

Current Circuit Splits

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by federal court of appeals opinions announced between March 2, 2011 and August 31, 2011. This collection is organized by civil and criminal matters, then by subject matter.

Each summary briefly describes a current circuit split. It is intended to give only the briefest synopsis of the circuit split, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point.

Preferred citation for the summaries below: *First Impressions*, 8 SETON HALL CIR. REV. [n] (2011).

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CIVIL MATTERS

ADMINISTRATIVE LAW

Remedies – Privacy Act: *Shearson v. U. S. Dep’t of Homeland Sec.*, 638 F.3d 498 (6th Cir. 2011)

The 6th Circuit addressed the issue of “whether the Privacy Act’s general exemptions provision, § 522a(j), permits an agency to wholly exempt systems of records from the civil-remedies provision, § 552a(g), and thereby avoid all civil liability, even for violations of non-exemptible provisions.” *Id.* at 502. The court noted that the 4th, 7th, and 9th Circuits determined that “an agency can exempt itself from § 552a(g) by properly promulgating rules.” *Id.* at 502–03 The D.C. Circuit however, had found “that an agency cannot escape liability for violating *non-exemptible* Privacy Act obligations simply by exempting itself from the

Act's civil-remedy provisions; rather, an agency may exempt a system of records from the civil-remedies provision only to the extent that the underlying substantive duty is exemptible under § 552(a)(j).” *Id.* at 503. The 6th Circuit agreed with the D.C. Circuit in finding that “an agency is permitted to exempt a system of records from the civil-remedies provision if the underlying substantive duty is exemptible under § 552a(j).” *Id.* at 504. The court disagreed with the 4th, 7th, and 9th Circuits, stating: “§ 552a(g) provides the general civil remedies for both exemptible and non-exemptible obligations, it is reasonable to conclude that Congress intended that the remedy follow the violation, i.e., § 552a(g) is applicable to non-exempted violations.” *Id.* at 503. Thus, the 6th Circuit concluded that an agency is not permitted to exempt a system of records from “claims alleging violation of non-exemptible Privacy Act provisions” *Id.* at 504.

BANKRUPTCY

Chapter 11 – Plan Cramdown Requirements Under 11 U.S.C. §

1129(b)(2)(A): *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011)

The 7th Circuit addressed whether 11 U.S.C. § 1129(b)(2)(A) requires that cramdown plans under subsection (iii), that contemplate selling encumbered assets free and clear of liens at an auction, satisfy the requirements set forth in Subsection (ii) of the statute. *Id.* at 649. The court noted that the 3rd and 5th Circuits determined that “Subsection (iii)’s scope was not limited by its neighboring subsections and that the proceeds from the sale of encumbered assets constituted the “indubitable equivalent” of the secured creditors’ claim. *Id.* It also noted that the 3rd Circuit’s dissent found “that the majority’s reading of the statute was at odds with the text of the statute itself, various canons of statutory interpretation, the statute’s legislative history, interests expressed in other parts of the Code and the settled expectations of lenders and borrowers.” *Id.* at 648. The 7th Circuit agreed with the 3rd Circuit’s dissent in finding that, “Subsection (ii), which offers the standard protections to creditors, [provides] the only way for plans seeking to sell encumbered assets free and clear of liens to obtain fair and equitable status.” *Id.* at 653 (internal quotations omitted). The court disagreed with the 3rd and 5th Circuits as “[u]nder their interpretation, plans could qualify for treatment under Subsection (iii) even if they seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections’ requirements.” *Id.* at 652. The 7th Circuit

stated that their sister courts' "reading of Subsection (iii) would nullify its neighboring subsections and ignore the protections for secured creditors recognized in other Code provisions[.]" *Id.* at 653. Thus, the 7th Circuit held "that the Code requires that cramdown plans that contemplate selling encumbered assets free and clear of liens at an auction satisfy the requirements set forth in Subsection (ii) of the statute." *Id.* at 653.

Chapter 12 – Post-Petition Income Tax: *United States v. Dawes (In re Dawes)*, 652 F.3d 1236 (10th Cir. 2011)

The 10th Circuit addressed whether income taxes generated from the sale of a farm asset during a Chapter 12 bankruptcy are taxes "incurred by the estate" as expressed under 11 U.S.C.S. § 503(b), and thus subject to downgrade and discharge. *Id.* at 1238–39. The court noted that the 9th Circuit determined that the taxes are not subject to downgrade and discharge because they are not "incurred by the estate," while the 8th Circuit found the opposite. *Id.* at 1239. The 10th Circuit agreed with the 9th Circuit that the term "incurred by the estate" should be interpreted according to its plain language, and because a Chapter 12 estate is not liable for post-petition federal income taxes, the estate cannot incur the tax liability. *Id.* at 1240. The court disagreed with the 8th Circuit that "incurred by the estate" means tax incurred during bankruptcy. *Id.* Thus, the 10th Circuit held post-petition income taxes generated during Chapter 12 proceedings "are liabilities of the individual debtor and not the bankruptcy estate," and therefore, "they are not within the purview of the bankruptcy proceedings or included in the reorganization plan." *Id.* at 1239.

CIVIL PROCEDURE

Appeals – Costs & Attorney Fees: *Int'l Floor Crafts, Inc. v. Dziemit*, 420 Fed. App'x. 6 (1st Cir. 2011)

The 1st Circuit addressed whether appellate attorney's fees may be included in an appeal bond. *Id.* at 17. The court noted that the 2nd, 6th, 9th, and 11th Circuits determined that a bond issued under Federal Rule of Appellate Procedure 7 may include appellate attorney's fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs, and the appellee is eligible to recover them." *Id.* The 3rd and D.C. Circuits, however, found Federal Rule of Appellate Procedure 39(e) "to

restrict the costs calculable for Rule 7 purposes” *Id.* at 17–18. The 1st Circuit agreed with the 2nd, 6th, 9th, and 11th Circuits in finding that “[c]ourts understand . . . fee shifting statutes to account for appellate fees as well.” *Id.* at 17. The court disagreed with the 3rd and D.C. Circuits, as “[those] cases presented distinguishable circumstances since neither involved a fee-shifting statute.” *Id.* at 19. Thus, the 1st Circuit concluded that a district court may include attorney fees in an appellate bond when “the applicable statute underlying the litigation contains a fee-shifting provision . . . and appellee is eligible to recover them.” *Id.* at 17.

Choice of Law – Forum Selection Clauses: *Slater v. Energy Servs. Group Int’l*, 634 F.3d 1326 (11th Cir. 2011)

The 11th Circuit addressed whether courts should analyze a forum selection clause under 28 U.S.C. § 1404(a) or Federal Rule of Civil Procedure 12(b)(3). *Id.* at 1332. The court observed that the 6th Circuit enforced a forum selection clause under § 1404, while the 2nd and 9th Circuits enforced international forum selection clauses under Rule 12(b)(3). *Id.* The 11th Circuit noted that it applied Rule 12(b)(3) to a motion to dismiss based on a forum selection clause which mandated a foreign venue. *Id.* The court noted that the Supreme Court previously held that “motions to dismiss based upon forum-selection clauses are cognizable as motions to dismiss for improper venue.” *Id.* at 1333 (internal citation omitted). The court extended this holding to motions to dismiss based on a domestic forum selection clause, adopting a broad interpretation of the Supreme Court’s aforementioned holding. *Id.* at 1333. Thus the 11th Circuit concluded “that § 1404(a) is the proper avenue of relief where a party seeks the transfer of a case to enforce a forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party’s request for dismissal based on a forum-selection clause.” *Id.* at 1336.

Standard of Review – Plain Error: *U.S. v. Cordery*, 656 F.3d 1103 (10th Cir. 2011)

The 10th Circuit addressed “whether an error must be plain at the time of trial or merely at the time of appeal.” *Id.* at 1107. The court noted that the 9th and D.C. Circuits have determined that “an error is plain only if it was clear at the time of the district court’s decision,” while the 7th and 11th Circuits have stated that “plain error is measured at the time of appeal” *Id.* The 10th Circuit agreed with the 7th and 11th Circuits in finding that “this approach has the advantage of avoiding

the necessity of distinguishing between cases in which the law at the time of appeal on the one hand and cases in which it was merely unsettled on the other.” *Id.* (internal quotation marks omitted). The court disagreed with the 9th and D.C. Circuits that an error is plain only where the law is well settled at the time of trial. *Id.* Thus, the 10th Circuit concluded that plain error is measured at the time of appeal. *Id.*

CONSTITUTIONAL LAW

Federal Employees – Remedies under the Civil Service Reform Act:
Elgin v. U. S. Dep’t of the Treasury, 641 F.3d 6 (1st Cir. 2011)

The 1st Circuit addressed “whether there is some implied exception to the exclusive [Civil Service Reform Act (CSRA)] remedy [where] the challenge [to termination of employment] . . . is a constitutional one sounding in equity.” *Id.* at 11. The court noted that the 3rd and D.C. Circuits have held that there was an implied exception to the exclusive CSRA remedy and that federal employees may bring to federal court constitutional claims relevant to their removal. *Id.* at 11. Alternatively, the 2nd and 10th Circuits found that the CSRA remedies were wholly exclusive and that CSRA employees must bring their constitutional challenges before the Merits Systems Protection Board, as provided under the CSRA. *Id.* at 11. The 1st Circuit agreed with the 2nd and 10th Circuits, based on its own precedent, its reading of Supreme Court precedent, and its interpretation of the CSRA’s legislative history. *Id.* Thus, the 1st Circuit held that there is no implied exception to the exclusive CSRA remedy. *Id.*

First Amendment – Retaliatory Arrest Claim: *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011)

The 10th Circuit addressed whether a plaintiff bringing a First Amendment retaliation claim against the government “must show that the defendants lacked probable cause for the arrest.” *Id.* at 1147. The court noted that the 6th, 8th, and 11th Circuits determined that plaintiffs are required to show lack of probable cause for a retaliatory arrest, while the 9th Circuit found plaintiffs may bring a First Amendment retaliation claim even where probable cause existed for the arrest. *Id.* The 10th Circuit agreed with the 9th Circuit in finding that plaintiffs must prove the absence of probable cause only in malicious prosecution claims and other retaliation cases involving “complex” causation. *Id.* at 1148–49. The court disagreed with the 6th, 8th, and 11th Circuits’ interpretation

that the Supreme Court had created a “no-probable-cause” requirement in all First Amendment retaliation cases. *Id.* at 1148. Thus the 10th Circuit concluded that plaintiffs are not required to show an absence of probable cause in retaliatory arrest cases under the First Amendment. *Id.* at 1148–49.

Property Rights – Prisoner’s Property Rights in Unearned Interest:
Young v. Wall, 642 F.3d 49 (1st Cir. 2011)

The 1st Circuit addressed the issue of whether “a prison’s unilateral suspension of its internal policy of paying interest on inmate accounts violated the constitutional rights of an affected inmate.” *Id.* at 51. The court stated that in order to establish constitutionally protected property interest, the plaintiff must point to a source that gives rise to such a right. *Id.* at 53. The court then noted that the 4th and 11th circuits concluded that no such right regarding unearned future interest existed. *Id.* at 54. The court also noted that the 9th Circuit came to an opposite conclusion by applying “the mantra that interest follows principal,” but criticized that conclusion because it failed to give “due weight to the truncation of prisoner’s property rights that is characteristic of common law” *Id.* at 54. After analyzing Rhode Island common law, statutory law, and policy and practice, the court agreed with the 4th and 11th Circuits and concluded that none of these could provide a source of property rights in unearned future interest. *Id.* at 53–55. Finding no property rights in collecting the interest, the court ultimately held that “prison inmates lack a constitutionally protected property right in interest not yet paid.” *Id.* at 51.

Speech and Debate Clause – Scope of Application: *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011)

The 9th Circuit addressed whether a district court must “hold a *Kastigar*-like hearing to determine whether the Government used evidence protected by the Speech and Debate Clause to obtain non-privileged evidence” against a Member of Congress. *Id.* at 1019. The court noted that the D.C. Circuit determined that the Clause is violated when privileged materials are reviewed without the Member of Congress’s consent because it distracts Members and their staffs from their legislative work. *Id.* at 1033. However, the 9th Circuit rejected this rationale finding that legislative distraction alone cannot serve “as a touchstone for application of the Clause’s testimonial privilege,” but rather, “distraction alone precludes inquiry only when the underlying action is itself precluded.” *Id.* at 1034–35. The 9th Circuit added that a

broad privilege would result in a violation of the Clause every time a court reviewed evidence merely to determine whether the Clause applied or not. *Id.* at 1038–39. Thus the 9th Circuit concluded that no requirement for a *Kastigar* hearing exists where the actions and choices for which the Member of Congress was being prosecuted were beyond the scope of the Speech and Debate Clause. *Id.* at 1039.

EMPLOYMENT

Benefits – Deference to Administrative Agencies: *Weight Loss Healthcare Ctrs. of Am., Inc. v. Office of Pers. Mgmt.*, 655 F.3d 1202 (10th Cir. 2011)

The 10th Circuit considered whether it owed deference to the Office of Personnel Management’s (OPM) interpretation of a federal employee insurance plan. *Id.* at 1205. The court noted that the 8th and 11th Circuit deferred to OPM’s interpretation because OPM has relevant expertise and was given broad authority to regulate the field by Congress. *Id.* at 1207. The court then noted that the 4th Circuit disagreed with this view “because contract interpretation is a question of law clearly within the competence of courts.” *Id.* (internal quotation marks omitted). The court disagreed with the 4th Circuit, finding that an earlier decision from the 4th Circuit was contrary, and that “[i]t ignore[d] OPM’s experience and expertise as well as the statutory scheme that gives OPM the primary and principal role of interpreting health-plan contracts with federal employees.” *Id.* Thus, the 10th Circuit agreed with the 8th and 11th Circuits and held that OPM’s interpretation of the federal employee insurance plan “is entitled to deference because of its intimate and extensive involvement in the negotiation and interpretation of federal health-insurance plans.” *Id.* at 1205.

FAMILY LAW

Family and Medical Leave Act (FMLA) – Burden of Proof: *Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011)

The 9th Circuit addressed whether an employer or employee bears the burden of proof to establish a reason for failing to reinstate an employee when an employer, defending against a Family and Medical Leave Act (FMLA) interference claim, “alleges that he had a legitimate reason not to reinstate an employee.” *Id.* at 779. The court noted that the 8th, 10th, and 11th Circuits “have all held that [Department of Labor

(DOL) Regulations 29 C.F.R. § 825.216(a)] validly shifts to the employer the burden of proving that an employee . . . would have been dismissed regardless of the employee’s request for, or taking of, FMLA leave.” *Id.* at 780 (alteration in original) (citations omitted). The 7th Circuit, however, relied on its previous case law interpreting the statute, rather than the plain text of the regulations, and held that the burden of proof remains with the employee. *Id.* The 9th Circuit found the majority rule to be “more natural” and agreed that “the plain language of the pertinent DOL regulations provides that the burden is on the employer to show that he had a legitimate reason to deny an employee reinstatement.” *Id.* The court also found persuasive the fact that this approach is consistent with “the Supreme Court’s admonition that the burden of proof should conform with a party’s superior access to the proof.” *Id.* Thus, the 9th Circuit concluded “that when an employer seeks to establish that he has a legitimate reason to deny an employee reinstatement, the burden of proof on that issue rests with the employer.” *Id.*

IMMIGRATION

State Enforcement – Immigration and Naturalization Act: *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S.Ct. 845 (2011)

The 9th Circuit addressed whether states have “inherent authority to enforce the civil provisions of federal immigration law.” *Id.* at 362. The court noted that the 6th Circuit determined that states do not have such inherent authority, while the 10th Circuit determined that they do. *Id.* at 363. The 9th Circuit agreed with the 6th Circuit in finding that, under 8 U.S.C. § 1357(g), “local law enforcement officers [could not] enforce completed violations of civil immigration law” absent specific authorization from the Attorney General. *Id.* The court disagreed with the 10th Circuit’s finding that Congress presumed states had this power when it enacted 8 U.S.C. § 1252(c) and 8 U.S.C. § 1357(g)(10). *Id.* 363–64. The court found the 10th Circuit’s interpretation of legislative history unpersuasive because Congress would not have intended “to displace pre-existing . . . authority’ when its purpose . . . was to grant authority it believed was otherwise lacking.” *Id.* at 365. The court also found the 10th Circuit’s reasoning unpersuasive because such reasoning requires a broad reading of § 1357(g)(10), which the 9th Circuit refused to grant. *Id.* Thus, the court concluded that states do not possess any inherent

authority to “enforce the civil provisions of federal immigration law.” *Id.* at 365.

TAX

Tax Reform Act – Interpreting 26 U.S.C. § 6501(e)(1)(A) and 6229(c)(2): *Intermountain Ins. Service of Vail v. C.I.R.*, 650 F.3d 691 (D.C. Cir. 2011)

The D.C. Circuit addressed the issue of “how to interpret [I.R.C. §] 6501(e)(1)(A)’s ‘omits from gross income’ language in cases that fall beyond subsection (i)’s scope.” *Id.* at 703. The court noted that the 4th, 5th, 9th, and Federal Circuits determined that the Supreme Court decision of *Colony, Inc. v. Comm’r*, 357 U.S. 28 (1958), interpreting § 275(c), applies to the relevant section. *Id.* at 700. The 7th Circuit, however, found “that *Colony* does not control and that the Commissioner’s interpretation of sections 6501(e)(1)(A) and 6229(c)(2) so aligns with Congress’s clear intent that the Commissioner had no need even to rely on the regulations.” *Id.* The D.C. Circuit agreed with the 7th Circuit in finding that *Colony* was not controlling “because that decision provides only the best, but not the exclusive, construction of the phrase ‘omits from gross income’” *Id.* The court disagreed with the 4th, 5th, 9th and Federal Circuits as it found that neither the plain meaning of the text, the section’s structure, the legislative history, the passages’ context, nor the reenactment history bars the Commissioner’s interpretation of § 6501(e)(1)(A). *Id.* at 698. Thus, the D.C. Circuit concluded that the “Court in *Colony* never purported to interpret § 6501(e)(1)(A),” and that nothing in the relevant section “unambiguously forecloses the Commissioner from interpreting ‘omissions from gross income’ as including basis overstatements.” *Id.* at 705.

TORTS

Awarding of Costs – Translation Costs in Litigation: *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218 (9th Cir. 2011)

The 9th Circuit addressed whether a district court may interpret 28 U.S.C. § 1920(6) in such a way that awards the costs of translation services to the defending party in a tort action. *Id.* at 1221. The court noted that the 7th Circuit had determined that the words “interpretation” and “translation” have distinct definitions and declined to award

translation service costs. *Id.* The 7th Circuit specifically construed § 1920(6) to embody the common understanding of an “interpreter” as one who translates the spoken word, and found that the dictionary definition of “interpreter,” meaning one who translates a written document, unreasonably stretched the meaning of § 1920. *Id.* “The 6th and D.C. Circuits concluded that ‘translation’ services and ‘interpretation’ services are interchangeable.” *Id.* The court reasoned that the 6th Circuit’s analysis “is more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party.” *Id.* The 9th Circuit joined the 6th and D.C. Circuits in holding “that within the meaning of § 1920(6), the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation.” *Id.* at 1221–22. Thus, the 9th Circuit held that § 1920(6) permits courts to award costs for translation services to defending parties. *Id.* at 1222.

Torture Victim Protection Act – Corporate Liability: *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011)

The D.C. Circuit addressed whether corporations can be held liable for aiding and abetting violations of the Torture Victim Protection Act (TVPA). *Id.* at 58. The court noted that the 9th Circuit held that corporations may not be held vicariously liable under the TVPA, while the 11th Circuit found corporations can be liable. *Id.* The D.C. Circuit agreed with the 9th Circuit in finding that the statutory text of the TVPA does not permit liability of corporations. *Id.* The court based its opinion on the absence of any statutory text permitting vicarious corporate liability, and added that, although Congress may provide for such a theory of liability, it has not done so. *Id.* Thus, the D.C. Circuit concluded that corporations cannot be held liable for aiding and abetting violations of the TVPA. *Id.*

CRIMINAL MATTERS

CONSTITUTIONAL LAW

Ex Post Facto Clause – Sentencing Guidelines: *United States v. Wetherald*, 636 F.3d 1315 (11th Cir. 2011)

The 11th Circuit addressed whether the “application of the Sentencing Guidelines in effect at the time of sentencing violated the Ex Post Facto Clause of the U.S. Constitution.” *Id.* at 1318. The court noted that the 7th Circuit determined that the Ex Post Facto Clause does not apply to advisory regulations like the Sentencing Guidelines, while the D.C. Circuit found the application of a harsher Guidelines range presents a constitutional problem. *Id.* at 1320–21. The D.C. Circuit found that a constitutional right was violated if “the district court’s failure to employ the Guidelines in effect at the time the offense was committed resulted in ‘a substantial risk’ of a more severe sentence.” *Id.* at 1321. The 11th Circuit agreed with the D.C. Circuit in finding that the Sentencing Guidelines, though advisory, implicate the Ex Post Facto Clause because the D.C. Circuit’s approach “recognizes the ongoing importance of the Sentencing Guidelines while maintaining the district Court’s broad discretion to consider relevant information in formulating an appropriate sentence.” *Id.* at 1322–23. The 11th Circuit concluded that a court’s application of the Sentencing Guidelines in effect at the time of sentencing will violate the Ex Post Facto Clause only when this choice results in a substantial risk of harsher punishment. *Id.* at 1322–23.

CRIMINAL OFFENSES

Money Laundering – Elements under 18 U.S.C.A. § 1956: *United States v. Quinones*, 635 F.3d 590 (2d Cir. 2011)

The 2nd Circuit addressed whether “proceeds of specified unlawful activity,” are limited to “profits” where the unlawful activity is the sale of contraband under the federal money laundering statute, 18 U.S.C. § 1956. *Id.* at 597. The court noted that the 11th Circuit held that “proceeds” are limited to “profits” only where the unlawful activity is an illegal gambling operation. *Id.* at 599. The 8th and 9th Circuits determined that “proceeds” are not limited to “profits” where the unlawful activity is a drug offense. *Id.* at 599. The 5th and 6th Circuits,

however, found that “proceeds” are limited to “profits” only where the conviction raises a “merger problem” and where the legislative history suggests this narrow reading. *Id.* The 2nd Circuit agreed with the 5th and 6th Circuits in finding that Supreme Court precedent requires an examination of legislative history. *Id.* at 599. The court disagreed with the 11th Circuit in finding that it was required to interpret “proceeds” as “profits” only in cases involving an illegal gambling operation. *Id.* at 599. Thus, the 2nd Circuit concluded that Congress did not intend to limit “proceeds” to “profits” where the unlawful activity is the sale of contraband. *Id.* at 600.

CRIMINAL PROCEDURE

Fourth Amendment – Probable Cause: *Dougherty v. City of Covina*, 654 F.3d 892 (9th Cir. 2011)

The 9th Circuit addressed “whether evidence of child molestation, alone, creates probable cause for a search warrant for child pornography.” *Id.* at 899. The court noted that the 2nd and 6th Circuits determined that evidence of child molestation alone was insufficient to establish probable cause, while the 8th Circuit determined that evidence of child molestation was sufficient, as there was an “intuitive relationship between acts such as child molestation or enticement and possession of child pornography.” *Id.* The 9th Circuit, explaining that “the question of probable cause is not readily, or even usefully, reduced to a neat set of legal rules,” employed a totality of the circumstances test. *Id.* (internal quotation marks omitted). Thus, the 9th Circuit determined that evidence of child molestation, under the totality of the circumstances approach, could create probable cause to search for child pornography in some instances, though it does not establish probable cause categorically. *Id.*

Fourth Amendment – Search Warrant: *United States v. Bailey*, 652 F.3d 197 (2d Cir. 2011)

The 2nd Circuit addressed whether it is permissible under the Fourth Amendment to detain a person who leaves a premises subject to a search warrant immediately before or during the search. *Id.* at 204. The court noted that the 5th, 6th, and 7th Circuits determined that detention is permissible, while the 8th and 10th Circuits found the opposite. *Id.* at 204–06. The 2nd Circuit agreed with the 5th, 6th, and 7th Circuits in finding that the interests in law enforcement safety and evidence preservation outweighed the individual’s *de minimis* intrusion of being

briefly detained. *Id.* at 205. The court disagreed with the 8th and 10th Circuits, which held that officer safety would not be jeopardized and that evidence would not be put at risk of being destroyed if the suspect was not detained. *Id.* at 205–06. Thus, the 2nd Circuit concluded that detaining an individual in the process of leaving a premises subject to a search warrant as soon as practicable does not violate the Fourth Amendment. *Id.* at 206.

4th Amendment Warrantless Search – Burden of Proof: *Bogan v. City of Chicago*, 644 F.3d 563 (7th Cir. 2011)

The 7th Circuit addressed the question of which party bears the burden of proving exigent circumstances in a § 1983 warrantless-search action where the police claim that the search was justified based on said exigent circumstances. *Id.* at 568. The court first recognized its prior agreement with the 2nd Circuit determination that the plaintiff bears the ultimate burden of nonpersuasion in a civil case, regardless of whether the justification is based on consent or some other recognized exception. *Id.* at 569. It went on to state that a preexisting split was well-defined: the 3rd and 10th Circuits place the burden of proof on the officers and the 2nd, 5th, 7th and 11th Circuits place the burden on the plaintiff. *Id.* Next, the court highlighted its own prior precedent, in which it adopted a burden-shifting scheme applicable to the related issue of consented-to searches. *Id.* at 568. While the preexisting split only specifically relates to the allocation of the burden of proof in other Fourth Amendment claims (establishing consent in a warrantless arrest and in an arrest without probable cause), the court considered this inquiry related to the narrower issue at hand: determining the burden of proof with regard to exigent circumstances in a warrantless search action. *Id.* In line with its prior precedent regarding consented-to searches, the court rejected the 10th Circuit’s reasoning and placed the burden of proof on the plaintiff to establish the absence of exigent circumstances. *Id.* at 569. The court explained that the extension of its prior holding was appropriate because a common 4th Amendment violation occurs in both consent and exigent circumstance cases. *Id.* at 568. Thus, the 7th Circuit held that where the officers come forward with proof of exigent circumstances, the question posed to the jury is whether or not the plaintiff has met her ultimate burden of showing that the search was unreasonable in the light of the existing circumstances. *Id.* at 571.

Fifth Amendment – Custodial Interrogation: *Burlew v. Hedgpeth*, No. 09-17788, 2011 U.S. App. LEXIS 17323 (9th Cir. Aug. 18, 2011)

The 9th Circuit addressed “whether a defendant is ‘in custody’ when he is detained in the back of a police car.” *Id.* at *4. The court noted that the 4th and 6th Circuits, and a previous 9th Circuit case have determined that a defendant was in custody where the defendant was not under arrest but was detained in a police car, while the 7th and 8th Circuits determined that a defendant was not considered to be “in custody” for purposes of *Miranda* warnings while questioned in the back seat of a squad car. *Id.* The court then noted that “the Supreme Court has emphasized that the determination of whether a defendant was in custody for *Miranda* purposes is a general one, which affords courts more leeway . . . in reaching outcomes in case-by-case determinations.” *Id.* at *4–5 (internal quotation marks omitted). Thus, the 9th Circuit, without reversing its prior case, held that a state does not unreasonably apply federal law in finding that a defendant was not in custody when placed in the back of a police car. *Id.* at *5.

Fifth Amendment – Non-evidentiary Use of Self-Incriminating Statements: *United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011)

The D.C. Circuit addressed whether a prosecutor can make non-evidentiary use of immunized testimony. *Id.* at 553. The court noted that the 3rd and 8th Circuits suggested that “non-evidentiary uses of immunized testimony are barred,” while the 1st, 2nd, 7th, 9th, and 11th Circuits held to the contrary. *Id.* The D.C. Circuit agreed with the 1st, 2nd, 7th, 9th and 11th Circuits in finding that Supreme Court precedent was unconcerned with the “exercise of prosecutorial discretion.” *Id.* at 554 (internal quotation marks omitted). The court stated that to decide otherwise “would entangle the court in what has hitherto been internal prosecutorial decision-making. And it would open a new field for courts’ having to make complex causal judgments of the sort already required to assure clean evidence.” *Id.* Thus, the D.C. Circuit concluded that prosecutors can use such immunized statements, at a minimum, in forming decisions to indict. *Id.*

Mandamus Petitions – Crime Victims’ Rights Act: *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011)

The D.C. Circuit addressed the appropriate standard of review for petitions for mandamus filed pursuant to the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. *Id.* at 532. The court observed that the 5th,

6th, and 10th Circuits apply “the traditional standard for mandamus, under which [a crime victim] must show that: (1) she has a clear and indisputable right to relief; (2) the district court has a clear duty to act; and (3) no other adequate remedy is available to her.” *Id.* Four circuits do not follow this standard. *Id.* at 532. The 9th Circuit uses an abuse of discretion or legal error standard. *Id.* at 533. The 2nd Circuit uses an abuse of discretion standard. *Id.* The 11th Circuit granted a petition “without asking whether victim had a clear and indisputable right to relief.” *Id.* The 3rd Circuit stated in dicta that “mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771.” *Id.* The D.C. Circuit adopted the traditional mandamus standard because “there is no indication that Congress intended to invoke any other standard.” *Id.* The court also reasoned that if Congress intended to provide “ordinary appellate review via mandamus [through § 3771(d)(3)], it is unclear what purpose § 3771 (d)(4) serves by providing the government the same thing on direct appeal.” *Id.* Furthermore, the D.C. Circuit opined that “the abbreviated 72-hour deadline suggests that Congress understood it was providing the traditional ‘extraordinary remedy’ of mandamus.” *Id.* Determining whether the lower court committed a “clear and indisputable” error within 72 hours is feasible because extensive briefing or prolonged deliberation is not normally required, whereas “full briefing and plenary appellate review within the 72-hour hour deadline will almost always be impossible.” *Id.* Thus, the D.C. Circuit held that the traditional standard for mandamus applies to petitions for mandamus filed under the CVRA. *Id.*

Power to Grant Writ of Habeas Corpus – Mootness: *Rhodes v. Judiscak*, 653 F.3d 1146 (10th Cir. 2011)

The 10th Circuit addressed whether a petition for habeas corpus relief is moot when it challenges the calculation of an already served prison sentence. *Id.* at 1148. The court noted that the 5th and 11th Circuits determined that a petition is not moot because a district court could consider a favorable ruling as a factor in a later petition for a shortened supervised release. *Id.* at 1148–49. The court noted that the 3rd and D.C. Circuits held that “whether a particular collateral consequence is sufficient to defeat mootness turns on the likelihood that a favorable decision would redress the injury.” *Id.* at 1149. The 11th Circuit agreed with the 3rd and D.C. Circuits, but not based on the low likelihood of redress. *Id.* Rather, the court stated that the petition is moot because redress is impossible, because neither it nor the district could provide a remedy for the harm alleged. *Id.* Thus, the 10th Circuit

held that a § 2241 petition for habeas corpus relief challenging only the calculation of an already served prison sentence is moot. *Id.*

Witness Tampering – Conduct Under 18 U.S.C. § 1512(b): *United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011)

The 9th Circuit considered witness tampering under 18 U.S.C. § 1512 and addressed “what type of conduct falls within the ambit of” the statute’s phrase “corruptly persuades.” *Id.* at 1183, 1186. The court noted that the 2nd and 11th Circuits “conclude[d] that persuasion with an ‘improper purpose’ qualifies (such as self-interest in impeding an investigation),” while the 3rd Circuit found that “there must be something more inherently wrongful about the persuasion (such as bribery or encouraging someone to testify falsely).” *Id.* at 1186. The 9th Circuit agreed with the 3rd Circuit, stating that, when a privilege not to testify exists, “the phrase ‘corruptly persuades’ cannot mean simply ‘persuades with the intent to hinder communication to law enforcement’ because such an interpretation would render the word ‘corruptly’ meaningless.” *Id.* at 1187. In contrast, the 2nd and 11th Circuits found the term “corruptly persuade” to include merely persuading a witness to invoke his or her legal privileges not to testify. *Id.* Thus, the 9th Circuit found that the term “corruptly” is “normally associated with ‘wrongful, immoral, depraved, or evil;” therefore, “a defendant could not be shown to act with ‘consciousness of *wrongdoing*’ merely by asking [a witness with a legal privilege not to testify] to withhold testimony absent some *other* wrongful conduct, such as coercion, intimidation, bribery, suborning perjury, etc.” *Id.* at 1189–90.

IMMIGRATION

Right of Review – Fugitive Disentitlement Doctrine: *Bright v. Holder*, 649 F.3d 397 (5th Cir. 2011)

The 5th Circuit addressed “whether an alien is a fugitive where . . . he has maintained the same address throughout his removal proceedings, the address was known to the [Department of Homeland Security (DHS)], and DHS made no attempt to locate or arrest the alien following his failure to report for removal,” thus barring further review of the Board of Immigration Appeals’ removal decision. *Id.* at 400. The court noted that the 2nd and 7th Circuits “have applied the fugitive disentitlement doctrine in this context, reasoning that even when an alien’s location is known, immigration officials must deploy resources to

bring him in. And, of course, he may not be so easy to find once his litigation options are exhausted.” *Id.* (internal quotations omitted). Conversely, the 9th Circuit found “that an alien’s failure to report for removal did not make her a fugitive during the pendency of her petition for review because her whereabouts were known to her counsel, DHS, and the court.” *Id.* The 5th Circuit agreed with the 2nd and 7th Circuits in finding that “[a]pplying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law.” *Id.* Thus, the 5th Circuit concluded that an alien is a fugitive where he has maintained the same address throughout his removal proceedings, and the address was known to the DHS. *Id.*

REMEDIES

Restitution Awards – Crime Victims’ Rights Act: *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011)

The D.C. Circuit addressed the issue of “whether the proximate cause requirement in the catch-all category also applies to the preceding categories” of the Crime Victims’ Rights Act (CVRA). *Id.* at 535. The 3rd, 9th, and 11th Circuits have held that it does, while the 5th Circuit has held that it does not. *Id.* The D.C. Circuit held that all of the categories require proximate cause because principles of tort and criminal law state that “a defendant is only liable for harms he proximately caused.” *Id.* Further, the D.C. Circuit reasoned that since 18 U.S.C. § 2259 defines “victim” as a person harmed “as a result of” the defendant’s offense, the statute invokes the same principle. *Id.* at 536. Thus, the D.C. Circuit joined the plurality of circuits in holding that the proximate cause requirement applies to the all of the categories of victim’s losses. *Id.* at 535.

SENTENCING

Early Release Programs – Bureau of Prisons Policy: *Licon v. Ledezma*, 638 F.3d 1303 (10th Cir. 2011)

The 10th Circuit addressed whether a Bureau of Prisons (BOP) policy categorically excluding prisoners convicted of felon in possession of a firearm charges from eligibility for a parole or early release program was “arbitrary, capricious, an abuse of discretion or otherwise not in

accordance with the law.” *Id.* at 1307. The court noted that the 3rd, 5th and 8th Circuits determined that the BOP provided sufficient justification for the policy, while the 9th Circuit found the policy arbitrary and capricious due to a lack of a non-arbitrary basis for the categorical exclusion. *Id.* at 1308–09. The 10th Circuit agreed with the 3rd, 5th and 8th Circuits in finding that the policy was not arbitrary or capricious because the BOP successfully urged that “the offense conduct of both armed offenders and certain recidivists suggests that they pose a particular danger to the public.” *Id.* at 1309. The court disagreed with the 9th Circuit because the BOP’s justification provided sufficient insight into its rationale. *Id.* at 1309–10. Thus, the 10th Circuit concluded that the BOP policy was valid as it sufficiently satisfied the arbitrary and capricious standard. *Id.* at 1309.