Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between January 31, 2016 and July 31, 2016. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and it intended to give only the briefest synopsis of the circuit split, and not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 13 SETON HALL CIR. REV. [n] (2016).

CIVIL MATTERS

CRIMINAL MATTERS

CIVIL

BANKING LAW

Consumer Protection – Fair Debt Collection Act: *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317 (7th Cir. 2016)

The 7th Circuit addressed whether a debt collector is liable for an agent's failure to disclose "the name of the creditor to whom [a] debt is owed" to the consumer. *Id.* at 319. The court noted that the 3rd and 9th Circuits determined that a debt collector could not escape vicarious liability for violations of the Act committed by agents, while the 6th Circuit found that the owner of debt is not vicariously liable when it is not a debt collector itself. *Id.* at 325–26. The 7th Circuit agreed with the 3rd and 9th Circuits in finding that an entity itself is a debt collector and should bear the burden of agents it enlists to collect debts on its behalf. *Id*. The court disagreed with 6th Circuit as to whether [defendant] was a debt-collector under this scope of review. *Id.* Thus, the 7th Circuit concluded "a debt collector who is independently obliged to comply with [statutory restrictions] must monitor the actions of those it enlists to collect debts in its behalf" to avoid vicarious liability. *Id.* at 325.

First Amendment – Anti-Surcharge Law: *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016)

The 5th Circuit addressed "whether the [Texas Anti-Surcharge Law, Tex. Fin. Code Ann. § 339.00, proscription against] surcharges for credit-card purchases constitutes a First Amendment violation." *Id.* at 75. In 1984, the federal ban on surcharges expired and states began enacting anti-surcharge regulation. *Id.* at 77. The court noted that the 2nd Circuit determined that the New York anti-surcharge law regulated economic activity and did not implicate First Amendment protections, while the 11th Circuit determined that Florida's anti-surcharge law regulated the content of merchant speech, thereby implicating First Amendment protections. *Id.* at 78–79. The 5th Circuit also noted that that the Texas anti-surcharge law, like New York's anti-surcharge law, does not define the terms "surcharge" or "discounts" or "any other pricing schemes beyond imposing surcharges for credit-card transactions." *Id.* at 80. The 5th Circuit joined the 2nd Circuit in holding that Texas's anti-surcharge law regulates economic behavior and does not implicate merchant First Amendment rights. *Id.* at 81.

Statutory Interpretation – Federal Debt Collection Procedures Act (FDCPA): *United States v. Badger*, 818 F.3d 563 (10th Cir. 2016)

The 10th Circuit addressed the issue of whether "debt" as defined in the Federal Debt Collection Procedures Act (FDCPA) includes "disgorgement" for purposes of enforcing a disgorgement order against the defendant. *Id*. at 573. The court noted that the 5th Circuit has held that the "FDCPA's definition of debt does not explicitly include disgorgement," and "disgorgement was not restitution because [i]t is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs . . . ." *Id*. at 574 (alterations in original) (internal quotation marks omitted). Whereas, the 7th Circuit has held that the FDCPA does not apply in "a proceeding to remedy a contempt of court." *Id*. at 576 n.5. The court joined the 5th Circuit, in holding that the disgorgement order is not subject to the FDCPA. *Id*. at 576. But, the 10th Circuit noted that it is "not as confident as the [5th Circuit] that disgorgement does not come within the meaning of *restitution* in the FDCPA." *Id*. at 576 n.5 (alteration in original). The court reasoned that the Restatement (Third) of Restitution often refers to disgorgement as a type of restitution. *Id*. However, the FDCPA contains an exception, which states that it cannot be interpreted to supersede or modify any federal law that authorizes, or any inherent authority of a federal court to provide, injunctive relief. *Id*. Such injunctive relief includes disgorgement injunctions or contempt sanctions. *Id*.

BANKRUPTCY

Jurisdiction – Claims Arising Under the Medicare Act: *Fla. Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297 (11th Cir. 2016)

The 11th Circuit addressed whether "42 U.S.C. § 405(h) bar[s] a bankruptcy court from exercising 28 U.S.C. § 1334 [bankruptcy] jurisdiction over claims that arise under the Medicare Act." *Id*. at 1304. The court recognized that circuits are split over the application of the jurisdictional bar of § 405(h), in light of a series of statutory revisions and codifications. *Id*. at 1310. The court noted that the 3rd, 7th and 8th Circuits examined the application of § 405(h) in the context of diversity claims brought under 28 U.S.C. § 1332, and found that § 405(h) does serve as a bar to the exercise of jurisdiction over claims arising under the Medicare Act. *Id*. The court further noted that while the 9th Circuit held § 405(h) bars § 1332 jurisdiction, "[it] is alone

among circuit court decisions in reading § 405(h) to permit bankruptcy court jurisdiction over Medicare claims under § 1334." *Id*. at 1312. The 11th Circuit joined with the 3rd, 7th and 8th Circuits in finding that the subsequent revisions to § 405(h) were not intended to produce any substantive change to the scope of the statute, and therefore, as § 1334 jurisdiction over Medicare claims were barred prior to the revision, that jurisdictional bar carried forward after the revisions. *Id.* at 1314. The court disagreed with the 9th Circuit's interpretation of § 405(h) as providing a "broad jurisdictional grant" to bankruptcy courts under § 1334, to hear Medicare claims that in some way pertain to a bankruptcy matter. *Id*. at 1311 (internal citations omitted). Thus, the 11th Circuit sided with the 3rd, 7th and 8th Circuits, holding "that because the previous version of § 405(h) precluded bankruptcy court review of Medicare claims under § 1334, so too must the newly revised § 405(h) bar such actions." *Id*. at 1322.

The Perishable Agricultural Commodities Act – Trust Assets: *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.)*, 817 F.3d 141 (5th Cir. 2016)

The 5th Circuit addressed whether Perishable Agricultural Commodities Act (PACA) trustee fees can "be deducted from the PACA trust assets before all claimants are made whole." *Id.* at 151. The court noted that the 2nd Circuit held that a "PACA trustee may not use PACA funds to pay attorney's fees incurred in collecting accounts receivable," while the 9th Circuit held that PACA trustees should be compensated for collection costs. *Id.* at 152. The court reasoned that "[t]he superpriority status of PACA claimants is preserved and the attorney claimants bear the greater risk of nonpayment. That difference is the very one Congress sought to achieve with the trust amendments to PACA." *Id.* at 154. As such, the 5th Circuit agreed with the 2nd Circuit in finding that "PACA's unequivocal language requires that a PACA trustee may not be paid from trust assets until full payment of the sums owing is paid to all claimants." *Id.* at 153–54.

CIVIL PROCEDURE

Diversity Jurisdiction – Amount in Controversy: *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179 (5th Cir. 2016)

The 5th Circuit addressed "whether the amount in controversy for establishing diversity jurisdiction over a petition to confirm an arbitration award is the amount awarded by the arbitration panel or the amount previously sought in the arbitration proceeding." *Id.* at 182.

The court noted that the 1st, 9th, and D.C. Circuits determined the amount in controversy to be the same as the amount demanded in the underlying arbitration proceeding, while the 6th and 11th Circuits determined the amount in controversy to be the same as the amount awarded by the arbitration panel. *Id.* The 5th Circuit agreed with the 1st, 9th, and D.C. Circuits that the amount in controversy is the amount demanded in the previous arbitration proceeding. *Id*. at 183. The court reasoned that the "demand approach" better recognized the scope of the controversy, since an arbitration award only represents a part of the litigation while the amount initially sought still frames the litigation overall. *Id.* The court was also persuaded by the fact that the "demand approach" more closely tracks the litigation of diversity jurisdiction claims, where the pleadings—and not the outcome—determine if the amount in controversy requirements have been met for diversity jurisdiction. *Id.* at 182–183. The court disagreed with the 6th and 11th Circuits use of the "award approach" because it was concerned that a court could have diversity jurisdiction over the claim at one stage of the case (e.g. a motion to compel arbitration if the amount demanded were high enough), but lack jurisdiction over the same claim at a later stage (e.g. a petition to confirm arbitration where the amount awarded fell below diversity jurisdiction minimums). *Id.* at 182. Thus, the 5th Circuit concluded that the "demand approach" would determine the amount in controversy for arbitration petitions brought through diversity jurisdiction. *Id.* at 183.

False Claims Act – Heightened Pleading Requirements: *United States ex rel. Eberhard v. Physicians Choice Lab. Servs., LLC*, 642 F. App'x 547 (6th Cir. 2016)

The 6th Circuit addressed whether violations of the False Claims Act (FCA) are subject to the heightened pleading standard of Rule 9(b). *Id*. at 550. The court noted that the 4th, 8th, and 11th Circuits require "representative samples" of the alleged fraudulent conduct. *Id.* at 550. The 1st, 3rd, 5th, and 9th Circuits held "that it is sufficient for a plaintiff to allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id*. (internal quotation marks omitted). The court stated that the 6th Circuit previously "impose[d] a strict requirement that relators identify actual false claims." *Id.* (internal quotation marks omitted). The 6th Circuit agreed with the 4th, 8th, and 11th Circuits in holding that there needs to be a "sufficiently strong inference" for alleging FCA violations. *Id*. at 553.

Habeas Corpus – Antiterrorism and Effective Death Penalty Act: *Rishor v. Ferguson*, 822 F.3d 482 (9th Cir. 2016)

The 9th Circuit considered whether a petitioner's Rule 59(e) motion should be construed as a "second or successive habeas petition," which are subject to the restrictions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 490. The court noted that the 4th, 5th, 8th and 10th Circuits determinations were based on the Supreme Court's ruling in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). *Id.* at 491 There, the Court held that where a Rule 59(e) motion advances a "claim," the motion should be construed as a second or successive habeas petition. *Id.* Conversely, the 3rd, 6th and 7th Circuits have held that irrespective of whether a Rule 59(e) motion advances a "claim" within the meaning of *Gonzalez*, the motion "should never be construed as a second or successive habeas petition." *Id*. The 9th Circuit declined to adopt the approach of the 4th, 5th, 8th and 10th Circuits as it found that such an approach would allow the AEDPA to "preclude broadly reconsideration of just-entered judgments," without any indication that Congress intended for the statute to do so. *Id*. at 492. The court also declined to adhere to the "bright-line" approach taken by the 3rd, 6th and 7th Circuits in excluding Rule 59(e) motions from the scope of the AEDPA and *Gonzalez* entirely, as doing so would "allow district courts to improperly entertain . . . motions that are 'in substance' habeas petitions.'" *Id.* at 493. Rather, the court opted for a "hybrid" approach that would apply the second-or-successive bar to a Rule 59(e) motion "*only when* the motion raises entirely new claims." *Id*. Thus, the 9th Circuit held that a Rule 59(e) motion for reconsideration that "seeks to raise an argument or ground for relief that was not raised in the initial habeas petition," which in effect raises an entirely new claim, will be "construed as a second or successive habeas petition subject to the AEDPA's restrictions." *Id.* at 492.

Motions to Intervene – Standing Requirements: *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60 (2d Cir. 2016)

The 2nd Circuit analyzed whether an intervenor, under Rule 24 of the Federal Rules of Civil Procedure, is required to independently meet the United States Constitution Article III standing requirements to intervene in litigation where the requirement is already satisfied between the existing parties. *Id.* at 64. The court noted that despite a long-standing circuit split on the issue, the Supreme Court has expressly declined to resolve it. *Id.* at 65. The 2nd Circuit held that

despite the Supreme Court's refusal to decide this issue, it has at least endorsed its position by *sub silentio*, permitting parties to intervene in cases without determining whether they have standing. *Id.* The 2nd Circuit's position is consistent with the 3rd, 5th, 6th, 9th, 10th and 11th Circuits. *Id.* at 64–65. The 7th, 8th, and the D.C. Circuits disagree and hold that Article III standing is an additional requirement for intervenors. *Id.* at 65. The 2nd Circuit ultimately reasoned that "there is no need to impose the standing requirement upon a proposed intervenor where the existence of a case or controversy has been established in the underlying litigation." *Id.* at 64 (internal citations omitted).

Prison Litigation Reform Act – Frivolous Filings: *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278 (11th Cir. 2016)

The 11th Circuit addressed the three-strikes provision of the Prison Litigation Reform Act, (the "Act") which "bars a prisoner who is not in danger of physical injury and has had three frivolous, malicious, or meritless filings from proceeding *in forma pauperis*." *Id.* at 1283. The court stated that the statute acknowledges three specific grounds that render a dismissal a strike: "frivolous," "malicious," and "fails to state a claim upon which relief may be granted." *Id.* The court noted that the D.C. and 10th Circuits held that a judge's denial of a petition to proceed *in forma pauperis* for frivolousness is the "but for" cause of the panel's dismissal of the appeal for want of prosecution, and constitutes a strike under the Act. *Id.* at 1285. The 11th Circuit disagreed, holding that the sequence of events that caused the dismissal is irrelevant, reasoning that the Act's language includes no indication that "but for" causation is a determining factor and instead focuses on grounds actually articulated in the order. *Id.*

CIVIL RIGHTS

Protection of Disabled Persons – Rehabilitation Act: *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016)

The 5th Circuit addressed whether "an independent contractor who lacks an employer-employee relationship with the defendant [can] sue that defendant for employment discrimination under Section 504 of the Rehabilitation Act . . . ." *Id.* at 425. Section 504 of the Rehabilitation Act "broadly prohibits discrimination . . . against disabled persons in federally assisted programs or activities." *Id.* at 425–26 (quotation marks omitted) (brackets omitted). The court noted that the 8th Circuit previously held that independent contractors may

not bring such suits because the Rehabilitation Act follows Title I's prohibition of employment discrimination suits by independent contracts. *Id.* at 429. The court explained that the 9th and 10th Circuits held otherwise, allowing for such suits to be brought under the Rehabilitation Act. *Id.* at 427–28. The 5th Circuit agreed with the 9th and 10th Circuits in holding that because the Rehabilitation Act "does not incorporate Title I's standards for determining which entities may be held liable for employment discrimination, it does not incorporate Title I's requirement that the defendant be the plaintiff's employer." *Id.* at 429. Thus, in the 5th Circuit, independent contractors may bring employment discrimination suits under the Rehabilitation Act. *Id.* at 432.

CONSTITUTIONAL LAW

Second Amendment – Standard of Scrutiny: *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016)

The 4th Circuit addressed what standard of scrutiny should be applied when resolving Second Amendment challenges. *Id.* at 179. The court noted that the 7th Circuit dispensed of levels of scrutiny entirely, while the D.C. and 9th Circuits applied a standard of intermediate scrutiny. *Id.* at 182–83. The 4th Circuit disagreed with the 7th, D.C., and 9th Circuits because, "the law here 'goes beyond mere regulation' and is instead 'a total prohibition of possession of certain types of arms.'" *Id.* at 183 (internal citations omitted). Thus, the 4th Circuit concluded, "strict scrutiny, then, is the appropriate level of scrutiny to apply to the ban of semi-automatic rifles and magazines holding more than 10 rounds." *Id.* at 182.

CONTRACTS

Government Benefits – Procurement Funds: *United States v. Harris,* 821 F.3d 589 (5th Cir. 2016)

The 5th Circuit addressed whether procurement funds involved in government contracts, awarded through an affirmative action contracting program, are properly handled under the special government benefits rule for loss calculation or the general loss calculation rule. *Id.* at 602. The 5th Circuit noted the 9th Circuit's position that the general rule of loss calculation applies because the text of the special rule provides examples of only unilateral benefits, not contracts. *Id.* at 604. Conversely, the 4th Circuit decided to apply the special governments rule without explanation. *Id.* The court explained

that the 7th and 11th Circuits have also applied the special governments rule because the government contracts awarded were in pursuit of a program that had a primary purpose of assisting small, minority owned businesses. *Id.* The 5th Circuit joined the 9th Circuit, as "[t]he mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a government benefit akin to a grant or an entitlement program payment." *Id.* (quotation marks omitted). Thus, the 5th Circuit held that "procurement frauds involving contracts awarded under [affirmative action contracting programs] should be treated under the general rule for loss calculation." *Id.*

COPYRIGHT

De Minimis Exception – Sound Recordings: *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016)

The 9th Circuit analyzed whether the "de minimis" exception applies to copyrighted sound recordings. *Id* at 874. The court concluded that Congress intended for the "de minimis" exception to apply to sound recordings and, therefore, the court disagreed and created a circuit split with the 6th Circuit. *Id.* at 886. The court reasoned that the 6th Circuit failed to consider the statutory structure, especially the express limitation on the rights of a copyright holder, as well as the legislative history. *Id.* at 884. The "de minimis" test, in the court's eyes, always applies when a "second artist has taken some expressive content from the original artist." *Id.* at 885. Therefore, the court held that the "de minimis" exception applies to actions alleging infringement of a copyright to sound recordings. *Id* at 887.

IMMIGRATION

Removal Proceedings – Requirement of a Notice to Appear: *Orozco-Velasquez v. Att'y Gen. United States*, 817 F.3d 78 (3d Cir. 2016)

The 3rd Circuit addressed whether a "notice to appear" (NTA) that lacks the specificity required by the Immigration and Nationality Act (INA) is effective in executing the removal of an alleged alien. *Id*. at 79. An alien must reside in the United States "for a continuous period of not less than 10 years" to be eligible for cancellation of removal. *Id*. A properly administered NTA triggers the INA's "stop-time" rule, which ends an alien's "period of continuous residence" upon receipt. *Id*. at n.2. In addressing the denial of a plaintiff's

application for cancellation of removal, the 3rd Circuit rejected the 4th and 7th Circuits' argument that 8 U.S.C. § 1229b(d)(1)'s "stop-time" definition was ambiguous as to what the drafter's intended of the "stop-time" rule. *Id*. at 82. By granting *Chevron* deference to the Board of Immigration Appeals's interpretation of the statute, many similar cases ended in similar denials of applications for cancellation of removal. *Id*. The 3rd Circuit found that the drafter's obvious intent was highlighted by the existence of the word "shall," which presented a "clear-cut command set out in § 1229(a)(1) that notice '*shall* be given in person to the alien . . . specifying,' *inter alia*, '[t]he time and place at which the proceeding will be held'" in regards to a NTA. *Id*. at 83. The 3rd Circuit held that because of the government's failure to adhere to the strict guidelines of the NTA, the plaintiff was entitled to apply for cancellation of removal. *Id.* at 84.

SECURITIES

Securities Exchange Act – Statute of Repose: *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016)

The 6th Circuit addressed whether tolling applies to a statute of repose. *Id.* at 792. The court noted that the 10th Circuit determined that tolling applies to statutes of repose pending class certification, while the 2nd Circuit found tolling could not apply to statutes of repose. *Id.* at 793. The 6th Circuit agreed with the 2nd Circuit, in finding that it was more consistent with the Supreme Court's holding that "[the relevant statute] was an 'unqualified bar on actions' after the five-year period, 'giving defendants total repose' after that time." *Id.* at 793–94. The court disagreed with the 10th Circuit that "legal tolling" is applicable to statutes of repose. *Id.* at 793. Thus, the 6th Circuit concluded that tolling could not apply to statutes of repose. *Id.* at 794.

CRIMINAL

CONSTITUTIONAL

Right to Assistance of Counsel – Right to Counsel of Choice: *United States v. Jimenez-Antunez*, 820 F.3d 1267 (11th Cir. 2016)

The 11th Circuit addressed whether the standard for evaluating a motion to replace retained counsel with appointed counsel ought to be an interference with justice standard, or a good cause standard, under the Sixth Amendment. *Id.* at 1271. The court noted that the 9th Circuit applied an interference of justice standard in evaluating a defendant's motion to replace retained counsel with appointed counsel, while the 1st Circuit applied a good cause standard. *Id.* at 1271–72. The 11th Circuit agreed with the 9th Circuit that, since the right to counsel of choice is implicated when a defendant moves to replace retained counsel with appointed counsel, an interference with justice standard applies. *Id.* at 1271. The court disagreed with 1st Circuit that the motion to dismiss retained counsel no longer involved the right to counsel of choice because it had merged with an action to engage new counsel; the court noted the 1st Circuit offered no other explanation for its implementation of a good cause standard. *Id.* at 1272. The 11th Circuit concluded that since a defendant who moves to dismiss retained counsel retains the right to counsel of choice, the standard for evaluating such a motion is interference with justice. *Id.*

Sentencing Guidelines – Residual Clauses: *United States v. Pawlak,* 822 F.3d 902 (6th Cir. 2016)

The 6th Circuit addressed whether "the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) that the Armed Career Criminal Act's 'residual clause' is unconstitutionally vague, compels the same result for an identical 'residual clause' in the United States Sentencing Guidelines." *Id.* at 903. The court noted that the 2nd, 3rd, 7th, 8th and 10thCircuits have held the Guidelines's residual clause to be unconstitutionally vague in light of the ruling in *Johnson*, while the 11th Circuit has been the only circuit to determine that the ruling in *Johnson* leaves the Guidelines unaffected. *Id.* at 907–08. The court disagreed with the 11th Circuit's determination that the Guidelines are immune to vagueness challenges because the court's decision relied on case law that has been undermined by recent Supreme Court decisions. *Id*. at 908–09. The court similarly rejected the 11th Circuit's characterization that "exposing the Guidelines to

vagueness challenges will upend our sentencing regime." *Id*. at 909–10 (internal quotations omitted). Thus, in joining with a majority of the circuits, the 6th Circuit departed from its own precedent in holding that "the rationale of *Johnson* applies equally to the residual clause of the Guidelines," and therefore, is unconstitutionally vague. *Id*. at 911.

CRIMINAL PROCEDURE

Motion Objection Requirements – Speedy Trial Act: *United States v. Brown*, 819 F.3d 800 (6th Cir. 2016)

The 6th Circuit addressed the issue of whether a motion for objection to a Speedy Trial Act ("STA") violation on behalf of the defendant must be in writing, or if an oral objection satisfies the requirements. *Id.* at 822. The court noted that the 7th, 9th and 10th Circuits have held that "a defendant's oral objection to an alleged STA violation satisfies [18 U.S.C.] § 3162(a)(2)'s motion requirement so long as the defendant brings to the court's attention his belief that his STA rights have been violated." *Id.* at 823. Alternatively, the 1st Circuit held that "the defendant's oral motion to dismiss did not satisfy the Act's motion requirement." *Id.* at 824. The court disagreed with the 1st Circuit because "§ 3162(a)(2) does not specify whether th[e] [defendant's] motion must be in writing, and the *Spagnuolo* court cited no binding authority for the proposition that an oral motion can never satisfy § 3162(a)(2)." *Id.* The court also noted that "reading the word 'written' into a § 3162(a)(2) motion, where Congress did not draft the statute to include this requirement, would ignore the fact that an oral objection may bring an alleged STA violation to the district court's attention just as readily as a written motion, and thereby elevate form over substance." *Id.* The 6th Circuit joined the 7th, 9th and 10th Circuits in holding that "oral objections at the final pretrial conference satisf[y] § 3162(a)(2)['s]" statutory requirements. *Id.* at 826.

Sentencing – Sentencing Guidelines: *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016)

The 10th Circuit addressed whether the vagueness doctrine enforced by *Johnson vs. United States*, 135 S. Ct. 2551 (2015) applies to the definition of "crime of violence" contained in United States Sentencing Guidelines (Sentencing Guidelines). *Id.* at 1225–26. The court noted that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Circuits determined that *Johnson's* vagueness doctrine applies to the Sentencing Guidelines because the definition uses the same language as the definition of "violent felony" in the Armed Career Criminal Act

(ACCA), while the 11th Circuit has not applied *Johnson* to the Sentencing Guidelines. *Id.* at 1225. The 10th Circuit agreed with the majority of circuits in finding that because the Supreme Court previously held that the ACCA was unconstitutionally vague, the Sentencing Guideline ought to be as well. *Id.* at 1226. Thus, the 10th Circuit concluded that the vagueness doctrine of *Johnson* applies to the Sentencing Guidelines. *Id.*

Sentencing – Sentencing Guidelines: *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016)

The 7th Circuit was faced with the question of whether the crime of domestic battery, as defined by Illinois state law, qualifies as a "crime of violence" within the meaning of the career offender sentencing guidelines. *Id.* at 1064. A "crime of violence" classification within this context requires that the underlying crime "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* (internal citations omitted). It was argued that because the underlying criminal statute for domestic battery did not include such physical force as an express element of the crime, it lacked standing for a "crime of violence" classification. *Id.* However, the 7th Circuit reaffirmed the position it had taken previously, that "a conviction for domestic battery under Illinois law necessarily requires proving physical force," as would any crime requiring proof of intentional causation of bodily harm. *Id.* In doing so, the 7th Circuit reaffirmed its alignment with the 8th Circuit on this issue. *Id.* at 1065. Conversely, the 1st and 4th Circuits have endorsed the countervailing argument, that similar statutes to the domestic battery statute at question in this case, "requiring intent or a threat to cause bodily harm do *not* include an element of force." *Id.*

Sentencing – Supervised Release: *United States v. Marsh*, 829 F.3d 705 (D.C. Cir. 2016)

The D.C. Circuit addressed whether 18 U.S.C. § 3624(e) "tolls a term of supervised release during a period of pretrial detention where the defendant is ultimately convicted of the charges on which he is held." *Id*. at 707. The court noted that the 9th Circuit determined that "pretrial detention does not constitute an 'imprisonment' within the meaning of § 3624(e) and thus does not operate to toll a term of supervised release." *Id*. at 709. Conversely, 4th, 5th, 6th and 11th Circuits held that "[imprisonment] makes no temporal distinctions between pre-and postconviction periods of confinement." *Id*. at 708. The D.C. Circuit agreed with the 9th Circuit, but relied on the phrase

"is imprisoned," as opposed to the phrase "imprisoned in connection with a conviction" that the 9th Circuit relied. *Id*. at 709. The court disagreed with the 4th, 5th, 6th and 11th Circuits as those circuits failed to "give[] effect to each word in the statute." *Id*. at 710. The D.C. Circuit concluded that § 3624(e) should be interpreted in the present tense, and thus, pretrial detention does not constitute an imprisonment within the meaning of statute. *Id*. at 707.

FIREARM POSSESSION

Standards of Review – Unregistered Firearm: *United States v. White*, 824 F.3d 783 (8th Cir. 2016)

The 8th Circuit addressed whether a defendant possessing a quasi-suspect weapon must also know "of the characteristics [of the weapon] which bring it under the coverage of the National Firearm Act['s]" requirements to warrant conviction. *Id*. at 790. The court noted that the 5th, 7th and 9th Circuits determined that "even when a weapon is quasi-suspect, the government must prove a defendant's knowledge of the characteristics that bring the weapon within the purview of the statute." *Id*. The court previously held that "[w]here the firearm is quasi-suspect . . . a specific jury finding of knowledge of the weapon's incriminating characteristics is unnecessary." *Id*. The 8th Circuit recognized its reservations on the split, but reasoned it "must [continue to apply] it as circuit precedent." *Id*. at 791. The 8th Circuit concluded that "the jury need not have found that [defendant] knew of the characteristics." *Id*.

IMMIGRATION

Appeals – State Law Applied to a State Statute: *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016)

The 9th Circuit addressed whether courts should evaluate the divisibility of a state statute by looking "to state law to verify whether a state statute has elements or means" in regards to the interpretation of the second footnote in *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Almanza-Arenas*, 815 F.3d at 480. The court noted that the 5th and 10th Circuits determined that the second footnote in *Descamps* does not differentiate between elements and means, and that courts should not look to state law, but should only look to *Taylor* and *Shepard* documents. *Id.* at 481–82. The 4th and 8th Circuits found that courts should look to state law in order to determine whether a state statute has elements or means. *Id.* The 9th Circuit agreed with the 4th

and 8th Circuits in finding that courts should look to state law to evaluate the divisibility of a state statute. *Id.* The court disagreed with the 5th and 10th Circuits as to the interpretation of *Descamps*. *Id.* The court reasoned that *Descamps* offers a "guide to courts to look at *Taylor* and *Shepard* documents if there [is] difficulty in distinguishing between the elements and means," but "cannot be read to suggest that elements and means are one and the same." *Id.* at 481. Thus, the 9th Circuit held that a court should look to state law when interpreting a state statute. *Id.*

Criminal Aliens – Civil Detention: *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)

The 1st Circuit addressed the enforcement method of the statutory reasonableness requirement for criminal aliens following their criminal sentence and pending their removal proceedings. *Id.* at 495. The court noted that the 2nd and 9th Circuits limited detention to six months absent a finding of exigent circumstance, while the 3rd and 6th Circuits found individualized review necessary to determine the reasonableness of continued detention. *Id.* The 1st Circuit agreed with the 3rd and 6th Circuits in finding such highly sensitive fact inquiries require a flexible and less rigid approach. *Id*. at 498. The court disagreed with the 2nd and 9th Circuits' bright-line rule requiring review after six months. *Id.* The 1st Circuit joined the 3rd and 6th Circuits in holding the statutory reasonableness requirement for criminal aliens depends upon the facts at hand and a determination of reasonableness shall occur on a case-by-case basis. *Id.*

Denaturalization – Procurement of Citizenship or Naturalization Unlawfully: *United States v. Maslenjak*, 821 F.3d 675 (6th Cir. 2016)

The 6th Circuit addressed whether an implied materiality element ought to be read into 18 U.S.C. § 1425(a), which criminalizes the knowing procurement of citizenship or naturalization by any means "contrary to law," because a conviction under § 1425(a) results in automatic denaturalization under 8 U.S.C. § 1451(e). *Id.* at 691. The court noted that the 1st, 4th, 7th and 9th Circuits determined that § 1425(a) implied a materiality requirement because § 1451(a) provided for a civil denaturalization and required materiality. *Id.* at 689. The court disagreed with that decision as neither § 1425(a), nor § 1451(e), use the term "material" when establishing the elements of conduct criminalized. *Id.* at 690. The court stated that to imply materiality as an element of § 1425(a) or § 1451(e) was to "ignore the plain text of [the statute] and disregard the overall statutory scheme

Congress has enacted for denaturalization . . . ." *Id.* at 691 (alteration in original). The 6th Circuit was persuaded rather by the construction of the statute itself and the inclusion of a civil action for denaturalization, which required materiality. *Id.* The court noted that the explicit inclusion of materiality in § 1451(a), and not in § 1425(a), reflected Congress's intent that there be no materiality requirement included in § 1425(a). *Id.* at 692. Thus, the 6th Circuit concluded that there is no implied materiality required for a conviction under § 1425(a). *Id.* at 682.

Immigration and Nationality Act – Sexual Abuse of a Minor: *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016)

The 10th Circuit addressed whether 18 U.S.C. § 3509 is the exclusive touchstone for defining all elements of the Immigration and Nationality Act's (INA) generic "sexual abuse of a minor" offense. *Id.* at 598. The court noted that the 4th and 9th Circuits determined that 18 U.S.C. § 3509 is not the exclusive touchstone, while the 2nd, 3rd and 7th Circuits found that 18 U.S.C. § 3509 is the exclusive touchstone. *Id.* at 599–601. The 10th Circuit joined the 4th and 9th Circuits in holding that 18 U.S.C. § 3509 should be used as a guide, rather than the exclusive touchstone, following the court's decision in *In re Pedro Rodriguez-Rodriguez*, 1999 BIA LEXIS 51, 22 I. & N. Dec. 991 (B.I.A. 1999). Thus, the 10th Circuit concluded that the statute is not the exclusive touchstone for defining all elements of the INA's generic "sexual abuse of a minor" offense. *Rangel-Perez*, 816 F.3d at 601.

Statutory Interpretation – Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA): *Santos-Quiroa v. Lynch*, 816 F.3d 160 (1st Cir. 2016)

The 1st Circuit addressed the issue of whether the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) "stop-time" rule applied retroactively to an Order to Show Cause (OSC), thereby rendering a noncitizen ineligible for a suspension of deportation. *Id*. at 161–63. The 9th Circuit held that that if the Board of Immigration Appeals denied the noncitizen's petition to reopen the deportation proceedings, that was considered a "final administrative decision," and therefore, the "stop-time" rule did not apply. *Id*. at 171. The court declined to follow the 9th Circuit's approach, and instead held that the Board of Immigration Appeals' interpretation and application of the "stop-time" rule to petitioner's case was "reasonable and consistent with the statutory language." *Id*. at 170. The Board of

Immigration Appeals' interpretation was that "whether deportation proceedings were pending or final on April 1, 1997" was irrelevant to his eligibility for suspension of deportation. *Id*. at 166. The court further held that the plain statutory language of the IIRIRA demonstrated that "Congress intended the "stop-time" rule to apply to all OCSs, regardless of whether they were issued on, before, or after April 1, 1997." *Id*. at 170.