

# **EIGHTH CIRCUIT CASE LAW UPDATE**

---

Nova D. Janssen

Assistant Federal Public Defender, Chief of Training, and CJA Resource Counsel

Federal Public Defender's Office, Northern & Southern Districts of Iowa

Des Moines, Iowa

# 8<sup>TH</sup> CIRCUIT CASES



# Categorical Approach & Hearsay

*US v. Oliver,*

987 F.3d 794 (8<sup>th</sup> Cir. Feb. 11, 2021)



Illinois’s definition of “cocaine” is categorically overbroad as a “serious drug felony.”

- Illinois statute is divisible by substance.
  - Watch for cases where prior was a cocaine offense, or where no *Shepard* documents establish the substance involved.
  - Joining *US v. Ruth*, 966 F.3d 642 (7<sup>th</sup> Cir. 2020) (overbroad as § 841(b)(1)(C) “felony drug offense”).

## **\*\*Circuit Split\*\*** **Guidelines**

## ***US v. Henderson,*** ***11 F.4<sup>th</sup> 713 (8<sup>th</sup> Cir. 2021)***

USSG § 4B1.2(b) defines “controlled substance” more broadly than the Controlled Substances Act.

- No textual basis to graft CSA definition to provision that includes “offenses under state law.”
- Would defeat Sentencing Commission intent to add this limitation.



**\*\*Circuit Split\*\***  
**Compassionate Release**

A non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of ‘extraordinary and compelling reasons’ for a reduction in sentence under § 3582(c)(1)(A).

***US v. Crandall,***  
***25 F.4th 582 (8<sup>th</sup> Cir. 2022)***

© MARK ANDERSON

WWW.ANDERSTOONS.COM



“Is this situation perfect? No. Is it what we expected? Certainly not. Can we do anything about it? Nope. Am I getting more and more depressed as I talk about it? You bet.”

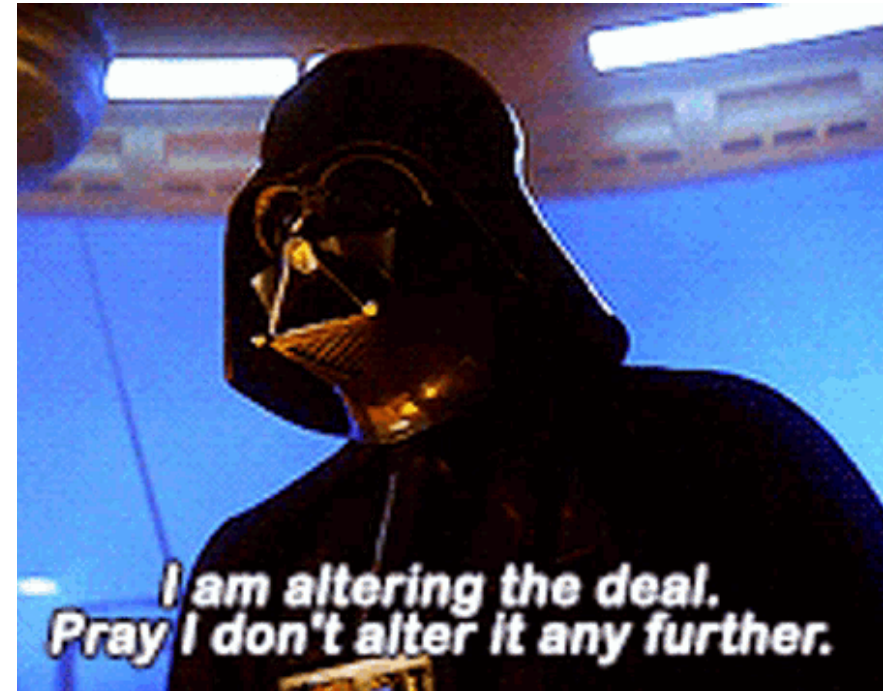
# Plea Agreements

***US v. Brown,  
5 F.4<sup>th</sup> 913 (8<sup>th</sup> Cir. 2021)***

Defendant preserves issue of government breach of plea agreement by objecting that it breached the agreement. He needs not *also* specifically ask for relief.

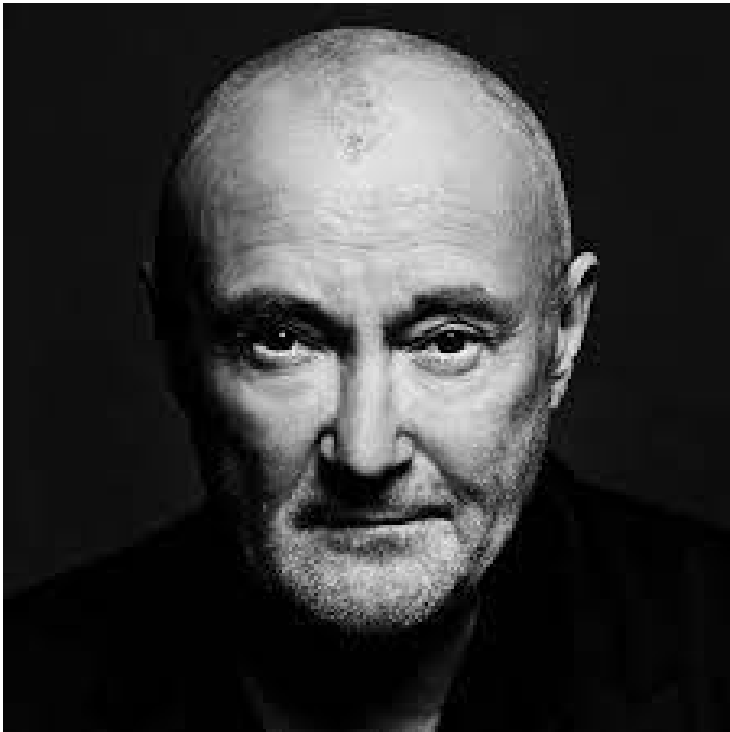
Government breaches plea agreement by advocating a position contrary to one in the agreement.

Government breach likely cannot be cured; but would require at a minimum an “unequivocal retraction” of the erroneous positions and statements.



## Plea agreements

***US v. Collins,  
25 F.4th 1097 (8<sup>th</sup> Cir. 2022)***



The district court cannot cure the government's breach of the plea agreement by variance.

# Restitution



## ***US v. Kidd, 23 F.4th 781 (8<sup>th</sup> Cir. 2022)***

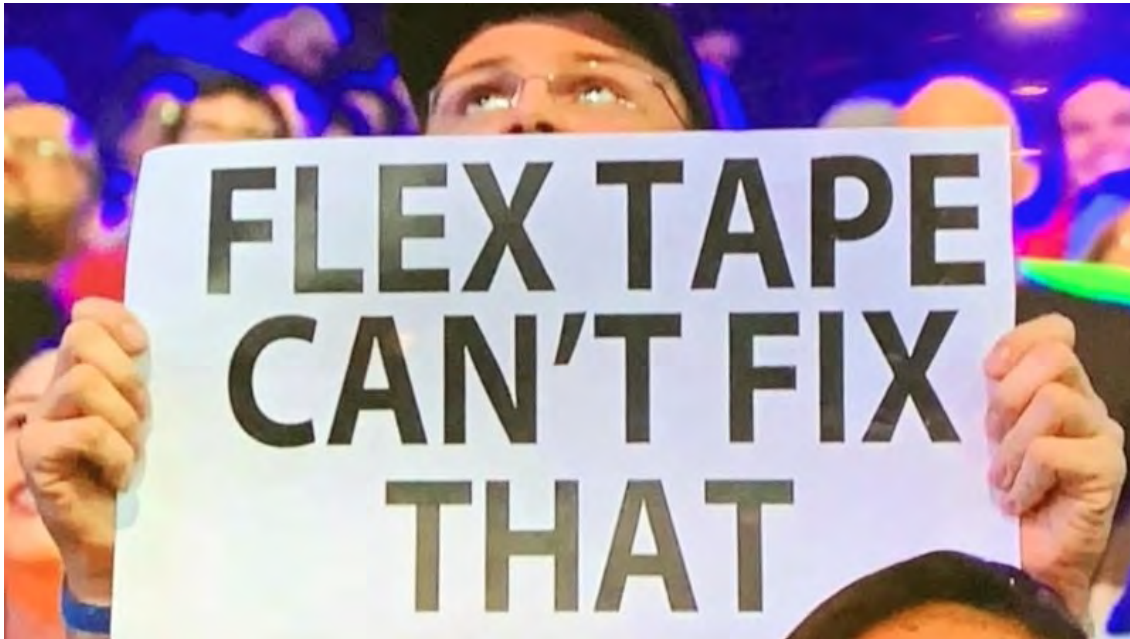
18 USC § 3664(n) does not pertain to prison wages. It (most likely) applies to money derived from outside sources, especially large, windfall transactions.

18 USC 3664(n): If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.



# Appeal Waivers

## ***US v. Howard, 27 F.4<sup>th</sup> 1367 (8<sup>th</sup> Cir. 2022)***



An appeal waiver may be enforceable to prevent appeal of even an obvious guideline calculation error.

The illegal-sentence exception to appeal waivers is extremely narrow—only a sentence outside the statutory range is appealable.

## Affirmative Defense

### *US v. Still,* *6 F.4<sup>th</sup> 812 (8<sup>th</sup> Cir. 2021)*



IF the affirmative defense of justification applies to violating 18 USC § 922(g), a defendant would need to establish:

- 1) He had no reasonable, legal alternative to violating the law; and
- 2) He dispossessed himself of the firearm as soon as a safe opportunity arose.

Also: Confrontation clause doesn't apply at sentencing.

## Affirmative Defense

# ***US v. Hoxworth, 11 F.4<sup>th</sup> 693 (8<sup>th</sup> Cir. 2021)***

IF the affirmative defense of justification applies to violating 18 USC § 922(g), proof of “no reasonable, legal alternative to violating the law” means:

- D did not recklessly or negligently place himself in the position of having to break the law;
- There is no reasonable, legal alternative;
- the threat is present, imminent, and impending; and
- it must be reasonable to think that the threatened harm can be avoided by committing the criminal act.



# Confrontation

Although revocation hearings are not afforded the same rights as an original sentencing hearing, due process still implicates the right to confront and cross examine adverse witnesses, *unless*:

- 1) The government shows good cause for the witness's absence; and
- 2) Evidence offered in the place of live testimony is reliable.

***US v. Coleman,***  
***7 F.4<sup>th</sup> 740***  
***(8<sup>th</sup> Cir. Aug. 4, 2021)***



## Confrontation

***US v. Busey,*  
*11 F.4<sup>th</sup> 664 (8<sup>th</sup> Cir. Aug.*  
*25, 2021)***

To the extent the court considered Thomas's hearsay statements in deciding an appropriate sentence, there was no error. The confrontation right recognized in *Bell* is limited to the question whether release should be revoked. This question was answered by Busey's possession of a controlled substance. Due process generally does not require confrontation during sentencing following a conviction, and due process does not require any greater protection in the sentencing phase of a revocation proceeding.



## Fourth Amendment

“Sweeping a space that requires a boost or ladder to access, like an attic, is at the outer boundary of the protective sweep doctrine,” but can still be reasonable in the totality of the circumstances.

***US v. Thompson,***  
***6 F.4<sup>th</sup> 789 (8<sup>th</sup> Cir. 2021)***



## Evidence



***US v. Lamm,  
5 F.4<sup>th</sup> 942 (8<sup>th</sup> Cir. 2021)***

**Authentication that a social media account belongs to a person requires extrinsic evidence, and cannot be accomplished by a certification from the social media forum alone.**

**“[T]he Government may authenticate social media evidence with circumstantial evidence linking the defendant to the social media account.”**

**Also: District courts have discretionary authority to allow hybrid representation.**

## Fourth Amendment



## ***US v. Shumaker,*** ***21 F.4<sup>th</sup> 1007 (8<sup>th</sup> Cir. 2021)***

No error in district court's decision to credit officer testimony they could smell burnt marijuana coming from a specific vehicle amongst other from 100 meters away on a day with 13–17 mph winds.



# Voir Dire

## ***US v. Young,*** ***6 F.4<sup>th</sup> 804*** ***(8<sup>th</sup> Cir. 2021)***

Court is con'l required to inquire about prospective jurors' ethnic or racial prejudices only if such issues are inextricably intertwined with conduct of the trial, or if the circumstances in the case suggest a significant likelihood that racial prejudice might infect the trial.

When not con'l required, questions re racial prejudice must still be asked under certain circumstances, i.e., defendant is accused of a violent crime, or has an alleged victim of a different racial or ethnic group.

Court abuses discretion by declining request to conduct voir dire regarding a potential juror bias only when there are substantial indications that bias likely affected the jury.



# Statutory Interpretation



***US v. Dozier,***  
***2022 WL 1100462 (8<sup>th</sup> Cir. Apr. 13,***  
***2022)***

Under 18 U.S.C. § 1791(a)(2), the accused “need[s] not know specifically what prohibited item he has, so long as he knows that he possesses a prohibited object.”



18 USC 1791(a): Whoever--(2) being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited objection; shall be punished . .

..

## Circuit Split

A person violates § 922(g)(3) if “the unlawful [controlled substance] use has occurred recently enough [to the firearm possession] to indicate that the individual is actively engaged in such conduct”

***US v. Carnes,  
22 F.4th 743 (8<sup>th</sup> Cir. 2022)***



## Guideline Interpretation



***US v. Miller,  
11 F.4<sup>th</sup> 944  
(8<sup>th</sup> Cir. 2021)***

A defendant does not have to have knowledge that the barrel is less than 18 inches for USSG § 2K2.1(a)(3) to apply.



USSG § 2K2.1(a)(3): BOL 22 if the offense involved a “firearm that is described in 26 USC § 5845(a) [“a shotgun having a barrel . . . Of less than 18 inches in length”].

# Statutory Interpretation



## ***US v. Love, 20 F.4th 407 (8<sup>th</sup> Cir. 2021)***

As a matter of law, a medical center for federal prisoners is within the “special maritime and territorial jurisdiction” of the United States.

The question is one of legislative, rather than adjudicative fact.



“Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.”

# Warrants

## ***US v. Espinoza,*** ***9 F.4<sup>th</sup> 633 (8<sup>th</sup> Cir. 2021)***



It is reasonable to infer that a person uploading a CP image received the file through some means, stored it on his device, and then purposefully placed the file on a website.

A warrant issued 7 months after the image upload is not stale as there is a fair probability D still possessed the device he used to upload the image, and evidence showed the data could be retrieved from hidden and deleted files.

## Fourth Amendment

### ***US v. Shipton,*** ***5 F.4<sup>th</sup> 933 (8<sup>th</sup> Cir. 2021)***



“[N]othing in *Carpenter*, *Riley*, or *Jones* calls into question our oft-repeated observation that a defendant has no reasonable expectation of privacy in materials he shares on a public peer-to-peer network.”

# Statutory Interpretation

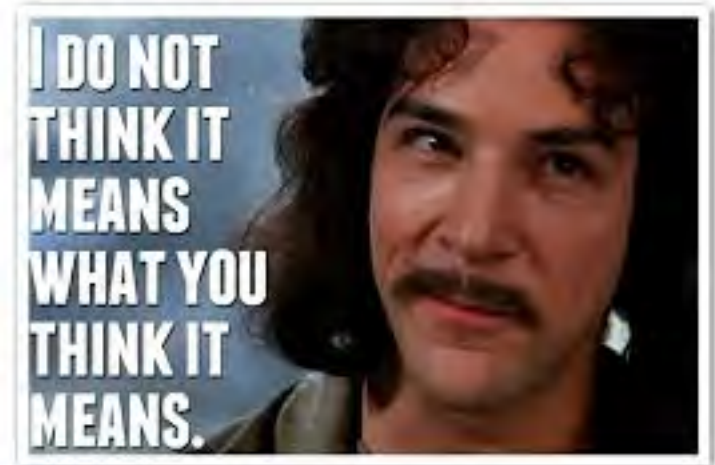
## *US v. Kempter,* *29 F.4th 960 (8<sup>th</sup> Cir. 2022)*

18 USC § 2429(b)(1) “[a]s used in this subsection, the term ‘full amount of the victim’s losses’ has the same meaning as provided in section 2259(b)(3).”

18 U.S.C. § 2259(b)(3); “Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.”

18 USC § 2259(c)(2): “full amount of the victim’s losses” means, “any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim.”

**Held:** § 2429(b)(3)’s reference to § 2259(b)(3) is obviously a drafting error, the definition in 2259(c)(2) should be used for purposes of § 2429(b)(1).





## Categorical Approach

### ***US v. Mink, 9 F.4th 590 (8th Cir. 2021)***



18 USC 844(i): Whoever maliciously damages or destroys . . . by means of fire . . . any building, vehicle or other real or personal property used in interstate or foreign commerce. . . .

18 USC 924(c)(3)(A): "crime of violence" means an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property **of another**, or

# Fraud

## ***US v. Garbacz, \_\_F.4th \_\_, 2022 WL 1230558 (8<sup>th</sup> Cir. Apr. 27, 2022)***

One's use of misappropriated cash, whether spent or placed into a bank account, is ordinarily not part of the scheme used to get it, and thus does not qualify as wire fraud.



A graphic on the left side of the slide features a spiral of clock faces. The spiral starts from a small clock face in the center and expands outwards, creating a sense of depth and time. The numbers on the clock faces are clearly visible, and the overall color scheme is a warm, yellowish-gold.

# Anders Briefs

*United States v. Bell,*

771 F. App'x 702 (8<sup>th</sup> Cir. June 7, 2019)

(Stras, J., dissenting)

We have been clear that “*Anders* briefing must be done as an advocate,” not as a way of highlighting the arguments that the government would make. Yet throughout the abbreviated five-page “argument” section in the brief, counsel devotes more space to arguing against his client’s interests than in favor of them. This, as we have said before, is not the way to write an *Anders* brief. Accordingly, before I would even consider this case, I would first have counsel comply with *Anders*.

Flashback!

## Anders Briefs

# ***US v. Cline, 27 F.4th 613 (8<sup>th</sup> Cir. 2022)***



An Anders brief must inform the court about potential avenues for appeal that were considered by counsel but ultimately deemed frivolous.

Counsel needs not advocate frivolous positions, and is permitted to explain why potential arguments explored are frivolous.

# Expectation of Privacy

## ***US v. Mattox, 27 F.4th 668 (8<sup>th</sup> Cir. 2022)***

© Mike Baldwin / Cornered

BALDWIN

CS176779

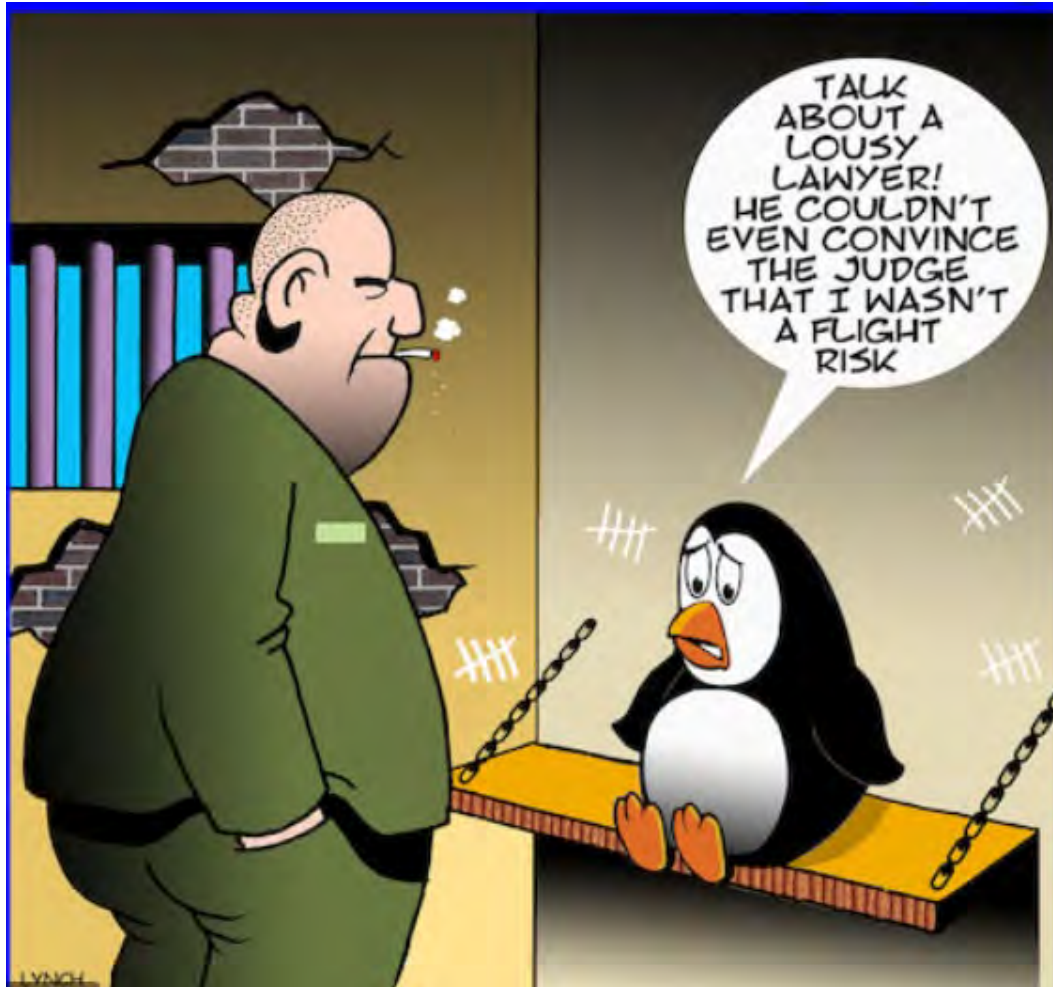


“Your medical records are safe with us.  
We take patient privacy very seriously.”

Hospital rooms have a diminished expectation of privacy, particularly for gunshot victims in states where the law requires police to respond.

# Disentitlement

## *US v. Emery,* *18 F.4th 585 (8<sup>th</sup> Cir. 2021)*



Under the fugitive disentitlement doctrine, a court of appeals needs not expend time or resources on deciding an appeal where the appellant has entered fugitive status.

## Competency/Involuntary Medication

# ***US v. Mitchell, 11 F.4<sup>th</sup> 668 (8<sup>th</sup> Cir. 2021)***



*Sell* authorizes the government not only to involuntarily medicate an incompetent defendant, but also to continue doing so during trial.

“Permitting involuntary medication through the conclusion of trial ensures, at the risk of stating the obvious, that the defendant will remain—at all necessary times—‘competent to stand trial.’”

## Sentencing

Uncharged conduct remains subject to a preponderance standard at sentencing, and can support a significant upward variance.

Concurrence: district judges should “disclaim reliance on acquitted or uncharged conduct” to increase sentences.

***US v. Ross,  
29 F.4th 1003 (8<sup>th</sup> Cir.  
2022)***





NOVA\_JANSSEN@FD.ORG