Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between August 1, 2016 and December 31, 2016. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

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

Preferred citation for the summaries below: *Circuit Splits*, 13 SETON HALL CIR. REV. [n] (2017).

CIVIL MATTERS

CIVIL

ARBITRATION

National Labor Relations Act – Collective Action Waiver: *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016)

The 9th Circuit considered whether an employer violates the National Labor Relations Act (NLRA) by requiring employees to sign an agreement precluding them from bringing a concerted legal claim. *Id*. at 979. The court noted that the 7th Circuit held that arbitration agreements requiring employees to bring claims in "separate proceedings" violates the employees' rights to engage in concerted activity under the NLRA. *Id.* at 983. The 2nd, 5th, and 8th Circuits all rejected that argument. *Id.* at 990 n.16. The court, noting the "well-established principle [that] employees have the right to pursue work-related legal claims together," stated that concerted activity, as "the right of employees to act together," is an essential and substantive right established by the NLRA. *Id*. at 980. Accordingly, the 9th Circuit sided with the 7th Circuit and held that a "concerted action waiver violates the NLRA and cannot be enforced." *Id*.

BANKRUPTCY

Compliance – Perishable Agricultural Commodities Act: *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Product, L.P.)*, 845 F.3d 609 (5th Cir. 2016)

The 5th Circuit addressed the issue of whether special counsel's fees and expenses can be disbursed from a Perishable Agricultural Commodities Act (PACA) trust fund before all claimants are paid in whole. *Id*. at 612. The court noted that the 2nd Circuit found that a PACA trust is unlike most common law trusts, and "sellers, as trust beneficiaries, 'are entitled to full payment before trustees may lawfully use trust funds to pay other creditors.'" *Id*. at 620 (internal citation omitted). The 2nd Circuit determined that "a PACA trustee may not use PACA funds to pay attorney's fees incurred in collecting accounts receivable held in trust for a seller of perishable agricultural commodities." *Id*. (internal quotations and citation omitted). The court noted that the 9th Circuit, however, found that a bank should be compensated for its collection costs because it performed all the work required to collect the PACA trust assets. *Id*. The court noted that the 2nd Circuit and 9th Circuit appear to distinguish "PACA trustees . . . who owe fiduciary duties to the PACA claims and are thus aware of the trust provision[, from] those whose primary role is outside the PACA trustee framework and do not owe duties to the claimants." *Id*. After examining the attorney's role as Special PACA Counsel, the 5th Circuit found that while not named "trustee," the order appointing the attorney as Special PACA Counsel allowed him to serve as "the functional equivalent of a PACA trustee." *Id*. at 621. The 5th Circuit agreed with the 2nd Circuit "that a PACA trustee–or in this case, its functional equivalent–may not be paid from trust assets 'until full payment of the sums owing' is paid to all claimants." *Id*. at 622 (internal citation omitted).

Proof of Claim – Fair Debt Collection Practices Act: *Owens v. LVNV Funding*, 832 F.3d 726 (7th Cir. 2016)

The 7th Circuit addressed "whether filing a proof of claim on a stale debt in bankruptcy is a misleading or deceptive act prohibited" by the Fair Debt Collection Practices Act (FDCPA). *Id*. at 734. The court noted that the 11th Circuit held that this constitutes a misleading or deceptive act, while the 2nd and 8th Circuits rejected such an approach. *Id*. at 735. The court further emphasized the 8th Circuit's rejection, which relied on the 2nd Circuit's opinion, of "a plaintiff-debtor's request to extend the FDCPA to time-barred proofs of claim in a case with nearly identical facts to the cases currently before [the court]." *Id*. The court distinguished

between an unsophisticated consumer standard, adopted by the 11th Circuit, and the competent attorney standard when determining "whether the communications would be likely to mislead a competent lawyer." *Id*. at 736. The 7th Circuit joined the 2nd and 8th Circuits in holding that where "a reasonably competent lawyer would have had no trouble evaluating whether [a] debt was timely," a proof of claim on a stale debt is not a deceptive or misleading act prohibited by the FDCPA. *Id*.

CIVIL PROCEDURE

Heightened Pleading Requirements – False Claims: *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750 (6th Cir. 2016)

The 6th Circuit addressed whether Rule 9(b) of the Federal Rules of Civil Procedure's heightened pleading standard, requiring a relator to "identify an actual false claim," may be relaxed when the relator "has pled facts which support a strong inference that a claim was submitted." *Id*. at 769. The court reasoned that an exception to the heightened pleading standards "could be applied when a relator alleges specific personal knowledge that relates directly to billing practices." *Id*. (internal citation omitted). The court noted that the 8th, 10th, and 11th Circuits have applied an "across-the-board heightened standard," while the 1st, 3rd, 5th, 7th, 9th, and D.C. Circuits have applied an "across-the-board permissive [standard]." *Id*. Pointing to 8th, 10th, and 11th Circuit decisions, the court did note, however, that "[e]very circuit that has applied a heightened standard, save ours, has retreated from such a requirement in cases in which other detailed factual allegations support a strong inference that claims were submitted." *Id*. at 772. The 6th Circuit adopted an approach that, "requires the pleading of representative false claims in the majority of cases, while . . . recognizing that a relator may nonetheless survive a motion to dismiss by pleading specific facts based on her personal billing-related knowledge that support a strong inference that specific false claims were submitted for payment." *Id.* at 773.

Interest on Damage Awards – Jones Act: *Nevor v. Moneypenny Holdings, LLC*, 842 F.3d 113 (1st Cir. 2016)

The 1st Circuit addressed whether a plaintiff is entitled to prejudgment interest on an award of damages under the Jones Act. *Id.* at 121. The 5th Circuit had held that "a seaman is not entitled to prejudgment interest when he prevails on parallel Jones Act and unseaworthiness claims," while the 2nd Circuit had held that "when a seaman prevails on both Jones Act and unseaworthiness claims and there are no exceptional

circumstances militating against an award of prejudgment interest, . . . the seaman is entitled to prejudgment interest on the total amount of the award." *Id.* at 122. The court began its analysis by noting that "the damages award straddles both a successful Jones Act claim and a successful unseaworthiness claim." *Id.* at 123. The court next noted that "[w]hen federal and state claims overlap, the plaintiff may choose to be awarded damages based on state law if that law offers a more generous outcome than federal law." *Id.* at 124. In the court's view, the "same paradigm seems altogether appropriate where, as here, a plaintiff has prevailed on fully aligned Jones Act and unseaworthiness claims." *Id.* As the plaintiff was entitled to interest on the unseaworthiness claims, the court joined the 2nd Circuit and held that "when a court, in a bench trial, awards damages based on mixed Jones Act and unseaworthiness claims, prejudgment interest is available." *Id.* at 123.

Interlocutory Appeals – Appointment of Counsel: *Sai v. Transp. Sec. Admin.*, 843 F.3d 33 (1st Cir. 2016)

The 1st Circuit addressed whether a denial of appointed counsel to an anti-discrimination claimant is an immediately reviewable collateral order. *Id*. at 35–36 (internal citations omitted). The court noted that the 3rd, 5th, and 9th Circuits allow interlocutory appeals of orders denying appointment of counsel, while the 6th, 7th, and 11th do not allow interlocutory appeals of such orders. *Id.* at 35 (citing *Ficken v. Alvarez*, 146 F.3d 978, 980 (D.C. Cir. 1998)). The 1st Circuit agreed with the 6th, 7th, and 11th because "a wrongful request for appointed counsel should not easily escape review after entry of final judgment." *Sai*, 843 F.3d at 36. The court disagreed with the 3rd, 5th, and 9th Circuits in finding that anti-discrimination claims are an immediately reviewable order. *Id*. The 1st Circuit concluded that "while we decline at this time to join those circuits treating a denial of appointed counsel to an anti-discrimination claimant as an immediately reviewable collateral order, we intimate no doubts about the reviewability of such a denial in an appeal from a final judgment." *Id*. at 36.

Jurisdiction – In Rem & Personal Jurisdiction: *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016)

The 4th Circuit addressed whether the district court's assertion that it had *in rem* jurisdiction pursuant to 28 U.S.C. § 1355(b)(2) was a proper interpretation of the statute with regard to assets in foreign countries. *Id*. at 418. The court noted that the 2nd Circuit read the statute as still requiring the "traditional paradigm, [that] 'the court must have actual or constructive control over the res when an *in rem* forfeiture suit is

initiated.'" *Id*. at 419. The 3rd, 9th, and D.C. Circuits have instead held that the statute "establishes jurisdiction in those courts," because § 1355 effectively dispenses with the traditional requirement. *Id*. In determining whether the statute addresses venue or jurisdiction, the court looked to the legislative history and plain meaning of the text. *Id*. at 420. Accordingly, the court rejected the 2nd Circuit's reasoning by holding that "courts may acquire jurisdiction by operation of the provision." *Id*. The 4th Circuit joined the 3rd, 9th, and D.C. Circuits in holding that the statute establishes jurisdiction, rather than venue, in certain courts. *Id*. at 419.

CONSTITUTIONAL LAW

Civil Rights – Prison Litigation Reform Act: *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016)

The D.C. Circuit addressed the issue of "whether injuries that are allegedly neither mental nor emotional are compensable under the [Prison Litigation Reform Act (PLRA)] without a prior showing of physical injury." *Id.* at 262. The court noted that the 2nd, 3rd, 10th, and 11th Circuits have held that 42 U.S.C. § 1997e(e) "precludes compensatory damages for *any* claim that does not include physical harm," and instead, focus on the "type of injury asserted." *Id.* at 262–63 (emphasis in original). The court further noted that the majority of circuits imply that mental or emotional injuries encompass a constitutional violation where there is no physical harm. *Id.* at 263. The court stated that a minority of circuits, including the 6th and 7th Circuits, have held that constitutional violations are distinct from mental or emotional harm. *Id.* The D.C. Circuit agreed with the narrow approach of the 6th and 7th Circuits. *Id.* The court reasoned that Congress did not intend for physical injury to be a requirement of every claim. *Id.* The court stated that if this was Congress's intent, "the statute could simply have provided: 'No Federal civil action may be brought by a prisoner . . . for *any* injury suffered while in custody without a prior showing of physical injury.'" *Id.* (citations omitted) (emphasis in original). The court further reasoned that the "mental and emotional" language is important because other types of intangible injury claims can be made. *Id.* at 264. The D.C. Circuit held that "there exists a universe of injuries that are neither mental nor emotional and for which plaintiffs can recover compensatory damages under the PLRA." *Id.* at 265.

Public Health & Welfare Law – Maternity & Children: *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016)

The 9th Circuit addressed a split regarding the appropriate level of scrutiny to apply to abortion-related disclosure cases. *Id*. at 837. The court noted that the 5th and 8th Circuits "applied a 'reasonableness' test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights." *Id*. at 837. The court also noted that the 4th Circuit ruled that the Supreme Court's previous decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007) did not announce a level of scrutiny to apply in abortion-related disclosure cases. *Id*. at 838. The 9th Circuit agreed with the 4th Circuit's interpretation that the Supreme Court did not clearly speak to the level of scrutiny to apply in these types of cases. *Id*. Therefore, the 9th Circuit joined the 4th Circuit and applied intermediate scrutiny to the disclosures. *Id*.

Standing – Article III: *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016)

The 6th Circuit addressed whether an increased risk of identity theft satisfies the injury requirement to establish Article III standing. *Id.* at 388. The court noted that the 7th and 9th Circuits held that an increased risk of identity theft satisfies the injury requirement for Article III standing, while the 3rd Circuit held otherwise. *Id*. at 389. The court reasoned that the Supreme Court has "found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm" even when it is not "literally certain the harm they identify will come about." *Id.* at 388. The court further reasoned that "[w]here a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for the fraudulent purposes alleged in Plaintiff's complaints." *Id.* The court also noted that "when plaintiffs already know that they have lost control of their data, it would be unreasonable to expect [them] to wait for actual misuse," rather, it is reasonable to expect them to "expend time and money to monitor their credit, check their bank statements, and modify their financial accounts." *Id.* Therefore, the 6th Circuit held that an increased risk of identity theft satisfy the Injury requirement for Article III standing because the costs reasonably incurred by plaintiffs are concrete injuries "suffered to mitigate an imminent harm." *Id.* at 389.

Statutory Interpretation – Vagueness Doctrine: *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016)

The 10th Circuit addressed whether "the [Immigration and Nationality Act's (INA)] definition of 'crime of violence,' 8 U.S.C. § 1101(a)(43)(F), which expressly incorporates 18 U.S.C. § 16(b)'s definition of that same term, is unconstitutionally vague in light of the Supreme Court's decision in *Johnson* [*v. United States*, 135 S. Ct. 2551 (2015)]." *Lynch*, 837 F.3d at 1068. The court began its inquiry with a determination as to the applicability of the vagueness doctrine, which is derived from the Due Process Clause of the Fifth Amendment, to immigration proceedings. *Id*. The court joined with the 6th and 9th Circuits in finding that "because deportation strips a non-citizen of his rights, statutes that impose this penalty are subject to vagueness challenges under the Fifth Amendment." *Id*. at 1069. The 10th Circuit then considered whether the residual definition of "crime of violence" under § 1101(a)(43)(F) of the INA, which mirrors a residual clause rendered unconstitutional by *Johnson*, was also unconstitutionally vague as applied in the context of immigration proceedings. *Id.* at 1070. The court noted that both the 6th and 9th Circuits have held that the INA's residual clause in § 1101(a)(43)(F) is unconstitutional, as the INA expressly incorporates the definition of § 16(b), which was similar to the residual clause at issue in *Johnson. Id.* at 1071. The court also noted that the 5th and 7th Circuits have considered "similar *Johnson*-based vagueness challenges" to a statute also incorporating § 16(b)'s definition of "crime of violence"—the 7th Circuit finding § 16(b) and the residual clause in *Johnson* "materially indistinguishable," while the 5th Circuit labeling them as "textually distinct." *Id.* at 1072 (internal quotations omitted). The court agreed with the 6th, 7th, and 9th Circuits' interpretation of § 16(b), and concluded "that § 16(b) is not meaningfully distinguishable from the [*Johnson*] residual clause and that, as a result, § 16(b), and by extension § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*." *Id*.

EMPLOYMENT LAW

ERISA Benefits – Settlement Procedure: *Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195 (2d Cir. 2016)

The 2nd Circuit considered whether Employment Retirement Income Security Act of 1974 (ERISA) benefit plans may be deemed "affiliates" of the company that sponsors them, for purposes of determining the distribution of a class action settlement. *Id.* at 198. The court noted that this inquiry turned on the degree of sponsor's "control" over the plan. *Id.* at 206–07. The court also noted that the 7th Circuit, in

reaching this inquiry, held that a company had control over a benefit plan it had sponsored because it had appointed the plan's administrator, a committee which "serve[d] at the pleasure of [the company's] Board of Directors," and therefore, the plan was deemed an "affiliate" of the company. *Id.* at 207 (internal quotations omitted). The court declined to adopt the approach of the 7th Circuit, however, finding that to the extent that its approach can be interpreted as declaring that "all ERISA plans are all 'affiliates' of their sponsors," such an interpretation fails to account for the statutory limitations that ERISA imposes on the sponsor's control over a benefit plan. *Id*. Rather, the court determined that ERISA's requirements, which were designed to insulate the plan from being manipulated in a manner consistent with the interests of the plan's sponsor, reinforce that the sponsor's control over the plan is "specifically circumscribed" to prevent management of the plan in a way that would adversely affect the plan's beneficiaries. *Id*. at 208. Thus, the 2nd Circuit held that a sponsor's ability to appoint and remove the plan's administrator, or even to disband the plan entirely, did not warrant a finding of "control" sufficient to deem the plan an "affiliate" of the sponsor company because ERISA imposes a "strict fiduciary duties [to block] such corporate influence." *Id.* at 209.

SECURITIES LAW

Administrative Law Judge Discretion – Administrative Proceedings: *Bandimere v. United States SEC*, 844 F.3d 1168 (10th Cir. 2016)

The 10th Circuit addressed whether the SEC's Administrative Law Judges (ALJs) are inferior officers and must therefore be appointed properly under the Appointments Clause of the U.S. Constitution. *Id.* at 1170. The D.C. Circuit held that ALJs were employees rather than inferior officers because they were unable to render final decisions. *Id.* at 1182. The court relied on the holding in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), that the duties of IRS special trial judges (STJs), who are classified as inferior officers, and reasoned that they are analogous to the SEC's ALJs. *Bandimere,* 844 F.3d at 1182. As a result, the court reasoned ALJs should also be classified as inferior officers and therefore subject to the Appointments Clause. *Id.* at 1179. The 10th Circuit disagreed with the D.C. Circuit, citing *Freytag*, which utilized a number of factors to determine inferior officer status, only one of which was the ability to make final decisions. *Id.* (international citations omitted). The 10th Circuit declined to follow the D.C. Circuit and held that SEC ALJs are inferior officers subject to the Appointments Clause. *Id*. at 1188.

CRIMINAL

CONSPIRACY

Juvenile Delinquency Act – Relevancy of Pre-Majority Acts: *United States v. Camez*, 839 F.3d 871 (9th Cir. 2016)

The 9th Circuit addressed whether the Juvenile Delinquency Act ("JDA") precludes pre–majority conduct as substantive proof in a conspiracy case spanning the defendant's eighteenth birthday. *Id.* at 874. The court noted that the D.C. Circuit held that under the JDA, only post–majority acts could be considered as proof of guilt in an adult proceeding while the 1st, 2nd, 6th, 10th, and 11th Circuits found that the JDA imposed no limitation on the use of pre–majority conduct as proof of guilt in adult proceedings. *Id*. at 875–877. The court agreed with the 10th and 11th Circuits in finding that precluding pre–majority conduct would erroneously suggest that Congress intended the JDA to substantively alter the standard for proving conspiracy cases spanning a defendant's eighteenth birthday. *Id.* at 875. To that end, the court was persuaded that pre–majority acts could substantively prove crimes spanning a defendant's eighteenth birthday because it found the scenario analogous to contract ratification—much as a minor could ratify an illegally formed contract upon attaining majority, so to could a pre–majority crime be ratified by post-majority involvement. *Id.* at 876. Therefore, the court joined the 1st, 2nd, 6th and 11th Circuits and found that the JDA did not preclude the use of pre-majority acts as proof of guilt in a conspiracy case spanning a defendant's eighteenth birthday, but declined to determine what limitations the JDA placed on the use of such proof. *Id.* at 876–877.

CRIMINAL PROCEDURE

Custody – Alien Detention: *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016)

The 9th Circuit analyzed the scope of the mandatory detention provision, 8 U.S.C. § 1226(c)(1), of the Immigration and Naturalization Act ("INA"). *Id.* at 1199. Specifically, § 1226(c)(1) mandates the Attorney General detain any alien who commits a crime enumerated in the provision, "when the alien is released" from criminal custody. *Id.* The circuits are split as to whether the "when the alien is released" language in the mandatory detention provision is a "time-limiting clause"—meaning such detention is only mandatory if it occurs immediately upon a subject alien's release from criminal custody—or, whether the mandatory

detention provision is a "duty-triggering clause," creating a duty to detain the subject alien at any time after they are released from criminal custody. *Id* at 1200. The 2nd, 3rd, 4th and 10th Circuits have held that the mandatory detention provision is a duty-triggering clause, and that authority to detain is not lost even when not done promptly upon release from criminal custody. *Id.* at 1196. The 1st Circuit held, however, that the mandatory detention provision is a time-limiting clause, only granting authority to detain if done promptly after a subject alien's release from criminal custody. *Id.* at 1196–97. The 9th Circuit sided with the 1st Circuit, stating that the legislature acts deliberately in selecting the words—and their meaning—in a statute, and thus included "when the alien is released" so as to authorize mandatory detention only at that time when the alien is released. *Id.* at 1200.

Habeas Corpus – Ineffective Assistance of Counsel: *Visciotti v. Martel*, 839 F.3d 845 (9th Cir. 2016)

The 9th Circuit addressed whether an ineffective assistance of counsel claim, in regards to cause and prejudice, receives review in deference to the state court determination considering the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 864. The court noted that the 7th Circuit determined that ineffective assistance of counsel claims in the cause and prejudice context employ a deferential standard of review, while the 6th and 3rd Circuits found a *de novo* standard of review proper. *Id.* at 864 n.13. The 9th Circuit agreed with the 6th and 3rd Circuits in finding that the AEDPA does not establish a statutory high hurdle for the issue of cause. *Id.* The court found that the AEDPA did not change the cause and prejudice standard as there was no indication in the statute to the contrary. *Id.* at 865. Thus, the 9th Circuit concluded ineffective assistance of counsel claims in the cause and prejudice context receive *de novo* review. *Id.*

Habeas Corpus – Scope of Review: *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016)

The 11th Circuit addressed whether a federal habeas court should look through a state appellate court's summary decision denying a petitioner relief to the reasoning in a lower state court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. § 2254(d). *Id*. at 1247. The court noted that that the 5th, 4th, 9th, 1st, and 7th Circuits have held that courts must "review the last reasoned state court decision." *Id.* at 1241. The court, however, also points out that only the 4th and 9th Circuits have expressly applied this this rule. *Id*. The court reasoned that "appellate courts may

affirm for different reasons, presuming that state appellate courts affirm only for the precise reasons given by a lower court deprives them of the benefit of the doubt," that is required. *Id.* at 1242. As such, the 11th Circuit disagreed with the other circuits and held that federal habeas courts need not look through a summary decision on the merits to review the reasoning of the lower state court. *Id.*

Search and Seizure – Trash Pull Evidence: *United States v. Abernathy*, 843 F.3d 243 (6th Cir. 2016)

The 6th Circuit addressed "whether and under what circumstances trash pull evidence, standing alone, can establish probable cause to search a home." *Id.* at 252. The court noted that the 8th Circuit had determined that probable cause existed in a analogous factual situation because "not only [did] the presence of discarded marijuana stems and seeds reasonably suggest that ongoing marijuana consumption or trafficking is occurring within the premises, but the simple possession of marijuana seeds is itself a crime under both federal and state law." *Id*. The 6th Circuit, however, noted that they had previously noted in dicta "that mere trash pull evidence, standing alone, is insufficient to create probable cause to search a residence." *Id* .at 253. The court further reasoned that "although the trash pull evidence certainly suggested that someone in the residence had smoked marijuana recently, that fact alone [did] not create an inference that the residence contained additional drugs." *Id*. at 255. As such, the court held that the trash pull evidence was insufficient, alone, to establish probable cause. *Id.* at 256.

Sentencing Guidelines – Habeas Corpus Petition: *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016)

The 6th Circuit examined the right of a prisoner to bring successive habeas corpus petitions under 28 U.S.C. § 2241 to challenge the misapplication of a sentence enhancement. *Id.* at 592. The court noted that the 4th Circuit recently held that a criminal defendant who has not shown actual innocence relating to the underlying conviction can not be found "actually innocent" of a sentence enhancement. *Id.* at 598. Alternatively, the 7th Circuit found a petition challenging the career-offender enhancement was sufficient where it satisfied three conditions under the savings-clause exception, allowing relief under §2241. *Id.* at 599. The court reasoned that serving a sentence under mandatory guidelines, which were subsequently lowered by retroactive Supreme Court precedent, is similar to serving a sentence above the statutory maximum in that both "are beyond what is called for by law." *Id*. at 599. Therefore, the court sided with the 7th Circuit in holding that a petition

can indeed be brought under § 2241 in certain circumstances. *Id*. at 599—600. The court held that such a petition can be brought if: "(1) prisoners who were sentenced under the mandatory guidelines regime pre-*United States v. Booker*, (2) who are foreclosed from filing a successive petition under § 2255, and (3) when a subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career-offender enhancement." *Id.*

Statutory Interpretation – Sentencing Enhancement Guidelines: *United States v. Canelas-Amador*, 837 F.3d 668 (6th Cir. 2016)

The 6th Circuit addressed the issue of which definition of "conviction" applies when a court is determining whether a "'Waiver of Trial by Jury and Acceptance of Plea of Guilty' constitute[s] a 'conviction for a felony that is . . . a crime of violence,' mandating a sixteen-point [sentencing] enhancement under the guideline provision applicable to Illegal Reentry. *Id*. at 670. The court noted that the 4th, 5th, 10th, and 11th Circuits determined that the Immigration and Naturalization Act, specifically 8 U.S.C. § 1101(a)(48)(A) definition of "conviction" controls, while the 1st, 2nd, and 9th Circuits have applied the definition in the U.S. Sentencing Guidelines Manual § 4A1.2(a)(4). *Id*. The 6th Circuit reasoned that in this case, due the insufficiency of the tools of statutory interpretation, "there remains a not insignificant doubt as to which definition should apply." *Id*. at 674. The 6th Circuit explained that "when, in criminal cases, the tools of statutory interpretation do not resolve a question, where significant doubt or uncertainty lingers, [the court] must construe the provision in favor of the defendant." *Id*. Therefore, the 6th Circuit agreed with the 4th, 5th, 10th, and 11th Circuits that "the more restrictive definition set forth in § 1101(a)(48)(A) applies." *Id*.

EVIDENCE

Prior Act – Nolo Contendere Pleas: *United States v. Green*, 842 F.3d 1299 (11th Cir. 2016)

The 11th Circuit analyzed **"**whether a criminal conviction pursuant to a *nolo* [*contendere*] plea can be admitted to prove a prior act under [FRE] 404(b)." *Id.* at 1311. The 8th Circuit had held that there is no meaningful difference between guilty convictions—which are permissible to use under Rule 404(b)—and convictions based on *nolo* pleas, since *nolo* pleas "constitute[] an admission of 'every essential element of the offense (that is) well pleaded in the charge.'" *Id.* at 1316. The 9th Circuit held that *nolo* convictions could not prove a crime was committed, absent other evidence. *Id.* The 9th Circuit was persuaded by the fact that Rule

803(22) "provides an exception to the hearsay rule for judgments of felony conviction resulting from guilty pleas, but not *nolo* pleas," and thus *nolo* pleas ought not be admitted to prove the truth of the matters they assert. *Id.* The 11th Circuit agreed with the 9th Circuit, similarly grounding its conclusion in Rule 803(22), which the court found strongly supported the "argument that a conviction based on a *nolo* plea should not as a general matter, be considered for the truth of the matter asserted." *Id.* at 1318–19. The 11th Circuit held that "to have Rule 404(b) prior act evidence admitted, the proponent need only provide enough evidence for the trial court to be able to conclude that the jury could find, by a preponderance of the evidence, that the prior act had been proved." *Id.* at 1319.