First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between February 21, 2012 and August 28, 2012. This collection, written by the members of the *Seton Hall Circuit Review*, is organized by circuit.

Each summary briefly describes an issue of first impression, and is intended to give only the briefest synopsis of the issue, 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: *First Impressions*, 9 SETON HALL CIR. REV. [n] (2012).

FIRST CIRCUIT

Central Pension Fund of the International Union of Operating Engineers and Participating Employers v. Ray Haluch Gravel Co., 695 F.3d 1 (1st Cir. 2012)

QUESTION: Whether an employer's failure to keep sufficient records, as required under 29 U.S.C. § 1059(a)(1), triggers a burden-shifting paradigm in assessing claims made by Employee Retirement Income Security Act (ERISA)-protected benefit plans seeking to enforce remittance requirements. *Id.* at 9.

ANALYSIS: The court first noted that the 6th, 9th, and 11th circuits "have concluded that an employer's failure to keep adequate records . . . may trigger burden-shifting." *Id.* The court emphasized, however, that "such burden-shifting is not automatic," and that the claimant must show, in addition to inadequate employer records, that "some employees performed covered work that was not reported to the benefit plan." *Id.* When both showings have been made, "the presumption is that the employer is liable for all hours potentially representing covered work." *Id.* at 10. This "burden-shifting paradigm," the court noted, prevents employers from evading "responsibility for benefit remittances by the simple expedient of failing to keep records that the law requires." *Id.*

CONCLUSION: The 1st Circuit held that "an employer's failure to keep adequate records as required by section 1059(a)(1)" triggers burden-shifting only when claimants also show that "some employees performed covered work that was not reported to the benefit plan." *Id.* at 9.

***Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013)**

QUESTION: Whether a homeowner "has standing to challenge the assignment of her [residential] mortgage—an assignment to which she is not a party and of which she is not a third-party beneficiary"—from a Mortgage Electronic Registration Systems, Inc. ("MERS") member to a third-party foreclosing mortgagee. *Id.* at 289.

ANALYSIS: The 1st Circuit first noted that where a plaintiff bears the burden of establishing standing, that burden requires a showing of injury, causation, and redressability. *Id.* The court noted that foreclosure of the plaintiff's home mostly satisfied the first two elements by virtue of the harm it caused plaintiff and the relation of that harm to the third-party's assigned right to foreclose. *Id.* As for redressability, the court observed that "a determination that [defendant-mortgagee] lacked the authority to foreclose would set the stage for redressing the plaintiff's claimed injury." *Id.* at 290. The 1st Circuit next determined that the plaintiff also had prudential standing even though she was a mortgagor who was neither a party to, nor a third-party beneficiary of, the assignment. *Id.* Even though "it is true that a nonparty who does not benefit from a contract generally lacks [prudential] standing to assert rights under that contract," the court drew a distinction here. *Id.* First, the court reasoned that "a Massachusetts mortgagor has a legally cognizable right under state law to ensure that any attempted foreclosure on her home is conducted lawfully." *Id.* Second, as an equity concern, the court noted that "where (as here) a mortgage contains a power of sale, [state] law permits foreclosure without prior judicial authorization." *Id.* Thus, the 1st Circuit reasoned that if a mortgagor could not challenge an assignment as a defense against foreclosure because she did not have standing to sue, then that mortgagor "would be deprived of a means to assert her legal protections." *Id.*

CONCLUSION: The 1st Circuit narrowly held that "a mortgagor has standing to challenge the assignment of a mortgage on her home [as being invalid as opposed to merely being voidable] to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee." *Id.* at 291.

***Pagán-Colón v. Walgreens of San Patricio, Inc.*, 697 F.3d 1 (1st Cir. 2012)**

QUESTION: Whether overtime pay should be included in an award of back-pay under the Family and Medical Leave Act (FMLA). *Id.* at 5.

ANALYSIS: "The FMLA provides than an employee may recover "any wages, salary, employment benefits, or other compensation denied or lost . . . by reason of the violation." *Id.* at 11 (internal quotation marks omitted). The court reasoned that overtime "certainly falls into the category of other compensation," because back-pay awards often included payments for overtime that an employee could have earned if the employer did not violate employment laws. *Id.* at 11 (internal quotation marks omitted).

CONCLUSION: The 1st Circuit held that "an award of back-pay under the FMLA properly included overtime compensation." *Id.* at 11.

***United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012)**[1]

QUESTION: Whether admission of evidence created in the regular course of business violated the Sixth Amendment's Confrontation Clause. *Id*. at *41.

ANALYSIS: The 1st Circuit noted that the threshold question in every evidentiary challenge under the Confrontation Clause is whether the evidentiary statement is testimonial. *Id*. at *37. The court reasoned that statements are testimonial when an objective witness would reasonably believe that the statement would be used at a later trial. *Id*. at *38. It clarified that some statements—such as business records or public records—are not testimonial. *Id*. The 1st Circuit further reasoned that although "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, this would not be so if the regularly conducted business activity is the production of evidence for use at trial." *Id*. at *40 (internal quotation marks omitted). Finally, courts must consider whether evidence admitted in violation of the Confrontation Clause caused harmless error beyond a reasonable doubt. *Id*. at *76.

CONCLUSION: The 1st Circuit held that hearsay statements that "(1) did not exist before criminal activity was discovered; (2) stated conclusions (though perhaps obvious ones) about the meaning of underlying data; (3) were created for the express purpose of reporting criminal activity and identifying the perpetrator of that activity; and (4) were reported to a government-funded entity that serves as a conduit for passing information to law enforcement" may not be introduced as evidence without confrontation of the authors. *Id*. at *81–82.

***United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013)**

QUESTION ONE: "[W]hether there is a First Amendment right of public access to Rule 17(c) subpoenas." *Id.* at 53.

ANALYSIS: The 1st Circuit applied the two prong test established by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, which considers "whether [the documents] have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 53–54 (internal quotation marks omitted). Addressing the first prong, the court explained that "discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation." *Id.* at 54. As to the second prong, the 1st Circuit determined that "there is scant value and considerable danger in a rule that could result in requiring counsel for a criminal defendant to prematurely expose trial strategy to public scrutiny." *Id.*

CONCLUSION: The 1st Circuit held that "[t]here is no First Amendment right of public access to the subpoenas or related materials." *Id.* at 54.

QUESTION TWO: Whether there is a common law right of public access to Rule 17(c) subpoenas. *Id.* at 52.

[1] Specific reporter pages were not assigned at time of publication; pin cites reflect Lexis page numbers. The Lexis cite is: *United States v. Cameron*, No. 11-1275, 2012 U.S. App. LEXIS 23397 (1st Cir. Nov. 14, 2012).

ANALYSIS: The 1st Circuit first explained that, "when considering whether the common law right of access applies, the cases turn on whether the documents that are sought constitute 'judicial records.'" *Id.* at 54. The 1st Circuit then reasoned that "Rule 17(c) materials relate merely to the judge's trial management role[,]" and are distinguishable from "judicial records," which are "materials on which a court relies in determining the litigants' substantive rights." *Id.* at 55. The court further noted "that even with respect to civil discovery, which does not implicate the same level of concern about revealing a criminal defendant's strategy, there is no right of public access." *Id.*

CONCLUSION: The 1st Circuit held that there is no common law right of public access to Rule 17(c) subpoenas. *Id.* at 56.

***United States v. Tavares*, 705 F.3d 4 (1st Cir. 2013)**

QUESTION: "Whether the district court's commission of a significant procedural error, here its failure to calculate [the defendant's] guidelines sentencing range, is subject to harmless-error analysis . . . ." *Id.* at 25–26.

ANALYSIS: The 1st Circuit noted that other circuits have found "a failure to calculate definitively the guidelines sentencing range" and other "serious procedural sentencing lapses" are subject to the harmless-error analysis. *Id.* at 26. The court observed that the Supreme Court has recognized "the continued validity of harmless-error analysis in procedural error cases." *Id.*

CONCLUSION: The 1st Circuit held that "the district court's failure to choose between the two proposed guidelines sentencing ranges and determine definitively which applied" was subject to the harmless error analysis. *Id.* at 28.

SECOND CIRCUIT

***Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673 (2d Cir. 2012)**

QUESTION: Whether §1703(d)(1) of the Interstate Land Sales Full Disclosure Act ("ILSA") requires the description of the lot, the agreement, or both to be written in a form that is acceptable for recording under state law. *Id.* at 676.

ANALYSIS: The court began its analysis by discussing the district court's decision, which interpreted §1703(d)(1) as requiring the entire agreement to be recorded. *Id.* at 679. The 2nd Circuit disagreed on the basis of grammar and statutory construction. *Id.* The court stated that the phrase, "which is in a form acceptable for recording[,]" modifies the word description, not agreement, based on rules of grammar. *Id.* The 2nd Circuit explained the language of the statute only requires the description be written in a way acceptable for recording; it does not require an actual recording. *Id.* at 680. The court finally explained that requiring the description to be written in a form acceptable for recording furthers the underlying purpose of the statute, which is to prevent fraudulent transfers. *Id.*

CONCLUSION: The 2nd Circuit held that §1703(d)(1) of the ILSA only requires the description of the lot, and not the agreement as a whole, to be written in a form that is acceptable for recording. *Id.* at 676.

***Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2011)**

QUESTION: Whether evidence of several other projects treated differently with regard to discrete land use issues is sufficient to support a class-of-one claim under the 14th Amendment's Equal Protection Clause. *Id.* at 222.

ANALYSIS: The court reasoned that the purpose behind requiring sufficient similarity among comparators in a class-of-one claim is to demonstrate that there was no legitimate reason for the government's disparate treatment. *Id.* Where the discrete issues in comparator projects are so similar to the case at bar that they are not affected by the character of each land use project, such disparity in treatment cannot fairly be attributed to government discretion. *Id.* at 224. An appellant cannot identify just one comparator that is similar in all respects. *Id*. at 223. Rather, evidence of multiple projects, each addressing a discrete issue and not sufficiently disparate in other extenuating circumstances, will satisfy the requirement of comparators in a class-of-one claim. *Id*.

CONCLUSION: The 2nd Circuit held that, where a plaintiff presents overwhelming evidence of being singled out regarding discrete land use issues and the government fails to explain how each comparator project's features influence of said discrete issues, "differential treatment with regard to them cannot be explained by anything other than discrimination" and this is sufficient to support a class-of-one Equal Protection claim. *Id.* at 223–24.

***Koch v. Christie's International PLC*, 699 F.3d 141 (2d Cir. 2012)**

QUESTION: Whether a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) "requires that a plaintiff have knowledge of a defendant's scienter, as well as alleged injury, for the plaintiff's claim to accrue." *Id.* at 148.

ANALYSIS: The 2nd Circuit began by recognizing that the Supreme Court, in *Rotella v. Wood*, decided that "discovery of the injury, not discovery of the other elements of the claim, is what starts the clock." *Id.* at 148 (internal quotation marks omitted). The court noted that a subsequent Supreme Court decision involving the Securities Exchange Act, *Merck & Co. v. Reynolds*, required a plaintiff to have knowledge of a defendant's scienter and knowledge of an injury for a claim to accrue. *Id.* The court reasoned, however, that because "[t]here is a presumption that the Supreme Court does not overrule itself *sub silentio*[,]" and because that subsequent case did not mention civil RICO claims, the *Rotella* decision was controlling. *Id.* at 149–50. The court further reasoned that the injury discovery rule serves the policies advanced by the Court in *Rotella* by holding plaintiffs to a higher standard. *Id.* at 150.

CONCLUSION: The 2nd Circuit held that "a RICO claim accrues upon the discovery of the injury alone." *Id.*

***Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012)**

QUESTION: Whether a child who did not legally immigrate to the United States can be found to have settled here within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. *Id.* at 45.

ANALYSIS: The 2nd Circuit stated that if more than a year passed since the child was removed from his home country, a showing that the child is now settled may be sufficient to refuse repatriation. *Id.* at 51–52. The court stated that several factors, including the age of the child, the stability of his environment, the respondent's employment and financial stability, among other factors, must be considered to determine

whether the child is "settled." *Id.* at 56–57. The court noted that a child's immigration status, though a relevant factor, is not dispositive. *Id*. at 57.

CONCLUSION: The 2nd Circuit held that the "now settled" defense is not subject to equitable tolling and that a child who lacks legal status in the United States is not foreclosed from being deemed to have settled in this country within the meaning of the Hague Convention. *Id.* at 58–59.

***Talavera v. Astrue*, 697 F.3d 145 (2d Cir. 2012)**

QUESTION ONE: Whether, when one claims Social Security Income benefits, "evidence of a qualifying deficit in adult cognitive functioning serves as prima facie evidence that those deficits existed prior to a petitioner's twenty-second birthday . . . ." *Id.* at 148.

ANALYSIS: The court noted that the majority of other circuits have held that "it is reasonable to presume, in the absence of evidence indicating otherwise, that claimants will experience a fairly constant IQ throughout their lives, and "the requirement that a claimant's intellectual disability arose before age 22 seems intended to limit coverage to an innate condition rather than a condition resulting from a disease or accident in adulthood." *Id*. at 152 (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit joined its sister circuits in holding that a claimant's evidence of qualifying limitations as an adult is sufficient to establish a rebuttable presumption that those limitations arose before age 22. *Id.* at 148.

QUESTION TWO: Whether "a petitioner must separately establish deficits in her cognitive and adaptive functioning" to be considered mentally retarded. *Id.* at 148.

ANALYSIS: The court interpreted the Social Security Administration's regulations addressing the burden of establishing that the claimant suffers from qualifying deficits in adaptive functioning "to mean that an applicant's inadequate adaptive functioning must arise from her cognitive limitations, rather than from a physical ailment or other infirmity." *Id*. at 153.

CONCLUSION: The 2nd Circuit held that a claimant must show deficits in both adaptive functioning and cognitive functioning to be qualified as mentally retarded. *Id*. at 148.

***United States v. Abdur-Rahman*, No. 10-4814-cr, 2013 U.S. App. LEXIS 3310 (2d Cir. Feb. 15, 2013)**

QUESTION: Whether health care fraud constitutes an enumerated felony violation recognized in 18 U.S.C. § 1028A, the federal aggravated identity theft statute. *Id.* at *2.

ANALYSIS: The court noted that subsection (c)(5) of § 1028A provides that "the term 'felony violation enumerated in subsection (c)' means any offense that is a violation of . . . any provision contained in chapter 63 (relating to mail, bank, and wire fraud)." *Id.* at *3. The court reasoned that, given the varying ways in which Congress uses the phrase "relating to" in Subsection 1028A(c), "the plain language of section 1028A [read as a whole] indicates that Congress's use of parentheticals and the phrase 'relating to' in Subsection 1028A(c) serves only an explanatory or descriptive purpose and does not expressly limit the definition of felony violation to only those offenses identified in the parenthetical." *Id.* at *5. The court further reasoned that "any other reading would

ignore the plain language and structure of the statute, fail to comport with the Supreme Court's guidance on the meaning of 'relating to,' and render Congress's use of the phrase 'any provision contained in Chapter 63' inoperative." *Id.* at *11.

CONCLUSION: The 2nd Circuit held "that the parenthetical language 'relating to mail, bank, and wire fraud' in 18 U.S.C. § 1028(c)(5) is merely a shorthand signal to the reader concerning the general nature of offenses contained in Chapter 63" and is not meant to limit felonies recognizable under 18 U.S.C. § 1028(A) to only to those three identified in the Chapter 63 parenthetical. *Id.* at *10. The 2nd Circuit therefore held that health care fraud is a recognizable predicate felony under 18 U.S.C. § 1028A(c)(5). *Id.* at *11.

***United States v. Catoggio*, 698 F.3d 64 (2d Cir. 2012)**

QUESTION: "Whether a district court may exercise its authority under the All Writs Act, [28 U.S.C. § 1651(a),] to restrain a convicted defendant's funds in anticipation of sentencing . . . ." *Id*. at 66.

ANALYSIS: As a preliminary matter, the court noted that because the "All Writs Act is aimed at achieving the rational ends of law[,] . . . courts have significant flexibility in exercising their authority under the Act." *Id.* at 67 (internal citations omitted) (internal quotation marks omitted). The court then noted that lower courts had determined "that a sentencing court may use the All Writs Act to prevent the defendant from frustrating collection of the restitution debt." *Id.* The court reasoned that, absent authority to ensure compliance with the district court's anticipated order of restitution, a court could not stop a convicted defendant awaiting sentencing from disposing of assets in an effort to avoid paying restitution or other fines and court costs. *Id.* at 68–69.

CONCLUSION: The 2nd Circuit held that "the district court properly exercised its authority under the All Writs Act to restrain assets in anticipation of resentencing." *Id*. at 68.

***U.S.* v. *Colasuonno*, 697 F.3d 164 (2d Cir. 2012)**

QUESTION: Whether the Bankruptcy Code's automatic stay provision impacts court-ordered conditions of a criminal sentence. *Id* at 169.

ANALYSIS: First, the court determined that the standard of review is *de novo* "[b]ecause applicability of the §362(b)(1) exception to the Bankruptcy Code's automatic stay presents a question of law." *Id.* at 173. The court then found that the plain language of the statute "exempts the commencement or continuation of a criminal action or proceeding against the debtor from the automatic stay afforded by §362(a)." *Id*. The court further reasoned that the common understanding of the terms "criminal proceeding" suggests that Congress intended to "create an exception for any action or proceeding that relates to an adjudication of guilt or that punishes a defendant for crimes." *Id.*

CONCLUSION: The 2nd Circuit held that proceedings to enforce a probationary sentence "fall within an express exception to the automatic stay because they constitute a continuation of the criminal action or proceeding." *Id*. at 169.

***United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012)**

QUESTION: Whether a court can rely on a probation department's presentence investigation report (PSR) description of a "defendant's pre-arrest conduct that

culminated in a prior conviction to determine whether that prior conviction constitutes one for a 'crime of violence' under [United States Sentencing Guidelines ("U.S.S.G.")] § 4B1.2(a)(1), where the defendant makes no objection to the PSR's description." *Id.* at 455.

ANALYSIS: The 2nd Circuit first established that, because Reyes did not object "to his classification as a career offender," the court reviewed his classification only for plain error. *Id.* at 457. The court, focusing on the language of the statute, determined that whether a conviction is a "crime of violence" depends on the "defendant's *conviction*, not the defendant's conduct in a particular case." *Id.* at 459. Thus, the court reasoned that underlying facts cannot be taken into consideration to make this determination. *Id.* The court recognized that generally, "reliance on a federal PSR's factual description of a defendant's pre-arrest conduct to determine whether a prior offense constitutes a 'crime of violence' . . . is prohibited." *Id.*

CONCLUSION: The 2nd Circuit held that reliance on an uncontested description in a PSR of pre-arrest conduct to "determine whether that prior conviction constitutes one for a 'crime of violence'" is improper. *Id.* at 455.

***United States v. Robinson*, 702 F.3d 22 (2d Cir. 2012)**

QUESTION: Whether 18 U.S.C § 1591(c), "which provides that 'in a prosecution . . . in which the defendant had a reasonable opportunity to observe the [victim], the Government need not prove that the defendant knew that the person had not attained the age of 18 years,'" requires the government to prove "the defendant's awareness of the victim's age . . . ." *Id.* at 26 (alteration in original).

ANALYSIS: The court began by examining the plain language of §1591(c), and observed that the text does not impose "an *additional* element on top of the *mens rea* requirement" that requires the government to prove "knowledge" or "reckless disregard." *Id.* at 31. Rather, the court reasoned that §1591(c) provides "an *alternative* to proving any *mens rea* [under §1591(a)] with regard to the defendant's awareness of the victim's age." *Id.* at 32. Specifically, the court outlined three separate avenues for proving a defendant's awareness of a victim's status as a minor: (1) the defendant's knowledge that the minor was under eighteen; (2) the defendant's reckless disregard of the minor's age; or (3) the defendant's reasonable opportunity to observe the age of the victim/minor. *Id.*

CONCLUSION: The 2nd Circuit held that 18 U.S.C. § 1591(c), "when applicable, imposes strict liability with regard to the defendant's awareness of the victim's age, thus relieving the government's usual burden to prove knowledge or reckless disregard of the victim's underage status under § 1591(a)." *Id.* at 26.

THIRD CIRCUIT

***D.K.* v. *Abington School District*, 696 F. 3d 233 (3d Cir. 2012)**

QUESTION ONE: Whether the scope of the "specific misrepresentations" exception to the IDEA's statute of limitations includes misrepresentations made by the School District regarding the ability of individualized supports to sufficiently address the student's deficits. *Id.* at 245.

ANALYSIS: The court first noted that "both statutory and regulatory guidance are lacking regarding the contours of the 'specific misrepresentations'" exception. *Id.*

(internal quotation marks omitted). The court identified one state appeals court and several district courts to have considered the issue, and agreed that "a showing of 'misrepresentation' akin to intent, deceit, or egregious misstatement" is required. *Id.* The court reasoned that, if it were to hold otherwise, "any plaintiff whose teachers first recommended behavioral programs or instructional steps short of formal special education might invoke the exception[,]" which cannot be the intent of the regulation. *Id.* at 245–46.

CONCLUSION: The court concluded that, "in order to be excused from the statute of limitations based on [the 'specific misrepresentations' exception] . . . because the school specifically misrepresented that it had resolved the problem, plaintiffs must show that the school intentionally misled them or knowingly deceived them regarding their child's progress." *Id.* at 246.

QUESTION TWO: Whether the scope of the "withholding of information" exception to the IDEA's statute of limitations applies to a "permission to evaluate form," which the school district is not statutorily mandated to provide. *Id.* at 245, 247.

ANALYSIS: The court specified that the text of the statute "plainly indicates that only the failure to supply *statutorily mandated* disclosures can toll the statute of limitations." *Id.* at 246. The court then found that because the School District was not obligated to disclose the "permission to evaluate form" in the particular circumstances at bar, the exception was not applicable. *Id.* at 247.

CONCLUSION: The court held that where the School District is not statutorily mandated to disclose information, the "withholding of information" exception to the IDEA's statute of limitation does not apply.

***In re Michael*, 699 F.3d 305 (3d Cir. 2012)**

QUESTION: "[W]hat does the Bankruptcy Code require a Chapter 13 trustee to do with undistributed funds received pursuant to a confirmed Chapter 13 plan when that Chapter 13 case is converted to Chapter 7?" *Id.* at 308.

ANALYSIS: The 3rd Circuit first noted that "when a debtor converts a Chapter 13 case to Chapter 7, the order converting the case is effectively backdated to the time of the order for relief under Chapter 13, which is the date of the filing of the Chapter 13 petition." *Id.* at 310. The court further noted, "[b]ecause under § 348(a), the date of the filing of the [Chapter 7] petition is the date the debtor filed the Chapter 13 petition, this suggests that property of the Chapter 13 estate acquired *post-petition* is excluded from the property of the new Chapter 7 estate." *Id.* (internal quotation marks omitted). The court determined that when a debtor pays a Chapter 13 trustee after the filing of the Chapter 13 petition, that debtor still has a vested interest in those assets until they are distributed to creditors. *Id.* at 313. The court observed that "[b]ecause § 1327(b) vests all property of the Chapter 13 estate in the debtor, including any post-petition property held by the Chapter 13 trustee at the time of conversion (such as funds transferred to the estate for eventual distribution to creditors), on conversion property of the Chapter 13 estate usually is under the control of the debtor." *Id*. (internal quotation marks omitted). The court explained that "property acquired post-petition that is in the Chapter 13 estate at the time of conversion is not property of the new Chapter 7 estate." *Id*. Rather, the court noted, "the debtor retains a vested interest in the property, and thereby the property

reverts to the debtor on conversion, assuming that the debtor does not convert in bad faith." *Id*.

CONCLUSION: The 3rd Circuit held that all funds received by Chapter 13 trustees after the initial petition for Chapter 13 bankruptcy and prior to distribution revert to the debtor if the estate is converted to a Chapter 7 estate. *Id.* at 316.

***National Sec. Sys. v. Iola*, 700 F.3d 65 (3d Cir. 2011)**

QUESTION: Whether "an insurance agent who makes fraudulent or misleading statements to induce participation in an ERISA plan is amenable to suit under state law theories of recovery." *Id.* at 84.

ANALYSIS: The 3rd Circuit analyzed the case of an insurance agent who misrepresented the presence of a reserve fund, accessibility of conversion credits and the nature of his commissions, all of which induced plaintiffs to participate in an ERISA plan. *Id.* at 84. The court noted that these claims are common law claims of misrepresentation, and if they have a connection with the administration of the plan, such a connection would result in their pre-emption under the pre-emption doctrine. *Id*. The court found, however, that a "state's common law, generally intended to prevent sellers of goods and services, including benefit plans, from misrepresenting the scope of their services, is quite remote from the areas with which ERISA is expressly concerned—reporting, disclosure, fiduciary responsibility, and the like." *Id.* at 85.

CONCLUSION: The 3rd Circuit held that ERISA does not preempt state law claims for misrepresentation that "are not premised on a challenge to the actual administration of the plan." *Id.*

***PG Publishing Company v. Aichele*, 705 F.3d 91 (3d Cir. 2013)**

QUESTION: Whether the *Richmond Newspapers* (or "experience and logic") test for "evaluating whether a right of access to information about government bodies, their processes and their decision" applies to a polling place or to the process of voting. *Id*. at 104.

ANALYSIS: The court began by noting that the *Richmond Newspapers* test "balances the interests of the People in observing and monitoring the functions of their government against the government's interest and/or long-standing historical practice of keeping certain information from public scrutiny." *Id.* The court then looked to prior decisions for guidance on the appropriate scope and application of the test. *Id*. at 104–06. Observing that in prior cases the court had applied the *Richmond Newspapers* broadly, the court found that "an extension of the 'experience and logic' test to the polling place is in line with the general trend of [its] decisional authority[,]" and respects the interests of the government and the public. *Id*. at 106, 107.

CONCLUSION: The 3rd Circuit held that "the experience and balance test articulated in *Richmond Newspapers* is applicable to the voting process." *Id*. at 106.

***United States v. Berberena*, 694 F.3d 514 (3d Cir. 2012)**

QUESTION: Whether the United States Sentencing Commission's (the "Commission") revision of the § 1B1.10 policy statement—prohibiting the reduction of imprisonment sentences imposed under 18 U.S.C. § 3582(c)(2)—exceeded its authority, violated separation of powers principles, and failed to comply with the Administrative

Procedure Act's ("APA") notice-and-comment provisions; thus, precluding its binding effect. *Id.* at 518–19.

ANALYSIS: The 3rd Circuit determined that the Sentencing Reform Act ("SRA") authorized the Commission to impose limitations on sentence reductions pursuant to 28 U.S.C. §§ 994(a) and (u), and 18 U.S.C. § 3582(c)(2). *Id.* at 520–23. The court explained that "§ 994(u) requires the Commission to specify by what amount sentences may be reduced based on retroactive amendments, § 994(a)(2)(C) requires that this specification be in the form of a policy statement, and § 3582(c)(2) makes those policy statements binding." *Id.* at 523 (citing another source). As to the separation of powers principle, the court found that "a delegation of legislative power is permissible if Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Id.* (internal quotation marks omitted). The court found that the intelligible principle was easily met by the clarity of §§ 994(a) and (u), and § 3582(c)(2). *Id.* at 523–25. The court observed that even though § 1B1.10 constrains a court's ability to reduce sentences imposed under § 3582(c)(2), the Commission's establishment of such a limit fell squarely within its function. *Id.* at 526. As to the APA's notice-and-comment provisions, the court observed that 28 U.S.C. § 994(x) is silent as to the Commission's issuance of policy statements. *Id.* The court therefore found the Commission is exempt from the APA's notice-and-comment provisions when issuing policy statements. *Id.* at 527.

CONCLUSION: The 3rd Circuit held that the Commission properly issued its revised policy statement for § 1B1.10, and therefore it is valid. *Id.*

***United States v. Kouevi*, 698 F.3d 126 (3d Cir. 2012)**

QUESTION: Whether 18 U.S.C. § 1546(a) criminalizes obtaining an authentic passport or visa by fraudulent means. *Id.* at 128–29.

ANALYSIS: The 3rd Circuit began by noting that the first paragraph of § 1546(a) provides that "[w]hoever knowingly forges, counterfeits, alters or falsely makes any . . . document prescribed by statute or regulation for entry into the United States . . . [commits an offense under this section.]" *Id.* at 129 (last alteration in original). The court distinguished the Supreme Court's decision in *United States v. Campos–Serrano* because the issue there involved whether a particular forged document was prohibited by the statute, not whether the statute criminalized possession of an authentic document obtained by fraud. *Id.* at 130. Consistent with the 9th Circuit's interpretation, the court reasoned that *Campos–Serrano* was not an attempt to describe the entire reach of the first paragraph of § 1546(a). *Id.* at 131. In determining that obtaining a passport by fraud was covered by the statute's "falsely make clause," the court rejected the defendant's narrow reading of the statute by considering basic rules of statutory construction, including the avoidance of surplusage and bizarre results. *Id.* at 134–35. The 3rd Circuit also considered Supreme Court precedent, which found that the phrase "falsely make" is broad enough to include documents procured by fraud. *Id.* at 135. Finally, the court reasoned that the statute is not sufficiently ambiguous to justify resorting to the rule of lenity. *Id.* at 138.

CONCLUSION: The 3rd Circuit concluded that 18 U.S.C. § 1546(a) "must be read to prohibit the possession or use of authentic immigration documents which are obtained by fraud." *Id*. at 139.

FOURTH CIRCUIT

***Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013)**

QUESTION: Whether a "minimal" or a "very strong showing" of inadequacy should be required where proposed intervenors, under Federal Rule of Civil Procedure 24, share the same objective as a government party. *Id.* at 351.

ANALYSIS: The 4th Circuit first noted that every circuit to rule on the issue has held that a strong showing of inadequacy is required. *Id.* The court started its analysis by explaining that the government's "basic duty" in public law litigation is to represent the public interest. *Id.* The court reasoned that "the government is simply the most natural party" to defend a statute when it faces a constitutional challenge. *Id.* The 4th Circuit further noted that the government is familiar "with the matters of public concern that lead to the statute's passage in the first place." *Id.* The court opined that allowing private parties and entities to intervene with only a minimal showing of inadequacy would "greatly complicate the government's job" with altered litigation strategies to accommodate the intervenors or more costly, complicated litigation. *Id.* The court also reasoned that "[t]o hold otherwise would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation." *Id.* at 352.

CONCLUSION: The 4th Circuit held that a proposed intervenor must make a strong showing of inadequacy when existing defendants are represented by a government agency. *Id.*

FIFTH CIRCUIT

***Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV*, 701 F.3d 1031 (5th Cir. 2012)**

QUESTION: Whether a court may determine if 11 U.S.C. § 1521 or § 1507 are applicable when a foreign representative requests relief under either provision. *Id*. at 1054.

ANALYSIS: The 5th Circuit held that courts should first consider whether relief under one of the listed and explicit provisions under § 1521 is applicable. *Id*. at 1056. The court explained that if the requested relief does not fall under one of the explicit provisions, a court should decide if the relief more appropriately falls under § 1521(a)'s general "appropriate relief." *Id*. at 1056. The 5th Circuit stated that a court must then consider whether the relief sought had been previously granted under § 304. *Id*. The court noted that only if the relief goes beyond what § 304 previously provided or currently afforded by United States law, may a court consider § 1507. *Id*. at 1057.

CONCLUSION: The 5th Circuit held that a court may determine the applicability of §§1521 and 1507. *Id*. at 1054.

***Escudero-Arciniega v. Holder*, 702 F.3d 781 (5th Cir. 2012)**

QUESTION: Whether burglary of a vehicle, as defined by N.M. Stat. Ann. § 30–16–3(B), constitutes a crime of violence so as to render a defendant removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.* at 782–83.

ANALYSIS: The 5th Circuit noted that "Section 1101(a)(43)(F) defines an aggravated felony as a crime of violence . . . for which the term of imprisonment [is] at least one year." *Id. at* 784 (alteration in original) (internal quotation marks omitted). The court then noted that "[a] crime of violence is any offense that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* (internal quotation marks omitted). In comparing a similar statute from Texas, the court posited that there is a significant risk that physical force will be used on another's property when a vehicle is burglarized. *Id.*

CONCLUSION: The 5th Circuit concluded that "burglary of a vehicle under the New Mexico statute constitutes a crime of violence . . . [,]" and thus, a defendant is removable under § 1227(a)(2)(A)(iii). *Id.*

***First Investment Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012)**

QUESTION: "[W]hether a court may dismiss a petition to confirm a foreign arbitration award for lack of personal jurisdiction under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[]" and the New York Convention. *Id.* at 744.

ANALYSIS: The court began its analysis with a discussion of the standard for review and enforcement actions under the New York Convention, particularly the difference between primary jurisdiction and secondary jurisdiction. *Id.* at 748–49. The court noted that when an enforcement action is brought in a country that is neither the venue nor the choice of law for the arbitration, that country has secondary jurisdiction. *Id.* The court explained that a country with secondary jurisdiction may not refuse to enforce an arbitration award unless one of the New York Convention's seven enumerated exceptions applies. *Id.* The court explained that, although personal jurisdiction is not one of the enumerated exceptions, it is "an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication," and that the Due Process Clause requires a court to dismiss an action in the absence of personal jurisdiction. *Id.* at 749.

CONCLUSION: The 5th Circuit held that "dismissal of a petition under the New York Convention for lack of personal jurisdiction is appropriate as a matter of constitutional due process." *Id.* at 748.

***LifeCare Management Services, LLC v. Insurance Management Administrators, Inc.*, 703 F.3d 835 (5th Cir. 2013)**

QUESTION: Whether an Employee Retirement Income Security Act (ERISA) claimant "may bring a lawsuit under 29 U.S.C. §1132(a)(1)(B) to recover benefits due to him under the terms of his plan" against a Third Party Administrator ("TPA"). *Id*. at 843 (internal quotation marks omitted).

ANALYSIS: The 5th Circuit first determined that the plain language of §1132(a)(1)(B) "does not limit the scope of defendants that a claimant may bring a lawsuit against." *Id*. at 843. The court noted that the 6th, 7th, 8th, and 9th Circuits have found that "entities other than the benefits plan or the employer plan administrators may be held liable under §1132(a)(1)(B)." *Id*. The court further noted that courts find liability under §1132(a)(1)(B) only if the party "exercises 'actual control' over the

administration of the plan." *Id*. The 5th Circuit reasoned that "the proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan." *Id*. at 844 (internal quotations omitted).

CONCLUSION: The 5th Circuit held that a TPA may be held liable under §1132(a)(1)(B) "only if it exercises 'actual control' over the plan's benefits claims process." *Id*.

***Sosebee v. Steadfast Insurance Co.*, 701 F.3d 1012 (5th Cir.)**

QUESTION: "Whether an insurer may waive its coverage defenses through its conduct in a direct action suit in which the insured is not a party while the insured is in bankruptcy . . . ." *Id*. at 1021 (emphasis omitted).

ANALYSIS: Citing to 11 U.S.C. §§ 541, 541(a) (2006), the 5th Circuit explained that an estate is created after a debtor declares bankruptcy. *Id*. at 1023. The court noted that profits of a liability insurance policy are not considered property of the estate, unlike insurance policies, which are typically part of the estate. *Id*. The court then explained that only when there is a threat that "claims against the debtor's insurer might exhaust insurance proceeds and thus threaten the debtor's estate over and above limits of liability insurance policies have courts held the proceeds of liability insurance policies are property of the bankruptcy estate." *Id*. The court found, therefore, if a party brings a direct action against the insurer, the claimant will recover directly from the insurer, not the bankruptcy estate. *Id*. at 1024. The court reasoned that a personal injury claimant also has the option of filing a claim against the debtor in the bankruptcy action, and the court must then lift the bankruptcy stay if the debtor objects to the case. *Id*.

CONCLUSION: The 5th Circuit held that "[w]here a court finds insurance proceeds to be property of the bankruptcy estate the automatic stay will apply to direct actions against insurers . . ., but where the proceeds of the insurance policies are not property of the bankruptcy estate, direct actions insurers will not be affected by the stay." *Id*. at 1025.

***Strickland v. Thaler*, 701 F.3d 171 (5th Cir. 2012)**

QUESTION: Whether a new federal habeas petition is a 'second or successive' petition under 28 U.S.C. § 2244, where, "in an initial petition the [district] court decided an exhausted claim on the merits and dismissed the unexhausted claims without prejudice, stating the petitioner may return to federal court after exhausting the unexhausted claims, and the petitioner seeks to refile his petition after exhausting the unexhausted claims." *Id.* at 174.

ANALYSIS: The 5th Circuit explained that "because exhaustion is based on comity rather than jurisdiction, there is no absolute bar to federal consideration of unexhausted habeas applications." *Id.* (citing another source). The court noted that "[t]here is no precedent in [its] cases for holding a claim previously dismissed without prejudice for failure to meet the exhaustion requirement is a 'second or successive' petition under 28 U.S.C. § 2244(b)(2) if refiled after exhaustion." *Id.* at 176. The court emphasized that the petitioner "relied on the [district] court's statement that he could 'again seek federal habeas corpus relief' once he exhausted his unexhausted claims." *Id.* The court stated that "district courts cannot send petitioners on wild goose chases by permitting them to split their exhausted and unexhausted claims, guaranteeing them

federal habeas review if they exhaust their state court remedies, only to then deny them habeas review once they have exhausted their state remedies." *Id.*

CONCLUSION: The 5th Circuit held that petitioner's new habeas petition is not a "second or successive" petition for the purposes of 28 U.S.C. § 2244 given his reliance on the district court's statements concerning federal habeas relief. *Id*. at 176–77.

***United States v. 0.073 Acres of Land*, 705 F.3d 540 (5th Cir. 2013)**

QUESTION: "[W]hether the federal government must provide just compensation under the Takings Clause of the Fifth Amendment when it condemns property burdened by a plaintiff's right to collect and thereby diminishes the plaintiff's assessment base." *Id.* at 543–44.

ANALYSIS: First, the 5th Circuit noted that "the government is required to provide just compensation if the interest for which compensation is sought is a property interest or right, and that interest has actually been taken." *Id.* at 545. Then, the court found that the right to collect assessments can be understood as a real covenant, and is a property interest. *Id.* at 546. The court reasoned that the right to collect assessments is unlike "recognized forms of compensable intangible property, such as easements, in that it is not directly connected with the are made," but are contractual in their nature. *Id.* at 548. The court further reasoned that allowing for compensation for "condemnations that eliminate interests that do not stem from the physical substance of the land . . . would unjustifiably burden the government's eminent domain power." *Id.* at 549.

CONCLUSION: The 5th Circuit held that the "right to collect assessments is not a compensable interest under the Takings Clause." *Id.*

***United States v. Rodriguez-Escareno*, No. 11-41063, 2012 U.S. App. LEXIS 22043 (5th Cir. Oct. 23, 2012)**

QUESTION: Whether the elements required for a conviction of conspiracy under 21 U.S.C. § 846 "are consistent with the meaning of 'conspiring' in Application Note 5 of U.S.S.G. § 2L1.2(b)(1)(A)(i)" such that a 16-level enhancement was appropriate under the Sentencing Guidelines. *Id.* at *4.

ANALYSIS: The 5th Circuit first reasoned that the generic meaning of "conspiracy" should be used since the Guidelines do not define it. *Id.* at *4. The court then noted that the meaning of a word may be gleaned using "the Model Penal Code, treatises, federal and state law, dictionaries, and the Uniform Code of Military Justice." *Id.* at *4–5. This meaning, according to the court, "generally corresponds to the definition in a majority of the States' criminal codes." *Id.* at *5. The 5th Circuit determined from such sources that "conspiracy" generally requires an overt action or conduct in furtherance of an agreement. *Id.* at *5–6. The court finally noted that it is well established that § 846 does not require an overt act. *Id.* at *6–7.

CONCLUSION: The 5th Circuit concluded that the enhancement was inappropriate because § 846 does not require an overt act, and therefore a conviction under that section could not trigger the enhancement for conspiring in Application Note 5 of §2L1.2(b)(1)(A)(i) of the Sentencing Guidelines. *Id.* at *6.

***United States v. Silva-De Hoyos*, 702 F.3d 843 (5th Cir. 2012)**

QUESTION: Whether convictions for possession with intent to distribute and importation of cocaine are offenses amounting to "the distribution of controlled substances" within the meaning of 21 U.S.C. § 862. *Id.* at 848.

ANALYSIS: The court first noted that the 11th and 10th Circuits interpreted the language of § 862(a) to require actual distribution, not the intent to distribute. *Id.* at 849. The 5th Circuit agreed that "possession with intent to distribute is not an offense consisting of distribution of controlled substances" within the meaning of the statute. *Id.* at 849. Since neither defendant's conviction included actual distribution, defendant's convictions were not offenses under § 862(a). *Id*.

CONCLUSION: The 5th Circuit held that the "district court's conclusion that [the defendant] was convicted of two drug-trafficking offenses was error that was plain." *Id.* at 849.

SIXTH CIRCUIT

***McCormick v. Miami University*, 693 F.3d 654 (6th Cir. 2012)**

QUESTION: Whether 42 U.S.C. § 1983 provides the exclusive mechanism to bring suit against state officials "acting in their individual capacity for alleged violations of § 1981." *Id.* at 656.

ANALYSIS: The 6th Circuit began by noting that the Supreme Court's decision in *Jett v. Dallas Independent School District* holds that § 1983 provides the exclusive mechanism for obtaining monetary damages for § 1981 violations by state actors who acted in their official capacity. *Id.* at 658. The court acknowledged that Congress amended § 1981 after *Jett* and that amendment created disagreement about the continued viability of *Jett's* holding. *Id.* at 660. The court looked to its own precedent, which holds that the amendment to § 1981 did not overrule *Jett*, but also did not yet address suits against officials in their individual capacity. *Id.* at 660–61. The court then reasoned that a plurality in *Jett* found that Congress created § 1983's precursor to provide the first and only federal damages remedy against state actors, and that because § 1983 provided a remedy to vindicate § 1981 violations, no federal damages remedy under § 1981 existed against a state actor in his or her official capacity. *Id.* at 661. The court opined that the *Jett* plurality's reasoning "naturally extend[s] to the context of individual state actors sued in their individual capacity." *Id.*

CONCLUSION: The court concluded "that § 1983 is the exclusive mechanism to vindicate violations of § 1981 by an individual state actor acting in his individual capacity." *Id*

***Taylor v. Geithner*, 703 F.3d 328 (6th Cir. 2013)**

QUESTION: "[W]hether Congress has waived sovereign immunity for breach-of-settlement-agreement claims brought under Title VII against the federal government as employer." *Id*. at 331.

ANALYSIS: The 6th Circuit posited that the federal government's waiver of sovereign immunity "must be clear, express, and unambiguous; it cannot be implied from vague language." *Id*. at 333. The court noted that the 4th, 9th, and 10th Circuits have found that, based on the plain language of 29 C.F.R. §1614.504 and 42 U.S.C. §2000e-16(c), Congress did not waive sovereign immunity. *Id*. at 334. The 6th Circuit reasoned

that 29 C.F.R. §1614.504 "provides clear instructions as to the exclusive procedures by which a complainant may seek relief—specific performance of the settlement agreement or reinstatement of the original complaint." *Id*. at 335.

CONCLUSION: The 6th Circuit held that Congress has not waived sovereign immunity for breach-of-settlement-agreement claims brought under Title VII against the federal government as employer. *Id*.

***United States v. Deen*, 706 F.3d 760 (6th Cir. 2013)**

QUESTION: Whether 18 U.S.C. § 3582(a), which prohibits consideration of a defendant's rehabilitative needs when sentencing him to prison following conviction, applies to 18 U.S.C. § 3583(e)(3), which requires a court to consider that defendant's rehabilitative needs when it revokes his supervised release term. *Id.* at 764.

ANALYSIS: The court noted that the Supreme Court in *Tapia v. U.S.* "held that § 3582(a) precludes sentencing courts from *imposing* or *lengthening* a prison term to promote an offender's rehabilitation." *Id*. at 765 (internal quotation marks omitted). The court then pointed out that there is no qualitative difference between a defendant's confinement when he is sent to prison due to a revoked supervised release and his initial imprisonment after conviction. *Id.* at 766. The court went on to explain that its "interpretation of § 3583(e)(3) works no harm on § 3583(e)'s more general requirement that a court consider the applicable § 3553(a) factors, including rehabilitation." *Id.*

CONCLUSION: The 6th Circuit concluded that a court may not take account of a defendant's rehabilitative goals to impose or increase a prison sentence following the repudiation of his supervised release. *Id.* at 765.

SEVENTH CIRCUIT

***United States v. Uribe*, No. 11-3590, 2013 U.S. App. LEXIS 2941 (7th Cir. Feb. 13, 2013)**

QUESTION: Whether a "discrepancy between the observed color of a car and the color listed on its registration alone" sufficiently creates a reasonable suspicion of criminal activity in conjunction with a *Terry* stop. *Id.* at *9–10.

ANALYSIS: The court noted a significant dearth of evidence the government provided in its effort to "tip the scales from a mere hunch to something even approaching reasonable and articulable suspicion" in order "to justify a detention based on one observed incident of completely innocent behavior in a non-suspicious context." *Id.* at *13. The court also observed that "the government provided no information on the correlation between stolen vehicles and repainted ones." *Id.* The court reasoned that, in weighing the defendant's "Fourth Amendment rights against the benefits of using investigatory stops to catch car thieves and recover stolen vehicles, [that correlation matters]." *Id.* The court explained that without evidence of correlation or other supporting evidence, it could not "conclude that a color discrepancy alone is probative of wrongdoing without the risk of subjecting a substantial number of innocent drivers and passengers to detention." *Id.* at *13–14

CONCLUSION: The 7th Circuit held "that no reasonable suspicion of vehicle theft attaches to a completely lawful color discrepancy in the absence of any evidence suggesting otherwise." *Id.* at *14.

EIGHTH CIRCUIT

***Hallmark Cards, Inc. v. Murley*, 703 F.3d 456 (8th Cir. 2013)**

QUESTION: Whether a "district court judge [is required] to issue explicit findings of bad faith and prejudice before giving an adverse inference instruction at trial, or if such findings may be implicit" when there is an alleged spoliation of evidence by one party. *Id*. at 461.

ANALYSIS: The court found that its precedent holds that "an explicit bad faith finding is required in the usual case involving pre-litigation spoliation of evidence." *Id*. The court then took into consideration "the gravity of an adverse inference instruction, which "brands one party as a bad actor," as compared to the court's burden of making on-the-record declarations. *Id*. In doing so, the 8th Circuit found that the court's minimal burden "is offset by [its] interests in ensuring that sanctions are imposed only after thoughtful consideration and an appropriate weighing of the evidence." *Id.* at 461–62.

CONCLUSION: The 8th Circuit held "that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction." *Id.* at 461.

NINTH CIRCUIT

***Cheema v. Holder*, 693 F.3d 1045 (9th Cir. 2012)**

QUESTION: Whether the "written advisals provided on the standard I-589 asylum application form constitute sufficient notice under 8 U.S.C. § 1158(d)(4)(A)." *Id.* at 1046.

ANALYSIS: The court began by noting that asylum applicants must receive adequate notice of the right to an attorney and the frivolous application penalties, which include becoming permanently ineligible for any immigration benefits under 8 U.S.C. § 1158(d)(6). *Id.* The court agreed with the 10th Circuit in finding that the statute does not specify a particular format in which the applicant must receive this notice. *Id.* at 1049. The court reasoned that because the language of the warning on the application for asylum "supplies all of the information concerning the consequences of filing a frivolous application to which the alien is entitled under the unambiguous language of § 1158(d)(4)(A)," the "warning on the asylum application adequately notifies the applicant of both the consequences of knowingly filing a frivolous application for asylum as well as the privilege of being represented by counsel, as required by [the statute]." *Id.* (internal quotation marks omitted).

CONCLUSION: The 9th Circuit held that "the written advisals on the I-589 asylum application form provide applicants with adequate notice of the consequences of filing a frivolous asylum application and of the privilege of being represented by counsel as required by 8 U.S.C. § 1158(d)(4)(A)." *Id.* at 1050.

***Corpuz v. Holder*, 697 F.3d 807 (9th Cir. 2012)**

QUESTION: Whether all or part of a criminal defendant's time spent in pre-trial civil psychiatric confinement should be included in his or her "term of imprisonment" under § 212(c) of the Immigration and Nationality Act (INA). *Id.* at 812.

ANALYSIS: First, while observing that § 212(c) of the INA offers no "plain meaning" for the word "imprisonment," the court noted that within the 9th Circuit, "imprisonment" is usually defined as "incarceration in a prison, jail, or other penal institution." *Id.* The 6th Circuit noted that its precedent did not require a criminal defendant held in pre-trial civil confinement be given credit against his sentence for time spent in the psychiatric facility. *Id.* at 813. The court concluded that because civil confinement in a psychiatric facility is not "imprisonment" within the 9th Circuit's definition, one could reasonably argue that none of the defendant's time spent at the psychiatric facility should be counted as part of "his term of imprisonment." *Id*. The court noted, however, that § 212(c)'s "five year imprisonment period" served as the dividing line between lesser and more serious offenses, and a defendant serving a sentence of more than five years is statutorily precluded from receiving good time credit towards obtaining an earlier release. *Id.* at 813–14. The court reasoned that to ignore time spent in pre-trial psychiatric confinement while calculating a defendant's "term of imprisonment" would "not accurately reflect the seriousness" of the individual defendant's crime. *Id.* at 814.

CONCLUSION: The 9th Circuit concluded that courts should calculate a "constructive good time credit for the period spent in civil confinement based on the degree to which the defendant accumulated good time credit while in prison"—only after this constructive good time credit is accounted for should time spent in pre-trial psychiatric confinement be calculated as part of the defendant's "term of imprisonment." *Id.*

***Gutierrez v. Wells Fargo Bank*, 704 F.3d 712 (9th Cir. 2012)**

QUESTION: Whether a party waived a permissive arbitration right, despite intervening Supreme Court precedent, "where the applicability of the right was not clear-cut, arbitration was never demanded, and the claim was first asserted on appeal following trial." *Id.* at 719.

ANALYSIS: The 9th Circuit observed that the appellant, a bank, never demanded arbitration or raised it as a defense until after an intervening Supreme Court decision. *Id.* at 720. The 9th Circuit noted that the bank never sought a stay pending the Supreme Court's decision. *Id.* The court then stated that waiver occurs when there is "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.* at 720–21 (citing another source). The 9th Circuit noted that permitting arbitration post-appeal would severely prejudice the appellee, a consumer, as the demand must come within a "reasonable time." *Id.* The court further held that permitting post-appeal arbitration would cause more delay and additional costs for both parties, while not serving any contractual purpose. *Id.* at 721–22.

CONCLUSION: The 9th Circuit held that a party waives a permissive arbitration right, despite intervening Supreme Court precedent, "where the applicability of the right was not clear-cut, arbitration was never demanded, and the claim was first asserted on appeal following trial." *Id.* at 719, 722.

***Mount Hope Church v. Bash Back!*, 705 F.3d 418 (9th Cir. 2012)**

QUESTION: "[W]hether losing a motion to compel . . . based on unpersuasive legal arguments, absent other aggravating factors, is enough to warrant Rule 45(c)(1) sanctions." *Id.* at 425.

ANALYSIS: The court began by noting that Federal Rule of Civil Procedure 45(c)(1) allows sanctions to be imposed upon a party or attorney who "unfairly harms a subpoena recipient by acting carelessly or in bad faith." *Id.* The court recognized that Federal Rule of Civil Procedure 26(g)(3) requires parties seeking discovery to act without bad faith and "reasonably without imposing undue burden or expense." *Id.* The court then looked to formulate a test for when Rule 45(c)(1) permits sanctions. *Id.* at 427. The court reasoned that absent bad faith, nothing is sanctionable in advocacy found to have "fulfilled its Rule 45(c)(1) duties to narrowly tailor the subpoena and issue it in compliance with existing law." *Id*. at 429.

CONCLUSION: The 9th Circuit held that sanctions under Rule 45(c)(1) would only be appropriate where the subpoena caused an "undue burden." *Id.*

***United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012)**

QUESTION: Whether the admission of certifications of business records by means of affidavit, without an authenticating witness, is a plain error in violation of the Confrontation Clause of the Sixth Amendment. *Id.* at 971.

ANALYSIS: The 9th Circuit began by recognizing that the Confrontation Clause guarantees criminal defendants the right to confront those who testify against him or her at trial. *Id.* at 973. The court then noted that affidavits containing certifications of business records are created to *authenticate* an admissible record, not to create testimonial evidence. *Id.* at 976. The court reasoned that because the records do not otherwise interpret the substance of the business records to *create* a record for the sole purpose of establishing or proving a fact against a defendant at trial, admissibility was permissible absent confrontation. *Id.*

CONCLUSION: The 9th Circuit held that routine certifications of business records by the custodian of such records are admissible under the Confrontation Clause as non-testimonial mechanisms to authenticate records rather than as substantive evidence against criminal defendants. *Id.* at 976.

***United States v. Budziak*, 697 F.3d 1105 (9th Cir. 2012)**

QUESTION: Whether a defendant who passively allows others to download child pornography is guilty of distribution under 18 U.S.C. § 2252(a)(2). *Id*. at 1109.

ANALYSIS: The 9th Circuit first began by noting that all other circuits had rejected the argument "that evidence of a deliberate, affirmative action of delivery is required to support a conviction for distribution." *Id.* at 1108–09. The court reasoned that passively distributing child pornography is nonetheless a form of distribution because it is "consistent with the plain meaning of the word." *Id.* at 1109.

CONCLUSION: The 9th Circuit held that passively distributing child pornography is sufficient to support a conviction under 18 U.S.C. § 2252(a)(2). *Id*.

***United States v. De Jesus-Casteneda*, 705 F.3d 1117 (9th Cir. 2013)**

QUESTION: "[W]hether a witness's testimony in disguise at trial violates the Confrontation Clause of the Sixth Amendment to the United States Constitution." *Id.* at 1118.

ANALYSIS: The 9th Circuit first explained that the Confrontation Clause "grants a criminal defendant the right to be confronted with the witnesses against him." *Id.* (internal quotation marks omitted). *Id.* at 1119. The 9th Circuit explained, however, that confrontation is not absolute, and "various state courts have derived from Supreme Court precedent which addresses the constitutionality of analogous arrangements which preclude the normal face-to-face confrontation that occurs when a witness testifies in the unobstructed view of the defendant." *Id.* This test considers "whether the disguise furthers an important state interest and whether the reliability of the evidence could be otherwise assured." *Id.* at 1120.

CONCLUSION: The 9th Circuit held that allowing a confidential informant to wear a disguise while testifying at trial does not violate the Confrontation Clause as long as the disguise furthers an important state interest and the reliability of the evidence is otherwise assured. *Id.*

***United States v. Doe*, 705 F.3d 1134 (9th Cir. 2013)**

QUESTION: Whether the Supreme Court's holding in *Dixon v. United States* that the defendant bears the burden of establishing the defense of duress by a preponderance of the evidence, "applies to affirmative defenses other than duress." *Id.* at 1145.

ANALYSIS: First, the 9th Circuit noted that the 7th and 6th circuits have already addressed similar issues of applying *Dixon* to other affirmative defenses. *Id.* The 9th Circuit agreed with the conclusions of the 6th and 7th circuits in adopting the reasoning of the 7th Circuit, explaining that common law affirmative defenses of excuse do not negate "knowingly" elements of a crime. *Id.* at 1145–46. The court found that because such a defense does not directly controvert an element of the crime, it does not, in itself, place the burden on the Government. *Id.* at 1146. The court further noted that "when a statute is silent on the question of affirmative defenses and when the affirmative defense does not negate an essential element of the offense, [the courts] must presume that the common law rule that places the burden of persuasion on the defendant reflects the intent of Congress." *Id.* at 1147 (citing another source).

CONCLUSION: The 9th Circuit held that where the defendant's common-law affirmative defense does not negate any element of the charged crime, but is grounded in excuse, the defendant bears the burden of proving his affirmative defense by a preponderance of the evidence. *Id.* at 1145–46.

***United States v. Guerrero*, 693 F.3d 990 (9th Cir. 2012)**

QUESTION ONE: Whether an appellate court has jurisdiction to consider a district court's non-final judgment denying a defendant's motion to seal pretrial competency proceedings and associated materials under the collateral order doctrine. *Id.* at 995.

ANALYSIS: The court noted that "three requirements must be met before [an appellate court can] exercise collateral order review." *Id.* First, "the order must . . . conclusively determine the disputed question." *Id.* (internal quotation marks omitted). Second, the order must "resolve an important issue completely separate from the merits of the action." *Id.* at 995–96 (internal quotation marks omitted). Third, the order must

"be effectively unreviewable on appeal from a final judgment." *Id.* at 996 (internal quotation marks omitted). The court reasoned that a collateral order review would "conclusively determine[] the disputed question of whether to allow public access to [a criminal defendant's] competency proceedings and related documents." *Id*. The court noted that "whether the competency proceedings and associated materials are unsealed is completely separate from the merits of the Government's case[.]" *Id.* (internal quotation marks omitted). The court further reasoned that "the issue is . . . an important one" to the court, defendant, and Government. *Id.* (internal quotation marks omitted). Finally, the court posited that an "order[] denying motions to seal competency proceedings . . . are not effectively unreviewable on appeal." *Id.* at 998.

CONCLUSION: The 9th Circuit concluded that it did not have jurisdiction to consider a district court's non-final judgment denying a defendant's motion to seal pretrial competency proceedings and associated materials under the collateral order doctrine. *Id.* at 995.

QUESTION TWO: "Whether there is a public right of access to criminal competency proceedings." *Id.* at 1000.

ANALYSIS: The court noted that there is a "presumed right of access to court proceedings and documents under the First Amendment." *Id.* (internal quotation marks omitted). The court applied the Supreme Court's experience and logic test "[t]o determine whether there is a right of access to a particular kind of hearing." *Id.* (internal quotation marks omitted). The court noted that, under the "experience prong . . . [courts] consider[] whether the place and process have historically been open to the press and general public." *Id.* (internal quotation marks omitted). The court established that it was "aware of only one (unpublished) federal court decision discussing whether there is a First Amendment right of access to a competency proceeding," and that it did not find a "decision denying open access to competency proceedings." *Id.* at 1000–01. The court then noted that, under the "logic [prong, the court considers] whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 1001 (internal quotation marks omitted). The court reasoned that "[p]ublic access to criminal trials and juror selection is essential to the proper functioning of the criminal justice system." *Id.* (internal quotation marks omitted). The court posited that "[a]llowing public access to a competency hearing permits the public to view and read about the criminal justice process and ensure that the proceedings are conducted in an open, objective, and fair manner." *Id.*

CONCLUSION: The 9th Circuit concluded that because "the experience and logic factors [of the Supreme Court's First Amendment test] are both met" there is a presumed public right of access to competency proceedings. *Id.* at 1001–02.

***United States v. Nielsen,* 694 F.3d 1032 (9th Cir. 2012)**

QUESTION: Whether a juvenile adjudication for sexual assault counts as a "conviction" under U.S.S.G. § 4B1.5(a), triggering the Repeat and Dangerous Sex Offender Against Minors sentencing enhancement. *Id.* at 1037.

ANALYSIS: The 9th Circuit first observed that application notes for § 4B1.5(a) define a "sex offense conviction" as "any offense" included in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was committed against a minor. *Id.* The government argued that

the phrase "'any offense' in this definition demonstrate the Sentencing Commission's intent to count 'any' prior sexual offense against a minor as a conviction, including juvenile adjudications." *Id*. The court, looking to the plain reading of the application notes, disagreed and reasoned that the notes were intended to "address which substantive offenses count as a 'sex offense,' rather than define what constitutes a 'conviction.'" *Id*. The Sentencing Guidelines apply to juvenile adjudications when "they say so expressly." *Id*. The court stressed that § 4B1.5(a) includes no reference to juvenile adjudications. *Id*. at 1038. The court further noted that the "Guidelines do not use the word 'conviction' to refer to juvenile adjudications." *Id*. Although "juvenile adjudications qualify as predicate convictions under particular federal statutes," the court emphasized that Congress "specifically indicates when it intends for juvenile adjudications to be considered convictions, while imposing age and severity limitations on what sorts of adjudications may be considered." *Id*.

CONCLUSION: The 9th Circuit held that the defendant's juvenile adjudication did "not constitute a 'sex offense conviction'" under § 4B1.5(a), and thus, did not trigger the Repeat and Dangerous Sex Offender Against Minors sentencing enhancement. *Id*.

***United States v. United States District Court for Northern Marina Islands*, No. 11-72940, 2012 U.S. App. LEXIS 19134 (9th Cir. Sept. 12, 2012)**

QUESTION: "[W]hether the district court has the authority to direct that the United States, its agencies, or its officers sued in their official capacities must appear at routine settlement conferences through a high-level official who has full settlement authority over the claim in dispute." *Id.* at *14.

ANALYSIS: The 9th Circuit found three sources of authority for the district court to order the appearance of the federal government at settlement conferences. *Id.* at *14–15. First, the court observed that the Federal Rule of Civil Procedure 16(c)(1) specifies that, "if appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." *Id.* at *15 (internal quotation marks omitted). Second, the court noted that the Civil Justice Reform Act of 1990 authorizes the district court to use mandatory settlement conferences and other litigation management techniques, "including a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference." *Id.* (internal quotation marks omitted). The court further noted that cases involving the federal government are not exempt from such techniques. *Id.* at *15–16. Third, court posited that the district court has "inherent power" over the management of its docket. *Id.* at *16. The 9th Circuit also rejected the federal government's assertion that the district court's authority would "interfere with the exclusive authority assigned to the Attorney General by Congress to conduct litigation" on its behalf, noting that, "[w]hen the United States stands as a party before the court, the authority of the Attorney General is no greater than that of any other party." *Id.* at *18–19.

CONCLUSION: The 9th Circuit held that a district court has broad authority to compel parties, including the federal government, to participate in mandatory settlement conferences. *Id.* at *1.

TENTH CIRCUIT

***Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012)**

QUESTION: Whether job transfers for medical treatment constitute a reasonable accommodation under the Rehabilitation Act. *Id.* at 1180.

ANALYSIS: The court noted that "a reasonable accommodation may include reassignment to a vacant position if the employee is qualified for the job and it does not impose an undue burden on the employer." *Id*. More specifically, the court posited that transfer accommodations are reasonable where the employee can no longer perform the essential functions of the job he or she holds, due to a disability. *Id*. The court then noted that the 1st, 7th, and 9th Circuits' hold that "even when qualified employees are able to perform a job's essential functions, employers may not be relieved of their duty to accommodate where accommodations are required to allow equal enjoyment of employment privileges and benefits or to pursue therapy or treatment. *Id.* at 1181. The court reasoned that the Equal Employment Opportunity Commission's Regulations also impose on employers an affirmative duty, beyond providing accommodations that allow the employee to perform the essential functions "to meet the [specific] needs of disabled workers and to broaden their employment opportunities. *Id*.

CONCLUSION: The 10th Circuit held that "a transfer accommodation for medical care or treatment is not per se unreasonable, even if an employee is able to perform the essential functions of her job without it" and therefore qualifies as reasonable accommodations under the Rehabilitation Act. *Id*. at 1182.

ELEVENTH CIRCUIT

***Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013)**[2]

QUESTION: Whether a defendant may obtain post-conviction relief by claiming ineffective assistance of counsel where, without consulting the defendant, counsel for defendant partially concedes guilt at trial in an effort to garner credibility in defending other charges. *Id.* at *1.

ANALYSIS: The 11th Circuit first considered whether Sixth Amendment jurisprudence precludes a defendant's counsel from conceding partial guilt as a defense strategy. *Id.* at *13. After concluding that it does not, the 11th Circuit noted that the 1st, 7th, and 9th Circuits expressly permit defense counsel's concession of guilt as a viable trial strategy. *Id.* The court agreed that the strategy is a tactical one and may be used by counsel to argue for a lighter sentence for the defendant. *Id.*

CONCLUSION: The 11th Circuit held that an admission of guilt by a defendant's counsel did not violate the Sixth Amendment. *Id.* at *8.

***Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916 (11th Cir. 2012)**

QUESTION: "[W]hether a sublease transferred by the Federal Deposit Insurance Corporation ("FDIC") to Iberiabank after it took over the assets of a failed bank is

[2] Specific reporter pages were not assigned at time of publication; pin cites reflect Lexis page numbers. The Lexis cite is: *Darden v. United States*, No. 10-15640, 2013 U.S. App. LEXIS 2928 (11th Cir. Feb. 12, 2013).

enforceable [pursuant to 12 U.S.C. §1821(e)(13)(A)] despite a clause purporting to terminate the sublease on sale or transfer of the failed bank." *Id.* at 917.

ANALYSIS: The 11th Circuit began with the plain language of §1821(e)(13)(A) and observed that the FDIC may enforce contracts "notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or appointment of or the exercise of rights or powers by a conservator or receiver." *Id.* at 924. The court found that the trigger of the termination clause "is the exercise of one of the rights of the receiver—the right to succeed to all rights [of a failed bank] . . . pursuant to §1821(d)(2)(A)(1)." *Id.* The court reasoned that such a reading of the statute "comports with Congress's stated intent in enacting [Financial Institutions Reform, Recovery, and Enforcement Act] FIRREA and its grant of broad powers to the FDIC to manage the affairs of failing banks under §1821." *Id.* at 925. Accordingly, the FDIC is "acting within its powers when it enforce[s] [a] sublease notwithstanding the termination clause." *Id.*

CONCLUSION: The 11th Circuit held that "the Termination Clause falls within the language of § 1821(e)(13)(A) and is therefore unenforceable against the FDIC as receiver of [a failed bank's assets]." *Id*.

***Moore v. Appliance Direct, Inc.*, 708 F.3d 1233 (11th Cir. 2013)**

QUESTION: Whether, under the Fair Labor Standards Act, liquidated damages are mandated "after a finding of liability for retaliation, unless excused by proof of reasonable good faith of the employer." *Id.* at 1238.

ANALYSIS: The court analyzed the plain text of 29 U.S.C. § 216(b) and reasoned that the first sentence of the statute, which does not mention retaliation, mandates liquidated damages when liability for unpaid minimum wages or overtime has been found. *Id.* at 1241. The court noted that the second sentence of § 216(b) was "added by amendment in 1977," and that "at the time Congress drafted the second sentence with its 'as may be appropriate' language, it was aware of its existing mandatory liquidated damages requirement for minimum wage and overtime claims and the application of a reasonable good faith exception to that, and did not choose to do the same in regard to retaliation claims." *Id.* at 1241–42.

CONCLUSION: The 11th Circuit held that § 216(b) of the Fair Labor Standards Act does not require the mandatory imposition of liquidated damages when liability for retaliation has been found. *Id.* at 1243.

***Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012)**

QUESTION: "Whether a party claiming actual identity theft resulting from a data breach has standing to bring suit . . . ." *Id.* at 1323.

ANALYSIS: The court first found that allegations of identity theft and resulting monetary damages "constitute an injury in fact under the law." *Id.* The 11th Circuit next determined that plaintiffs' injury was fairly traceable to defendant's actions. *Id*. The plaintiffs "became victims of identity theft after the unencrypted laptops containing their sensitive information were stolen." *Id*. at 1324. Finally, the court found that plaintiffs had met their burden of showing "that a favorable resolution of the case in their favor could redress their alleged injuries." *Id*.

CONCLUSION: The 11th Circuit held that alleging a health care plan operator failed to properly secure information on a company laptop was sufficient to confer standing. *Id.* at 1329–30.

***Sims v. MVM, Inc.*, 704 F.3d 1327 (11th Cir. 2013).**

QUESTION: Whether the Supreme Court's decision in *Staub v. Proctor Hospital* "modifies . . . previous case law applying the cat's paw theory and lowers the burden for plaintiffs in cases involving the [Age Discrimination in Employment Act ("ADEA")]." *Id.* at 1335.

ANALYSIS: The court first noted that the Supreme Court's decision in *Staub* "defined the circumstances under which an employer could be" subject to liability under the "cat's paw" theory pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). *Id.* at 1335. The court stressed that "the text of the USERRA and the ADEA differ in important respects." *Id*. In particular, the court stated that "USERRA . . . requires that a plaintiff demonstrate discrimination by showing that the proscribed bias was a 'motivating factor' in the adverse decision." *Id.* The court pointed out that "this 'motivating factor' causation standard is simply the traditional tort law standard of proximate cause . . . ." *Id.* The court then noted that, by contrast, the ADEA's "but-for" causation standard "requires that the proscribed animus have a determinative influence on the employer's decision." *Id.* at 1335–36. The court reasoned that in determining the applicability of the *Staub* analysis, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Id.* at 1336 (internal quotation marks omitted). The court noted that "the ADEA requires more than what must ordinarily be proven under an analogous Title VII or USERRA action." *Id.* Accordingly, the court determined that, "[b]ecause the ADEA requires a 'but-for' link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a 'motivating factor' in the adverse employment decision, . . . *Staub*'s 'proximate causation' standard does not apply to cat's paw cases involving age discrimination." *Id*.

CONCLUSION: The 11th Circuit held that "*Staub*'s 'proximate causation' standard does not apply to cat's paw cases involving age discrimination." *Id.* at 1336.

***United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012)**

QUESTION: Whether Congress has the authority, pursuant to the Offences Clause, "to proscribe drug trafficking in the territorial waters of another nation . . . ." *Id.* at 1249.

ANALYSIS: The court began by recognizing that word "define" in the Offences Clause "is limited by the law of nations." *Id*. "Offences against the Law of Nations" is defined as "violations of customary international law." *Id.* Drug trafficking, the subject of the case, "was not a violation of customary international law at the time of the Founding, and . . . is not a violation of customary international law today." *Id.* at 1253–54. In addition, "the United States ha[d] not offered . . . any alternative ground upon which the Act could be sustained as constitutional." *Id.* at 1258.

CONCLUSION: The 11th Circuit held that "Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of [another nation]." *Id.* at 1258.

***United States v. Colon*, 707 F.3d 1255 (11th Cir. 2013)**[3]

QUESTION ONE: Whether application of Sentencing Commission Amendment 759, which precludes courts from reducing terms of imprisonment below a minimum of an amended guideline range on motions for sentence reductions due to amended guideline range violates the Ex Post Facto Clause. *Id.* at *5–6.

ANALYSIS: The 11th Circuit first noted the Ex Post Facto Clause prohibits "imposition of punishment more severe than the punishment assignment by law when the act to be punished occurred." *Id.* at *5. The court further reasoned that the measuring point is the time at which the defendant committed the offense. *Id.* at *5–6.

CONCLUSION: The 11th Circuit concluded that the Amendment did not permit the court to undo prior departures or variances from the guidelines and "so long as the effect of post-conduct amendments to the guidelines is not to increase a defendant's punishment beyond what it would have been without those amendments," the imposition of punishment is not more severe. *Id.* at *6.

QUESTION TWO: Whether the Sentencing Commission exceeded its authority under the Sentencing Reform Act by passing an amendment to U.S.S.G. § 1B1.10(b) that eliminates a district court's discretion to lower a sentence below a prisoner's amended guideline range. *Id.* at *6–7.

ANALYSIS: The court first noted that Congress requires the Sentencing Commission to: 1) specify the circumstances under which and the amounts by which sentences can be reduced based on retroactive amendments, and; 2) do so in a policy statement. *Id.* at *9. The 11th Circuit reasoned that the Commission's amendment prohibits reductions "unless the original sentence had been below the applicable guideline range because of a reduction based upon the defendant's substantial assistance to authorities." *Id.* at * 7. The court opined that, in placing this requirement, the Commission indicated the circumstances and amount by which sentences can be reduced. *Id.* The court determined that, although the Sentencing Reform Act does not allow the Sentencing Commission to override a court's decision to lower a sentence at the original proceeding, the amendment to § 1B1.10(b) does not override any earlier sentencing decisions by courts, it simply limits new departures and variances. *Id.* at *9–10.

CONCLUSION: The 11th Circuit concluded that the Sentencing Commission did not exceed its statutory authority in amending § 1B1.10(b) to limit a court's discretion to lower a sentence below amended guideline ranges. *Id.* at *10.

QUESTION THREE: Whether, in amending § 1B1.10, "the Sentencing Commission violated the separation of powers doctrine by failing to comply with 28 U.S.C. § 994(p)'s report-and-wait procedure and thereby issuing legislative rules without Congressional approval and oversight." *Id.* at *11.

ANALYSIS: The court first reasoned that the report-and-wait procedure applies only to guidelines and not to policy statements. *Id.* at *11–12. The court noted that § 1B1.10(b)(2) is a policy statement, not a guideline. *Id.* at *12. The court opined that the

[3] Specific reporter pages were not assigned at time of publication; pin cites reflect Lexis page numbers. The Lexis cite is: *United States v. Colon*, No. 12-12794, 2013 U.S. App. LEXIS 2587 (11th Cir. Feb. 6, 2013).

purpose of the report-and-wait requirement to make the Commission accountable was fulfilled because Congress can override any policy statement by statute. *Id.*

CONCLUSION: The 11th Circuit determined that the Commission did not violate the separation of powers doctrine in amending § 1B1.10. *Id.* at *13.

QUESTION FOUR: Whether the Commission violated the Administrative Procedure Act by not complying with notice and comment rulemaking requirements. *Id.*

ANALYSIS: The court relied largely on the fact that §1B1.10 is a policy statement, not a guideline. *Id.* at *14. The 11th Circuit then noted that Congress only requires that guideline changes go through notice and comment rulemaking under the Administrative Procedure Act, but did not extend the requirement to policy statements. *Id.* The court also reasoned that it was of no consequence that this policy statement is binding because Congress made the policy statement binding on courts by statute rather than the Commission making a rule that is binding. *Id.* at *15.

CONCLUSION: The 11th Circuit determined that § 1B1.10, as a policy statement made binding by Congress, not the Commission, is not subject to notice and comment rulemaking under the Administrative Procedure Act. *Id.*

***United States v. Griffin*, 696 F.3d 1354 (11th Cir. 2012)**

QUESTION: Whether a police officer that conducts a *Terry* stop of an individual and asks questions unrelated to the cause of the stop violates the Fourth Amendment. *Id.* at 1357.

ANALYSIS: The court stated that a police officer can briefly stop a person for investigative purposes without violating the Fourth Amendment if the officer has reasonable suspicion that criminal activity may take place. *Id.* at 1358. The court stated that great deference is given to the judgment of the police officer in whether to conduct a *Terry* stop. *Id.* at 1360. The court then noted that Police questioning unrelated to the purpose of the stop that does not extend the duration of the stop does not constitute a seizure under the Fourth Amendment, and is not equivalent to a search. *Id.* at 1362–64

CONCLUSION: The 11th Circuit held that an officer who asks questions unrelated to the cause of the stop does not violate the Fourth Amendment unless such questions "measurably extend the duration of the stop." *Id.* at 1362.