.

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#### Kipp v. Davis

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 15-99020

**Opinion Date:** August 19, 2020

**Judge:** Jacqueline H. Nguyen

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Ninth Circuit affirmed the district court's denial of a petition for habeas corpus relief challenging petitioners' conviction and death sentence for first-degree murder, forcible rape, and robbery. The panel held that any constitutional error in admitting petitioner's reference to "Satan" was harmless at both the guilt and penalty phases, and thus rejected petitioner's First Amendment argument under *Dawson v. Delaware*, 503 U.S. 159 (1992). The panel also held that because the admission of the Satan references could not have had substantial and injurious effect or influence in determining the jury's verdict, petitioner cannot meet the higher Strickland

standard of prejudice on his ineffective-assistance-of-counsel claims. Furthermore, the district court properly denied petitioner's claim that trial counsel was ineffective during the penalty phase by failing to adequately investigate and present mitigating evidence regarding his life. Finally, weighing the overwhelming weight of the aggravating evidence against the purported juror misconduct, the panel held that any misconduct was harmless.

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### **United States v. Berckmann**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 18-10446

**Opinion Date:** August 20, 2020

**Judge:** John Byron Owens

**Areas of Law:** Criminal Law

The Ninth Circuit affirmed defendant's convictions for assaulting his wife with a dangerous weapon and assault of a spouse by strangulation, both of which occurred on federal land. The panel held that the evidence from two other attacks on defendant's wife was proper non-propensity evidence admitted under Federal Rule of Evidence 404(a). The panel stated that other acts of domestic violence involving the same victim are textbook examples of evidence admissible under Rule 404(b). In this case, the district court did not abuse its discretion by admitting the non-propensity evidence to show that defendant was not joking around or simply trying to frighten his wife, but rather intended to assault and strangle her. The panel also held that there was no error in admitting the evidence under Rule 403 where the evidence of the prior attacks were probative of his intent in this case. Furthermore, the district court on three separate occasions instructed the jury that such acts could only be used for the limited purpose of deciding whether the defendant had the state of mind, knowledge, or intent to commit the crimes charged in the indictment.

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### **United States v. Lague**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 18-10500

**Opinion Date:** August 20, 2020

**Judge:** J. Clifford Wallace

**Areas of Law:** Criminal Law

The Ninth Circuit affirmed defendant's conviction for 39 counts of distributing controlled substances outside the usual course of professional

practice and without a legitimate medical purpose to five of his former patients. Defendant's conviction stemmed from his role as a physician's assistant at a chronic pain-management medical practice. The panel held that uncharged prescriptions of controlled substances in enormous quantities, and in dangerous combinations, support a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. In this case, defendant's practice-wide evidence was therefore probative of his unlawful intent, undermining his defense at trial that the charged prescriptions amounted to a "few bad judgments." The panel held that, because the prescription data made the intent element of the 21 U.S.C. 841 charges more probable, the district court properly admitted defendant's uncharged prescriptions under Federal Rule of Evidence 404(b). Assuming without deciding that the district court abused its discretion under Rule 403 by failing to preview all of the underlying prescription data before admitting it into evidence, the panel held that the error was harmless in light of the overwhelming evidence of guilt.

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### **United States v. Mitchell**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 20-99009

**Opinion Date:** August 19, 2020

**Judge:** Per Curiam

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

Defendant filed an emergency motion to stay his execution pending appeal of the denial of his motion to strike his execution warrant, vacate his execution, and enjoin violation of the district court's original judgment. Defendant argues that he is entitled to a stay pending appeal of the district court's order because the district court erred in denying his motion for injunctive relief. The Ninth Circuit denied the motion and held that defendant failed to carry his burden of demonstrating that he is likely to succeed on the merits of his claim that inconsistencies between the BOP's protocol for implementing his execution and Arizona's procedures violate the judgment and the Federal Death Penalty Act (FDPA), or that it is probable that he would suffer an irreparable injury in the absence of the stay. In this case, defendant identifies six purported inconsistencies between the BOP's execution protocol and the procedures in the Department Order Manual. The panel held that the BOP's protocol and the Department Order Manual procedures on which defendant relies are largely indistinguishable. To the extent there is any difference between the federal and Arizona procedures with respect to the first four examples, the BOP has provided a declaration certifying that it will comply with those procedures. Furthermore, as to the

fifth and sixth examples, the BOP has complied with the Department Order Manual's procedures.

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#### **United States v. Rodriguez**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 16-50213

**Opinion Date:** August 20, 2020

**Judge:** Jacqueline H. Nguyen

**Areas of Law:** Criminal Law

The Ninth Circuit affirmed defendant's convictions for conspiracy in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act and conspiracy in violation of the Violent Crimes in Aid of Racketeering Activity (VICAR) Act. Defendant's convictions stemmed from her role as "secretary" to a high-ranking member of the Mexican Mafia (La Eme). The panel held that the district court correctly gave a "substantial purpose" rather than "but-for cause" instruction for the VICAR purpose element, and the evidence was sufficient to satisfy VICAR's membership-purpose requirement. The panel also held that there was no basis for reversal on the claimed instructional error for the RICO count; the jury instructions regarding attempt and conspiracy as predicate acts did not broaden the basis for conviction beyond the scope of the RICO statute; and the district court did not abuse its discretion in giving its mid-trial instruction. The panel rejected defendant's challenges to the dual role opinion testimony offered by two law enforcement witnesses for the government. Finally, the panel held that the district court did not err in excluding testimony from a key defense witness. Accordingly, the panel found no cumulative error providing a basis for reversal of defendant's conviction.

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#### **United States v. Swenson**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 18-30215

**Opinion Date:** August 19, 2020

**Judge:** Milan Dale Smith, Jr.

**Areas of Law:** Criminal Law, Public Benefits

After defendant was convicted of wire and securities fraud, he was ordered to pay restitution pursuant to the Mandatory Victims Restitution Act (MVRA). The government sought to enforce the restitution order pursuant to the Federal Debt Collection Procedures Act (FDCPA), and thus applied for a post-judgment writ of garnishment against a bank account that held the



Social Security benefits of defendant's wife (the claimant), on the theory that those funds were subject to garnishment pursuant to community property principles of Idaho state law. The district court denied claimant's objections and concluded that the MVRA's enforcement provision, 18 U.S.C. 3613(a), overrides the protections afforded Social Security benefits under the Social Security Act (SSA) so the benefits were garnishable community property. The Ninth Circuit held that it has jurisdiction, following the district court's entry of an order directing the disposition of the funds at issue pursuant to the writ of garnishment. The panel reversed the district court's disposition order and held that claimant's Social Security benefits are not subject to garnishment pursuant to the MVRA in connection with her husband's criminal restitution order. The panel explained that the government was entitled to collect on property only to the same extent defendant had a right to it. In this case, defendant would have no right to his wife's Social Security benefits because the SSA preempts application of Idaho state law community property principles. Accordingly, the panel reversed the order denying claimant's objections, vacated the disposition order, and remanded for further proceedings.

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### **United States v. Valencia-Lopez**

**Court:** US Court of Appeals for the Ninth Circuit

**Docket:** 18-10482

**Opinion Date:** August 19, 2020

**Judge:** Mark J. Bennett

**Areas of Law:** Criminal Law

The Ninth Circuit vacated defendant's conviction of four drug felonies stemming from his transportation and importation of 6,000 kilos of marijuana. Defendant, a truck driver, was transporting bell peppers from Mexico to Arizona when Customs and Border Protection officers stopped him and found the marijuana hidden within the pepper packages. Defendant claimed that he acted under duress after armed gunmen seized his truck in Mexico and held him at gunpoint for several hours. The panel held that the district court erred in allowing an ICE agent's testimony because the district court did not properly fulfill its gatekeeping role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In this case, the district court made no reliability findings about the agent's testimony. The panel also held that the error was not harmless where allowing the agent to testify obviously and substantially impacted the viability of defendant's duress defense. Accordingly, the panel remanded for a new trial.

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### **Millard v. Rankin**

**Court:** US Court of Appeals for the Tenth Circuit

**Docket:** 17-1333

**Opinion Date:** August 20, 2020

**Judge:** Eid

**Areas of Law:** Constitutional Law, Criminal Law

Plaintiff-Appellees David Millard, Eugene Knight, and Arturo Vega challenged the constitutionality of Colorado's Sex Offender Registration Act (CSORA). The district court held CSORA was unconstitutional as applied to the Appellees because the statute inflicted cruel and unusual punishment and violated substantive due process guarantees. Additionally, the district court held that the state courts' application of CSORA's deregistration procedures to Vega violated his procedural due process rights. Defendant-Appellant, the State of Colorado, appealed the entirety of the district court's decision. The Tenth Circuit determined the district court's ruling contravened binding Supreme Court and Tenth Circuit precedent, and reversed.

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### **United States v. Mannie**

**Court:** US Court of Appeals for the Tenth Circuit

**Dockets:** 19-6102, 19-6111

**Opinion Date:** August 18, 2020

**Judge:** David M. Ebel

**Areas of Law:** Constitutional Law, Criminal Law

To alleviate some of the impacts caused by the statutory sentencing disparity between crack cocaine and powder cocaine offenses, Congress passed the Fair Sentencing Act of 2010 ("2010 FSA"). In 2018, Congress passed the First Step Act ("2018 FSA"), which, inter alia, made the Fair Sentencing Act's benefits retroactively applicable to offenders who committed offenses prior to the 2010 FSA's effective date of August 3, 2010. Arthur Mannie, Jr., and Michael Maytubby moved the district court for reductions in their sentences pursuant to the 2018 FSA. In 2009, Mannie pleaded guilty to one count of possession with intent to distribute 50g or more of crack cocaine; Mannie's was ultimately sentenced to 262 months, the bottom of the guideline range. Because the 2010 FSA reduced the statutory maximum sentence for Mannie's offense from life to forty years imprisonment, his alternate offense level was 34, rather than 37. This reduction, combined with a reduction for acceptance of responsibility, resulted in a new advisory guideline range of 188 months to 235 months. Mannie requested a below-guidelines sentence of 120 months or, in the alternative, a sentence at the bottom of the range, 188 months. In 2006, a jury convicted Maytubby of eight counts relating to his participation in a drug trafficking organization, including one count of conspiracy to distribute

cocaine base. In 2007, Maytubby's three original 235-month sentences were each reduced to 188 months, pursuant to Amendment 706. Seven years later, pursuant to Amendment 782, each of Maytubby's three, modified, 188-month sentences was further reduced to 151 months. The district court declined to reduce either sentence under the FSAs; both Mannie and Maytubby appealed. After review, the Tenth Circuit concluded that in Mannie's case, the sentencing court presented a "thorough and reasonably articulated basis" for denying relief, and thus did not abuse its discretion in denying Mannie's request. With regard to Maytubby, the Tenth Circuit found his original sentences were not below the guideline range, and had been reduced to the bottom of the then-current guideline range. The court had no authority to reduce Maytubby's drug offense sentences further. Maytubby's appeal was dismissed for lack of standing.

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### **United States v. Meadows**

**Court:** US Court of Appeals for the Tenth Circuit

**Docket:** 19-4071

**Opinion Date:** August 18, 2020

**Judge:** Moritz

**Areas of Law:** Constitutional Law, Criminal Law

Kimberly Meadows appealed a district court's denial of her motion to suppress evidence obtained during a traffic stop, arguing that the officer's stop was unreasonable because it was based on probable cause of a Utah equipment violation, and the state decriminalized such violations. On December 4, 2017, a Utah highway-patrol officer pulled Meadows over after he observed that tinted glass obscured the brake light inside the rear window of her car, which he believed violated Utah law. He issued Meadows a warning citation for an equipment violation. During the stop, he found drugs and drug paraphernalia. The Tenth Circuit rejected Meadows' argument, concluding that the officer's stop was reasonable regardless of whether Utah has decriminalized such violations. Accordingly, the district court was affirmed.

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### **United States v. Muskett**

**Court:** US Court of Appeals for the Tenth Circuit

**Docket:** 17-2123

**Opinion Date:** August 14, 2020

**Judge:** Carolyn Baldwin McHugh

**Areas of Law:** Constitutional Law, Criminal Law, Native American Law

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In 2013, defendant-appellant Donovan Muskett was indicted by grand jury, charged with four counts: assault with a dangerous weapon in Indian Country; aggravated burglary in Indian Country (based on New Mexico's aggravated burglary statute by way of the federal Assimilative Crimes Act); using, carrying, possessing, and brandishing a firearm during and in relation to and in furtherance of a crime of violence; and negligent child abuse in Indian Country. Muskett entered into a plea agreement, under which he pled guilty to the brandishing a firearm charge, the government dismissed the remaining three counts. The parties agreed that, contingent on the district court's acceptance of the plea agreement, Muskett would be sentenced to 84 months in prison. The district court accepted Muskett's plea and sentenced him to 84 months of imprisonment followed by a three-year term of supervised release. In this matter, Muskett appealed the denial of his motion to vacate the brandishing conviction as a crime of violence based on the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) (invalidating the residual clause in 18 U.S.C. 924(c)'s definition of a "crime of violence" as unconstitutionally vague). The parties' primary disputed whether Muskett's predicate federal felony—assault with a dangerous weapon, 18 U.S.C. 113(a)(3)—qualified as a crime of violence under the elements clause, thereby rendering harmless the Davis defect in his conviction. Muskett suggested the Tenth Circuit conduct this analysis using the law as it existed at the time of his conviction because application of current law would violate due process limits on the retroactive application of judicial decisions enlarging criminal liability. The Tenth Circuit found precedent compelled the conclusion that assault with a dangerous weapon was categorically a crime of violence under the elements clause. "And we conclude that at the time of his offense, Mr. Muskett had fair notice that section 924(c)'s elements clause could ultimately be construed to encompass his commission of assault with a dangerous weapon." The Court thus affirmed the district court's denial of Muskett's section 2255 motion.

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### **United States v. Campbell**

**Court:** US Court of Appeals for the Eleventh Circuit

**Docket:** 16-10128

**Opinion Date:** August 14, 2020

**Judge:** Tjoflat

**Areas of Law:** Criminal Law

On its own motion, the Eleventh Circuit vacated its prior opinion and substituted the following opinion. The court affirmed the district court's denial of defendant's motion to suppress evidence found in the search of defendant's car. Defendant argued that the seizure was unreasonable because the officer lacked reasonable suspicion to believe that a traffic

violation had occurred and, even if there was reasonable suspicion, defendant's seizure became unreasonable when the officer prolonged the stop by asking questions unrelated to the purpose of the stop. The court agreed with the district court that there was reasonable suspicion to stop defendant. In this case, a rapidly blinking turn signal creates reasonable suspicion that a traffic violation has occurred. However, the court found that under the Supreme Court's recent decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the officer unlawfully prolonged the stop when he asked unrelated questions without reasonable suspicion about whether defendant was trafficking contraband. Because these questions were permitted under binding precedent at the time, the court held that the good faith exception applies and declined to invoke the exclusionary rule. Therefore, there was no need to consider whether defendant's consent purged the taint from the unlawfully prolonged seizure nor did the court reach the question of whether the consent issue was waived.

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### **State v. Honorable Michael W. Kemp**

**Court:** Arizona Supreme Court

**Docket:** CR-19-0274-PR

**Opinion Date:** August 17, 2020

**Judge:** Beene

**Areas of Law:** Criminal Law

The Supreme Court held that Arizona's statutory framework for adjudicating intellectual disability complies with the constitutional requirements announced in the recent United States Supreme Court cases, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (Moore I), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (Moore II). Pursuant to Ariz. Rev. Stat. 13-753(K)(3), a finding that a defendant has an intellectual disability requires a mental deficit "existing concurrently with significant impairment in adaptive behavior" before the defendant is eighteen. At issue in this case was the impact of Moore I and Moore II on section 13-753(K)(1)'s definition of "adaptive behavior." The Supreme Court held that Moore I and Moore II did not eliminate section 13-753(K)(1)'s requirements that the trial court conduct an overall assessment to determine if the defendant has a deficit in any life-skill category and, if a deficit exists, determine whether it affects the defendant's ability to meet "the standards of personal independence and social responsibility expected of defendant's age and cultural group." Because the trial court did not conduct an overall assessment of Defendant's ability to meet society's expectations of him, the Supreme Court reversed and remanded this case for a new intellectual disability determination using the standard set forth in this opinion.

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**California v. McGee****Court:** California Courts of Appeal**Docket:** C088342(Third Appellate District)**Opinion Date:** August 18, 2020**Judge:** Ronald B. Robie**Areas of Law:** Constitutional Law, Criminal Law

Defendant-appellant Tyrone McGee appealed after entering a no contest plea to being a felon in possession of a firearm. On appeal, he challenged the trial court's denial of his motion to suppress evidence seized during a search of the car he was driving and a female passenger's purse. After review of the trial court record, the Court of Appeal concluded the presence of an unsealed bag of marijuana plainly visible on the passenger's person constituted probable cause to search the passenger's purse. Since the purse contained a gun which defendant pled to possessing, the Court affirmed.

**California v. Schaffer****Court:** California Courts of Appeal**Docket:** E073302(Fourth Appellate District)**Opinion Date:** August 17, 2020**Judge:** Fields**Areas of Law:** Constitutional Law, Criminal Law

Defendant-appellant Andras Peter Schaffer was convicted and sentenced to three years in state prison in 2015 for failing to register as a sex offender. He was released on parole in 2016 on the condition he wear a GPS monitoring device and charge it, at least twice daily. He appealed a July 2019 superior court order, finding by a preponderance of the evidence that he violated his parole by failing to keep his GPS monitoring device charged and ordering him to serve 180 days in county jail. Relying on the plurality opinion in *United States v. Haymond*, 139 S.Ct. 2369 (2019), defendant claimed he had a Fifth and Sixth Amendment right to have a jury determine whether he violated his parole based on proof beyond a reasonable doubt, and the court violated that right by denying his request to allow a jury to determine whether he violated his parole. The Court of Appeal determined defendant did not have a right to have a jury determine whether he violated his parole, and the reasoning of the *Haymond* plurality did not apply to defendant's case.

**Pasos v. Los Angeles County Civil Service Commission****Court:** California Courts of Appeal**Docket:** B291952M(Second Appellate District)**Opinion Date:** August 18, 2020**Judge:** Feuer**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law, Government & Administrative Law

After the Department discharged plaintiff based on her failure to report another deputy's use of force against an inmate and her failure to seek medical assistance for the inmate, the Commission affirmed the discharge. However, the trial court granted plaintiff's petition for writ of mandate and directed the Commission to set aside plaintiff's discharge, award her back pay, and reconsider a lesser penalty. The Court of Appeal reversed and remanded, holding that the Commission did not abuse its discretion in upholding plaintiff's discharge. In this case, plaintiff committed a more egregious violation of Department policy that went beyond a failure to report the use of force or to seek medical attention by perpetuating a code of silence among deputies in the jail, which encouraged other deputies to ignore their responsibilities and brought embarrassment to the Department. Therefore, plaintiff's conduct also violated the general behavior policy, which requires a deputy "not act or behave privately or officially in such a manner as to bring discredit upon himself or the Department." Given the Department's reasoned explanation that discharge was necessary in light of plaintiff's furtherance of the code of silence and the resulting embarrassment and loss of trust in the Department, the court held that this is not the exceptional case where reasonable minds cannot differ on the appropriate penalty.

**People v. Brooks****Court:** California Courts of Appeal**Docket:** B300182(Second Appellate District)**Opinion Date:** August 20, 2020**Judge:** Victoria Gerrard Chaney**Areas of Law:** Criminal Law

After a jury found defendant guilty of five of the six counts alleged against him based on actions he took during and after a domestic dispute, the trial court also found true that defendant had suffered each of three prior convictions under Penal Code section 667, subdivision (a)(1). The trial court sentenced defendant to 27 years and 4 months in prison. The Legislature

subsequently enacted and the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 to give a trial court discretion that it did not have before January 1, 2019 to strike prior serious felony conviction enhancements. The Court of Appeal affirmed the trial court's decision declining, on remand, to strike the two five-year serious felony enhancements imposed under section 667, subdivision (a)(1). The court held that defendant was not entitled to have his motion heard by the original sentencing judge. The court also held that the trial court considered proper criteria, understood sentencing law, and did not abuse its discretion when it denied defendant's motion to strike enhancements imposed before the trial court had discretion to strike enhancements under section 667, subdivision (a)(1).

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### **People v. Ochoa**

**Court:** California Courts of Appeal

**Docket:** B297183(Second Appellate District)

**Opinion Date:** August 18, 2020

**Judge:** Dennis M. Perluss

**Areas of Law:** Criminal Law, Juvenile Law

Applying the principles of *Miller v. Alabama*, (2012) 567 U.S. 460, the California Supreme Court in *People v. Gutierrez*, (2014) 58 Cal.4th 1354, 1361, held that Penal Code section 190.5, subdivision (b), which prescribes a sentence of life without parole or a term of 25 years to life for a 16- or 17-year-old defendant found guilty of special circumstances murder, "authorizes, and indeed requires" consideration of the youth-related mitigating factors identified in *Miller* before imposing life without parole on a juvenile homicide offender. Legislation enacted shortly before the decision in *Gutierrez* now provides for youth offender parole hearings at statutorily prescribed points, including Senate Bill No. 394 for youth offenders sentenced to life without parole. In this case, defendant was sentenced to life without parole for murder during an attempted robbery committed when he was 17 years old. The Court of Appeal held that the sentencing court is statutorily required to consider youth-related mitigating factors before imposing life without parole. When, as here, the record is at the very least ambiguous as to whether the sentencing court understood its obligation to consider youth-related mitigating factors at sentencing before making the discretionary sentencing decision required by section 190.5, subdivision (b), remand is appropriate. Finally, the court held that defendant's sentence for aggravated assault should have been stayed under section 654. The court affirmed defendant's convictions and remanded for resentencing.

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### **People v. The North River Insurance Co.**

**Court:** California Courts of Appeal

**Docket:** B295923(Second Appellate District)

**Opinion Date:** August 17, 2020

**Judge:** Dennis M. Perluss

**Areas of Law:** Criminal Law

North River and its bail agent, Bad Boys Bail Bonds, moved in superior court to set aside the summary judgment against them as void because it was entered by a different superior court judge from the one who had declared the forfeiture. The Court of Appeal affirmed the trial court's denial of the motion, holding that Penal Code section 1306 plainly requires the court that declared the forfeiture to enter the summary judgment. However, that language does not state, and does not mean, that the same judge of the court must enter both orders. In this case, the trial court did not err in denying the North River parties' motion to set aside the summary judgment; the record before Judge Kim reflected the earlier declaration of forfeiture, the expiration of the appearance period during which forfeiture could be vacated and the absence of a pending motion to vacate forfeiture; with that information, Judge Kim was required to enter summary judgment in accordance with the bond's terms; and thus there was no due process violation.

**Read Opinion**

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### **People v. Townsend**

**Court:** California Courts of Appeal

**Docket:** A158082(First Appellate District)

**Opinion Date:** August 19, 2020

**Judge:** Tucher

**Areas of Law:** Criminal Law

In 2005, Townsend was placed on felony probation. After violating his probation, he was sentenced to three years in prison. Townsend was released in September 2009, subject to a three-year parole term. Townsend absconded from parole supervision on nine occasions and was jailed five times for parole violations, spending 896 days in the community on parole supervision, 2,309 days absconding from parole supervision, and 334 days in jail on parole violations. The Department of Corrections pushed his parole release date to December 23, 2019. After Townsend absconded for the ninth time, the Department petitioned the court to revoke Townsend's parole. The trial court denied the petition, stating Townsend's "parole may not be extended by the time he was in custody on the parole violation[s]." The court of appeal reversed. Penal Code section 3064 tolls the period of parole while an absconder is a "fugitive from justice," until his return to custody. Section 3000(b)(6)(A)) reads, "Except as provided in Section 3064,



in no case may a prisoner subject to three years on parole be retained under parole supervision or in custody for" longer than four years from his initial parole. Because Townsend's 334 days in jail on probation violations is less than a full year, each day he spent in jail extended his parole term by a day, and his discharge date is extended by 2,309 plus 334 days; none of these suspensions and extensions violated any other statutory provision.

**Read Opinion**

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### **The People v. David C.**

**Court:** California Courts of Appeal

**Docket:** F079739(Fifth Appellate District)

**Opinion Date:** August 17, 2020

**Judge:** Jennifer R.S. Detjen

**Areas of Law:** Criminal Law, Juvenile Law

Minor was adjudged a ward of the juvenile court for crimes he committed when he was 11 years old. Afterwards, Senate Bill No. 439 amended Welfare and Institutions Code section 602 to provide that any minor who is between the ages of 12 years and 17 years, when he or she violates any law is within the jurisdiction of the juvenile court and may be adjudged to be a ward of that court. The Court of Appeal held that the juvenile court's jurisdiction over the minor terminated, by operation of law, when that amendment went into effect. While the court concluded that, under the procedural posture of this case, minor is not entitled to dismissal of the proceedings, including the original charges and wardship determination, that occurred prior to January 1, 2019, the court also concluded that the juvenile court now lacks jurisdiction to adjudicate the alleged violations of probation that occurred after the amendment's effective date. The juvenile court's order denying minor's notice and motion to dismiss for lack of jurisdiction under section 602(a) is affirmed insofar as the motion sought dismissal of proceedings. The court affirmed the order in all other respects.

**Read Opinion**

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### **Colorado v. Monroe**

**Court:** Colorado Supreme Court

**Citation:** 2020 CO 67

**Opinion Date:** August 17, 2020

**Judge:** William W. Hood, III

**Areas of Law:** Constitutional Law, Criminal Law

Defendant Sheila Monroe argued that she stabbed a fellow bus passenger in the neck out of self-defense. She asserted her legal authority to do so without first retreating to a place of no escape. Yet, during the closing

arguments of Monroe's trial, the prosecution repeatedly argued that Monroe didn't act reasonably in self-defense because she failed to retreat. Although the trial court admonished the jury that Monroe didn't have a duty to retreat, it instructed the jury that it could consider Monroe's failure to retreat as relevant to whether she actually believed that she faced an imminent use of unlawful force. The jury found Monroe guilty of first degree assault and attempted first degree murder. Monroe appealed, arguing that because she had no duty to retreat the trial court should not have permitted any argument regarding her failure to do so, even if it was ostensibly directed at undermining the reasonableness of her claim of self-defense. A division of the court of appeals reversed, concluding the prosecution's arguments impermissibly imposed on Monroe a duty to retreat. The matter was remanded for a new trial. The Colorado Supreme Court addressed the question the court of appeals did not address in its opinion: the prosecution could not argue that a defendant acted unreasonably in self-defense because she failed to retreat from an encounter. Thus, the trial court erred by permitting the prosecution's arguments regarding Monroe's failure to retreat. Accordingly, the Supreme Court affirmed the court of appeals' judgment on different grounds, reversed Monroe's judgment of conviction, and remanded this case for a new trial.

### [Read Opinion](#)

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### **Green v. Delaware**

**Court:** Delaware Supreme Court

**Docket:** 552, 2019

**Opinion Date:** August 17, 2020

**Judge:** Traynor

**Areas of Law:** Constitutional Law, Criminal Law

Todd Green appealed the Superior Court's denial of his motion for postconviction relief under Superior Court Criminal Rule 61. Green was arrested during the first week of June 2014 after his girlfriend's thirteen-year old daughter reported to her sister, a sexual abuse nurse examiner and a Child Advocacy Center forensic interviewer, that Green had raped her on the evening of May 28, 2014 and that "it wasn't the first time." A grand jury returned a twenty-two count indictment against Green, and after a five-day trial, he was convicted by jury on three of those counts: attempted rape in the second degree, attempted sexual abuse of a child, and unlawful sexual contact in the second degree. After a pre-sentence investigation, the Superior Court sentenced Green to a cumulative period of Level V incarceration of 50 years and nine months. To the Delaware Supreme Court, Green appealed his convictions, arguing that the jury's exposure to several instances of inadmissible testimony had a "cumulative prejudicial effect" and deprived him of a fair trial. The Supreme Court rejected that argument and affirmed the Superior Court's judgment, concluding that "[a]ny

prejudicial effect of the testimony relied upon by Green [was] . . . far outweighed by the overwhelming evidence of his guilt.” Green then filed a pro se motion for postconviction relief, alleging his trial counsel was ineffective throughout the trial in violation of his Sixth, Eighth, and Fourth Amendment rights under the United States Constitution and under Article I, sections 4, 7, and 11 of the Delaware Constitution. Several of the issues at the heart of Green’s ineffective-assistance claims were touched upon in the Supreme Court’s earlier order denying Green’s direct appeal, but a few were not. So Green also alleged in his motion that his counsel on direct appeal was ineffective for not raising those issues. A Superior Court Commissioner “recommend[ed] that Green’s motion be denied as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated.” The trial judge, without addressing the commissioner’s procedural-bar analysis, adopted the Commissioner’s Report and Recommendation and denied Green’s motion. In this appeal, Green dropped his claim that his appellate counsel was ineffective, but challenged the Superior Court’s determination that his claims were procedurally barred and that his trial counsel rendered constitutionally effective representation. Although the Supreme Court agreed with Green that his claims were not procedurally barred under Rule 61(i)(3) and (4), the Supreme Court concluded nonetheless that Green’s trial counsel’s performance, viewed as a whole, did not fall below an objective standard of reasonableness. Therefore, the Court affirmed.

### **Read Opinion**

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### **In re Individuals in Custody of State of Hawai'i**

**Court:** Supreme Court of Hawaii

**Docket:** SCPW-20-0000509

**Opinion Date:** August 14, 2020

**Judge:** Per Curiam

**Areas of Law:** Criminal Law, Health Law

Given the rising number of COVID-19 cases at the O'ahu Community Correctional Center (OCCC) and the difficulties with social distancing the Supreme Court requested additional information to assist the court and parties in addressing the public health and safety concerns raised by the cluster of COVID-19 cases at OCCC. The Office of the Public Defender (ODP) filed a petition for extraordinary writ and/or a writ of mandamus seeking a reduction of the inmate populations at the State's correctional centers and facilities in an effort to mitigate the harm that COVID-19 may inflict upon the inmates, correctional staff, and general public. The Supreme Court stated that there was an urgent and immediate concern in reducing the inmate populations at OCCC and ordered that the DPS shall provide to the OPD a list of all inmates at OCCC who meet certain criteria.

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**People v. Sophanavong****Court:** Supreme Court of Illinois**Citation:** 2020 IL 124337**Opinion Date:** August 20, 2020**Judge:** Rita B. Garman**Areas of Law:** Criminal Law

In 2013, the defendant was indicted on three counts of first-degree murder and single counts of aggravated kidnapping and violating an order of protection. The defendant pled guilty to one count of first-degree murder; the prosecution agreed to dismiss the remaining charges and to recommend a sentence of 55 years' imprisonment. Defense counsel noted that the terms were "effectively a life sentence" and that, against counsel's advice, the defendant chose to "take it." The court accepted the prosecution's factual basis for the plea and inquired about criminal history. The defendant had previously been convicted of manufacture or delivery of cannabis, a Class 1 felony. The parties waived a presentence investigation (PSI) report. The court imposed a 55-year sentence. The defendant filed a timely motion to withdraw his plea, claiming he had not been "in a coherent state of mind" and ineffective assistance. The appellate court vacated his sentence, citing failure to comply with 730 ILCS 5/5-3-1, which requires a circuit court to consider a PSI before sentencing a defendant for a felony offense, except where "both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to the defendant's history of delinquency or criminality." The court held that the PSI requirement cannot be waived. The Illinois Supreme Court reversed, reinstating the sentence. The defendant forfeited any section 5-3-1 claim by failing to raise it in his three motions to withdraw the plea. Despite his attorney's stated willingness to take the case to trial, he persisted in taking the plea deal.

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**Powell v. State****Court:** Supreme Court of Indiana**Docket:** 19S-CR-527**Opinion Date:** August 18, 2020**Judge:** Goff**Areas of Law:** Criminal Law

The Supreme Court affirmed Defendant's convictions for two counts of attempted murder, holding that Defendant's actions, despite their proximity in space and time, amounted to two distinct, chargeable offenses. Defendant fired five to six shots in rapid succession at two victims sitting in

an adjacent vehicle. Defendant seriously injured one of the victims. At issue was whether Defendant was guilty of one count of attempted murder for the single act of shooting or two counts of attempted murder, one count for each victim. The jury found Defendant guilty of two counts of attempted murder. On appeal, Defendant argued that his two convictions violated the state constitutional protection against double jeopardy. The Supreme Court affirmed, holding that because the evidence was sufficient to prove that Defendant fired his weapon multiple times with the dual purpose of intentionally killing both victims the multiple shots Defendant fired amounted to two chargeable offenses.

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### **Wadle v. State**

**Court:** Supreme Court of Indiana

**Docket:** 19S-CR-340

**Opinion Date:** August 18, 2020

**Judge:** Goff

**Areas of Law:** Civil Rights, Criminal Law

The Supreme Court expressly overruled the constitutional tests set forth in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), in resolving claims of substantive double jeopardy and adopted an analytical framework that applies the statutory rules of double jeopardy. The *Richardson* court adopted a comprehensive analytical framework constituting of a statutory elements test and an actual evidence test for deciding all substantive double jeopardy claims under Ind. Const. art. I, 14. Application of the tests, however, proved largely untenable, resulting in a patchwork of conflicting precedent and inconsistent standards. Defendant in this case was convicted of several offenses for leaving the scene of an accident after striking and injuring the victim while driving drunk. The Supreme Court overruled *Richardson* and adopted a framework that applies when a defendant's single act or transaction implicates multiple criminal statutes. The Court then held that Defendant's multiple convictions violated the statutory rules of substantive double jeopardy.

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### **Podieh v. State**

**Court:** Maryland Court of Appeals

**Docket:** 31/19

**Opinion Date:** August 14, 2020

**Judge:** Barbera J.

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

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The Court of Appeals reversed the decision of the court of special appeals reversing the decision of the post-conviction court granting Petitioner post-conviction relief based on the court's finding that Petitioner received ineffective assistance of counsel, holding that Petitioner's counsel rendered ineffective assistance based on a conflict of interest. Petitioner pleaded guilty to possession with intent to distribute a controlled dangerous substance. Petitioner subsequently filed a petition for post-conviction relief, alleging that he received ineffective assistance of counsel because he was misadvised of the immigration consequences of his plea agreement and because his counsel failed to disclose a personal conflict of interest. The post-conviction court granted Petitioner relief based on the court's finding of an actual conflict of interest. The court of special appeals reversed. The Court of Appeals reversed, holding that defense counsel's conflict of interest rendered his representation of Petitioner constitutionally deficient under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.

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### **Vigna v. State**

**Court:** Maryland Court of Appeals

**Docket:** 55/19

**Opinion Date:** August 18, 2020

**Judge:** Biran

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Court of Appeals affirmed Defendant's convictions for sexually abusing several female students while he was their elementary school teacher, holding that any error by the trial court in excluding character evidence of appropriateness with children in Defendant's custody or care was harmless beyond a reasonable doubt. On appeal, Defendant argued that the trial judge erred by excluding evidence from parents of students and from professional colleagues that, in their opinion, Defendant was the type of person who behaved appropriately with children in his custody or care. The Court of Special Appeals affirmed. The Court of Appeals also affirmed, holding (1) character evidence of appropriateness with children in one's custody or care may be admissible in a criminal case where a defendant is accused of sexually abusing a child; (2) any error in excluding Defendant's proffered character evidence was harmless beyond a reasonable doubt; and (3) Defendant's constitutional arguments were not preserved for appellate review or abandoned and, in any event, lacked merit.

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### **Commonwealth v. Santiago**

**Court:** Massachusetts Supreme Judicial Court  
**Docket:** SJC-11798  
**Opinion Date:** August 13, 2020  
**Judge:** Barbara A. Lenk  
**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Supreme Judicial Court affirmed Defendant's conviction for murder in the first degree, holding that any claimed instructional errors did not give rise to a substantial likelihood of a miscarriage of justice and that Defendant did not receive ineffective assistance of counsel. On appeal, Defendant argued that the trial court erred by failing to instruct the jury concerning a lack of criminal responsibility and mental impairment and erred by failing properly to instruct the jury that they could consider evidence of intoxication when determining whether a murder was committed with extreme atrocity or cruelty. Defendant further argued that trial court's failure to remedy the instructional errors deprived him of the effective assistance of counsel. The Supreme Judicial Court affirmed, holding (1) there was no error in the jury instructions and, accordingly no substantial likelihood of a miscarriage of justice in counsel's handling of the instructions; and (2) there was no reason to reduce the verdict to one of murder in the second degree.

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### **Commonwealth v. Vasquez**

**Court:** Massachusetts Supreme Judicial Court  
**Docket:** SJC-12562  
**Opinion Date:** August 13, 2020  
**Judge:** Barbara A. Lenk  
**Areas of Law:** Criminal Law

The Supreme Judicial Court denied Defendant's motion for attorney's fees and costs made by an attorney who claimed to have been privately retained by Defendant for the purpose of opposing the Commonwealth's application for leave to appeal, holding that no attorney's fees are required under Mass. R. Crim. P. 15(d) in this situation. Defendant, who was indigent, was convicted of murder in the second degree and two firearm offenses. Before trial, Defendant filed motions to suppress a variety of evidence. After the trial judge ruled on the motions, both sides sought leave to appeal from the rulings that were adverse to them. The Supreme Court affirmed in part and reversed in part. At issue was the attorney's fees request by the attorney claiming to be privately retained by Defendant. The Supreme Judicial Court denied the request, holding that Rule 15(d) was not meant for attorneys who represent defendants whom they know to be indigent and from whom they never expect to receive payment.

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### **New Hampshire v. Minson**

**Court:** New Hampshire Supreme Court

**Docket:** 2019-0124

**Opinion Date:** August 18, 2020

**Judge:** Gary E. Hicks

**Areas of Law:** Constitutional Law, Criminal Law

Shawn Minson was convicted after a bench trial for felony cocaine possession, possession with intent to dispense the controlled drug fentanyl in a quantity of five grams or more, and possession with intent to dispense the controlled drug crack cocaine in a quantity of five grams or more. On appeal, he argued that the Superior Court erred by denying his motion to suppress evidence obtained as a result of a “protective sweep” of his motel room, and by denying his post-conviction motion effectively seeking to reopen the motion-to-suppress record. Finding no reversible error, the New Hampshire Supreme Court affirmed.

**Read Opinion**

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### **State v. Coley**

**Court:** North Carolina Supreme Court

**Docket:** 2A19

**Opinion Date:** August 14, 2020

**Judge:** Morgan

**Areas of Law:** Criminal Law

The Supreme Court affirmed the decision of the court of appeals reversing Defendant's convictions and granting Defendant a new trial, holding that the trial court erred by declining to give Defendant's requested jury instruction on self defense and the defense of habitation. After a jury trial, Defendant was found guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. The court of appeals reversed, holding that the trial court erred by failing to give Defendant's requested jury instructions on the law of self-defense with the stand-your-ground provision and the law of the defense of habitation. The Supreme Court affirmed, holding (1) there was sufficient evidence presented at trial to support the submission of Defendant's requested instructions to the jury on self-defense and the defense of habitation; and (2) there was a reasonable possibility that had the trial court not committed prejudicial error in its presentation of instructions to the jury a different result would have been reached at the trial.

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### **State v. Cox**



**Court:** North Carolina Supreme Court  
**Docket:** 94PA19  
**Opinion Date:** August 14, 2020  
**Judge:** Morgan  
**Areas of Law:** Criminal Law

The Supreme Court reversed the decision of the court of appeals reversing Defendant's convictions, holding that the State presented sufficient evidence at trial to show that Defendant possessed the felonious intent necessary to support his convictions. Defendant was convicted of conspiracy to commit robbery with a dangerous weapon, felonious breaking or entering, and discharging a weapon into an occupied property. During trial, Defendant had moved to dismiss the charges against him for insufficiency of the evidence, but the trial court denied the motion. The court of appeals reversed Defendant's conviction for conspiracy to commit robbery with a dangerous weapon and for felonious breaking or entering on the basis of insufficiency of the evidence. The Supreme Court reversed, holding that, due to the existence of sufficient evidence regarding felonious intent, the trial court properly denied Defendant's motions to dismiss the charges against him.

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### **State v. Robinson**

**Court:** North Carolina Supreme Court  
**Docket:** 411A94-6  
**Opinion Date:** August 14, 2020  
**Judge:** Cheri Beasley  
**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Supreme Court held that the retroactivity provision of the Racial Justice Act (RJA) Repeal violated the double jeopardy protections of the North Carolina Constitution. Defendant was convicted of first-degree murder and sentenced to death. After the North Carolina General Assembly enacted the RJA, Defendant filed a motion for appropriate relief pursuant to the RJA. After a hearing, the trial court concluded that race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors and resentenced Defendant to life imprisonment without the possibility of parole. After three more defendants showed that their death sentences were sought or imposed on the basis of race the General Assembly repealed the RJA. The trial court concluded that the RJA Repeal retroactively voided the defendants' claims and dismissed each of the defendants' motions for appropriate relief. The Supreme Court vacated the trial court's order, holding that the retroactivity provision of the RJA Repeal violates double jeopardy protections and that, in any event, the State lacked the statutory authority to appeal that judgment.

**State v. Smith****Court:** North Carolina Supreme Court**Docket:** 119PA18**Opinion Date:** August 14, 2020**Judge:** Paul M. Newby**Areas of Law:** Criminal Law

The Supreme Court modified and affirmed the decision of the court of appeals upholding Defendant's convictions for two counts of engaging in sexual activity with a student, holding that Defendant sufficiently preserved for appellate review whether the State presented sufficient evidence of each element of the crime for which he was convicted, but, nonetheless, the trial court properly denied Defendant's motion to dismiss. On appeal, Defendant argued that the trial court erred in denying his motion to dismiss based on insufficient evidence, arguing that the evidence at trial did not establish that he was a "teacher" within the meaning of N.C. Gen. Stat. 14-27.7(b). The court of appeals concluded that Defendant had failed to preserve his arguments for appellate review. The Supreme Court affirmed as modified, holding (1) Defendant sufficiently preserved for appellate review all sufficiency of the evidence issues through his motion to dismiss at trial; and (2) Defendant fell within the "teacher" category under the statute.

**State v. Waycaster****Court:** North Carolina Supreme Court**Docket:** 294A18**Opinion Date:** August 14, 2020**Judge:** Davis**Areas of Law:** Criminal Law

The Supreme Court affirmed the decision of the court of appeals concluding that the General Assembly did not intend for the means of proof mentioned in the Habitual Felons Act, N.C. Gen. Stat. 14-7.4, to be exclusive, holding that the methods of proof listed in section 14-7.4 are not exclusive. Defendant was indicted on charges of interfering with an electronic monitoring device and attaining the status of habitual felon. Defendant was found guilty of interfering with an electronic monitoring device. During the habitual felon phase of the trial, the court introduced into evidence a computer printout from the Automated Criminal / Infraction System (ACIS) showing that Defendant had been convicted of felonious breaking and entering. The jury found that Defendant had attained the status of a habitual felon. On appeal, Defendant argued that the trial court erred by allowing into

evidence the ACIS printout as proof of his prior conviction for the purpose of establishing that he was a habitual felon. The court of appeals affirmed. The Supreme Court affirmed, holding that section 14-7.4 is permissive, rather than mandatory, with respect to the issue of how a defendant's prior convictions may be established and that such convictions may be proven by means of any admissible evidence.

**Read Opinion**

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### **State v. Kirkland**

**Court:** Supreme Court of Ohio

**Citation:** 2020-Ohio-4079

**Opinion Date:** August 18, 2020

**Judge:** Judith L. French

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Supreme Court affirmed the judgment of the trial court sentencing Defendant to death for the aggravated murders of Casonya C. and Esme K., holding that there was no prejudicial error in the proceedings below. Defendant was found guilty of two aggravated murders and sentenced to death for each aggravated murder. The Supreme Court later vacated the death sentences and remanded the case to the trial court for resentencing. On remand, the trial court again sentenced Defendant to death for the aggravated murders of Casonya and Esme. The Supreme Court affirmed, holding (1) the trial court did not err by denying Defendant's request for individual sequestered voir dire; (2) the trial court did not commit an obvious error in failing to dismiss a prospective juror sua sponte; (3) Defendant did not receive ineffective assistance of counsel during the resentencing hearing; (4) any error with respect to the prosecutor's comments during closing arguments did not prejudicially affect Defendant's substantial rights; and (5) the death sentences in this case were proportionate and appropriate.

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### **Pennsylvania v. Bagnall**

**Court:** Supreme Court of Pennsylvania

**Docket:** 38 WAP 2019

**Opinion Date:** August 18, 2020

**Judge:** Max Baer

**Areas of Law:** Constitutional Law, Criminal Law

The issue presented for the Pennsylvania Supreme Court's review in this case was whether the Mercer County, Pennsylvania District Attorney's Office, and later the Pennsylvania Office of the Attorney General, violated

the due process rights of Appellant Michael Bagnall under *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to disclose a cooperation agreement between the DA's Office and a key witness in Appellant's murder prosecution. The issue arose under circumstances where the OAG assumed the prosecution of Appellant prior to trial due to a conflict of interest between the DA's Office and Appellant's defense counsel, and the OAG was never made aware of the existence of the agreement. After review of the trial court record, the Pennsylvania Supreme Court held the OAG was imputed with knowledge of the agreement between the DA's Office and the key witness at Appellant's trial, and that, having satisfied all of the requirements for establishing a Brady violation, Appellant was entitled to a new trial. Because the Superior Court reached a contrary result, the Supreme Court reversed and remanded.

**Read Opinion**

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### **Pennsylvania v. Nevels III**

**Court:** Supreme Court of Pennsylvania

**Docket:** 32 WAP 2019

**Opinion Date:** August 18, 2020

**Judge:** Thomas G. Saylor

**Areas of Law:** Constitutional Law, Criminal Law

In an appeal by allowance, the issue presented for the Pennsylvania Supreme Court's consideration was whether the statute criminalizing retaliation against witnesses applied only to witnesses in civil litigation. In March 2014, Husband and Wife witnessed a fatal shooting outside their home. In their grand jury testimony about the incident, they implicated Theodore Smedley. In June 2015, shortly before Smedley's trial was scheduled to begin, an arson fire occurred at the couple's house, where they and their daughter were sleeping. Although the flames engulfed the home, all three occupants escaped, albeit with injuries. Appellant Charles Nevels, Smedley's cousin, was eventually arrested in connection with the fire and charged with multiple counts of retaliation against a witness, attempted homicide, and aggravated arson. A jury convicted Appellant on all counts, and he was sentenced to a lengthy prison term. On appeal, Appellant argued, among other things, that the evidence was insufficient as a matter of law to sustain his conviction for retaliation against a witness. Appellant argued that 18 Pa.C.S. 4953(a) required the retaliation to have been committed against a "witness, victim or a party in a civil matter." He maintained that such language excluded Husband and Wife because they provided testimony in a criminal matter. A divided superior court affirmed Appellant's sentence. The Pennsylvania Supreme Court disagreed with Appellant's preferred reading of the statute, "there is little indication that that addition to the list of persons protected under Section 4953 was intended to

affirmatively remove protections that already existed for victims and witnesses in criminal matters." Judgment was affirmed.

### **Read Opinion**

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#### **Pennsylvania v. Reid**

**Court:** Supreme Court of Pennsylvania

**Docket:** 752 CAP

**Opinion Date:** August 18, 2020

**Judge:** Dougherty

**Areas of Law:** Constitutional Law, Criminal Law, Legal Ethics

This case was one of several similarly situated capital appeals involving former Chief Justice Ronald Castille's role as the elected District Attorney of Philadelphia. In 2017, the Honorable Leon Tucker, Supervising Judge of the Criminal Division, Philadelphia Court of Common Pleas ("PCRA court"), granted appellant Anthony Reid relief under the Post-Conviction Relief Act in the form of nunc pro tunc reinstatement of his right to appeal the order denying his first timely PCRA petition. The Pennsylvania Supreme Court previously affirmed the order denying appellant's first PCRA petition; however, the PCRA court concluded the Supreme Court had to reconsider appellant's PCRA appeal again, this time without the participation of Chief Justice Castille, pursuant to *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016). While the Pennsylvania Court agreed Chief Justice Castille's participation in appellant's prior PCRA appeal implicated the same due process concerns at issue in *Williams*, the Supreme Court concluded the lower court lacked jurisdiction under the PCRA to reinstate appellant's nunc pro tunc right to appeal. Consequently, the Supreme Court also lacked jurisdiction, and was compelled to quash this serial appeal as untimely.

### **Read Opinion**

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#### **State v. Bryant**

**Court:** South Dakota Supreme Court

**Citation:** 2020 S.D. 49

**Opinion Date:** August 19, 2020

**Judge:** Kern

**Areas of Law:** Criminal Law

The Supreme Court affirmed the judgment of the circuit court convicting Defendant of two counts of aggravated assault and three counts of simple assault and ordering him to pay restitution to Medicaid for its coverage of the victim's medical expenses, holding that the circuit court did not err. Specifically, the Supreme Court held that the circuit court (1) did not commit plain error in finding that Medicaid qualified as a victim for purposes of

restitution under S.D. Codified Laws 23A-28-2(5); (2) did not commit plain error by permitting testimony from two detectives that Defendant did not act in self-defense; and (3) did not abuse its discretion in denying Defendant's motion for a mistrial based on the prosecutor's statements during closing argument.

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### **State v. Taylor**

**Court:** South Dakota Supreme Court

**Citation:** 2020 S.D. 48

**Opinion Date:** August 19, 2020

**Judge:** Jensen

**Areas of Law:** Civil Rights, Constitutional Law, Criminal Law

The Supreme Court affirmed Defendant's conviction of second-degree rape and sexual contact involving a second victim, holding that Defendant's allegations of error were unavailing. Specifically, the Supreme Court held (1) the circuit court did not abuse its discretion by allowing evidence of Defendant's two prior alleged sexual assaults; (2) the admission of other act evidence did not violate Defendant's constitutional rights under the Double Jeopardy and Due Process Clauses; (3) the circuit court did not abuse its discretion when it denied Defendant's motion for a mistrial; (4) there was sufficient evidence to support the conviction; (5) the circuit court erred in admitting forensic laboratory reports by affidavit without affording Defendant the opportunity to cross-examine the analysts who conducted the testing and authored the reports, but the error was not prejudicial; and (6) Defendant's sentence did not violate the Eighth Amendment.

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### **State v. Lopez**

**Court:** Utah Supreme Court

**Citation:** 2020 UT 61

**Opinion Date:** August 18, 2020

**Judge:** Thomas R. Lee

**Areas of Law:** Criminal Law

The Supreme Court held that any power a defendant has to subpoena witnesses at a preliminary hearing is limited by the court's authority to quash unreasonable subpoenas, and that reasonableness inquiry must be informed by the standards that govern preliminary hearings and the rights that the law guarantees for crime victims. The two defendants in this consolidated opinion sought to compel their alleged victims to testify by way of subpoena. The victims, however, had previously participated in interviews

about their alleged abuse, and those interviews were introduced as reliable hearsay at the defendants' preliminary hearings. The Supreme Court held that once the State has used a victim's reliable hearsay to make a prima facie showing of probable cause, a subpoena compelling the victim to give additional, live testimony will survive a motion to quash only if the defendant demonstrates that the subpoena is necessary to present specific evidence that is reasonably likely to defeat the showing of probable cause.

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### **Vermont v. Welch**

**Court:** Vermont Supreme Court

**Citation:** 2020 VT 74

**Opinion Date:** August 14, 2020

**Judge:** Cohen

**Areas of Law:** Constitutional Law, Criminal Law

Defendant Gregory Welch was convicted by jury of lewd and lascivious conduct. At trial, the State introduced evidence that defendant fled when police tried to arrest him, and the court instructed the jury on the use of flight evidence as suggesting consciousness of guilt. Defendant argued on appeal that the court erred in failing to instruct jurors that they could not return a guilty verdict based solely on the evidence of flight. Finding no reversible error, the Vermont Supreme Court affirmed.

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### **Washington v. Loughbom**

**Court:** Washington Supreme Court

**Docket:** 97443-8

**Opinion Date:** August 20, 2020

**Judge:** Yu

**Areas of Law:** Constitutional Law, Criminal Law

In May 2017, petitioner Gregg Loughbom was charged with three counts of various drug crimes: count I, delivery of controlled substances acetaminophen and hydrocodone; count II, delivery of controlled substance methamphetamine; and count III, conspiracy to deliver a controlled substance other than marijuana. These charges stemmed from two controlled drug buys conducted by a confidential informant (CI) on December 20 and 31, 2016. The information was later amended to include school zone enhancements for all three counts pursuant to RCW 69.50.435. During jury selection, the prosecutor asked, "Are there any among you who believe that we have a drug problem in Lincoln County?" He then commented, "Wow, okay. Just about every[one]," and followed with the



question, “Is there anyone who feels that we don’t?” Thereafter, the prosecutor referenced the war on drugs three times. The issue this case presented for the Washington Supreme Court’s review centered on whether the prosecutor committed reversible error when he repeatedly invoked the phrase, “war on drugs” during the one-day jury trial, without objection by petitioner. The Court held that the State’s framing of Loughbom’s prosecution as representative of the war on drugs denied Loughbom a fair trial and constitutes reversible error. Therefore, the Court reversed the Court of Appeals and remanded for a new trial.

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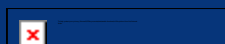
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